

COUNTRY REPORT - SPAIN

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1 Introduction

Corporate criminal liability is relatively new in Spain. Although the academia has paid extensive attention to this matter for decades,¹ corporate criminal liability was introduced into the Spanish Criminal Act (*Código Penal*, CP)² in 2010 and first relevant judicial decisions have been issued in 2016.

In general terms the doctrinal basis for corporate criminal liability is a controversial matter, however, today most authors are favourable to a liability based on corporation's own acts. Such liability is only enforceable in respect of criminal offences for which is expressly provided for in the Spanish Criminal Act. In the case of core crimes it is not provided for, for some treaty crimes it is.

Procedural rights and guarantees of corporations have been incorporated into our Criminal Procedural Act gradually, in particular in 2011 and 2015. As a guiding principle, corporations must enjoy the same procedural rights and guarantees as natural persons.

Criminal liability for corporations may carry with civil liability in the course of criminal proceedings. This is a major opportunity for victims of specific treaty crimes to get restitution, reparation of damages, and compensation of material and moral injuries.

Spanish courts are empowered to exercise jurisdiction over specific criminal offences that are committed by corporations in the Spanish territory, regardless of the headquarters of the company are located in Spain or abroad (territoriality principle). Spanish courts may also extend jurisdiction to Spanish companies committing criminal activities abroad (active personality principle), as well as to criminal offences affecting Spanish interests regardless of the location of headquarters of the corporation involved (protecting principle).

In light of the universality principle, Spanish authorities may extend jurisdiction to only a few of treaty crimes allegedly committed by corporations abroad. Among the treaty crimes entailing corporate criminal liability, only those meeting certain additional requirements

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¹ See Silvina Bacigalupo Saggese, *La responsabilidad penal de las personas jurídicas* (Bosch, Barcelona 1998), as well as the bibliography mentioned in this publication and in the following pages of my report.

² Qualified Law (*Ley Orgánica*, LO) 10/1995 of 23 November of Criminal Act. State Official Journal (Boletín Oficial del Estado, BOE) No 281 of 24.11.1995.

(most related to the place of residence of the author in the Spanish territory, or the Spanish nationality of the victim) may be investigated and prosecuted according to this principle, which is interpreted and applied very restrictively by Spanish courts.

These are the most relevant points of corporate criminal liability in Spain, which are developed further along this report.

2 General Framework

2.1 Legal Framework and Relevant Actors

2.1.1 Substantive Law establishing criminal liability

2.1.1.1. Legal framework

Qualified Law (*Ley Orgánica*, LO) 5/2010, of 22 June³ introduced corporate criminal liability into the Spanish Criminal Act 1995 (*Código Penal*, CP).

Previously to this legal amendment, Spanish courts were entitled to adopt against corporations (and other entities without legal personality) any of the complementary measures (*consecuencias accesorias*) laid down by Article 129 CP. They were not considered criminal penalties, but complementary consequences of an individual's conviction, and were barely applied in practice.⁴

As mentioned, the legal situation changed in 2010. The LO 5/2010 introduced Art. 31 bis into the Criminal Act setting up the legal basis for corporate criminal liability. The Preamble of this Qualified Law expressly mentioned the need to align the Spanish legal system

³ BOE No 152 of 23.6.2010.

⁴ See Antonio Salas Cancellor, 'Consecuencias accesorias' in María Poza Cisneros (dir.) *Ejemplar dedicado a las penas y medidas de seguridad en el nuevo Código Penal*, (1996) 24 *Cuadernos de Derecho Judicial* pp. 323 and ff. ; More in particular, Fermín Javier Echarri Casi, *Consecuencias accesorias y personas jurídicas en el nuevo Código Penal*, PhD directed by Prof. Vicente Gimeno Sendra (2002); Fermín Javier Echarri Casi, *Sanciones a personas jurídicas en el proceso penal: las consecuencias accesorias* (Aranzadi, Pamplona 2003); José María Zugaldía Espinar: 'Las penas previstas en el Art. 129 CP para las personas jurídicas (Consideraciones teóricas y consecuencias prácticas)' (1997) 46 *Poder Judicial* pp. 331 and ff.; Rosario de Vicente Martínez, 'Persona jurídica y consecuencias accesorias' (2002) 8 *Revista de Derecho y Proceso Penal* pp. 103 and ff. ; Jesus María Silva Sánchez, 'La aplicación judicial de las consecuencias accesorias para las empresas' (2006) 2 *Indret: Revista para el Análisis del Derecho* <http://www.indret.com/pdf/342_es2.pdf > accessed 30 September 2017; Jesús Sánchez Silva, 'Las consecuencias accesorias para las empresas en la práctica judicial' in Gonzalo Quintero Olivares and Fermín Morales Prats (coord.), *Estudios de Derecho ambiental. Libro homenaje al profesor Josep Miquel Prats Canut* (Tirant lo Blanch, Valencia 2008) pp. 729 and ff. On corporate criminal liability in Spain before the legal amendment of 2010 see Silvina Bacigalupo Saggese, *La responsabilidad penal de las personas jurídicas* (Bosch, Barcelona 1998), and Francisco Jiménez-Villarejo Fernández, 'La responsabilidad penal de la persona jurídica en el espacio judicial europeo: comentarios al Proyecto de modificación del Código Penal de 2006' in Coral Arangüena y Ángel José Sanz Morán, *La reforma de la justicia penal: aspectos materiales y procesales* (Lex Nova, Valladolid 2008) pp. 52 and ff.

‘... to the international legal instruments requesting a clear criminal response against corporations, mainly in criminal offenses where the participation of corporations is especially obvious (corruption in private sector, in international transactions, child pornography, trafficking of human beings, money laundering, illegal immigration, attacks against information systems...)’.

The accessory consequences laid down by Art. 129 CP remained applicable for other entities without legal personality.⁵

As drafted in 2010, Art. 31 bis CP was highly criticised and merely applied. Both the academia and judicial authorities underlined that this legal provision did not delimit clearly the model of liability for corporations adopted by the Spanish legislator (a vicarial model, a model based on corporation’s own acts), neither whether it was an objective liability or based on the culpability of the corporation and, if the later, which elements should be considered in order to appreciate, mitigate and exclude the culpability⁶.

Qualified Law 5/2010 introduced also Art. 116(3) into the Criminal Act, according to which

‘Criminal liability of corporations will carry with civil liability in accordance with Article 110 of this Criminal Act as a shared responsibility with the natural persons who shall be convicted for the same facts’.⁷

Article 110 CP states that civil liability includes restitution, reparation of damages, and compensation of material and moral injuries. The victim is entitled to claim civil liability before civil courts or criminal courts (Art. 109(2) CP).

The abovementioned Article 31 bis CP was later amended by Qualified Law 7/2012 of 27 December⁸ in order to extend corporate liability to political parties and unions⁹.

⁵ See Luis Gracia Martín, ‘Sobre la naturaleza jurídica de las llamadas consecuencias accesorias para personas jurídicas en el Código Penal español’, in Nelson Salazar Sánchez and others (coord.), *Dogmática penal de Derecho penal económico y política criminal: homenaje a Klaus Tiedeman*, (2011) 1 pp. 159 and ff. ; María Isabel González Tapia, ‘Las consecuencias accesorias del Art. 129. La nueva responsabilidad penal de los entes sin personalidad’ in María Isabel González Tapia and José María Palma Herrera (dirs.), *Procedimientos operativos estandarizados y responsabilidad penal de la persona jurídica* (Dykinson, Madrid 2014) pp. 43 and ff.

⁶ See Carlos Gómez Jara-Díez and others, *Responsabilidad penal de las personas jurídicas. Aspectos sustantivos y procesales* (La Ley Wolters Kluwer, Madrid 2011). See also Judicial Decision (Auto) of the Investigating Judge n. 2 of Pamplona of 11 January 2016 (ECLI:ES:JI:2016:3A) and of the District Court (*Audiencia Provincial, AP*) of Navarra of 7 March (ECLI:ES:APNA:2017:20A), mentioning the ambiguity of Art. 31 bis as drafted in 2010 (Case Football Club Osasuna).

⁷ See Manuel Gómez Tomillo, ‘La responsabilidad civil de las personas jurídicas: especial problemática del tercero lucrativo’ in Ángel Juanes Peces (dir.) *Responsabilidad penal y procesal de las personas jurídicas* (Colección Mementos Prácticos, Francis Lefebvre, Madrid 2015) pp. 177 et ff.

⁸ BOE No 312 of 28.12.2012.

⁹ On this matter, see Gonzalo Quintano Olivares, ‘La responsabilidad penal de los Partidos como personas jurídicas’ (2013) 859 *Actualidad Jurídica Aranzadi*, and later Antonio Camacho Viscaíno and Juan Pedro

More recently, Qualified Law 1/2015 of 30 March¹⁰ has redrafted Article 31 bis and inserted Articles 31 ter, 31 quarter and 31 quinquies in the Spanish Criminal Code. These legal provisions, which remain applicable today, have improved technically the existing paragraphs and developed further the concept of compliance¹¹.

According to Article 31 bis CP, paragraph (1), corporations shall be liable for criminal offences committed: (a) 'by legal representatives of those who, acting individually or as members of a board of the corporation, are authorised to take decisions on behalf of the corporation or have organizational and control powers within the organisation', or (b) 'by those who, being under the authority of the individuals mentioned in previous paragraph may have committed the facts due to a severe infringement by those individuals of the supervision, surveillance and control measures of their activities, attending the particular circumstances of the case'.

In case (a), criminal offences must be committed 'on behalf of the corporation, or in its direct or indirect benefit', whilst in the case (b) criminal offences must be carried out 'on behalf and direct or indirect benefit of such corporations'.

In both cases, corporations may be exempt from liability as long as some particular conditions are met.

In case (a), the following four conditions should be present:

1st. The managing board has adopted and implemented efficiently, before the commission of the crime, organizational and management models including surveillance and control measures appropriate to prevent criminal offences with the same nature or to reduce significantly the risk of their commission

2nd. The supervision focused on the functioning and implementation of the preventive model has been conferred to a board of the corporation with

Cortés Labadía, 'Partidos políticos y responsabilidad penal de las personas jurídicas', (2015) 8586 Diario La Ley; José Miguel Zugaldía Espinar, 'La responsabilidad criminal de los partidos políticos y sindicatos', in María Luisa Maqueda Abreu and others (coord.), *Derecho Penal para un Estado social y democrático de Derecho: estudios en homenaje al profesor Emilio Octavio de Toledo y Ubieta* (2017) pp. 383 and ff.; José León Alapónt, 'La responsabilidad penal de los partidos políticos en España: ¿disfuncionalidad normativa?' (2017) 27 Revista general de Derecho Penal pp. 1698 and ff. On the impossibility of prosecuting political parties and unions before LO 7/2012 see Judicial decision (Auto) of the Regional Court of Andalucía (Tribunal Superior de Justicia, TSJ) 13/2013 of 4 February (ECLI:ES:TSJAND:2013:12A).

¹⁰ BOE No 77 of 31.3. 2015.

¹¹ Bibliography on corporate liability following the legal amendment of 2015 is very extensive. For the purposes of this report, see in particular Ángel Juanes Peces (dir.), *Responsabilidad penal y procesal de las personas jurídicas* (Colección Mementos Prácticos, Francis Lefebvre, Madrid 2015); Miguel Bajo Fernández and others (coord.), *Tratado de Responsabilidad penal de las personas jurídicas adaptado a la Ley 1/2015, de 30 de marzo, por la que se modifica el Código Penal* (Aranzadi 2016), and the publications mentioned in further pages and footnotes of this report.

independent proactive and control powers, or has been tasked by law with the role of supervising the efficiency of internal controls of the corporation.

3rd. The individuals being the authors have committed the crime fraudulently eluding the models of organization and prevention, and

4th. The board mentioned in 2nd condition has not omitted or exercised in an insufficient manner its powers of supervision, surveillance and control’.

In case (b), corporations will be exempted of liability

‘as long as, before the commission of the crime, this corporation has adopted and implemented efficiently an organisational and management model appropriate to prevent criminal offences with the same nature or to reduce significantly the risk of their commission’ (Art. 31 bis (4)).

Other paragraphs of Article 31 bis CP clarify and delimit the meaning of some key concepts. The information to be included in the ‘organisation and management models’ appropriate to prevent criminal offences or to reduce significantly the risk of their commission is numbered in paragraph (5). The ‘supervision focused on the functioning and implementation of the preventive model’ mentioned under the 2nd condition ‘may be assumed directly by the managing board’ in the case of small corporations, i.e., those authorized to present abbreviated annual accounts, as expressly mentioned in paragraph (3).

When the conditions foreseen in case (a) or (b) may be accredited partially, this circumstance shall be considered by the court for the purposes of mitigating the penalties (Article 31 bis CP, paragraph (2) *in fine* and paragraph (4) *in fine*).

According to Article 31 quarter, corporate liability may be also mitigated as long as the legal representatives, after the commission of criminal offences, carry out any of the following activities:

- ‘ a) the confession of the criminal offence to the judicial authorities, before being informed on the existence of criminal investigations against such corporations,
- b) the collaboration during investigations, providing at any moment pieces of evidence that are new and relevant for the clarification of the facts,
- c) the total or partial reparation of the damages caused by the criminal offence,
- d) the setting up of efficient measures in order to prevent and detect criminal offences that may be committed through the corporation, before the trial’.

