

## Requiem for Universal Jurisdiction in Spain

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Volume 33, Number 1, 2020

URI: <https://id.erudit.org/iderudit/1079905ar>

DOI: <https://doi.org/10.7202/1079905ar>

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Publisher(s)

Société québécoise de droit international

ISSN

0828-9999 (print)

2561-6994 (digital)

[Explore this journal](#)

Cite this article

Esteve Moltó, J. E. (2020). Requiem for Universal Jurisdiction in Spain. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, 33(1), 55–84.  
<https://doi.org/10.7202/1079905ar>

Article abstract

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# REQUIEM FOR UNIVERSAL JURISDICTION IN SPAIN

*José Elías Esteve Molto\**

The two relevant legislative reforms that universal jurisdiction was subjected to have been a serious blow to the fight against impunity in Spain. The reasons for this *de facto* repeal of universal justice can only be explained by political interference of foreign governments whose citizens were cornered by Spanish justice. However, with regard to the 2014 reform, there was the possibility that the Constitutional Court might declare that the reform violated some articles of the Spanish Constitution. This last hope evaporated when this court recently rejected the appeals. First, the ruling on 20 December 2018 rejected the Socialist MPs' arguments. Then, with this precedent, in 2019 the vast majority of cases pursuing international crimes – Tibet, Falun Gong, Rwanda, Guantanamo, the Ashraf refugee camp in Iraq, Couso – were definitively closed. After having exhausted all Spain's internal options, now the different appeals before the European Court of Human Rights are being rejected. Meanwhile, universal jurisdiction has only survived in the Spanish courts if it involves pursuing a few cases of terrorism, leaving those who were being investigated for war crimes and genocide to go scot-free.

Les deux réformes législatives pertinentes sur la compétence universelle ont porté un coup sérieux à la lutte contre l'impunité en Espagne. La motivation de cette abrogation *de facto* de la justice universelle ne s'explique que par l'ingérence politique des gouvernements étrangers, dont les ressortissants ont été acculés par la justice espagnole. Cependant, en ce qui concerne la réforme de 2014, la Cour constitutionnelle pourrait avoir déclaré qu'elle viole certains articles de la Constitution espagnole. Ce dernier espoir s'est évanoui avec les récents jugements de ce tribunal, qui a rejeté tous les appels. Tout d'abord, l'arrêt du 20 décembre 2018 a rejeté les arguments des députés socialistes. Et plus tard, avec ce précédent, au cours de l'année 2019, les juges de cette cour ont procédé à la fermeture définitive de la grande majorité des cas de poursuites pour crimes internationaux : Tibet, Falun Gong, Rwanda, Guantanamo, camp de réfugiés d'Ashraf en Irak, Couso. Après avoir épuisé toutes les voies de recours internes en Espagne, maintenant toutes les plaintes devant la Cour européenne des droits de l'homme sont rejetées. Pendant ce temps dans les tribunaux espagnols, la justice universelle n'a survécu que lorsqu'il s'agit de poursuivre certains cas de terrorisme, laissant impunis les individus qui faisaient l'objet d'une enquête pour crimes de guerre et génocide.

Las dos relevantes reformas legislativas sobre la jurisdicción universal han supuesto un duro golpe a la lucha contra la impunidad en España. La motivación para esta derogación *de facto* de la justicia universal únicamente se explica por las interferencias políticas de gobiernos extranjeros, cuyos nacionales han sido acorralados por la justicia española. Ahora bien, en relación con la reforma del 2014 cabía la posibilidad que el Tribunal Constitucional declarara que la misma atenta contra algunos de los artículos de la Constitución Española. Esta última esperanza se ha desvanecido con las recientes sentencias de este tribunal, rechazando los recursos de apelación. Primero, la sentencia del 20 de diciembre de 2018 desestimó los argumentos de los diputados socialistas. Y más tarde, con este precedente, durante el año 2019 se ha procedido a cerrar definitivamente la gran mayoría de los casos de persecución de crímenes internacionales: Tíbet, Falun Gong, Ruanda, Guantánamo, campo de refugiados Ashraf en Iraq, Couso. Después de agotar todos los recursos internos en España, las demandas presentadas ante la Corte Europea de Derechos Humanos ya están siendo rechazadas. Mientras tanto en los tribunales españoles, la jurisdicción universal únicamente ha sobrevivido cuando se trata de perseguir algunos casos de terrorismo, dejando en la impunidad a los individuos que estaban siendo investigados por crímenes de guerra y genocidio.

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From their tall ivory towers in certain sectors of academia, some scholars insist on preaching that universal jurisdiction is expanding and that the number of cases in various national courts is increasing.<sup>1</sup> Thus, the reversals seen in Spain in 2009<sup>2</sup> or 2014,<sup>3</sup> or in Belgium,<sup>4</sup> are only isolated low-impact cases, as the general tendency is the opposite. This type of doctrinal position, oblivious to the suffering of the victims of international crimes, only minimises the effects of the very serious interference of domestic and international politics in the free and independent exercise of judicial power.

Indeed, it is indisputable that in the last few years numerous cases of universal jurisdiction have proliferated, but against whom are they directed, and what scope do they have? The cases against crimes committed in Syria, Africa and even Myanmar have multiplied in various courts. And this is a good thing, as impunity must be fought on all fronts. However, at the same time, the facts are also undeniable regarding the reversal of cases against leaders of countries with permanent seats on the UN Security Council or their staunch allies. And whilst cases like these proliferate, other investigations into people accused of genocide, or torturers or war criminals with Chinese, Israeli or United States nationality have been gradually buried.

Thus, the scope of the effects of universal justice should not be measured solely by the number of cases or the number of countries that exercise this last mechanism for the victims. Stock should be taken with a wider perspective, and the degree of impunity that has become entrenched globally should be examined. And in this regard, the citizens of certain countries are considered untouchable, and neither universal justice nor the International Criminal Court have sufficient tools to fight this impunity. The result of all this is that this absence of accountability leads to international crimes being repeated. And that is the key: there are some countries that insist on living, at an international level, outside the rule of law, and this insistence on developing international relations violating *jus cogens* or mandatory law is an indication of a very serious deterioration of law. And it is precisely this grave result of a global world without any values that has not only become visible in the attack on universal justice but is also the cause of other problems such as climate change or the refugee crisis.<sup>5</sup>

<sup>1</sup> Máximo Langer, "Universal Jurisdiction Is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction" (2015) 13:2 *Journal of International Criminal Justice* 245.

<sup>2</sup> Ignacio de la Rasilla del Moral, "The Swan Song of Universal Jurisdiction in Spain" (2009) 9 *Intl Crim L Rev* 777; Javier Chinchón Álvarez "Análisis formal y material de la reforma del principio de jurisdicción universal en la legislación española: de la « abrogación de facto » a la « derogación de iure »" (2009) 7211 *La Ley* 1; Carmen Márquez Carrasco, Magdalena Martín Martínez, "El principio de jurisdicción universal en el ordenamiento jurídico español: pasado, presente y futuro" (2011) XI *Anuario Mexicano de Derecho Internacional* 251.

<sup>3</sup> Javier Chinchón Alvarez, "The reform(s) of universal jurisdiction in Spain: For whom the bells tolls?", (2013-14) 18 *Spanish yearbook of international law* 231; Maria Dolores Bollo Arocena, "The reform of the universal jurisdiction in Spain: Did public international law require the reform carried out by means of law 1/2014?" (2013-14) 18 *Spanish yearbook of international law* 239.