Article 31 ter CP establishes a clear distinction between corporation’s liability and individuals’ liability, in the sense that the first applies ‘although the specific individual

liable for such criminal offence has not been identified, or it was not possible to conduct criminal proceedings against such individual' (paragraph. (1)). With the same spirit, corporate liability will not be excluded or modified by any circumstance 'related to the culpability of the accused person of those aggravating his/her liability, the deceased of this person or the impossibility to bring her/him before the court' (paragraph (2)).

Lastly, Article 31 quinquies excludes from the scope of provisions related to corporate liability 'the State, Public Administrations, Agencies and Public Entities, Public Companies, international organizations of public Law, and any other entity with public or administrative sovereignty powers' (paragraph (1)). In the particular case of 'public commercial societies executing public policies or providing public services of general economic interests', judicial authorities may only impose specific sanctions foreseen in Article 33(7) (a) and (g), although such limitation will not apply 'where the judge considers that managers or administrators set up a public commercial society with the sole purpose of eluding corporate liability'.

The following relevant provisions of the Spanish Criminal Code are also applicable in cases of corporate criminal liability: Article 33 (sanctions), Articles 50, 52 y 53 (financial penalties) Article 66 bis (general rules concerning the application of sanctions), Articles 110, 116 and 120 (civil liability), Article 129 (accessory consequences),¹² Article 130 (extinction of criminal liability), Article 133 (prescription of sanctions) and Article 136 (criminal records).¹³

The Spanish General Prosecutor's Office has issued two Communications (*Circulares*) addressing crucial points of corporate criminal liability. *Circular* 1/2011 provided some guidelines for Spanish Prosecutors for the interpretation of Article 31bis CP following LO 5/2010,¹⁴ whilst *Circular* 1/2016 provides guidelines for Spanish Prosecutors in light of the amendments introduced into the Spanish Criminal Act by LO 1/2015.¹⁵

¹² Pilar Fernández Pantoja, 'Las consecuencias accesorias' in Lorenzo Morillas Cueva (dir), *Estudios sobre el Código Penal reformado: (Leyes Orgánicas 1/2015 y 2/2015)*, (Dykinson, Madrid 2015) pp. 269 and ff; Jacobo Dopico Gómez-Aller, 'Consecuencias accesorias aplicables a entidades sin personalidad jurídica' in Ángel Juanes Peces (dir.), *Responsabilidad penal y procesal de las personas jurídicas* (Colección Mementos Prácticos, Francis Lefebvre, Madrid 2015) pp. 1000 and ff.

¹³ Another relevant provision is Art. 60(1)(c) of Royal Administrative Decree (Real Decreto Legislativo, RDLeg) 3/2011 of 14 November, excluding corporations convicted for terrorism, organised crime, *association de malfaiteurs*, illegal financing of political parties, trafficking of human beings and other serious crimes expressly listed therein from participating in public procurement procedures (BOE No 276 of 16.11.2011). The Draft Law on Public Procurement (*Proyecto de Ley de Contratos del Sector Público*) implementing Directives 2014/23/EU and 2014/24/EU foresees a similar provision (Art. 71(1)(a)) and the possibility of derogate such exclusion under certain circumstances (Art. 72(5)). This Draft Law is available as any other at <<http://www.congreso.es/portal/page/portal/Congreso/Congreso/Iniciativas>> accessed 30 September 2017.

¹⁴ <https://www.fiscal.es/fiscal/PA_WebApp_SGNTI_NFIS/descarga/memoria2012_vol1_circu_01.pdf?idFile=7ed535ae-8bf0-4aa5-b219-618b3ac7420f> accessed 30 September 2017.

Circular 1/2016 was contemporary to two judicial decisions of the Spanish High Court (*Sentencias del Tribunal Supremo*, SSTs) related to the legal responsibility of corporations: STS 154/2016, of 29 February,¹⁶ and STS 221/2016, of 16 March 2016.¹⁷ Previously to both judicial decisions, STS 514/2015, of 2 September¹⁸, had mentioned as *obiter dicta* that ‘inalienable principles of criminal law’ are also applicable in investigations and trials against corporations¹⁹.

In the case analysed by STS 154/2016, of 29 February, four individuals and three corporations had been convicted by the Criminal Chamber of the National Court (*Audiencia Nacional*, AN) in a case of drug trafficking involving Spain and Venezuela.²⁰ In its Judgment, the Supreme Court addressed crucial points on corporate legal liability, including the elements constituting such liability, the legal status of dummy corporations (*sociedades pantalla*) conflicts of interests between individuals and corporations (and among the respective lawyers), the applicable legal framework to shell corporations, the burden of proof and the procedural rights of companies.

Some statements of this judicial decision were very controversial and motivated that seven magistrates issued a Particular Opinion (*Voto Particular*). Although it was not a dissenting opinion (they agreed on the conviction imposed), the *Voto Particular* provided a different view on three main points: the infringement of the contradictory principle (because the judicial decision covered matters not expressly discussed in criminal proceedings), whether the lack of a compliance culture is a constitutive element of corporate legal responsibility, and who (the prosecutor or the defence) has the burden of proof related to compliance programmes.

In the case examined by STS 221/2016, of 16 March, two individuals and a real state agency had been convicted by a Regional Court (*Audiencia Provincial*, AP) in a case of fraud (*estafa*),²¹ which was further appealed before the Supreme Court. Although the case does not have international implications, STS 221/2016 of 16 March 2016 is important for two main reasons. First, it resumes the different positions about the elements constituting

¹⁵ <https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/CIRCULAR%201-2016%20-%20PERSONAS%20JURÍDICAS.pdf?idFile=cc42d8fd-09e1-4f5b-b38a-447f4f63a041> accessed 30 September 2017.

¹⁶ ECLI:ES:TS:2016:613. This Judgment is available, as any other STS, at <<http://www.poderjudicial.es/search/indexAN.jsp>> accessed 30 September 2017.

¹⁷ ECLI:ES:TS:2016:966.

¹⁸ ECLI:ES:TS:2015:3813.

¹⁹ See Carlos Gómez-Jara Díez, ‘El Tribunal Supremo ante la responsabilidad penal de las personas jurídicas. Aviso a navegantes’, (2015) 8632 *Diario La Ley*.

²⁰ Judgment of the National Court (*Sentencia de la Audiencia Nacional*, SAN), Criminal Chamber 51/2014 of 3 November. ECLI:ES:AN:2014:4620.

²¹ Judgment of the Provincial Court (*Sentencia de la Audiencia Provincial*, SAP) of Cáceres 203/2015 of 8 May. ECLI:ES:APCC:2015:312.

corporate legal liability, and secondly, it analyses carefully the procedural rights of corporations, in particular the presumption of innocence and the right to defence.

Following the abovementioned judicial decisions of the Supreme Court, some others have analysed carefully corporate criminal liability. Among them, STS 583/2017, of 19 July²² is closely linked to STS 154/2016, as the *Audiencia Nacional* and, with some modifications, the Supreme Court in 2017 accused and convicted for money laundering most of individuals and corporations that have been convicted in 2016 for drugs trafficking. This judicial decision analysed mainly the elements constituting corporate liability, some procedural rights of corporations (the right of an individual specially designated to defend own interests, the right to say last words before the court), and the criteria to be considered in order to impose proportionated pecuniary sanctions.

The abovementioned *Circulares* and judicial decisions of the Supreme Court have triggered an intense debate on corporate criminal responsibility, covering both criminal law and procedural criminal law implications. The international activities of corporations and therefore cross-border consequences of such activities are part of this intense debate.

2.1.1.2. Doctrinal basis for corporate criminal liability

The doctrinal basis for corporate criminal liability has been a very controversial matter. In general terms this doctrinal basis has evolved from a vicarial system to a liability based on the company's own acts, although some elements clearly attached to this second system remain unclear yet.

With the introduction of Article 31 bis CP in 2010, *Circular 1/2011* and some authors²³ considered that corporations were criminally responsible when a senior manager or a legal representative of the company had committed a crime on behalf of the corporation and in its representation (vicarial system). According to this opinion, liability is transferred from the individual (senior directive or legal representative) to the corporation. The acts and mens rea's bodies and legal representatives would be attributed to the corporation. Some other authors²⁴ were clearly in favor of a liability based on the company's own acts.

²² ECLI:ES:TS:2017:3210.

²³ Cf. Bernardo Del Rosal Blasco, 'Responsabilidad penal de empresas y códigos de buena conducta corporativa' (2011) 7670 *Diario La Ley*; José Luis Díez Ripollés, 'La responsabilidad penal de las personas jurídicas. Regulación española', in *Indret*, Revista para el Análisis del Derecho <<http://www.indret.com/pdf/875.pdf>> accessed 30 September 2017 (2012). Defending a sort of mixed system in light of amendments introduced in 2010, see Alfonso Galán Muñoz, 'La responsabilidad penal de la persona jurídica tras la reforma de la LOE 5/2010: entre la hetero- y la autorresponsabilidad' in Carlos María Romeo Casabona and Fátima Flores Mendoza (eds), *Nuevos instrumentos jurídicos en la lucha contra la delincuencia económica y tecnológica*, (2012) pp. 503 and ff.

²⁴ Carlos Gómez-Jara Díez, 'Aspectos sustantivos de la responsabilidad penal de las personas jurídicas', in Julio Banacloche and others, *La responsabilidad penal de las personas jurídicas. Aspectos sustantivos y procesales* (2011); see on the same author, Chapter V ('Fundamentos de la responsabilidad penal de las personas jurídicas'), Chapter VI ('El injusto típico de la persona jurídica (tipicidad)', Chapter VII ('La culpabilidad de

As mentioned, the position of the academia and judicial authorities has gradually evolved towards the model based on the company's own acts, specially following the legal reform of 2015. Nowadays most of authors²⁵ establish a distinction between criminal liability of senior managers and criminal liability of corporations, the later only being possible when, jointly with a criminal offence committed by senior managers of employees, there is a lack of a compliance culture and/or proper organization and implementation of compliance programmes aimed at avoiding the commission of criminal offences.

This second opinion seems to be seconded by *Circular 1/2016*. Although the starting point of this *Circular* was the vicarial model (probably in order to give continuity to the approach of *Circular 1/2011*), Prosecutors are instructed "to pay attention to the particular criminal offences committed by the corporation as such", so that, "when criminal offences have been detected and reported to the judicial authority, prosecutors should request the exclusion of sanctions not only in cases where the compliance measures were adopted and proved to be efficient, but also when such measures are in line with a culture of compliance".²⁶

The STS 154/2016 and 212/2016, as well as the Particular Opinion expressed in relation with STS 154/2016 tried to overcome the doctrinal discussion on whether Spain was in line with the vicarial system or with the system attributing liability to corporations for its own facts. As example, STS 154/2016 expressly announced its intention 'to analyse the elements constituting corporate criminal liability trying to elude doctrinal discussions that, not being necessary for the resolution of the case, may trigger some confused interpretations'.

Closely related to this second model, both the academia and the abovementioned judicial decisions (and the Particular Opinion) have different views on three main points:

- 1) Whether the absence of a 'culture of compliance' is one of the elements constituting the criminal offence,

la persona jurídica'), Chapter VIII ('La atención de la responsabilidad de las personas jurídicas') and Chapter IX ('Autoría y participación en la responsabilidad penal de las personas jurídicas'), in Miguel Bajo Fernández and others, *Tratado de responsabilidad penal de las personas jurídicas* (2012).

²⁵ See Carlos Gómez-Jara Díez, '¿Qué modelo de responsabilidad penal de las personas jurídicas? Una respuesta a las críticas planteadas al modelo constructivista de autoresponsabilidad penal empresarial', in Miguel Ontiveron Alonso (coord.), *La responsabilidad penal de las personas jurídicas: fortalezas, debilidades y perspectivas de cara al futuro* (2014) pp. 177 et ff., and the bibliography mentioned in the following pages and footnotes of this report. See also Ignacio Colomer Hernández, 'Cesión de datos obtenidos a través de sistemas de compliance y procesos penales', in Ignacio Colomer Hernández (dir.), Sabela Oubiña Barbolla and M. Ángeles Catalina Benavente (coord.), *Cesión de datos personales y evidencias entre procesos penales y procedimientos administrativos sancionadores o tributarios* (2017) pp. 370 et ff. Further on the concept of culpability of corporations, see Luis Rodríguez Ramos, 'Sobre la culpabilidad de las personas jurídicas' (2016) 8766 *Diario La Ley*. A different view is sustained by Professor Bernardo del Rosal Blasco, still in favour of a vicarial system of corporate liability with some nuances derived from corporate liability based on its own facts, see 'Sobre los elementos estructurales de la responsabilidad penal de las personas jurídicas: reflexiones sobre las SSTS 154/2016 y 221/2016 y sobre la Circular n. 1/2016 de la Fiscalía General del Estado' (2016) 8732 *Diario La Ley*.

²⁶ See conclusion n. 19.2.

- 2) The role of the 'compliance programmes' and, more in particular, whether they are one of the elements constituting the crime (*elemento constitutivo del tipo*, related to *tipicidad*) or a legal excuse excluding liability (*circunstancia eximente de responsabilidad*, related to *antijuricidad*) and, closely linked to both previous points,
- 3) Whether the accusation or the defence has the burden of proof of the elements mentioned in (1) and (2).

The three points are very complex matters. Although a careful analysis of them will exceed the purposes of this report, a summary of the most relevant ideas is provided below.²⁷

As starting point, STS 154/2016 suggested in several occasions that the lack of a 'culture of compliance' is one of the elements of crime. More in particular, this judicial decision pointed out that

'the centre of criminal liability is the absence of mechanisms of control appropriated to prevent the commission of crime, making clear the commitment of the corporation to reinforce the application of law, regardless the more specific conditions foreseen in Article 31 bis CP and related to "compliance" and "compliance models" that should have been implemented in order to apply the exemption of liability'.

As result, the Prosecutor has the burden of proof for establishing the absence of efficient mechanism of control adopted by the corporation.

The Particular Opinion to this Judicial decision did not share this approach and considered that the elements constituting corporate legal liability are only those expressly stated in Article 31 bis (a) and (b) CP. The accusation is obliged to present pieces of evidence accrediting the existence of these elements, but the obligation does not cover the lack of a culture of compliance.

This Particular Opinion clarifies that, although limited to the elements expressly mentioned in Article 31 bis (a) and (b), corporate liability is not an objective liability but based on the culpability of the company: the corporation is responsible for criminal offences committed by managers and employees in a commercial context because it is guilty (*culpable*) of allowing managers and employees the commission of criminal offences on its behalf and benefit. Therefore, culpability is based on the principles of *culpa in eligendo*, *culpa in vigilando*, and *in constituendo* and *in instruendo*.

²⁷ See more in detail Carlos Gómez-Jara Díez: 'El pleno jurisdiccional del Tribunal Supremo sobre responsabilidad penal de las personas jurídicas' (2006) 8724 Diario la Ley; of the same author, 'Delito corporativo y responsabilidad penal de las personas jurídicas: un desarrollo coherente de la jurisprudencia del Tribunal Supremo' (2016) 8830 Diario La Ley; Manuel Gómez Tomillo: "La responsabilidad penal de las personas jurídicas: Comentario a la STS 154/2016 de 29 de febrero, ponente José Manuel Maza Martín'(2016) 8747 Diario La Ley.

STS 212/2016 acknowledges that corporate criminal liability is a difficult matter and that most of controversial issues will be clarified step by step. This judicial decision points out that corporations are not responsible for all criminal offences committed on its behalf and benefit by managers and employees, but only when 'there is a clear violation of the duty of supervision, surveillance and control of the activities, in light of the particular circumstances of the case'. However, this decision does not go further on this argument and prefers analysing corporate liability from the perspective of the procedural rights of corporations.

According to STS 2012/2016 and regardless the particular opinions on the elements constituting the criminal offence and/or the circumstances excluding criminal liability, corporations are protected by and entitled to exercise the same procedural rights as the individuals or natural persons. The same rules governing the burden of proof should apply to corporations and natural persons. With this approach, STS 212/2016 concludes that the Prosecutor has the burden of proof for establishing that corporations did not undertake the necessary compliance measures, whilst the defence has the obligation of accrediting the adoption and efficient implementation of such measures.

Further judicial decisions seem to have clarified the matter and considered that criminal corporate liability requires the concurrence of three elements: (a) the activities carried out by managers and directives must constitute any of the crimes expressly connected to corporate liability in the Spanish Criminal Code; (b) such activities must be developed on behalf of the corporation and in its own benefit, and (c) there must be a clear lack of organization and management models appropriate to prevent or at least to reduce significantly the risk of the commission of such specific offences²⁸.

2.1.1.3. *List of criminal offences involving corporate criminal liability*

Corporate criminal liability is limited to specific offenses. Article 31bis CP states clearly that corporations will be liable 'in cases foreseen in this Code'. Such cases are mainly related to white-collar crime and International law/human right crimes.

The following criminal offences related to white-collar crime may entail corporate criminal liability:

- Unauthorised disclosure of information, Art. 197 quinquies CP
- Fraud (*estafa*), Art. 251 bis CP
- Frustrated execution of crime, Art. 258 ter CP
- Insolvency crime, Art. 261 bis CP

²⁸ STS 583/2017 of 19 July para (28). ECLI:ES:TS:2017:3210.

However, in cases of small corporations and/or when the criminal investigations are in a very preliminary stage, Spanish courts tend to analyse only the concurrence of elements (a) and (b). See among others SAP Madrid 710/2016 of 13 October (ECLI:ES:APM:2016:13584); SAP Zaragoza 575/2016 of 1 December (ECLI:ES:APZ:2016:2042).. In both cases, element (c) was not mentioned neither by the Prosecutor nor by the defence.

- Cybercrime, Art. 264 quater CP
- Crimes related to intellectual and industrial property, markets and consumers, Art. 288(2) CP
- Money laundering, Art. 302(2) CP
- Illegal financing of political parties Art. 304 bis (5) CP
- Crimes against public funds and social security, Art. 310 bis CP
- Urbanism crimes, Art. 319(4) CP
- Crimes related to explosives and similar elements, Art. 348(3) CP
- Counterfeiting, Art. 386(5) CP
- Falsification of debit and credit cards and travel checks, Art. 399 bis (1), paragraphs (2) and (3)
- Bribery, Art. 427 bis CP
- Traffic of influences, Art. 430(2) and (3) CP
- Smuggling, Art. 2(6) of Qualified Law 12/1995, of 12 December, combatting smuggling.

The following criminal offences related to International law/human rights framework may entail corporate criminal liability:

- Gathering, trafficking and illegal reception of human organs, Art. 156 bis (3) CP
- Trafficking in human beings, Art. 177 bis (7) CP
- Exploitation of prostitution and other forms of sexual exploitation, and abuse of minors, Art. 189 bis CP
- Criminal offences against the rights of foreign citizens, including illegal immigration, Art. 318 bis (5) parr. (1) y (2) CP
- Criminal offences against natural resources and environment, Art. 328 CP
- Crimes related to nuclear materials and other hazardous radioactive substances, Art. 343(3) CP
- Crimes against public health, Art. 366 CP
- Drug trafficking, Art. 369 bis, parr (3) to (6) CP
- Crimes related to hate speech, discrimination and violence, Art. 510 bis
- Terrorism financing, Art. 576(5) CP.

The academia has stressed and criticised the lack of coherence of the Spanish legislator when laying down corporate liability in the abovementioned *categories* of crime, because some *specific offences* included in each category are associated to corporate liability whilst other particular offences pertaining to the same category are not. They have also noticed that the abovementioned list is not aligned with the corresponding EU Directives laying down criminal liability for similar criminal offences.²⁹

²⁹ See Norberto Javier de la Mata Barranco: 'Tipos penales para los que se prevé responsabilidad penal: lagunas y deficiencias a la luz de la normativa europea', Ángel Juárez Peces (dir) *Responsabilidad penal y procesal de las personas jurídicas* (Colección Mementos Prácticos, Francis Lefebvre, Madrid 2015) pp. 189 et ff.

2.1.2 Procedural law governing criminal prosecution & actors

2.1.2.1. Legal framework

The abovementioned LO 5/2010 introducing corporate criminal liability in the Spanish Criminal Code was not accompanied by any legal amendments to the Criminal Proceedings Act (*Ley de Enjuiciamiento Criminal*, LECrim).³⁰

More than one year later, LO 37/2011, of 10 October containing measures speeding-up criminal proceedings³¹ introduced into the *Ley de Enjuiciamiento Criminal* the following particularities applicable to corporations:³²

- Competent courts in cases of corporate liability (Art. 14 bis LECrim),
- Summons of corporations and their obligation to nominate a lawyer, a *procurador*³³ and a person specially designated (Art. 119(a) LECrim),
- The hearing before the investigating judge (Art. 119(b) LECrim)
- The right of information of corporations in the abovementioned hearing (Art. 119(1)(c) LECrim),
- The presence of the individual specially designated in investigative acts (Art. 120 LECrim)
- Delivering of a testimony by the person specially designated, assisted by a lawyer (new Art. 409 bis LECrim),
- Precautionary measures for corporations (Art. 544 quáter LECrim),
- The private places of corporations considered as their domicile (home) and therefore protected by the right of privacy (Art. 554 (4) LECrim)
- The presence of the individual specially designated during the trial (Art. 746 in relation with Article 786 bis, both LECrim)
- Procedural rights of the person specially designated, including right to keep silent, not to declare against himself and not to confess culpability, as well as the right to say last words in trial (Art. 786 bis LECrim),
- The plea-bargain possibilities of corporations (Art. 787 (b) LECrim)

In the particular area of environmental crime, see Antonio Vercher Noguera, 'Algunas notas sobre la responsabilidad penal de las personas jurídicas en el contexto penal ambiental comunitario' (2016) 8805 Diario La Ley; Antonio Vercher Noguera, 'La persona jurídica y el sistema de compliance en el Código Penal: su aplicación en el contexto ambiental', (2016) 8833 Diario La Ley.

³⁰ Adopted by Royal Decree of 14 September 1882, available at: <<http://www.boe.es/buscar/act.php?id=BOE-A-1882-6036&tn=2>> accessed 30 September 2017. See on this matter Julio J. Muerza Esparza, 'Sobre la responsabilidad penal de las personas jurídicas y el proceso' (2011) 822 Actualidad Jurídica Aranzadi.

³¹ BOE No 245 of 11.10.2011.

³² See in detail Fernando Gascón Inchausti, *Proceso penal y persona jurídica* (Marcial Pons, Madrid 2012).

³³ The *procurador* is the representative of individuals and corporations before the court and works closely with the lawyer, This representation is mandatory in most criminal proceedings.

- Summons of corporations and trial in absentia (Art. 839 bis and 786 bis (2) LECrim)

In 2015, two legal amendments of LECrim implemented several EU Directives on procedural rights for suspects and accused persons in Spanish criminal proceedings. The academia considers that such procedural rights for suspects and accused persons are also applicable to corporations³⁴ as soon as the corresponding Directive or the Spanish legal provision does not exclude corporations expressly (as it is the case of Directive on the presumption of innocence, although this Directive has not been implemented yet in our legal system).

In particular LO 5/2015, of 27 April, implemented Directive 2010/64/EU, of 20 October 2010, on the right to interpretation and translation in criminal proceedings³⁵, and Directive 2012/13/EU on the right to information in criminal proceedings³⁶. This Qualified Law introduced (or redrafted) the following rights and procedural acts relevant for corporations into LECrim:

- The right of information and defence (redrafting of Art. 118 LECrim),
- The right of interpretation and translation (introduction of new Chapter, Arts. 123 to 127 LECrim),
- The general principle of publicity of procedural acts and exceptions allowing confidentiality (Art. 302 LECrim),
- The first rearing of the suspect in order to be informed about charges and about his/her obligation to designate an address for notifications. He/she is also informed that, if an address is not provided, procedural acts and trial will continue *in absentia* (Art. 775 LECrim),
- The right of suspect to be informed on new events related to the investigation, in order to exercise his/her right to defence (Art. 775 LECrim).

On the other hand, LO 13/2015, of 5 October, implemented Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty³⁷. The most relevant modification introduced into the Spanish Criminal Proceedings Act was a new drafting of Art. 118 LECrim, on the right of information and defence.

The abovementioned legal provisions do not constitute a complete set of rules. The Spanish *Ley de Enjuiciamiento Criminal* was adopted in 1883 and has been submitted to

³⁴ See in favour of this interpretation Montserrat de Hoyos Sancho, 'Sobre la necesidad de armonizar las garantías procesales en los enjuiciamientos de personas jurídicas en el ámbito de la Unión Europea. Valoración de la situación actual y algunas propuestas' (2007) 43 Revista General de Derecho Procesal.

³⁵ [2010] OJ L 280.

³⁶ [2012] OJ L 142.

³⁷ [2013] OJ L294.

innumerable legal amendments. Furthermore, in the particular area of procedural rights for suspects and accused persons, Spain has to implement in the near future Directive 2016/1919 on legal aid³⁸, and Directive 2016/343, of 9 March, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings³⁹. A complete new Criminal Proceedings Act is necessary in order to provide an appropriate legal framework, among many other matters, to the procedural rights of corporations.

2.1.2.2. *Procedural rights and guarantees of corporations*

In view of this fragmented legal framework, the Spanish Supreme Court considers that, as a general rule and as far as that could be possible, corporations must enjoy the same procedural rights than natural persons. On this matter STS 154/2016 reiterated STS 514/2015, of 2 September, according to which 'any conviction of corporations must respect inalienable principles of criminal law':

'Therefore, the constitutional rights and guarantees mentioned in this appeal, as the fundamental right to access to Justice, the presumption of innocence, the judicial authority pre-designated in accordance with the law, the right a fair trial and others, regardless their particular entitlement, and the possible refusal in this case, they all protect also corporations in the same terms as they protect natural persons submitted to criminal proceedings and, as result, such fundamental rights may be mentioned by corporations and their violations alleged in court by such corporations'.

For the purposes of this report, four aspects on procedural rights for suspects and accused persons in criminal proceedings seem particularly relevant for corporations: (a) the right to be informed on charges and the right to defence, (b) the status of the person specially designated, (c) the investigative measures to be adopted against corporations, and (d) trials in absentia.