<sup>4</sup> Steven Ratner, "Belgium's War Crimes Statute: A Postmortem" (2003) 97:4 *AJIL* 888; Luc Reydam, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law" (2003) 1 *Journal of International Criminal Justice* 679.

<sup>5</sup> Javier de Lucas, *Mediterráneo: el naufragio de Europa* (Valencia: Tirant Lo Blanch, 2015); Juliane Schmidt, "Europe and the refugees: a crisis of values", Comment, (20 June 2016), online : *European Policy Centre* <<https://www.epc.eu/en/Publications/Europe-and-the-refugees-a-crisis-1d329c>>; Heather Grabbe, Stefan Lehne, "Climate Politics in a fragmented Europe" (18 December 2019) online : *Carnegie*

This is why hypotheses such as Kissinger's should not prevail in legal circles as they have in Spain. Kissinger warned that the "tyranny of the judges" would to some extent undermine the separation of powers. This reaction was set in motion when the exercise of universal jurisdiction by some Spanish courts at the end of the 20th Century extended its scope beyond trials of retired Nazis to include leaders of current world powers. It was then that voices began to be raised against this practice. They included that of the above-mentioned former U.S. Secretary of State and Nobel Peace prize-winner, rewarded no doubt for his part in the Dirty War unleashed by the Condor Operation, or for the heaviest bombing campaign in history, which devastated Vietnam and also Laos and Cambodia (nearly 8 million tons of explosives, easily outweighing the two million dropped by the U.S. during the entire Second World War). Obviously, as he was also on the U.S. National Security Council, he could also have ended up as one of the accused in any of the cases begun against the Chilean Military Junta led by Pinochet.<sup>6</sup> Which is why his evaluation of universal jurisdiction should come as no surprise, as he declared:

an unprecedented movement has emerged to submit international politics to judicial procedures (...) The danger lies in pushing the effort to extremes that risk substituting the tyranny of judges for that of governments; historically, the dictatorship of the virtuous has often led to inquisitions and even witchhunts.<sup>7</sup>

Pronouncements like this show that exercising universal jurisdiction has given rise to a deep juridical debate that is both political and diplomatic.<sup>8</sup> The accusation that by pursuing third country nationals accused of war crimes and genocide, national judges are interfering in the internal affairs of other States, has provoked all manner of reactions and endorsements.

Therefore, by prosecuting criminals, does international politics fall into the hands of the judges, or is judicial power subject to the mandates of *real politik* in order to guarantee the impunity of important leaders accused of serious human rights violations? In short, faced with genocide or a crime against humanity, the aim under the protective and legitimising shield of a universal social contract is for international law to protect the sovereignty of the people,<sup>9</sup> rather than for some sovereigns, using and

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*Endowment for International Peace* <<https://carnegieeurope.eu/2019/12/18/climate-politics-in-fragmented-europe-pub-80616>>.

<sup>6</sup> Michael Ratner, Reed Brody, *The Pinochet Papers: the case of Augusto Pinochet in Spain and Britain* (Boston: Kluwer Law International, 2000); Naomi Roht-Arriaza, "The Pinochet Effect and the Spanish Contribution to Universal Jurisdiction", (2006) *International Prosecution of Human Rights Crimes* 113.

<sup>7</sup> Henry Kissinger, "The pitfalls of universal jurisdiction: risking judicial tyranny", (July-August 2001), online: *Foreign Affairs* <<https://www.foreignaffairs.com/articles/2001-07-01/pitfalls-universal-jurisdiction>>.

<sup>8</sup> Margarita Robles Carrillo, "El principio de jurisdicción universal: estado actual y perspectivas de evolución", (2014) LXVI-2 *Revista Española de Derecho Internacional* 81; Irene Vázquez Serrano, *El principio de jurisdicción universal ¿utopía o el mundo real?* (Valencia: Tirant Lo Blanch, 2019); Maria Chiara Marullo, *Tendencias internacionales sobre la jurisdicción universal: la experiencia española* (Pamplona, UPNA, 2017).

<sup>9</sup> Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law" (1990) 84 *AJIL* 866.

abusing their privileged positions of power, to systematically violate their citizens' basic rights. Even so, the latest legislative twists again raise the question of whether universal protection should be extended to "a unitarian Humanity that is the bearer of inviolable rights beyond those granted to citizens in a determined State",<sup>10</sup> as believed centuries ago by Grotius or Suárez,<sup>11</sup> or whether international law's humanising progress has just been a mirage? Perhaps the Lotus judgement is no longer a reference and the extraterritorial application of the criminal law must be questioned?<sup>12</sup> Are Nations losing the common interest to capture and punish the enemies of all mankind?<sup>13</sup> Is not anymore universal jurisdiction "a common endeavour in the face of atrocities",<sup>14</sup> if these *hostis humani generis* are nationals of the most powerful countries? Or as Professor Cassese asked with perplexity after the judgement of the International Court of Justice in the Arrest Warrant Case (Congo v. Belgium), "when may Senior State officials be tried for international crimes?"<sup>15</sup>

Let us briefly review the evolution of some of the judicial cases in Spain, and the reactions they elicited, in order to obtain different evaluation elements.

## I. The Exercise of Universal Jurisdiction in Spain versus *Real Politik*

From the very start, the Pinochet case raised protests from the Chilean government. While the then President José Miguel Insulza waved the well-worn flag of non-interference in internal affairs, the dictator's detention in London led to the Chilean ambassador in Madrid being withdrawn in protest. But naturally, the effects of the reaction of a country like Chile are unlike the shock wave that can be unleashed by the government of a world power with a permanent seat on the UN Security Council. Thus, the alarm bells were set off at all levels by the precedent set by the Pinochet case.<sup>16</sup> So, it is not surprising that when years later other investigations pointed at U.S. or Chinese leaders, these arguments and practices were resorted to in an attempt to put a brake on

<sup>10</sup> Antonio Quintano Ripollés, *Tratado de derecho penal internacional e internacional penal*, Tomo I, (Madrid: Consejo Superior de Investigaciones Científicas, Instituto Francisco de Vitoria, 1955) at 645 [Translated by the author].

<sup>11</sup> Theodor Meron, "Common Rights of Mankind in Gentili, Grotius and Suarez", (1991) 85:1 AJIL 110.

<sup>12</sup> Marc Henzelin, *Le principe de l'universalité en droit pénal international : droit et obligation pour les états de poursuivre et juger selon le principe de l'universalité* (Bâle, Helbing & Lichtenhahn, 2000), for a detailed analysis of the case and for different interpretations of the judgement, see chapter 7.1 at 138-49 [Henzelin].

<sup>13</sup> *The Case of the SS Lotus (France v Turkey)* (1927), PCIJ (Ser A/B) No 10, Dissenting Opinion Moore (referred to a pirate, "as an outlaw, as the enemy of all mankind – *hostis humani generis* - whom any nation may in the interest of all capture and punish" at para 249).

<sup>14</sup> *The Democratic Republic of the v Belgium*, [2000] ICJ Rep 75. Joint Separate Opinion of Judges Higgings, Kooijmans and Buergenthal ("The underlying idea of universal jurisdiction properly (...) is a common endeavour in the face of atrocities" at 79).