The most relevant provision governing the right to be informed on charges and the right to defence is Article 188(1) LECrim, which is as follows:

All persons with charges may exercise the right to defence, participating in procedural acts, since he/has has been informed on the existence of the charges, has been arrested or submitted to any other precautionary measure, or has been

³⁸ [2016] OJ L297. On the state of play of the implementation in Spain of EU Directives on procedural rights of suspects and accused persons see Coral Arangüena Fanego, 'Las garantías procesales de sospechosos e imputados en procesos penales' in Ángeles Gutiérrez Zarza (coord.) *Los retos del espacio de Libertad, Seguridad y Justicia en la Unión Europea en el año 2016* (Wolters Kluwer, Madrid 2017).

³⁹ [2016] OJ L65. This Directive excludes corporations from its scope of application. Contrary to this exclusion, see Montserrat de Hoyos Sancho, 'Sobre la necesidad de armonizar las garantías procesales en los enjuiciamientos de personas jurídicas en el ámbito de la Unión Europea. Valoración de la situación actual y algunas propuestas' (2007) 43 *Revista General de Derecho Procesal* pp. 38 and ff.

formally accused. To this effect, the person will be informed, without any delay, of the following rights:

- a) The right to be informed on the charges, as well as any new events related to the purpose of the investigation and the charged facts. This information will be provided as detailed as possible in order to ensure the most effective exercise of the right to defence.
- b) The right to examine procedural acts enough in advance in order to ensure the right to defence and, in any case, before his/her testimony.
- c) The right to participate in criminal proceedings in order to exercise the right to defence in accordance with this Law.
- d) The right to nominate a lawyer of his/her preference (...).⁴⁰
- e) The right to apply for legal aid, the proceedings applicable and the conditions to enjoy it.
- f) The right to interpretation and translation without any costs (...)
- g) The right to keep silent and not to deliver any testimony, not to answer any or some of the questions formulated
- h) The right not to auto incriminate and not to declare guilty.

The information numbered in this paragraph will be provided in an understandable and accessible language. To this effects, the information will be aligned with the age of the person concerned, level of maturity, disability or any other personal circumstance which may lead to a modification of the capacity to understand the meaning of the information provided.

Article 119 LECrim lies down that corporations will be informed on charges during the first appearance of the person specially designated before the investigating judge in order to inform him/her about procedural rights of the corporation and the facts supposedly committed⁴¹. Previously to this first appearance, the corporation is summoned at its headquarters and required to designate a representative, a lawyer and a procurator. If the corporation does not designate a lawyer and a *procurador*, both professionals will be designed by the court (*de oficio*). If a representative is not appointed, criminal proceedings will continue with the lawyer and the *procurador* (Art. 119(1)(a)).

The first appearance will take place with the presence of the lawyer and the individual especially designated to represent the corporation. In absence of this individual, the

⁴⁰ The right to be assisted by a lawyer was briefly analysed by STS 154/2016. The defence of one of the corporations alleged the violation of the right to defence because the same lawyer assisted one of the natural persons accused and convicted, and one of the corporations. In this particular case, the High Court considered that the right of defence had not been violated because the corporation was a dummy company and these companies are not entitled to enjoy the same procedural rights and guarantees that corporations.

⁴¹ See more in detail Javier Muñoz Cuesta, 'La declaración en instrucción de la persona jurídica: un aspecto más sobre la controversia doctrinal de su responsabilidad penal', (2016) 919 Actualidad Jurídica Aranzadi pp. 5 and ff.

appearance will take place only with the lawyer (Art. 119(1)(b)). The investigative judge provides the information related to the facts and activities under investigation. The information is provided in written (Art. 119(1)(c)). All acts of communication between the court and the corporation, including personal communications, will be channelled through the *procurador* (Art. 119(1)(d)). Article 786 bis (2) LECrim expressly states that “the non-appearance of the individual specially designated by the corporation shall not prevent the hearing, which shall take place with the attendance of corporation’s lawyer and *procurador*”.⁴²

STS 154/2016 analysed the rules for the appointment of the individual specially designated in order to avoid any conflict of interests. In the particular case submitted to the Supreme Court, the corporation had been represented by its senior manager who, during the opportunity given by the court of first instance to say some last words before the end of trial, he made some statements in favour on its own defence but nothing in corporation’s defence.

The Supreme Court underlined that corporations should have the right to defend its own and exclusive interests, which may be different and contradictory with those of the individual who may have represented the corporation in criminal proceedings. The Supreme Court considered that this potential conflict of interests was an ‘important challenge’ not covered by the legal amendments introduced in the *Ley de Enjuiciamiento Criminal* in 2011. It must be noted that the individual especially designated may have the possibility of collaborating with the prosecutor who is investigating the individuals, providing documents and pieces of evidence related to the author and circumstances of criminal offences, in order to achieve a reduction of the penalty.

The Supreme Court mentioned that other legal systems offer different solutions to this potential conflict of interests, including the designation by the judicial authority of a sort of “legal defender”, or a collegiate unit composed of independent individuals jointly with representatives of interests of other persons affected by a possible conviction or, through the attribution of this responsibility to a ‘compliance officer’. The Court acknowledged that it does not have the power to decide on the most convenient system for the designation of the individual specially designated, but underlined that, in case of a conflict of interests, the consequence may be the annulment of the trial and the need to repeat it, in order to ensure the appropriate right of the defence of the corporation. The Court also mentioned the possible annulment of the entire criminal proceedings, including the investigative phase and initial possibilities of corporations to negotiate with the Prosecutor.

As result, the Supreme concluded that prosecutors and judicial authorities should prevent any situation of possible conflict of interests that may derive in a violation of the right of defence of corporations, and reminded the legislator about the need of introducing the necessary legal amendments into the *Ley de Enjuiciamiento Criminal*.

⁴² See also Art. 839 bis (4) LECrim.

However, in the specific case analysed the Supreme Court refused any violation of the right to defence of the corporation, as the lawyer did not provide any piece of evidence related to the concrete damage caused to the corporation as result of not having said the senior manager any last word on its behalf.

STS 583/2017, of 19 July, reiterated the arguments provided in STS 154/2016, of 1 October, and concluded that the right to say last words was neither violated, giving two main reasons. First, the senior manager was the owner of the 100% of the actions of the company, and therefore there was a coincidence among the interest of the individual and the company accused, and second, the lawyer did not provide any facts accrediting that, should the corporation had the opportunity to say last words through a different individual specially designated, the conviction of the Court could have been another one.⁴³

On the other hand, some investigative measures that in principle may be adopted against corporations are especially controversial.

The right of privacy, which includes home privacy, protects corporations. Article 554(4) LECrim considers as domicile (home):

‘As regards corporations, the physical place constituting the management board center of the corporation, being such center the headquarters of the corporation or an independent place, as well as any other places where documents or other type of information related to the daily activities of the company, are in custody and preserved from access to third parties’.

Domiciliary searches and seizures in the abovementioned places may only be undertaken by previous consent of the corporation or, subsidiarily, with judicial authorisation. In practice, corporations may have interests conflicting with those of senior managers and members of the management board. Due to this conflict of interests, it is unclear whether a corporation might authorise searches and seizures in the particular office of one of its senior managers and, conversely, whether the latter may give his consent to some searches and seizures at the main heart quarters of the company. In order to avoid any risk of inadmissibility of evidence in a later stage, the request for a judicial authorisation seems to be the best option⁴⁴.

Corporations have the right of secret communications. The most difficult point in that regard is to determine in each particular situation which person is protected by this

⁴³ On the abovementioned conflict of interests, see in detail Ignacio Colomer Hernández, ‘Cesión de datos obtenidos a través de sistemas de compliance y procesos penales’, in Ignacio Colomer Hernández (dir.), Sabela Oubiña Barbolla and M. Ángeles Catalina Benavente (coord.), *Cesión de datos personales y evidencias entre procesos penales y procedimientos administrativos sancionadores o tributarios* (2017) pp. 376 et ff.

⁴⁴ Ángel Juanes Peces ‘Introducción a la responsabilidad penal de las personas jurídicas. Consideraciones generales y problemas sustantivos y procesales que dicha responsabilidad suscita’ in Ángel Juanes Peces (dir) *Responsabilidad penal y procesal de las personas jurídicas* (Colección Mementos Prácticos, Francis Lefebvre, Madrid 2015) pp. 16.

fundamental right (the corporation as such, directives, employees). In any event, a previous judicial authorisation explaining carefully the context and reasons of this interception is required.

Corporations have also the right of non self-incrimination and therefore are not obliged to deliver documents that might incriminate them⁴⁵. At the beginning of the investigation (i.e. previously to formal charges), the request to deliver such documents will be addressed to the legal representative of the corporation. After the issuing of formal charges against the company, the request will be addressed to the individual specially designated to represent the corporation in court.⁴⁶ During the trial, the individual specially may give testimony on behalf of the corporation, provided that this evidence was proposed and accepted by the court, and regardless the right of the corporation to keep silent and do not make any statement against corporation or to provide a confession of guilty (Art. 786 bis LECrim, reproduced *infra*).

Another controversial matter is the possibility of incorporating documentation gathered by coercive means in previous administrative proceedings into the judicial file.⁴⁷ Circular 1/2011 was favourable to the admission as evidence of documents gathered previously in the context of administrative proceedings, however, some authors, in light of the contradictory case-law issued by the European Court of Human Rights and the Court of Justice of the EU, have doubts on this matter.⁴⁸

Lastly, and contrary to the general rule of individuals, corporations may be submitted to trial *in absentia* regardless the type and gravity of the penalties attached to the criminal offences committed.

As a general rule, the presence of the individuals (natural persons) formally accused is mandatory in Spanish trials. Only in two particular cases, namely when criminal offences allegedly committed are punishable with a deprivation of liberty of no more than two

⁴⁵ See more in detail Óscar Serrano Zaragoza, 'Contenido y límites del derecho a la no autoincriminación de las personas jurídicas en tanto sujetos pasivos del proceso penal' (2014) 8415 Diario La Ley; Cristina Garau Alberti, 'Derecho a no autoincriminarse de la persona jurídica' (2017) 9032 Diario La Ley.

⁴⁶ Ángel Juanes Peces 'Introducción a la responsabilidad penal de las personas jurídicas. Consideraciones generales y problemas sustantivos y procesales que dicha responsabilidad suscita' in Ángel Juanes Peces (dir) *Responsabilidad penal y procesal de las personas jurídicas* (Colección Mementos Prácticos, Francis Lefebvre, Madrid 2015) pp. 18-19.

⁴⁷ As regards the presentation in court of documents and pieces of evidence gathered by the compliance officers in the framework of internal enquiries and/or in parallel to criminal proceedings, with or without limiting fundamental rights, see in detail Ignacio Colomer Hernández Ignacio Colomer Hernández, 'Cesión de datos obtenidos a través de sistemas de compliance y procesos penales', in Ignacio Colomer Hernández (dir.), Sabela Oubiña Barbolla and M. Ángeles Catalina Benavente (coord.), *Cesión de datos personales y evidencias entre procesos penales y procedimientos administrativos sancionadores o tributarios* (2017) pp. 403 et ff.

⁴⁸ *Ibid* 19-20.

years, or with any other penalty not exceeding of six years, his/her presence is not required and trials may be conducted in absentia of the individual⁴⁹.

The situation is different for corporations. The presence of the individual specially designated to represent the interests of the corporation in trial is expressly foreseen in the Spanish Criminal Act, however, if this individual is not present the trial will continue with the assistance of the lawyer and the 'procurador'. On this matter, Art. 786 bis LECrim is as follows:

- (1) When the accused persons is a corporation, the later is entitled to be represented by a person specially designated in order to ensure a better exercise of the right to defence. The individual will be located in the place reserved for the accused persons. The individual may deliver a testimony on behalf of the legal person provided that this piece of evidence was proposed and admitted, and regardless his/her right to keep silent, not to declare against the corporation and not to admit guilty, as well as to exercise last word in trial. To this purpose, a person summoned to deliver a testimony as witnesses cannot be appointed as individual special designated.
- (2) Nevertheless, *the non-appearance of the person specially designated by the corporation will not be an obstacle for the continuation of the trial, which will continue with the presence of the lawyer and the 'procurador' of the corporation.* (emphasis added)

2.2 Principles of Jurisdiction: building the nexus

The extension and limits of the Spanish jurisdiction in cross-border criminal cases is laid down in Article 23 of the Qualified Law 6/1985, of 1 July, for the Judiciary (Ley Orgánica del Poder Judicial,⁵⁰ LOPJ).

Paragraph (1) of this legal provision recognises the **territoriality principle**, according to which "the Spanish jurisdiction will be competent for cases committed in the Spanish territory and on board of Spanish ships or airplanes, notwithstanding the provisions of the International Treaties ratified by Spain".

Paragraph (2) of Article 23 LOPJ recognises **the principle of active nationality**, according to which the Spanish Jurisdiction shall be competent for criminal offences committed abroad, provided that the perpetrators are Spanish nationals or individuals who received Spanish nationality after committing the crimes. In both cases, the following three conditions should be meet:

⁴⁹ See Víctor Moreno Catena 'La ausencia del investigado' in Victor Moreno Catena and Valentín Cortés Domínguez, *Derecho Procesal Penal* (Tirant lo Blanch, Valencia 2017) pp. 124 and ff.

⁵⁰ LO 6/1985of 1 July, for the Judiciary. BOE No 157of 2.7. 1985.

- a) The facts shall be punishable in the State where they were committed, unless this condition is not foreseen by the International Treaty or Convention applicable to the case;
- b) The victim of crime or the Spanish Prosecutor's Office must officially initiate criminal proceedings in Spain, and
- c) According to the 'non bis in idem' principle, the author of crime shouldn't be acquitted, indulged or convicted in other country or, if convicted, shouldn't have served the conviction yet in that country. If the conviction has been partially served, the penalties imposed in Spain will be reduced accordingly.

The **principle of passive personality** is not recognised as such (although some criminal offences that may be prosecuted in Spain according to the principle of universal jurisdiction require among other elements that the victims are Spanish citizens).

Paragraph (3) of Article 23 LOPJ lays down the principle of **protection of national interests**. According to this principle, Spain may extend jurisdiction in the following cases:

- Treason, crimes against peace or the independence of the State,
- Crimes against the King, his/her Consort, his/her Successor, the Regent,
- Crimes of sedition and rebellion
- Falsification of royal signature or stamp, State stamp, signatures of Ministries and other public and official stamps,
- Counterfeiting and expedition of money
- Any other falsification prejudicing the State credit or interests,
- Any attempt against authorities or Spanish public servants
- Crimes committed by Spanish public servants residing in other countries, and crimes and Spanish Public Administration
- Crimes related to operations and transactions

The **principle of universal jurisdiction** is recognised in Article 23(4) LOPJ, with the particularities laid down in paragraphs (5) and (6) of the same legal provision. They are very extensive paragraphs, containing provisions related to particular types of crime and setting up, for each type of crime, particular conditions under which the Spanish jurisdiction may undertake criminal proceedings. As mentioned, the Spanish nationality of the victim is one of the conditions established for some types of crime.

There has been a restrictive evolution of the scope of application of the universality principle, especially after the legal amendments of paragraphs (4) and (5), and the introduction of paragraph (6) by Qualified Law 1/2014, of 13 March⁵¹.

⁵¹ BOE No. 63 of 14.3.2014.

As a background, when the Qualified Law for the Judiciary (LOPJ) was adopted in 1985, the principle of universal jurisdiction was recognised in Article 23(4) LOPJ without any restriction or additional requirements for its application in practice, excepting the need to respect the judicial decisions issued by other countries about the same case (*cosa juzgada*). This legal provision contained a list of criminal offences allowing Spanish courts to investigate, prosecute and bring to court the perpetrators of such offences regardless the place where they were committed and the nationality or place of residence of victims and perpetrators. It was considered that Spanish courts were legitimated for such cases because they affected humanitarian interests protecting the international community. The list was as follows:

- a) Genocide
- b) Terrorism
- c) Piracy and unlawful seizure of aircrafts
- d) Falsification of foreign currency
- e) Criminal offences related to prostitution
- f) Drug illicit trafficking
- g) Any other crime that should be prosecuted in Spain, according to International Treaties or Conventions.

The list of crimes included in Article 23(4) was extended in 1999 to cover abuse of minors and vulnerable victims,⁵² in 2005 to cover feminine mutilation (with the condition that the perpetrators were located in Spain),⁵³ and in 2007 to protect victims of illegal immigration⁵⁴.

With this legal framework, the Investigating Central Judges of the *Audiencia Nacional* initiated investigations for criminal offences committed during dictatorships of Argentina and Chile, and addressed formal accusations against Ricardo Miguel Caballo and Adolfo Schilingo (Argentina), and Augusto Pinochet (Chile). As it is well known, the Spanish Judge Baltasar Garzón issued an extradition request against Augusto Pinochet, who was in domiciliary arrest until the British Government refused extradition in view of the delicate health of Pinochet. The *Audiencia Nacional* convicted Augusto Schilingo to 640 years of deprivation of liberty.

On the basis of the Universal Jurisdiction principle, and following a heated discussion between the Spanish Supreme Court and the Spanish Constitutional Court, the *Audiencia*

⁵² LO 11/1999 of 30 April, amending Title VIII of Book II of the Spanish Criminal Act. BOE No 104 of 1.5. 1999.

⁵³ LO 3/2005 of 8 July, amending LO 6/1985 of 1 July of the Judiciary, allowing extraterritorial prosecution of genital mutilation of women. BOE No 163 of 9.7. 2005.

⁵⁴ LO 13/2007 of 19 November, allowing the extraterritorial prosecution of illegal trafficking and illegal immigration of persons. BOE No 278 of 20.11. 2007.

Nacional conducted investigations for crimes committed in Guatemala against population of the Maya ethnic group (Caso Rigoberta Menchú).⁵⁵

The murder of two journalists in Baghdad (Iraq), one of them of Spanish nationality, motivated the initiation of investigations against three soldiers of United States (Caso Couso)⁵⁶. The Investigating Central Judges initiated also two other relevant cases, with obvious political implications, against Prime Ministers and some other high level members of the Chinese Communist Party (Caso Tibet and Caso Falun Gong).⁵⁷

In 2009, a new legal amendment changed Article 23(4) dramatically.⁵⁸ As a positive aspect, this legal reform introduced crimes against humanity and war crimes in the list of paragraph (4), considering that both types of crimes were not included yet and their prosecution was based on the International conventions and customary law.

As a not so positive element, the legal reform of 2009 introduced some sentences in the same paragraph “in order to adapt and clarify this legal provision in line with the subsidiarity principle and the case-law of the Constitutional Court and jurisprudence of the Supreme Court”. As result, paragraph (4) included three new conditions for the prosecution of criminal offences under the universality principle:

- Spanish courts will be entitled to prosecute such crimes provided that the perpetrators are located in Spain or the victims have Spanish nationality, or if it is possible to establish a relevant connection with Spain. In any event, any other country or International Court must not have initiated a criminal investigation or prosecution based in the same facts.
- The Spanish criminal investigation or proceedings shall finalise as soon as the opening of another procedure before other country or the International Court was initiated.
- Criminal investigations and prosecutions against such crimes are exceptional, and shall always require official charges by the Prosecutor or the victim.

⁵⁵ STC 237/2005 of 26 September 2005. Jaume Ferrer Lloret ‘Alcance y límites del principio de jurisdicción universal en la jurisprudencia española más reciente’ R. Huesa Vinaia (coord.) *Derechos Humanos, Responsabilidad Internacional y Seguridad Colectiva: Interacción de Sistemas. Estudios en Homenaje al Profesor Eloy Ruiloba Santana* (Marcial Pons, Madrid 2008) 193 and ff.; Juan Santos Vara ‘La jurisdicción de los Tribunales españoles para enjuiciar los crímenes cometidos en Guatemala’ (2006) 11 *Revista Española de Estudios Internacionales* <www.reei.org> accessed 30 September 2017.

⁵⁶ José María Sánchez Patrón: ‘La competencia extraterritorial de la jurisdicción española para investigar y enjuiciar crímenes de guerra: el caso Couso’ (2007) 14 <www.reei.org> accessed 30 September 2017.

⁵⁷ About these cases and the evolution of the Universal Jurisdiction in general, see Ángel Sánchez Legido ‘El fin del modelo español de Jurisdicción Universal /The end of the Spanish model of Universal Jurisdiction’ (2014) 27 <www.reei.org> accessed 30 September 2017.

⁵⁸ LO 1/2009 of 3 November, complementary to the Law amending procedural legislation for the setting up of the Administrative Offices attached to Judicial Courts. BOE No 266 of 4.11. 2009.

In 2014, the universality principle was extensively amended.⁵⁹ The entire list of criminal offences was redrafted and, for each type of crimes, additional conditions were introduced. For many of these criminal offences, the Spanish jurisdiction is recognised only in accordance with the international treaties applicable or the particular international treaty expressly mentioned.

The Qualified Law 2/2015, of 30 March modifying the Criminal Code in terrorism matters introduced new modifications into Art. 23(4) LOPJ.⁶⁰ This legal amendment (not very well drafted) extended the universal jurisdiction of the Spanish courts to those terrorism cases where proceedings are targeted against a foreign citizen residing habitually in Spain or located in Spain or, without such conditions, cooperating with a Spanish citizen, or with a foreign citizen residing or located in Spain, for the purposes of committing terrorist crimes.

As result of all the abovementioned legal amendments, the list of criminal offences in respect of which the universality principle is recognised in Spain is as follows:

- a) Genocide, crimes against humanity and crimes against individuals and goods protected in cases of armed conflict;
- b) Torture and crimes against moral integrity laid down by Articles 174 to 177 of Spanish Criminal Act,
- c) Crimes of enforced disappearance included in the International Convention for the Protection of All Persons from Enforced Disappearance. New York, 20 December 2006,
- d) Piracy, terrorism, illicit trafficking of drugs, trafficking in human beings, against the rights of foreigners and against the security of maritime navigation committed in maritime spaces, in cases foreseen in the International Treaties ratified by Spain or in the framework of legal acts adopted by an International Organisation,
- e) Terrorism, as soon as the case presents one or more links with Spain (one of the link refers to the Spanish nationality of the corporation on behalf of which the crime was committed),
- f) Crimes committed in the framework of the International Convention for the Suppression of unlawful seizure of aircrafts. The Hague, 16 December 1970,
- g) Crimes included in the International Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done in Montreal on 23 September 1971 and its Protocol,
- h) Convention on the Physical Protection of Nuclear Materials done in Vienna on 29 October 1979,
- i) Drugs trafficking,
- j) Setting up, financing and integration in a group or criminal organisation, or crimes committed in the framework of such organisations,

⁵⁹ LO 1/2014 of 13 March, amending LO 6/1985 of 1 July of the Judiciary, related to Universal Jurisdiction. BOE No 63 of 14.3. 2014.

⁶⁰ BOE No 77 of 31.3. 2015.

- k) Sexual abuse against minors,
- l) Crimes laid down by the Council of Europe Convention on preventing and combating violence against women and domestic violence,
- m) Trafficking in human beings,
- n) Private corruption,
- o) Crimes laid down by the Council of Europe Convention on the Counterfeiting of Medical Products,
- p) Any other criminal offence whose prosecution was mandatory by an International Treaty applicable to Spain or by other legal acts of an International organisation.

As already mentioned, most of the abovementioned types of crime require the existence of a link with Spain (place of residence of the suspect, nationality of the victim...) and other elements (the initiation of criminal investigation by the Prosecutor or the victim, the respect of the non bin idem principle...) as pre-conditions to initiate a Spanish investigation.

On the other hand, the distinction between jurisdiction to prescribe (legislative jurisdiction) and jurisdiction to adjudicate (judicial jurisdiction) is not commonly used in Spain. The competence of the Spanish judicial authorities to investigate, prosecute and bring to court extraterritorial cases is expressly provided for in the law governing the Spanish Judiciary, that is, the Qualified Law 6/1985, of 1 July (not the Criminal Act, as in other countries). In light of the principles of territoriality, active nationality, protection of national interests and universal jurisdiction, as laid down in Article 23 LOPJ and interpreted by the Supreme Court, Spanish judicial authorities examine whether the criminal offences regulated in the Spanish Criminal Act may or may not be prosecuted in Spain.

2.3 International Law and Human rights framework

The most relevant international conventions and treaties conferring jurisdiction to Spanish judicial authorities in order to investigate, prosecute and bring to court international core crimes and treaty crimes are as follows:

- Convention on the Prevention and Punishment of the Crime of Genocide. Paris, 9 December 1948.
- International Convention for the Suppression of the Traffic in Women and Children. Geneva, 30 September 1921.
- International Convention on the Elimination of All Forms of Racial Discrimination. New York, 7 March 1966.
- International Covenant of Economic, Social and Cultural Rights. New York, 16 December 1966.
- International Covenant of Civil and Political Rights. New York, 16 December 1966.

- Convention for the Suppression of unlawful seizure of aircrafts. The Hague, 16 December 1970.
- Convention on the Physical Protection of Nuclear Material. Vienna, 29 October 1979.
- Convention on the Elimination of All Form of Discrimination against Women. New York, 18 December 1979.
- United Nations Convention on the Law of the Sea. Montego Bay, 10 December 1982.
- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. New York, 10 December 1984.
- United Nations Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. Rome, 18 March 1988.
- Convention on the Rights of the Child. New York, 20 November 1989.
- International Convention Against the Recruitment, Use, Financing and Training of Mercenaries. New York, 4 December 1989.
- International Convention for the Suppression on the Financing of Terrorism. New York, 9 December 1999.
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. New York, 18 December 1990.
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000.
- United Nations Convention against Transnational Organised Crime. New York, 15 November 2000.
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime. New York, 15 November 2000.
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime. New York, 15 November 2000.
- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organised Crime. New York, 31 May 2001.
- United Nations Convention against Corruption. New York, 31 October 2003.
- International Convention for the Suppression of Acts of Nuclear Terrorism. New York, 13 April 2005.
- Convention of the Rights of Persons with Disabilities, 13 December 2006.
- International Convention for the Protection of All Persons from Enforced Disappearance. New York, 20 December 2006.
- Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul, 11 May 2011.
- Council of Europe Convention on the Counterfeiting of Medical Products. Moscow, 28 October 2011.

- Council of Europe Convention against trafficking of human beings. Warsaw, 16 May 2005.
- Rome Statute of the International Criminal Court. Rome, 17 July 1998.
- Amendment to Article 8 of the Rome Statute of the International Criminal Court. Kampala, 10 June 2010.
- Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, Kampala, 11 June 2010.
- Agreement on the Privileges and Immunities of the International Criminal Court. New York, 9 September 2002.