<sup>15</sup> Antonio Cassese, "When may Senior State officials be tried for international crimes? Some comments on the *Congo v. Belgium case*?" (2002) 13:4 Eur J Intl L 853.

<sup>16</sup> Antonio Remiro Brotons, *El caso Pinochet: Los límites de la impunidad* (Madrid, Política Exterior-Biblioteca Nueva, 1999).

the judicial cases. In fact, this extrajudicial reticence reappeared not only in government circles, but even in the courts.

In this regard and by way of illustration, on 27 July 2005 the public prosecutor issued a report opposing the acceptance of the Tibet case, in which he invoked the theory followed by the Supreme Court in its 319/2004 ruling of 8 March 2004 concerning the Condor Operation. The report concluded that “it is not for any one State to be unilaterally responsible for establishing order, when resorting to Criminal Law, against everyone everywhere in the world”. He then added that a broad conception of universal justice, as desired by this case, led to “an exaggerated interpretation of national sovereignty” and could unleash a series of “undesirable consequences from the perspective of juridical safety”. Juridical safety for whom? Those accused of genocide, or the victims? In addition, in its report rejecting the case, the public ministry concluded by invoking the principle of minimal intervention in the affairs of another State, enshrined in article 2.7 of the UN Charter. Finally, as is well known, after the appeal, the case was accepted in a ruling on 10 January 2006 by Section 4 of the Audiencia Nacional’s Criminal Court.<sup>17</sup> This ruling, together with the evidence given in court by the first Tibetan victim, led to loud protests from the Chinese Government through the spokesman at the Chinese Foreign Ministry, Liu Jianchao, who declared to the international media that the investigation into so-called international crimes committed in Tibet was “complete defamation, and an absolute lie” and obeyed “the secessionist objectives of the Dalai Lama’s clique”. In addition, the Beijing Government summoned the Spanish ambassador in the Chinese capital, in protest at the behaviour of the Spanish courts, and declared that using human rights in Tibet was just an excuse to interfere in China’s internal affairs.<sup>18</sup> They added that they not only opposed this external interference by the Spanish judges, but they also publicly declared that the Spanish courts had no authority to try this case, whilst they trusted that the Spanish Government would comply with their request to “resolve this problem appropriately so that, with efforts on both sides, Sino-Spanish relations could continue evolving healthily”; a declaration that clearly reveals the lack of any separation of powers in China.<sup>19</sup>

A similar rejection was obtained from the Guatemalan Government and its Constitutional Court, after the ruling of 6 January 2008 by the First Instance Central Court n° 1 of Spain’s Audiencia Nacional, in which the judge Santiago Pedraz made an plea calling for the international media to cooperate in the investigation into the Mayan genocide.<sup>20</sup> Then, a month later, after the judge Fernando Andreu issued international

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<sup>17</sup> Audiencia Nacional [National Court], Fourth Division of the Criminal Court, 16 January 2006, *Appeal Proceedings 196/05*, online : (pdf) <<http://blog.uclm.es/cienciaspenales/files/2016/10/3auto-an-comite-de-apoyo-al-tibet.pdf>> ( Spain).

<sup>18</sup> Xinhua, “Interference in Tibet issue opposed”, *Xinhua, China Daily*, Beijing, 7 June 2006.

<sup>19</sup> José Reinoso, “China califica de calumnias las acusaciones contra varios de sus líderes”, *El País* (10 June 2006), online : <[https://elpais.com/diario/2006/06/10/espana/1149890413\\_850215.html](https://elpais.com/diario/2006/06/10/espana/1149890413_850215.html)>.

<sup>20</sup> Audiencia Nacional [National Court], First-instance Central Court n° 1, 16 January 2008 (2009), *Guatemalan case*, Preliminary Proceedings 331/2009 (Spain), case summary available online: (pdf) <<https://nsarchive2.gwu.edu/guatemala/genocide/round1/procedimientos1.pdf>>.

arrest warrants against forty Rwandan leaders,<sup>21</sup> the African Union rejected abusing the principle of universal jurisdiction, as it endangered international order,<sup>22</sup> despite the International Criminal Court's verdict regarding Rwanda, in the *Prosecutor v. Ntuyahaga* case<sup>23</sup> which urged all States of the international community to pursue those responsible for these crimes. Also, within this African context, the displeasure of the Moroccan kingdom emerged after preliminary proceedings began regarding crimes of genocide and torture in Western Sahara. This diplomatic tension rekindled the debate over applying the principle of universal jurisdiction, which had taken place in the Supreme Court in the above-mentioned Guatemala case. That ruling had declared that Spanish subsidiary intervention based on the inaction of the jurisdiction of a third-country "implied judging the capacity of a State's jurisdictional bodies to administer justice". It also warned that a declaration of this nature could prove extraordinarily important in the sphere of international relations.

These diplomatic disagreements were, however, no cause for worry until judicial prosecutions began to intensify after January 2009, which led former Israeli Foreign Minister Tzipi Livni, to complain to her Spanish counterpart Miguel Angel Moratinos about the investigation begun by the Audiencia Nacional judge Fernando Andreu into the Israeli minister for the 2002 Gaza bombing.<sup>24</sup> The Spanish minister immediately promised his Israeli counterpart that the law would be changed so as to put a brake on the judicial initiative. Obama's U.S. Government had likewise been objecting to the investigations by the judges Baltasar Garzón and Eloy Velasco into various cases of torture in Guantanamo. Following these criteria, the chief prosecutor of the Audiencia Nacional, Javier Zaragoza, after a meeting with the U.S. Embassy's political advisor, requested in writing that these lawsuits be rejected; a fact that later came to light in the Wikileaks cables. The investigations into the CIA flights and the so-called Couso case encountered identical obstacles, and once again the Wikileaks revelations brought to light the cooperation between Spain's ministers and state prosecutor and the U.S. Embassy in Madrid and revealed that Spanish support was "total".<sup>25</sup>

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<sup>21</sup> Audiencia Nacional [National Court], First-instance Central Court n° 4, 6 February 2008, *Sala and ors v Kabareb and 68 others*, Preliminary Investigation 3/2008-D, 1 International Law and Domestic Courts 1198.

<sup>22</sup> The incident was brought to; *Recognition of sickle-cell anaemia as a public health problem*, UNGAOR, 63rd Sess, UN Doc A/Res/63/237 (2009) 1 ; *Request for the inclusion of an additional item in the agenda of the sixty-third session*; *Letter dated 21 January 2009 from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General*, UNGAOR, 63rd Sess, UN Doc A/63/327 (2009) 1.

<sup>23</sup> *The Prosecutor v Bernard Ntuyahaga*, ICTR-98-40-T, Decision on the Prosecutor's motion to withdraw the indictment (18 March 1999) (International Criminal Tribunal for Rwanda, Trial Chamber I), online : (pdf) ICTR <<https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-98-40/trial-decisions/en/990318.pdf>> ("the Tribunal wishes to emphasize, in line with the General Assembly and the Security Council of the United Nations, that it encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law").

<sup>24</sup> Audiencia Nacional [National Court], First-instance Central Court n° 4, 29 January 2009, *Gaza bombing case*, Preliminary Proceedings No 157/2008 (Spain).