2.4 Framework of prosecuting a cross-border case

In Spain, a cross-border case with a transnational dimension is built in accordance with different rules depending on whether judicial cooperation is required from another EU Member State or from a third State.

In transnational cases involving other EU Member States, judicial cooperation in criminal matters is basically governed by the Law 23/2014, of 20 November, concerning mutual recognition in criminal matters in the EU⁶¹, and related European and national legal instruments⁶².

Transnational cases involving third States are governed by the International or bilateral Conventions and Treaties applicable between Spain and the third State concerned⁶³. Spain does not have an International Judicial Cooperation Act.

In both contexts (European, international), the Spanish Criminal Proceedings Act is also applicable, with an important consequence. Some EU Directives on procedural rights for suspects and accused persons have been implemented in Spain through the introduction of the necessary amendments into the Spanish Criminal Proceedings Act.⁶⁴ As soon as this Act is also applicable in transnational cases involving third States, the abovementioned procedural rights and safeguards apply and protect corporations from third States equally.

⁶¹ BOE No. 282 of 21.11.2014. On this law see the exhaustive collective work coordinated by Coral Arangüena Fanego and others *Reconocimiento Mutuo de Resoluciones Penales en la Unión Europea* (Aranzadi, Madrid 2015).

⁶² The most relevant EU and Spanish legal instruments on judicial cooperation in criminal matters are listed and available through the website of the Spanish Network of European Criminal Law (*Red Española de Derecho Penal Europeo*, ReDPE) at < <http://redpe.wordpress.com/biblioteca/legislacion-dpe-2> > accessed 30 September 2017.

⁶³ The most relevant International and bilateral conventions applicable between Spain and third States (as well as EU Member States) are accessible through the so called 'Prontuario', a database set up and updated regularly by the Spanish Ministry of Justice, the Spanish General Council of the Judiciary and the Spanish Prosecutor's Office, available at < www.prontuario.org > accessed 30 September 2017.

⁶⁴ Procedural rights protecting corporations (including those recognised as result of the implementation of EU Directives on this matter) have been analysed in section 2.1.2 of this report.

Therefore, the right to be informed on charges and the right to defence, the right to interpretation and translation, and the right of a lawyer according to Art. 118 LECrim applies to corporations involved in cross-border cases.

On the individual specially designated, some authors have pointed out that the Spanish Criminal Act does not oblige corporations to nominate an individual able to understand, read and speak proper Spanish, and that the freedom to designate the best individual to defend the interest of the corporation should prevail.⁶⁵

As regards the notification of the first hearing, for corporations with headquarters in other EU Member States or third States, a request for mutual legal assistance must be issued and send by a letter of request in order to ensure the company is aware of the date and place of the hearing and the right to be present through an individual specially designated.

Spain has not implemented yet Directive 2014/41/EU, of 3 April, on European Investigation Order in Criminal Matters,⁶⁶ and therefore letters of request in accordance with European instruments on mutual legal assistance are still applicable (mainly the 1957 Convention of the Council of Europe and the 2000 EU Convention).⁶⁷

Lastly, the individual specially designated is entitled to be present at trial with guarantees laid down in Article 786 bis LECrim (right to keep silent, not to declare against the corporation and not to admit guilty, right to say last words). However, if he/she is not present, trial will continue with the sole assistance of the lawyer and the representation of the *procurador*.

2.5 Prominent cases, media coverage

Criminal liability of corporations is a relatively new matter in Spain, at least from a practical point of view, and most attention is focused on the interpretation and practical application of Spanish rules in national cases involving drug trafficking, money laundering, fraud and other related white-collar crime offences.

⁶⁵ Montserrat de Hoyos Sancho, 'Sobre la necesidad de armonizar las garantías procesales en los enjuiciamientos de personas jurídicas en el ámbito de la Unión Europea. Valoración de la situación actual y algunas propuestas' (2007) 43 Revista General de Derecho Procesal pp. 14.

⁶⁶ [2014] OJ L130. On the European Investigation Order in Spain, see Mar Jimeno Bulnes, 'Orden europea de investigación en materia penal' in Mar Jimeno Bulnes (dir.) *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo* (Bosch, Barcelona 2016); Carmen Rodríguez-Medel Nieto, *Obtención y admisibilidad en España de la prueba penal transfronteriza* (Aranzadi, Madrid 2016); Coral Arangüena Fanego, 'Orden europea de investigación: próxima implementación en España del nuevo instrumento de obtención de prueba penal transfronteriza', (2017) 58 Revista de Derecho Comunitario Europeo pp. 905-939.

⁶⁷ See Dictamen 1/17 de la Fiscalía de Sala de cooperación penal internacional sobre el régimen legal aplicable debido a la no transposición en plazo de la Directiva de la Orden Europea de Investigación y sobre el significado de la expresión 'disposiciones correspondientes' que sustituye dicha Directiva, available at <https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/DIC%201-17%20OEI%20Regimen%20transitorio_2.pdf?idFile=6b507dd8-4ec7-427a-b17d-4d29de03539f> last accessed 30 September 2017.

In this context, most relevant cases receiving continuous media coverage are related to fraud committed by football clubs, political parties and bank entities.⁶⁸ As examples and very briefly, Barcelona Football Club was accused of fraud with the occasion of the signature of contracts with a football player and, as result of a plea-bargaining with the Prosecutor, paid two penalties amounting 5,5 million euros in total⁶⁹. The political party *Partido Popular* is formally accused in the Caso Gürtel.⁷⁰ Bankia, a relevant Spanish bank entity, has been also formally accused of investment fraud⁷¹. The most recent case is related to the Industrial and Commercial Bank of China (ICBC), which has been formally accused of money laundering involving criminal organisations at large scale.⁷²

As regards environment and human rights, the most relevant case widely covered by mass media is the Volkswagen scandal for spewing tonnes of nitrogen oxides into the air through the illegal manipulation of car motors. The facts motivated the starting of a judicial investigation conducted by the Central Investigating Judge (*Juzgado Central de Instrucción*, JCI) n. 2 of the *Audiencia Nacional*. In the framework of this investigation and as first steps, the Investigating Judge conferred Volkswagen AG with headquarters in Germany the status of investigated person (in view of its possible participation in criminal offences related to fraud causing serious damages to a generality of individuals, subsidy fraud, and criminal offences against environment) and ordered the notification of this decision to the corporation, through the corresponding letter of request, for the purposes of the corporation to nominate an individual specially designated to represent Volkswagen's interests.⁷³

Lastly, mass media publishes regularly news related to the production chains of big Spanish textile companies operating mainly in Bangladesh, India and other third countries.⁷⁴ Some years ago Inditex (the matrix of Zara), Cortefiel and El Corte Inglés were involved in the issue of the building that collapsed due to deterioration in Dacca, Bangladesh, causing the murder of more than one hundred of workers in textile workshops, many of them minors and specially girls who perceived a small salary and some other donatives as part of their future dowry for marriage (the so-called *sumangali* practice).⁷⁵ The case did not go to court, but contributed to increasing awareness among

⁶⁸ See Maite de la Parte Blanco, 'Sobre fútbol, fichajes, delitos contra la Hacienda Pública y responsabilidad de las personas jurídicas. Sentencia de la Audiencia Provincial de Barcelona de 14 de diciembre de 2016', (2017) 2 Revista Aranzadi Doctrinal.

⁶⁹ SAP of Barcelona 694/2016 of 14 December. ECLI:ES:APB:2016:13399.

⁷⁰ On this case, see in detail < https://elpais.com/tag/caso_gurtel/a > last accessed 30 September 2017.

⁷¹ See decision of the Central Investigating Judge (*Auto del Juzgado Central de Instrucción*, AJCI) n. 4 of the Audiencia Nacional of 11 May 2017. ECLI:ES:AN:2017:329A.

⁷² See AJCI n. 2 of the Audiencia Nacional of 6 September 2017. ECLI:ES:AN:2017:801A.

⁷³ JCI Decision of 30 June 2016 (ECLI:ES:AN:2016:109A).

⁷⁴ See for instance < http://www.eldiario.es/economia/Inditex-Corte-Ingles-Cortefiel-Carrefour_0_480852401.html > last accessed 30 September 2017.

⁷⁵ See the report Flawed Fabrics. The abuse of girls and women workers in the South Indian textile industry, available at < <https://www.somo.nl/wp-content/uploads/2014/10/Flawed-fabrics.pdf> > last accessed 30

Spanish citizens on the importance to pay attention to the origin of products offered in the Spanish market and the conditions under which they are produced. Today, Spanish big companies have endorsed international agreements to improve the conditions of workers in third countries, and offer information on this matter in domestic websites.⁷⁶

There are not official statistics yet related to the prosecution and conviction of corporations by the Spanish Courts.

2.6 Public debate on Corporate Social Responsibility

As mentioned in the previous section of this report, the accountability of corporations and in particular their compliance with human rights and ethical standards is subject to an increasing debate and awareness among Spanish citizens.

There is also an increasing debate among public administrations and corporations, mainly due to the need of implementing in our legal system Directive 2014/95/UE amending Directive 2013/34/UE as regards disclosure of non-financial and diversity information by certain large undertakings and groups.⁷⁷ The Spanish draft law however still waiting for the approval of the Council of Ministers before being forwarded to the Spanish Parliament.⁷⁸

Another element contributing to this debate among public administrations and private corporations is the recently adopted National Action Plan about Corporations and Human Rights (*Plan de Acción Nacional de Empresas y Derechos Humanos*, PNEyDH) of September 2017.⁷⁹

The Action Plan reproduces guiding principles contained in Pillars I and III of the Ruggie principles and, for each of them, contains a set of measures to be implemented in the following three years.

Any of the abovementioned debates cover questions related to the exclusion of corporate social responsibility under Article 25 ICC. It is however a relevant matter in order to avoid impunity of corporations involved in cross-border core crimes that must be addressed in due time.

3 Holding Corporations accountable - the Jurisdictional Issue

3.1 General Jurisdiction – General aspects of Jurisdiction

September 2017.

⁷⁶ See for instance the news 'Así combaten Inditex, H&M y Primark la explotación en sus fábricas', < <http://www.elmundo.es/economia/2017/03/19/58ca89eee5fdea012e8b469f.html> > last accessed 30 September 2017.

⁷⁷ [2014] OJ L330.

⁷⁸ <<http://www.lamoncloa.gob.es/consejodeministros/Paginas/enlaces/010917-enlaceanteproyecto.aspx>> last accessed 30 September 2017.

⁷⁹ Resolution of 1 September 2017 of the Secretariat of State for External Affairs. BOE No. 222 of 14.9.2017.

In general terms Spain exercises its jurisdiction over criminal activities committed in the Spanish territory (territoriality principle, Art. 23(1) LOPJ), and extends such jurisdiction to Spanish natural persons and corporations committing criminal activities abroad (active nationality principle Art. 23(2) LOPJ), as well as to criminal offences affecting Spanish interests (national interests principle Art. 23(3) LOPJ).

Spain may also extend jurisdiction over a long list of core crimes and treaty crimes expressly mentioned in Art. 23(4), (5) and (6) LOPJ provided that, for most of them, some additional conditions (mainly related to the Spanish nationality of the author and/or the victim, or the initiation of the investigation by a Public Prosecutor) are met (universality principle).

In the particular case of corporations, Spanish courts are empowered to exercise jurisdiction over criminal offences committed by them in the Spanish territory, regardless the headquarters of the company are located in Spain or abroad (Art. 23(1) LOPJ). Spanish courts may also extend jurisdiction to Spanish companies committing criminal activities abroad (Art. 23(2) LOPJ)). They may also extend jurisdiction to criminal offences affecting Spanish interests, regardless the nationality of the corporation involved (Art. 23(3) LOPJ).

As regards core crimes and treaty crimes allegedly committed by corporations, Spanish authorities may extend jurisdiction to only a few of them, because a double set of conditions must be present. First, the particular crime must be included in the list of crimes associated to corporate liability according to the Spanish Criminal Act, and secondly some additional requirements expressly mentioned in Art. 23(4), (5) and (6) should be met.

3.1.1 Territorial Jurisdiction

Spanish courts are empowered to exercise jurisdiction over corporations committing criminal offences in the Spanish territory (Art. 23(1) LOPJ). The particular criminal offence(s) committed must be associated to corporate liability by the Spanish Criminal Act and the facts must be committed totally or partially in the Spanish territory. Jurisdiction is conferred regardless the location of the headquarters of the company (Art. 23(1) LOPJ).

In some criminal offences, as environmental crimes, the facts and its consequences are spread along several countries, they are not committed only in a sole and particular state. In this situation, and depending on the crime committed, Spain may exercise jurisdiction over all the facts or only over the facts committed in Spain. The later is the most common approach, and was adopted for instance in the Volkswagen case. The crime was committed in many countries, however, this circumstance did not impeded Spanish courts to conduct investigations against the facts committed in Spain.

On the other hand, Spanish jurisdiction is exercised regardless the location of the company. Again in the Volkswagen case, the Central Investigating Judge n. 2 of the *Audiencia Nacional* considered the filial corporation Volkswagen Spain as supposedly

responsible for the environmental crime committed, and summoned this filial, which provided arguments favourable to conduct investigations against Volkswagen Germany instead. The later nominated an individual specially designated to represent its interests before the Spanish courts. Volkswagen Germany is, finally, the corporation submitted to Spanish jurisdiction.