<sup>25</sup> "Cable en el que se critican las acusaciones a mandos de EE UU por torturas en Guantanamo", *El País*, (30 November 2010), online :

The Spanish authorities reacted immediately. Carlos Dívar, now deceased but at that time president of the General Council of the Spanish Judiciary, declared that Spain could not become “the judicial policemen of the world”.<sup>26</sup> And along the same lines, the then supposedly progressive state prosecutor, Conde Pumpido, announced the prelude of a reform of universal justice, calling this type of legal initiative before the Audiencia Nacional’s judges, “toys in the hands of people seeking the limelight”. Only days later, parliamentary proceedings began that would amend the controversial article 23.4 of the *Organic Law of Judiciary Power*. On 25 June that year, the Spanish Parliament approved almost unanimously the Bill<sup>27</sup> justifying the need for the reform, with the aim of preventing diplomatic conflicts.<sup>28</sup> The new terms of Law 1/2009 required the existence of various links and national connections in order to continue investigating international crimes in Spain.<sup>29</sup>

As everyone knows, investigations had begun earlier in Belgium in an attempt to clarify the possible crimes committed by President Bush (father) in the 1991 Gulf War.

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<[http://www.elpais.com/articulo/espana/Cable/critican/acusaciones/mandos/EE/UU/torturas/Guantanamo/elpepuesp/20101130elpepunac\\_17/Tes](http://www.elpais.com/articulo/espana/Cable/critican/acusaciones/mandos/EE/UU/torturas/Guantanamo/elpepuesp/20101130elpepunac_17/Tes)> (“*Cable criticising the indictment of former U. S. officials for their involvement in Guantanamo. Prior to her visit to Spain in 2009, the U. S. Ambassador in Madrid informs Napolitano about U. S.-Spain relations and the ‘irritating’ issue of trying to indict several officials*”) [translated by the author]; Carlos Yarnoz, “EE UU maniobró en la Audiencia Nacional para frenar casos; La embajada intentó boicotear las causas ‘Guantanamo’, ‘Couso’ y ‘vuelos de la CIA’- Políticos y fiscales españoles colaboraron en la estrategia”, *El País*, (30 November 2010), online: <[http://www.elpais.com/articulo/espana/EE/UU/maniobro/Audiencia/Nacional/frenar/casos/elpepuesp/20101130elpepunac\\_1/Tes](http://www.elpais.com/articulo/espana/EE/UU/maniobro/Audiencia/Nacional/frenar/casos/elpepuesp/20101130elpepunac_1/Tes)>; Mónica Ceberio Belaza, “Los ministros españoles trabajan para que no prosperen las órdenes de detención”; U. S. backed by the Spanish Government and prosecutors to close the Couso case. – A cable from the U. S. Embassy affirms that Conde-Pumpido told Aguirre that he was doing all he could to dismiss the case of the death in Baghdad of Telecinco TV channel cameraman. - “Moratinos assures that Vice President De la Vega is supportive”, *El País*, (30 November 2010), online: <[http://www.elpais.com/articulo/espana/ministros/espanoles/trabajan/prosperen/ordenes/detencion/elpepuesp/20101130elpepunac\\_35/Tes](http://www.elpais.com/articulo/espana/ministros/espanoles/trabajan/prosperen/ordenes/detencion/elpepuesp/20101130elpepunac_35/Tes)>.

<sup>26</sup> Carlos Dívar, on universal jurisdiction: “We cannot become the judicial policemen of the world” The president of the General Council of the Spanish Judiciary (CGPJ) wishes to amend this law, *El Mundo*, (4 May 2009), cited in José Elias Esteve Molto, Causes and Initial Effects of the Spanish Organic Law 1/2009 Reforming the Principle of Universal Jurisdiction in Spain (2012) XVI Spanish Yearbook of International Law 19. (“Without detriment to what might be provided for in international treaties and conventions signed by Spain, in order to enable Spanish courts to try the aforementioned crimes, it must be established that the purported perpetrators are in Spain or that there are victims of Spanish nationality, or that there is some relevant connecting link with Spain, providing no procedure has been initiated in another competent country or in an international court entailing an investigation and effective prosecution, if appropriate, of such punishable acts” at para 35).

<sup>27</sup> Boletín Oficial de las Cortes Generales, Congreso de los Diputados, IX Legislatura, Serie A [Official Parliamentary Gazette, Spanish Parliament, IX Term of office, A Series]: Proyectos de Ley [Bills], 6th July 2009.

<sup>28</sup> Diario de Sesiones del Congreso de los Diputados, IX Legislatura nº 95, Sesión Plenaria nº 90 (25th June 2009) at p. 45, online: (pdf) <[https://www.congreso.es/public\\_oficiales/L9/CONG/DS/PL/PL\\_095.PDF](https://www.congreso.es/public_oficiales/L9/CONG/DS/PL/PL_095.PDF)>.

<sup>29</sup> *Organic Law 1/2009* of 3<sup>rd</sup> November, complementary to the Reform of Procedural Codes Act implementing the new judicial office, which amends the *Organic Law 6/1985* of 1<sup>st</sup> July, on the Judiciary. Spanish Official State Gazette 266 at 92 091-92 092 cited in “Ley Orgánica 1/2009, de 3 de noviembre, complementaria de la Ley de reforma de la legislación procesal para la implantación de la nueva Oficina judicial, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial” (3 November 2009), online: <<https://www.boe.es/eli/es/lo/2009/11/03/1>>.



Similarly, U.S. General Franks was accused of war crimes in the Second Iraq War, and finally considerable progress was made in the investigation into international crimes committed by Ariel Sharon in the Lebanon offensive in the 1980s. It was precisely when the Israeli general was being investigated by the Belgian courts, that he held the position of Israeli prime minister. With all these precedents in the Belgian courts, the same old diplomatic complaints began to surface among the representatives of the countries affected, until in 2003, when Ariel Sharon, the maximum Israeli leader, was being judicially investigated for the attacks on the Sabra and Shatila refugee camps near Beirut,<sup>30</sup> diplomatic pressure suddenly and abruptly resulted in a legal reform. To be specific, the political pressure exerted by the U.S. Government, which threatened to withdraw NATO's general headquarters from Brussels, led to the imposition of legal limitations to exercising universal jurisdiction in Brussels.

Returning to the Spanish case, after the 2009 reform some cases managed to avoid being closed, and their respective proceedings continued. Faced with the progress of the Tibet case, accusations were once again made of interfering in internal Chinese affairs. The diplomatic situation was especially aggravated in the early months of 2013 when the Fourth Section of the Audiencia Nacional's Criminal Court issued international arrest warrants against former Chinese President Jiang Zemin, and former Chinese Prime Minister Li Peng.<sup>31</sup> On this occasion the Asian giant did not limit itself to expressing its "strong displeasure" or calling the arrest warrants "shameful", but threatened Spain directly, leaving no room for doubt. Zhu Weiqun, president of China's Religious and Ethnic Affairs Commission, the highest Parliamentary advisory body, said with regard to the Spanish judiciary power: "Let them go ahead if they dare".<sup>32</sup> And they did not dare, as 20% of Spain's national debt is in Chinese hands, which settled the matter and laid the foundations for the latest reform of universal justice in Spain: *Organic Law 1/2014*. This was approved easily, and a week after its publication in the BOE (Official State Gazette), began to unfold its effects, as the judiciary began to request that all cases of universal justice be closed, starting with those against Chinese leaders. The result was that in a matter of months most of the cases in the Audiencia Nacional were closed, and all the appeals in the Supreme Court were rejected.<sup>33</sup> All this has confirmed that this law has been a *de facto* repeal and a Copernican turn in this matter,<sup>34</sup> or maybe even the end of universal justice in Spain.<sup>35</sup>

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<sup>30</sup> Malvina Halberstam, "Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?" (2003) 25 *Cardozo L Rev* at 247-266.