The BBSH Case is not related to core crime or treaty crimes, but to money laundering committed in Spain and involving criminal organisations at large scale, but it is also relevant as soon as the headquarters of the Bank are located in Luxembourg. When the Central Investigating Judge was analysing its possible jurisdiction to investigate the case, he verified whether the activities were also a crime in Luxembourg, thus adding a second requirement (double criminality) not expressly recognised in our legal system. The Prosecutor did not contest this verification.

3.1.2 *Extraterritorial Jurisdiction*

3.1.3 *Active personality or nationality principle*

According to the active personality principle (Art. 23(2) LOPJ), Spanish courts are competent for criminal offences associated to corporate liability by the Spanish criminal code that have been committed by Spanish corporations abroad, as soon as three additional conditions are met:

- a) The facts must also constitute a crime in the country where they were committed, unless this condition is not foreseen by the International Treaty or Convention applicable to the case;
- b) The victim of crime or the Spanish Prosecutor's Office should officially initiate criminal proceedings in Spain, and
- c) The author of crime shall not be acquitted, indulged or convicted in other country of, if convicted, shall not have served the conviction yet in that country. If the conviction was partially served, the penalties imposed in Spain shall be reduced accordingly.

In practice, Spanish jurisdiction has not been exercised yet over Spanish corporations for core crimes or treaty crimes committed abroad. As mentioned in previous sections of this report, mass media has reported in several occasions about the exploitation by Spanish corporations of textile workers of third countries involved in their production chain, however, the cases did not go to court. Moreover, Spanish big corporations as Inditex pay increasing attention to the protection of human rights in third countries as part of their strategy to ensure a good reputation⁸⁰.

⁸⁰ See Irene Martín Martín and others, 'La RSC como estrategia de comunicación para lograr el incremento de la reputación corporativa y el capital social. Casos significativos de empresas del Ibex 35', in *Comunicación y desarrollo en la era digital. Congreso AE-IC 3, 4 y 5 febrero de 2010* pp. 28 and ff., and more

The passive personality principle is not recognised in Article 23 LOPJ.⁸¹

3.1.4 *Protective principle*

In accordance with the protective principle, Spanish jurisdiction may be exercised over criminal offences affecting any of the Spanish interests expressly numbered by Art. 23(3) LOPJ.

It is hard to find situations wherein a corporation may be prosecuted in accordance with this principle, because the criminal offence expressly numbered by Art. 23(3) LOPJ must entail corporate liability in accordance with Spanish Criminal Act.

In this narrow context, it seems that corporations committing active bribery (*cohecho activo cometido por un particular*) may be prosecuted by Spanish jurisdiction. Criminal offences against Spanish Public Administration are expressly numbered by Art. 23(3)(h) LOPJ, and among them active bribery (*cohecho activo cometido por un particular*) of Art. 424 CP entails corporate liability in accordance with Art. 427 CP. In my opinion, this type of bribery would be specially regrettable in cases of Spanish corporations enjoying the so-called "Marca España" that perceive public grants for the diffusion of this Spanish brand abroad.

3.1.5 *Jurisdiction over military personnel and/or private military contractors*

Spain has a Military Jurisdiction, separated from the Ordinary Jurisdiction, which is competent for investigating, prosecuting and bring to military courts the military personnel committing criminal offences abroad. This is considered an extension of the Spanish jurisdiction based on the personality principle and is recognised in Article 12(3) and (4) of Qualified Law 4/1987 of 15 July, concerning Competences and Organisation of the Military Jurisdiction.⁸²

Military actions for peace purposes are developed in the framework of Status Of Force Agreements (SOFA). They are International agreements signed between Spain and the State where the Spanish military forces are going to develop their mission. The Agreement contains rights and obligations for both States and establishes that, in case of conflict or

recently Orencio Vázquez Oteo, 'Factores que influyen en la calidad y cantidad de la Responsabilidad Social en las empresas españolas. Estudio de caso de las empresas del Ibex 35', (2015) 85 CIRIEC – España, Revista de economía pública, social y corporativa pp. 181 and ff..

⁸¹ Paragraph (4) laying down universal jurisdiction principle contains a list of criminal offences conferring jurisdiction to the Spanish courts and, for some of them, the Spanish nationality of victims is required as a condition to prosecute. This is the case of the following criminal offences: torture crimes and crimes against integrity (paragraph (b)(2^o)); enforcement disappearance according to the Convention of New York of 2006 (Art. 23(4)(c)(2^o) LOPJ); terrorism (Art. 23(4)(e)(4^o) LOPJ); crimes against sexual liberty and integrity (Art. 23(4)(k)(4^o); Violence against women, paragraph (l)(3^o); Trafficking of human beings, paragraph (m)(4^o); falsification and fraud of medical products (paragraph (o)(5^o)).

⁸² BOE No 171 of 18.7.1987.

suspicious of criminal offences by Spanish military personnel, the Spanish military or ordinary courts will have exclusive jurisdiction to examine the case.⁸³

Spanish Military Jurisdiction is applied restrictively and only to military personnel. It does not cover contractors or other outsourced services staff, which are submitted to the Ordinary Jurisdiction.

The Spanish Action Plan for Corporations and Human Rights includes several measures aimed at protecting human rights in cases of contracts and outsourced services between Spanish Military forces and private companies.

In accordance with Principle 6 of the Ruggie Principles (States commitment in the promotion of human rights by business enterprises with which they conduct commercial transactions), the Action Plan includes among other measures:

The Government will examine the best manner to apply criteria in line with the Guiding Principles in relation to the Royal Legislative Decree 3/2011 of 14 November, of 1 August, adopting the consolidated version of the Law of Contracts for Public Sector, the Law 24/2011, of 1 August, of contracts of public sector in the areas of defence and security and other rules applicable in this area.⁸⁴

In accordance with Principle 7 of the Ruggie Principles (States obligation to ensure that business enterprises operating in contexts of armed conflicts are not involved in abuses of human rights), the Action Plan mentions that Spain has endorsed the Montreaux Document on Private Military and Security Companies.⁸⁵ In line with this principle, the Action Plan includes the following measures:

1. The Government, acting through its representatives in the exterior, will provide information to the corporations about the risks of their activities and economic relationships specially in areas of conflict.
2. In the framework of the II National Action Plan for women, peace and security, the Government will develop tools and guidelines for companies about how to confront the risk of sexual violence and gender violence in areas of conflict.
3. The Government is committed to include clauses on human rights in contracts of military services and private security in accordance with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), UN Code of Conduct for Law Enforcement Officials (1979) and the Arms Trade Treaty (2013).

⁸³ Luis Francisco Pascual Sarria: 'La competencia de la Jurisdicción Militar para tropas desplazadas' (2013) Centro de Estudios Jurídicos, available as all publications of this Center at < www.fiscal.es > accessed 30 September 2017.

⁸⁴ Plan de Acción Nacional de Empresas y Derechos Humanos, BOE no 222 of 14.9.2017 p. 90395.

⁸⁵ Ibid p. 90396.

4. The Government will promote application of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.
5. The Government will participate in the multilateral efforts aimed at improving the prevention, mitigation and solution of situations involving high violations of human rights by corporations.⁸⁶

3.1.6 *Vicarious Jurisdiction – Stellvertretende Strafrechtsflege*

Under certain conditions, Spain has jurisdiction over alleged offenders who committed crimes in other State, when Spanish courts deny extradition to such State. This is expressly recognised in last sentence of Article 23(4) LOPJ, and therefore closely linked to the principle of universal jurisdiction, as follows:

“The Spanish jurisdiction will be also competent to examine the crimes listed above that were committed abroad by foreign citizens who stayed in Spain and whose extradition were refused by Spanish authorities, provided that this is expressly foreseen in an International Treaty”.

Therefore, the application of the vicarious jurisdiction is submitted to a double condition: the crime should be included in the list of criminal offences for which Spain has universal jurisdiction and, if extradition is refused by Spanish authorities, the need to prosecute the crime in Spain must be recognised in the International Treaty applicable.

3.1.7 *Universal Jurisdiction*

The principle of universal jurisdiction is recognised in Article 23(4) LOPJ, with the particularities laid down in paragraphs (5) and (6) of the same legal provision.

According to paragraph (4), the Spanish jurisdiction may cover criminal activities committed outside the Spanish territory, either by Spanish nationals or foreigners, as soon as such activities constitute any of the criminal offences listed in the same paragraph and provided that, for each of them, certain conditions expressly set up by the same paragraph are met.

The first letters of Art. 23(4) LOPJ refers to ‘(a) genocide, crimes against humanity or against any other person or goods specially protected in armed conflicts’, ‘(b) torture and related crimes against human integrity’ and ‘(c) crimes of forced disappearance included in the International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006’. However, as mentioned in other sections of this report, any of these core crimes entail corporate responsibility according to the Spanish Criminal Act.

⁸⁶ Plan de Acción Nacional de Empresas y Derechos Humanos, BOE no 222 of 14.9.2017 p. 90396.

In accordance with letter (d), Spanish judicial authorities may extend its jurisdiction against:

'Piracy, terrorism, drugs trafficking, trafficking in human beings, crimes against the rights of workers, and crimes against maritime security committed in Ocean areas, in cases provided for international treaties ratified by Spain or legal provisions of International organizations'.

Among the abovementioned criminal activities, only drugs trafficking, trafficking in human beings and crimes against the rights of workers entail corporate liability according to the Spanish Criminal Act.

Unfortunately, terrorism (except for the modality of terrorism financing), piracy and crimes against maritime security do not entail corporate liability according to the Spanish criminal Act. Therefore, when any of these types of crime are committed outside the Spanish territory, Spanish judicial authorities may conduct investigations and prosecutions against natural persons who are suspect of having committed such crimes, but not against corporations.

Letter (e) refers to terrorism, as soon as some additional conditions listed in the same letter are met. However, as terrorism does not entail neither corporate liability according to the Spanish Criminal Act and, Spanish judicial authorities would be entitled to conduct investigations and prosecutions against natural persons involved in terrorism, but not against corporations. The Spanish legislator must reconsider this exclusion, specially taking in mind the proliferation of international and regional terrorism organisations operating at large scale and, on the other hand, the need to implement Directive (EU) 2017/541 of 15 March on combatting terrorism.⁸⁷

Moreover and illogically, letter (e) includes as one of the conditions under which Spanish jurisdiction may cover terrorism that *'criminal offences have been committed on behalf of a corporation with headquarters in Spain'*. Despite the Spanish headquarters, this corporation will not be prosecuted because, as mentioned, terrorism is not one of the crimes associated to corporate liability in the Spanish Criminal Act.

Letters (f) and (g) are related to *'criminal offences of the Convention for the Suppression of Unlawful Seizure of Aircraft, done in The Hague on 16 December 1970'*, and *'criminal offences of the Convention for the Suppression of Unlawful Acts against the safety of Civil Aviation, done in Montreal on 24 February 1988'*, respectively. Any of these types of crimes entail corporate criminal liability according to the Spanish Criminal Act.

Letter (h) recognises Spanish jurisdiction for *'crimes of the Convention on the physical protection of nuclear material, done in Viena and New York on 3 March 1971, as soon as*

⁸⁷ See in particular Articles 17 (Liability of legal persons) and 18 (sanctions for legal persons) of Directive (EU) 2017/541 of 15 March on combating terrorism. [2017] OJ L88.

the criminal offence has been committed by a Spanish citizen'. Crimes related to nuclear materials and other hazardous radioactive substances entail corporate liability according to Art. 343(3) CP, and therefore it seems that corporations could be investigated and prosecuted for such criminal offences, provided that they have been committed by a Spanish citizen, although this condition opens the door to other possible interpretations, for instance, that corporation should be also based in Spain, or that only Spanish citizens (natural persons) should be investigated and prosecuted, as the condition does not mention legal persons equally.

Letter (i) refers again to drugs trafficking, in this occasion conditioning Spanish jurisdiction to one of the following additional requirements: (1^o) criminal proceedings must be conducted against a Spanish individual, or (2^o) when activities are related to the execution of such criminal offences or to the setting up of a criminal organisation for the purposes of committing drugs trafficking in the Spanish territory.

It is not easy to identify when a particular case of drug trafficking will be included in letter (d) or (i), and therefore if any special connection with Spain (as required in letter (i)) would be necessary to investigate and prosecute a corporation for drug trafficking.

Letter (j) mentions crimes related to the constitution, financing and integration in criminal groups or organisations, or crimes committed by them, as soon as they intend the commission of criminal activities in the Spanish territory with penalties equal to or greater than three years of deprivation of liberty. It may be worth remembering here that dummy corporations (i.e, those setting up with the sole and exclusive purposes of being instrumental to crime) are excluded from the scope of corporate liability, consequences accessories of Art. 129 CP apply to them.

Letter (k) is about crimes against the liberty and sexual indemnity of minors, as soon as certain conditions establishing a particular link with Spain are met: (a) that criminal proceedings are conducted against a Spanish, (b) that criminal proceedings are conducted against a foreigner residing habitually in Spain, (c) that criminal proceedings are conducted against a corporation, organisation, groups or any other entity or aggrupation with headquarters in Spain, or (d) that criminal offences are committed against a victim having Spanish nationality or residence at that time.

Abuse of minors entails corporate liability according to Art. 189 bis CP, however, as the terminology used in Art. 23(1)(k) LOPJ is different and seems wider, not all crimes against the liberty and sexual indemnity of minors could allow criminal proceedings against related corporations. On the other hand, and again, the alternative conditions set up in letter (k) open de door to different interpretation on whether a corporation could be also prosecuted when conditions (a), (b) or (d) are met.

Letter (l) refers to criminal offences of the Council of Europe Convention of 11 May 2011 on the prevention and fight against women and domestic violence, as soon as certain

conditions related to the nationality of the author of the victim are met. No further comments on this letter are needed, as by their nature, they are committed by individuals.

The following three letters of Art. 24(1) LOPJ are about '(m) trafficking of human beings', '(n) corruption among individuals or during international economic transactions', and '(o) falsification of medical products and crimes that may entail a risk for public health', as soon as some conditions are met. In particular, the three letters reproduce the conditions of letter (k), described above, and therefore raise the same interpretative problems as that letter as regards the possibility of prosecuting corporations for such crimes.

Lastly, letter (p) recognises the extension of the Spanish jurisdiction over any other crime that must be prosecuted under international treaties or organisations ratified by Spain, in cases and under conditions foreseen in such treaties or legal provisions.

The application of this letter (p) could allow, for instance, the prosecution in Spain of crimes related to gathering, trafficking and illegal reception of human organs, criminal offences against natural resources and environment, or crimes related to hate speech, discrimination and violence. All of the entails corporate liability according to the Spanish Criminal Act and are regulated by International or European treaties and conventions ratified by Spain.

On the other hand, according to Art. 23(5) LOPJ the abovementioned criminal offences cannot be prosecuted in Spain in two particular situations:

- (a) An International Court set up in accordance with International Treaties and Conventions ratified by Spain has initiated a criminal investigation about the same facts,
- (b) An extradition to State where the criminal offences were committed, or the State of the nationality of the victims, or before an International Court, has been requested, provided that such extradition was not authorised.

Paragraph (b) will not be applicable when the State claiming jurisdiction does not have the willing or the capacity to initiate an investigation, and the lack of willing or capacity was appreciated by the Spanish High Court upon request of the Judge conducting the case.

Finally, criminal offences listed in paragraphs (3) on protective principle, and (4) on universality principle, will be prosecuted in Spain only in cases when the victim or the Public Prosecutor has presented a formal accusation.

There are not cases where the universality principle has been applied to corporations yet.

3.1.8 *Other sources of jurisdiction*

Spain has not established other grounds of jurisdiction in order to hold corporations liable.

3.1.9 *Transitional Justice Mechanisms*

In the Spanish criminal justice system, there are not special rules on extraterritorial jurisdiction for special justice mechanisms.

3.2 Jurisdiction for Prosecuting Corporations under International Law (UN Law, multilateral treaties)

3.2.1 *General*

The international treaties and customary laws may serve as the basis for conferring jurisdiction to Spanish courts under the principle of territoriality and the principle of universal jurisdiction.

Concerning the territoriality principle, last sentence of Article 23(1) LOPJ expressly mentions that the Spanish jurisdiction will be competent for cases committed in the Spanish territory and on board of Spanish ships or airplanes, “without prejudice to the provisions of the international treaties ratified by Spain”. On the basis of this last sentence, Spanish prosecuted and convicted cases of piracy committed in Somalia in accordance with Article 105 UN Convention on the Law of the Sea (UNCLOS) and Article 6 (in relation with Article 3) of UN Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.⁸⁸

As regards the universality principle, most of core crimes and treaty crimes listed in Article 23(4) LOPJ must be understood and interpreted in line with particular International Treaties or Conventions expressly mentioned in the same legal provision.

3.2.2 *Jurisdictions prescribed by International Humanitarian law – Core crimes*

Article 23(4)(a) confers jurisdiction to Spanish courts in cases of genocide, crimes against humanity and crimes against individuals and goods protected in case of armed conflicts as long as

‘criminal proceedings are conducted against a Spanish citizen or a foreigner residing habitually in Spain, when his/her extradition has been refused by Spanish authorities.’

Although any international treaty is mentioned in this letter (a), in practice Spanish courts analyses carefully the international treaties on the matter that have been ratified by Spain.⁸⁹

⁸⁸SAN 10/2011 of 3 May (ECLI:ES:AN:2011:1949) and STS 1387/2011 of 12 December (ECLI:ES:TS:2011:8470).

⁸⁹ See for instance Judicial decision of AN 35/2017 of 27 July, in a case related to crimes against humanity committed in Syria. ECLI:ES:AN:2017:799A.

Article 23(4)(b) recognises the Spanish jurisdiction over torture and crimes against moral integrity laid down by Articles 14 to 177 of Spanish Criminal Code, as soon as

1st Criminal proceedings are conducted against a Spanish citizen, or

2nd The victim was a Spanish citizen at the time of committing the crime and the suspect of the criminal offence is in the Spanish territory.

Again, although letter (b) does not mention any international treaty, Spanish courts analyses carefully those that have been ratified by Spain.⁹⁰

Lastly, Article 23(4)(c) related to crimes of enforced disappearance does expressly refer to the International Convention for the Protection of All persons from enforced disappearance, done in New York on 20 December 2006. The Convention is taken into account by the Spanish Courts⁹¹ in order to examine their own competence to investigate crimes of enforced disappearance, jointly with the following two additional conditions mentioned in the same letter:

1st Criminal proceedings are conducted against a Spanish citizen, or

2nd The victim was a Spanish citizen when the crime was committed and the suspect of the criminal offence was in Spain.

3.2.3 Jurisdictions based on Customary International Law – Core crimes

The Spanish courts have not acknowledged yet customary international law as a legal basis conferring jurisdiction to Spain. However, customary law is frequently mentioned as *obiter dicta* in judicial decisions analysing Spanish jurisdiction to investigate and prosecute genocide, crimes against humanity and core crimes.⁹²

4 Overlapping Domestic Legal Framework and the Prosecution of Corporations

4.1 Conflicts of Jurisdiction – General

There has been an evolution in the tendency of the Spanish courts, namely the *Audiencia Nacional*, in prosecuting and bring to court humanitarian cross-border cases committed in other countries. As previously mentioned, the legal reforms of 2009⁹³ and 2014⁹⁴ limited dramatically the practical application of the universality principle. In 2014, the legislator

⁹⁰ See Judicial decision of AN 34/2007 of 25 November, which on the other hand states that the international treaties do not establish an obligation to the States, but the possibility for them to prosecute crimes in light of the universality principle. ECLI:ES:AN:2015:215A.

⁹¹ See Judicial decision of AN 2/2014 of 13 January. ECLI:ES:AN:2014:257A.

⁹² See STC 237/2005 of 26 September, and related judicial decisions in the Case of Rigoberta Menchú.

⁹³ LO 1/2009 of 3 November, complementary to the Law amending procedural legislation for the setting up of the Administrative Offices attached to Judicial Courts. BOE No 266 of 4.11.2009.

⁹⁴ LO 1/2014 of 13 March, amending LO 6/1985 of 1 July of the Judiciary, related to Universal Jurisdiction. BOE No 63 of 14.3.2014.

justified the reform among other reasons on the need to establish some limits to the Spanish jurisdiction, which is entitled to invade the sovereignty of other countries only on the basis of the international commitments acquired by our country:

‘the extension of the Spanish jurisdiction further to the territory of Spain shall be legitimate and justified only in light of an international treaty or the consensus of the international community’.

The same reform of 2014 introduced some clarifications related to the subsidiarity principle, thus excluding Spanish jurisdiction in cases when an investigation, prosecution or trial had been initiated by the International Criminal Court or the State of the nationality of the perpetrator or the victim, and provided that the perpetrator is not in Spain or, if located in our country, is going to be extradited to that country or transferred to the International Criminal Court.

In any event, the same legal reform established that the Spanish courts may continue investigating or prosecuting the case if the State having primary jurisdiction is not willing to undertake such investigation or is not in the position to do so. The second chamber of the Spanish High Court, in view of the particular circumstances of the case and in light of the criteria of the Rome Statute, shall assess whether Spanish courts have or do not have jurisdiction over the case.

Today, the Spanish jurisdiction is not reluctant to continue initiating such cases, although the legal framework has reduced very much the possibilities in practice, as described in section 3.1.6. of this report.

4.2 Overlapping domestic jurisdictions

Corporations may be held accountable in collateral proceedings (administrative proceedings) for providing financing or other involvement in atrocities committed abroad. This seems to be especially relevant in cases of terrorism financing.

4.3 Conflicting International Jurisdictions

The Spanish legal system does not have specific provisions addressing the problems of international conflicts of jurisdiction in cases of prosecuting corporations for “core crimes” or “treaty crimes”.

The specific provision setting up the subsidiarity of the Spanish jurisdiction for investigating and prosecuting treaty crimes in accordance with the universality principle may be an argument to solve potential conflicts of jurisdictions in cases where corporations are prosecuted.

5 Proposals for Reform of the Legal Framework of Jurisdiction

In Spain, there is an intense debate on the role to play by Spanish jurisdiction to protect human rights. For many decades, Spain was proud to take the lead in the defence of

human rights at international level, but this leadership changed dramatically following legal amendments of 2009 and 2014, which reduced significantly the scope of application of the universality principle.

In this context, some authors claim for an extension of the universality principle, allowing Spanish jurisdiction to investigate and prosecute core crimes and treaty crimes without the limits and conditions established by the Spanish legislator in paragraphs (4), (5) and (6) LOPJ.⁹⁵ In any event, this legal provision is very complicated and difficult to interpret by judicial courts, as it contains many additional conditions, exceptions and duplications. At least a redrafting of paragraphs (4) and (5) in order to improve them technically is rather urgent.⁹⁶ Otherwise Spain takes the risk of facilitating the impunity of core crimes and treaty crimes thanks to an unclear legal framework.

Lastly, the principle of universal jurisdiction would need a careful revision in order to avoid impunity of corporations committing core crimes or treaty crimes abroad.

6. Conclusion

Spanish big companies investing abroad or having part of their production channels in third countries are facing important challenges in order to promote and respect human rights in cross-border business activities. They are key players for the prevention and suppression of human rights abuses in business situations. Being aware of this situation, Spanish big corporations have adopted self-regulation initiatives and subscribed international agreements as part of their strategy to get reputation before customers and citizens who are increasingly demanding the respect of environment and human rights in business operations.

In this context, the approval of the draft Spanish law transposing EU Directive on disclosure of non-financial information of 2014, and the implementation of the National Action Plan about Corporations and Human Rights of 2017, will reinforce the commitment of Spanish big companies and extend corporate social liability to medium and small companies. The Action Plan reproduces extensively the Ruggie Principles and includes concrete measures to ensure practical implementation in Spain of guiding principles included in Pillar I and III in the following three years.

In order to avoid impunity of core crimes and treaty crimes committed by corporations in cross-border cases, the Spanish legislation needs some improvement.

⁹⁵ See the evolution and state of play of academic discussions in Ángel Sánchez Legido "El fin del modelo español de Jurisdicción Universal /The end of the Spanish model of Universal Jurisdiction" (2014) 27 pp. 2 and ff. < www.reei.org > accessed 30 September 2017.

⁹⁶ On the need to improve technical drafting of Art. 23(4) and (5) LOPJ, see my paper 'La destrucción del patrimonio histórico como crimen de guerra: los Templos Sagrados de Tombuctú, Al Mahdi y la Corte Penal Internacional' (2015) 8664 Diario La Ley.

First, core crimes must be included in the list of crimes entailing corporate criminal liability in accordance with the Spanish Criminal Act. So far, they are not.

Second, the drafting of Article 23 LOPJ conferring jurisdiction to Spanish courts would need a revision, because the paragraphs related to the territoriality principle, personality principle, protective interests and universality principle were written taking in mind natural persons, not legal persons. It is true that paragraph (4) laying down the universality principle refers in certain letters to corporations but, as it has been underlined in section 3.1.6 of this report, such references complicate the interpretation and practical application of the universality principle and opens the door to impunity situations.

Further to this technical improvement, Art. 23(1) LOPJ on the territoriality principle confers a good basis for prosecuting corporations in crimes committed in Spanish territory, regardless the location of the headquarters of the company. The active personality principle, as drafted in Art. 23(2) LOPJ, seems also a good basis in order to assert Spanish jurisdiction for crimes committed abroad by Spanish companies.

Conversely, the list of criminal aimed at protecting Spanish interests abroad (Art. 23(3) LOPJ) needs to be updated and adapted to the current interests of Spain. So far, it seems that only in cases of active bribery (*cohecho impropio cometido por un particular*) Spanish courts may prosecute corporations for violations of Spanish interests abroad.

As regards the universality principle, the complex and unclear Art. 23(4), (5) and (6) LOPJ contains too many conditions to ensure that Spain could exercise effective jurisdiction over violations of treaty crimes committed by corporations. Furthermore, the restrictive interpretation of the universality principle in recent years will facilitate impunity as well.

On the other hand, EU legal instruments on judicial cooperation in criminal matters provides for a solid basis to ensure efficient investigations and prosecutions against corporations in cases involving Spain and other EU Member States. In cases involving third countries, the efficiency of investigations and prosecutions will depend among other elements on the particular international or bilateral treaty applicable.

The right of victims to exercise civil actions in criminal proceedings is a very positive element to ensure maximum access to remedies and proper restitution and reparation of damages.

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