<sup>31</sup> Juan Jorges Lopez, Elena Lopez-Alamansa Beaus & José Élias Esteve Molto, "Decisiones de órganos judiciales españoles en materia de Derecho Internacional Público" (2014) 30 *Anuario Espanol de Derecho Internacional* 481 at 489 [Lopez].

<sup>32</sup> Juan Pablo Cardenal & Heriberto Araújo, "Pólvora china para dinamitar la justicia universal" *El Mundo*, (29 March 2014), online: <<https://www.elmundo.es/opinion/2014/03/29/53356a98268e3e97408b4574.html>>.

<sup>33</sup> José Élias Esteve Moltó, "The 'Great Leap Forward' to impunity. Burying universal jurisdiction in Spain and returning to the paradigm of Human Rights as '*domaine réservé*' of the States" (2015) 13:5 *Journal of International Criminal Justice* at 1121-1144.

<sup>34</sup> Concepción Escobar Hernández, "Universal jurisdiction in Spain: substantial change of modelo or implied repeal?" (2013-2014) 18 *Spanish yearbook of international law* 255-265.

<sup>35</sup> Montserrat Abad Castelos "The end of universal jurisdiction in Spain?" (2014) 18 *Spanish yearbook of international law* at 223-230.

But a double hope still remained: that the Constitutional Court might revoke all the closures of the cases, and that a new progressive Spanish government might repeal the legal reform of 2014.

## **II. From the Ministry of Justice's Failed Project to the Constitutional Court's Ruling Rejecting the Socialist MP's Constitutional Appeal against *Organic Law 1/2014***

### **A. The Frustrated Political Attempt to Recover Universal Justice in Spain**

In late 2018 the question of universal jurisdiction in Spain moved from the highest of hopes to the most disappointed frustration. Indeed, initially, the unexpected change in government seemed to encourage the belief that this principle would be recovered. Pedro Sánchez, the new Socialist Prime Minister, did not hesitate to pronounce himself on this matter to the press, declaring that “limiting universal justice (...) had created loopholes for impunity for crimes against humanity and genocide”. As a result, the Government was working on “repealing the limiting of universal justice”.<sup>36</sup>

Precisely with the aim of effectively fulfilling that political will, and completely consistent with the legal grounds put forward in the constitutional appeal 3754-2014 lodged by socialist MPs against *Organic Law 1/2014* that modified universal jurisdiction, at the end of August the Minister of Justice, Dolores Delgado, set up with the utmost urgency a commission of experts to give the final boost to the announced counter reform.<sup>37</sup>

Indeed, the urgency to draw up new wording for article 23.4 of the *Organic Law of Judicial Procedure* (LOPJ) followed the logic of parliamentary proceedings, as the Government wished to make the most of the proceedings to amend the *Proposal for an Organic Law to modify the Judicial Power's Organic Law 6/1985*, of 1st July, regarding improving universal justice, which the Esquerra Republicana Parliamentary Group (the nationalist Catalanian left-wing party) had presented in September 2016, and which was about to expire.

However, as far as one knows, the expert commission's report did not limit itself to recovering universal jurisdiction in its absolute version of 2018, but, following the ministry's guidelines, was more ambitious. Thus, it included new crimes to be universally persecuted, such as aggression, and extended the extraterritorial jurisdiction of the Spanish courts, broadening the assumptions in the principles of active and passive

<sup>36</sup> Entrevista Pedro Sánchez: “Una democracia como la Española no puede permitirse monumentos franquistas”, *elDiario.es* (22 July 2018) online: <[www.eldiario.es/politica/Entrevista-Pedro-Sanchez\\_0\\_794770909.html](http://www.eldiario.es/politica/Entrevista-Pedro-Sanchez_0_794770909.html)>.

<sup>37</sup> “El gobierno crea una comisión para restablecer la justicia universal”, *Europapress* (27 August 2018) online: <<https://www.europapress.es/nacional/noticia-gobierno-crea-comision-restablecer-justicia-universal-20180827104712.html>>.

personality and that of protection. Furthermore, it included the possibility of persecuting new economic and environmental crimes abroad, and at the same time, attributing criminal responsibility to corporations, all of which necessarily implied immediate modifications to the criminal code.

The first setback came when the expert commission's advanced report, endorsed by the Justice Ministry, clashed head on with the ruling by the Foreign Ministry's Legal Advisory Department. From what has leaked out,<sup>38</sup> the Foreign Ministry document warned against the possible effects of the legal reform that "introduced elements that could directly and adversely affect State relations." One only has to remember the pressure to which the various Spanish Governments were subjected by countries such as Israel and the United States in 2009, and especially by China in 2013, which was the direct cause for the reforms of article 23.4 of the LOPJ. Moreover, the Justice Ministry's proposal was thought to be "susceptible to generating serious practical problems not only in international relations, but also - and much more likely - in the relations between the courts and the application of the rules of international legal cooperation and assistance."

In short, universal justice could not become yet again a "permanent subject of debate and conflict to the detriment of a viable foreign policy in line with the principle of reality". The clash between two utterly irreconcilable models was inevitable, and in the end, reasons of State and arguments more appropriate to *real politik* won the match against the Justice Ministry's determined commitment to a more humane vision and application of international law in line with granting greater effectiveness to the instruments necessary for the fight against the most outrageous impunity. What is particularly reprehensible about the ruling is that it mentioned the victims in order to justify rejecting the expert commission's report, stating that such an absolute and extended exercise of universal jurisdiction could lead to a series of "practical problems" that would in turn lead to the "victims being disappointed". Yet it is much more disappointing and onerous for the victims of international crimes when impunity is endorsed, thereby blocking their access to justice, rather than being able to litigate in court despite the obstacles that must be overcome in this type of legal case.

Whatever the case, the criteria of the Ministry of Foreign Affairs under Borrell (who was later appointed High Representative of the European Union for Foreign Affairs and Security Policy) prevailed in the Government. Neither the Minister of Justice's firm intentions, nor the support of civil society through the platform *justiciauniversalya.com* have been able to persuade the Socialist parliamentary group to restore universal justice, as was their original proposal. On the contrary, the political and parliamentary process seems to have taken another direction that, at best, will give us a watered-down version of article 23.4 of the 2009

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<sup>38</sup> María Peral, "Demoledor informe de Exteriores contra la propuesta de justiciar universal de Dolores Delgado", *El Español* (18 October 2018), online : [https://www.elespanol.com/espana/tribunales/20181018/demoledor-exteriores-propuesta-justicia-universal-dolores-delgado/346216819\\_0.html](https://www.elespanol.com/espana/tribunales/20181018/demoledor-exteriores-propuesta-justicia-universal-dolores-delgado/346216819_0.html).

version of the LOPJ.<sup>39</sup> A counter-reform that, should it occur, is expected to have parliamentary allies that would have been unheard of at the start of the proceedings, namely, the (right-wing) Popular and (liberal) Ciudadanos parliamentary groups. Whatever the case, what is certain, according to what has been published, is that “the Government renounces extending universal justice on the advice of the experts to whom it entrusted the reform”.<sup>40</sup> Indeed, the amendments presented by the various parliamentary groups and published in the Official Gazette of the Spanish Parliament (BOE - *Boletín Oficial del Estado*) on 19 November 2018<sup>41</sup> lead once more to universal jurisdiction being subject to national connecting links.

On one hand, amendment 7, presented by the left-wing Unidas-Podemos Party, states that Spanish courts will be competent in all cases if there is “a victim with Spanish nationality”. Failing that, it declares surprisingly that:

for victims of any other nationality, in order for Spanish courts to try the above-mentioned crimes there should exist - or have existed - a cooperative programme or project to develop or protect human rights that is approved by a state, autonomous or supra-municipal public institution with the country where the crimes mentioned were committed.<sup>42</sup>

Whatever the case, amendment 9 presented by the liberal Ciudadanos parliamentary group, amendment 10 presented by Rafael Simancas of the Socialist group, and amendment 16 presented by the Popular Party group, all share a paragraph they have cut and pasted from article 23.4 of the 2009 version of the LOPJ, which states that:

Regardless of what international treaties and conventions signed by Spain may establish, for Spanish courts to try the above-mentioned crimes it must be proved that the accused are in Spain, or there are Spanish victims, or there is some relevant connecting link with Spain.<sup>43</sup>

Meanwhile, parliamentary proceedings continue regarding the amendments to the Proposal for a *Organic Law to modify the Judicial Power's Organic Law 6/1985*, of 1st July, regarding improving universal justice, and the Constitutional Court has recently ruled on the abovementioned appeal of unconstitutionality<sup>44</sup> presented in its day by the Socialist MPs against *Organic Law 1/2014*.

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<sup>39</sup> José Elías Esteve & Javier de Lucas, “La Justicia Universal, en serio (contra la versión 2.0 de la reforma de 2009)”, *elDiario.es* (6 November 2018), online:

<[https://www.eldiario.es/tribunaabierta/Justicia-Universal-serio-version-reforma\\_6\\_832976715.html](https://www.eldiario.es/tribunaabierta/Justicia-Universal-serio-version-reforma_6_832976715.html)>.

<sup>40</sup> Marcos Pinheiro, Irene Castro, “El Gobierno renuncia a ampliar la Justicia Universal como piden los expertos que encargó la reforma”, *elDiario.es* (22 December 2018) online:

<[https://www.eldiario.es/politica/Gobierno-renuncia-Justicia-Universal-expertos\\_0\\_846215621.html](https://www.eldiario.es/politica/Gobierno-renuncia-Justicia-Universal-expertos_0_846215621.html)>.

<sup>41</sup> Congreso de los Diputados, XII Legislatura, Serie B, proposiciones de ley, nº 18-4, online: (pdf) <[http://www.congreso.es/public\\_oficiales/L12/CONG/BOCG/B/BOCG-12-B-18-4.PDF](http://www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-18-4.PDF)>.

<sup>42</sup> Amendment 7, *ibid* at 8-9.

<sup>43</sup> Amendment 9, *ibid* at 9-10.

<sup>44</sup> See the commentary to this judgment in María Chiara Marullo, “La jurisdicción universal española en la STC 140/2018, de 20 de diciembre” (2019) 71:2 *Revista Española de Derecho Internacional* at 311-17.

## **B. The Constitutional Court's Ruling on 20 December 2018: The Denial of the Appeal of the Socialist MP's Certifying the Suppression of Universal Jurisdiction in Spain**

Over four and a half years after the Socialist MPs presented the constitutional appeal against *Organic Law 1/2014*, the Constitutional Court in full has finally replied to the appeal.<sup>45</sup> First, the speed with which the Constitutional Court deals with some cases is surprising, whilst in others, such as this one, affecting the interests of victims of the most heinous international crimes, the lengthy delay of this judgement is reprehensible.

Likewise, it should be mentioned first, that the participation of former State Attorney General Cándido Conde-Pumpido in this ruling may be considered a threat to the right to impartial justice. His participation should either have been challenged, once it was known that he was transferring from the Supreme Court to the Constitutional Court in March 2017, or he himself could have abstained in this case, given his implication in decisive rulings on the same subject matter now being dealt with by the Constitutional Court.

Indeed, Conde-Pumpido was a rapporteur judge in the Supreme Court's ruling 296/2015 on 6 May 2015 (in appeal n° 1682/2014 against closing the Tibet case, the original cause that had motivated the urgent approval of the reform of universal justice) that ratified all the propositions of the fateful legal reform promoted by the Popular Party's Government in *Organic Law 1/2014*. His forceful and crystal-clear declarations in that ruling had already dealt with the same subject matter on which the Constitutional Court has now pronounced itself. He already stated in that ruling that universal jurisdiction had a: "particularly damaging nature for the essential interests of the International Community" and as a result

consisted in the exercise of criminal jurisdiction by the courts of a particular country in particularly serious international crimes depending on the nature of the crime, without taking into consideration either the place where it was committed or the nationality of the perpetrator.<sup>46</sup>

In the ruling, Conde Pumpido openly lamented that the Audiencia Nacional (Spain's Special Court) had accepted cases such as those of Tibet, Falun Gong and Couso, as it was impossible to "be ignorant of the problems that the broad interpretation of universal jurisdiction was causing Spain's international relations." In this regard, he even lamented publicly the 2009 modified version of article 23.4, as "the effectiveness of this reform was not restrictive enough." He deplored the fact that no brake had been applied to "popular action or to a broad interpretation - that some considered fraudulent - of the concept of Spanish victims."<sup>47</sup>

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<sup>45</sup> Tribunal Constitucional [Spanish Constitutional Court], 20 December 2018 (2019), *Recurso de inconstitucionalidad 3754/2014*, 22 Official State Gazzete, No 140/2018 (Spain).

<sup>46</sup> Tribunal Supremo [Supreme Court Criminal Division], 6 May 2015, *The Falung Case*, Ruling No 296/2015, second ground of law (Spain).

<sup>47</sup> *Ibid.*

However, what is most surprising, and fully affects his participation in the plenary session of this Constitutional Court ruling, is that while the constitutional appeal regarding the reform of universal justice was pending, after being accepted by the Constitutional Court on 23rd July 2014, the rapporteur judge should pronounce himself directly on that matter in that Constitutional Court ruling, and reach conclusions such as the following : “The 2014 reform is not unconstitutional as it does not violate the principle of equality, the prohibition against arbitrariness, or the fundamental right to effective judicial protection.”<sup>48</sup> In any case, three years after endorsing the constitutionality of *Organic Law 1/2014*, and abusing his authority as rapporteur judge for the Supreme Court by issuing this ruling, he again participates in the same verdict, only this time as a Constitutional Court judge. This is completely unacceptable, as Conde Pumpido already had well-developed criteria regarding universal justice (beginning, curiously enough, in his days as state attorney general when he visited the American Embassy in Madrid in order to comply with diplomatic pressure to design strategies and thus be able to close this type of case); all of which inevitably affects independence and due impartiality, as article 217 of the LOPJ states when it establishes the reasons for a judge to abstain or be challenged.

Having made these necessary preliminary observations, and returning to the above-mentioned Constitutional Court ruling, it dedicates, as could not be otherwise, the first few pages to detail the appeal’s antecedents. After describing the parliamentary proceedings regarding the proposal put forward by the Popular Party’s parliamentary group, the ruling goes on to lay out the various claims of unconstitutionality recorded in the appeal. The ruling likewise records the position of the court attorney regarding the urgent processing of the *Organic Law* and the procedure for its approval, by which it only had to be read through once to be approved, concluding that “no formal defect of unconstitutionality is considered to exist.”<sup>49</sup>

The antecedents then conclude with an extensive explanation of the state attorney’s position, who appears in the appeal on behalf of the Government. It is no surprise that the allegations presented are an out-and-out defence of the reform and maintain that the connecting criteria that were introduced “limit juridical insecurity”; he is referring, presumably, to the juridical insecurity that could affect the criminals accused and prosecuted by the law, and that with this reform this insecurity would be transferred to the victims. In the same vein, the state attorney is pleased that “it is now the law, rather than judicial decisions, that determines the scope of jurisdiction”. And to ratify the path that the legislator should lay out for the judiciary in this regard, the ruling declares that “the rule that is challenged does not suppress the principle of universal jurisdiction, but instead settles it for its fair application by the Spanish courts”.<sup>50</sup> A statement that seems to consider judicial decisions taken in the persecution of international crimes abroad, anomalous

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<sup>48</sup> *Ibid.*

<sup>49</sup> Constitutional Court *supra* note 45 [translated by the author].

<sup>50</sup> Constitutional Court *supra* note 45.

deviations. Which is the case, as in section c, after declaring that the reform does not constitute “a lack of protection for Spanish victims,”<sup>51</sup> it declares that before the reform, “extending Spanish jurisdiction to cover all crimes committed abroad against Spanish victims would have had excessive effects.” Equally striking are the State representative’s arguments regarding the reform not violating article 96 of the *Spanish Constitution*, and its coherence with international treaties; considerations that we shall discuss later when referring to the Constitutional Court’s ruling on this constitutional matter recorded in the appeal.

After the lengthy review of the antecedents, the second part of the Constitutional Court’s ruling discusses in detail the legal grounds that support its rejection of the constitutional appeal. First, the ruling starts by delimiting the object of the appeal, referring to three matters. After specifying that *Organic Law 2/2015*, which modified article 23.4 e. 2° regarding terrorism, does not affect the appeal, and excluding the allegations relating to parliamentary procedure, as no violation of a constitutional precept is invoked, the ruling decides for the same reason not to venture into judging the appeal’s criticism of the reform’s regressive nature.

The third grounds of law then review the course taken by universal jurisdiction in Spain, emphasizing that in two rulings (on Guatemala<sup>52</sup> and Falun Gong) this court determined its absolute scope based on the wording of article 23.4 of the LOPJ in 1985.<sup>53</sup> However, with reference to ruling 237/2005, the ruling states that “the above statement certainly does not imply that that has to be the only canon for interpreting the precept, nor that its exegesis cannot be subject to subsequent regulating criteria that might even restrict its scope of application.”<sup>54</sup> Therefore, it is understood that this absolute criterion is not fixed, particularly when both the said rulings were issued before the first important reform of universal jurisdiction in 2009. Thus, it is understood that the connecting criteria introduced by the legislator in 2009 endorsed the Supreme Court’s position in opposition to the Constitutional Court’s ruling in the Guatemala case.

In addition, the blatant admission of this serious discrepancy of jurisprudence questions the vague statement registered in the Preamble to *Organic Law 1/2009*, on 3rd November, complementary to the law to reform procedural legislation in order to establish the new Judicial Office, which stated that “the reform enables the doctrine arising from the Constitutional Court and the jurisprudence of the Supreme Court (...) to be adapted and clarified.”<sup>55</sup> This was not the case. The 2009 reform did not attempt to reconcile these two courts’ disparate positions, but instead transferred to the law the Supreme Court’s restrictive thesis regarding the principle of subsidiarity.

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<sup>51</sup> *Ibid* at 18.

<sup>52</sup> See Tribunal Constitucional [Spanish Constitutional Court], Ruling of the Second Division of the Constitutional Court, 26 September 2005, 258 Official State Gazzete, No 237/2005 (Spain).

<sup>53</sup> See Tribunal Constitucional [Spanish Constitutional Court], Ruling of the Second Division of the Constitutional Court, 22 October 2007, 284 Official State Gazzete, No 227/2007 (Spain).

<sup>54</sup> Constitutional Court *supra* note 45, third ground of law.

<sup>55</sup> *Organic Law 1/2009 of 3rd November*, complementary to the Reform of Procedural Codes Act implementing the new judicial office (Spain).

Then, in the fourth grounds of law, after several pages describing the various sections of the new article 23 that arose from *Organic Law 1/2014*, the ruling goes on to declare unambiguously that

it can be concluded without any difficulty that, just as the appellants alleged, *Organic Law 1/2014* restricts the scope of the previously regulated principle of universal jurisdiction, because it introduces various points of connection with regard to crimes that are punishable abroad where the previous regulation had not always specified them.

And the Constitutional Court emphasizes that those stricter requirements “do not take into consideration the principle of passive personality”, which makes it more difficult to prosecute some crimes, including the most serious international crimes, as “the nationality of the victim or where they habitually reside has no relevance to persecuting crimes of genocide, or crimes against humanity or against persons or goods that are protected in cases of armed conflict (...)”. Moreover, with this restrictive spirit, “accusations, as instruments to set in motion criminal proceedings within Spanish jurisdiction, are excluded, together with popular action, which was previously possible in these cases.”<sup>56</sup>

Notwithstanding, and despite calling the reform restrictive, the ruling states that it should declare whether said reform is detrimental to constitutional precepts. And from the fifth legal grounds onwards the Constitutional Court starts to define its position on the constitutionality of *Organic Law 1/2014*. It is precisely on this point that it declares that the new article 23 of the LOPJ does not violate article 10.2 of the Spanish Constitution,<sup>57</sup> as this provision is not “an autonomous canon of constitutionality,” nor does it

mean that the Universal Declaration of Human Rights that it mentions, or the international human rights treaties and agreements ratified by Spain, are directly included in the Spanish legal system in the same position as that occupied by the Constitution, or as a direct parameter of the constitutionality of the internal rules.<sup>58</sup>

Article 10.2 does not imply the “direct inclusion” of these international treaties in our legal system, but rather, that for all practical purposes, it cannot be denied that those convention instruments have already been ratified by Spain and published in the BOE, and thus are part of the Spanish legal system. Many of these treaties include mandatory regulations or those of *jus cogens* that are not “in the same position” as the Spanish Constitution, but, instead, at a higher hierarchical level than the Constitution and internal rules. To adopt a position regardless of this humanization of international law means legislating and exercising judicial power in some sort of autonomous limbo that leaves Spain cut off not only from Europe - whose values are constantly praised -

<sup>56</sup> Constitutional Court *supra* note 45, 4th ground of law.

<sup>57</sup> Article 10.2 of *Spanish Constitution* (1978): “The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain” [translated by the author].

<sup>58</sup> Constitutional Court *supra* note 45, fifth legal ground.



but also from the international jurisprudence on the matter, without forgetting that Spain is party to the International Criminal Court's Statute of Rome and has ratified many Treaties and published them in the BOE, including a Vienna Convention on Treaty rights. Which is why, if an internal regulation contradicts an international treaty, the latter prevails, and likewise, if, when an international treaty is going to be ratified, it clashes with a constitutional regulation, it is the Constitution that must adapt to the treaty, and not vice versa. And when this contradiction occurs, said previous constitutional revision should proceed, as article 95 of the Spanish Constitution establishes.<sup>59</sup>

Thus, it is clear that international law prevails over national law once the former is incorporated by a State. Article 27 of the *Vienna Convention* specifies that "one party cannot invoke the provisions in its domestic law as a justification for failing to comply with a treaty." Thus, any international treaty, convention, pact or agreement - whatever its form or legal designation - signed between States, governed by international law, and duly ratified or approved by Spain, constitutes a superior hierarchical rule than any provision in national law. Similarly, according to the principle of *pacta sunt servanda* (article 26 of the *Vienna Convention and a fundamental principle of international law*, as indicated by Resolution 2625/XXV of the United Nations General Assembly), States should execute in good faith international treaties and the obligations arising from them. This general principle of international law has the corollary that States (which respond individually) cannot claim they are hindered by domestic law in order to avoid their international commitments. Thus, the rules for exercising jurisdiction should be applied respecting the legal commitments established in the conventions and treaties ratified by Spain.

Notwithstanding, the Constitutional Court in no way accepts this interpretation of international law, neither in the light of articles 10.2 or 96 of the *Spanish Constitution*. Likewise, in connection with article 10.2, the Court believes that article 24.1 of the *Spanish Constitution*, regarding effective judicial protection, should not be contextualized as "a right to freedom that is derived directly from the Constitution", but is more a case of a "benefit or right" that depends on the "procedural requirements established by the legislator". And having reached this point, the legislator in this particular case "can count on broad freedom in defining or determining the conditions and consequences of accessing justice". So much so, that limits can be established to this fundamental right, as long as this restriction is proportional and appropriate to the "objective sought" and "preserves other rights, goods or interests that are protected by the Constitution."<sup>60</sup>

This being so, the inescapable question is what are the real legal reasons behind the limitations introduced by *Organic Law 1/2014*, and the other rights or

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<sup>59</sup> Beatriz Vázquez Rodríguez, "La jurisdicción universal en España a la luz de la STC 140/2018 de 20 de diciembre de 2018: la regresividad escapa al control de constitucionalidad" (2019) 38 *Revista Electrónica de Estudios Internacionales*, especially the fourth section at 25-30. For a recent analysis of the constitutionality of the law, see Irene Vázquez Serrano, "La constitucionalidad de la LO 1/2014 relativa a la jurisdicción universal" (2020) 36 *Anuario Español de Derecho Internacional* 207-244.

<sup>60</sup> Constitutional Court *supra* note 45.

interests that are protected and that justify restricting the right of victims of genocide and other international crimes to effective judicial protection? According to the then foreign minister, there was only one motive: 20% of Spain's national debt was in the hands of the People's Republic of China.<sup>61</sup> This weighty argument fits the objective sought, while an important interest protected by the Constitution would be a reason of State, namely, that of safeguarding the State's important economic interests before the overvalued human right of victims of crimes prohibited by mandatory law to access justice.

Having constitutionally endorsed the reasonable and proportional primacy of *lex mercatoria* and economic interests over human rights, and integrated the principle that commerce but not justice can and should be globalized, the Constitutional Court declares that there is no "single and universally valid model of application for the principle of the universality of jurisdiction." Indeed, in order to settle this unquestionable affirmation, the ruling resorts first to various rulings of the International Criminal Court in order to accurately confirm that the Hague judges have never wanted to venture into this field. Similarly, they mention the Princeton principles<sup>62</sup> to support the argument that universal jurisdiction is a power, rather than an obligation of States, like the jurisprudence of the European Human Rights Court, which declares that the right to justice can be limited by States that hold the privileged, subjective and much invoked "margin of appreciation in developing said regulation." In short, "with regard to universal jurisdiction, there is no ruling by the Strasbourg Court that generally validates any model of universal jurisdiction in the light of article 6.1 of the European Convention on Human Rights (*ECHR*)". Moreover, "said Court denies the obligatory nature of universal jurisdiction in cases where article 4 of the *ECHR* can be applied."<sup>63</sup>

The Constitutional Court ends this section by stating:

In short, one cannot deduce from the decisions made by the UN General Assembly, the International Court of Justice or the European Court of Human Rights, that there exists an absolute and general principle of universal jurisdiction that is of obligatory application by the States that are signatories of the treaties included in said systems.

Nor can that same conclusion be reached from "what their governing bodies make of reading said treaties."<sup>64</sup>

Indeed, there is no single model of universal jurisdiction, nor a general obligation for States to exercise their jurisdiction absolutely and universally. However, it cannot be denied, on one hand, that when the International Court of Justice has had the opportunity to venture into the question of universal jurisdiction, it has avoided

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<sup>61</sup> The Spanish Foreign Minister García Margallo admitted publicly that universal justice reform was aimed at maintaining the 20% of Spain National Debt acquired by China. See the interview online at <https://www.rtve.es/alacarta/videos/el-debate-de-la-1/>.

<sup>62</sup> "The Princeton Principles on Universal Jurisdiction" (2001), online: *Princeton University* (pdf) <[https://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](https://lapa.princeton.edu/hosteddocs/unive_jur.pdf)>.

<sup>63</sup> Constitutional Court *supra* note 45, 5th legal ground of law.

<sup>64</sup> Constitutional Court *supra* note 45, 5th legal ground of law.

doing so, and on the other, that treaties do exist that impose the obligation of universally pursuing international crimes. And the paradigmatic example that is always mentioned is the 1949 *Geneva Conventions* ratified by Spain on 4th August 1952<sup>65</sup> and in the *First Additional Protocol of 1977* (in force from 21st April 1989).<sup>66</sup> It is not true, as the State allegations maintain in point 6.B.d of the antecedents, that the comments of the International Committee of the Red Cross (ICRC) on article 146 of Geneva Convention IV deny this obligatory nature. That interpretation had already been voiced in the dissenting opinion of the judges Ramón Sáez Valcárcel and José Ricardo de Prada Solaesa on 4th July 2014 in ruling 38/2014, which was supported by Ángela Murillo Bordallo and Clara Bayarri García in ordinary proceedings 63/2008 of the Plenary Session of the Audiencia Nacional's Criminal Court, which led to closing the Tibet case. They pointed out that said comment made in the ruling in a footnote on the UN Secretary General's report regarding article 146 of *Geneva Convention IV*, had been transcribed from another ruling by the Supreme Court's Second Court (precisely when the plea of nullity was rejected in the other Tibet case closed after the 2009 reform). They denounced this transcription having been taken "out of context from a passage in the document, which distorted its meaning", and they went on to argue in the dissenting opinion: "In the deliberation we warned that was not what the text had said, and we urge you to refer to the original source, as courts are obliged to do, and not to trust what was alleged in a written extract. Such an error must be corrected."<sup>67</sup> Thus, they included the text of the International Committee of the Red Cross (ICRC) cited by the Secretary General, precisely to strengthen the opposite conclusion to that reached by the judges, who have stated that there is no obligation for universal prosecution of serious violations of the Geneva Conventions; an error that reappears in this ruling. In short, it cannot be ignored by national judges the international criminal law pointing out that there is not only a right but an obligation of the States to prosecute international crimes.<sup>68</sup>

Likewise, in the fifth legal grounds in fine (p.45), the Constitutional Court judges argue that the existence of absolute universal jurisdiction cannot be deduced either from the interpretation made by the treaties' controlling bodies. Well, the Committee against Torture "believe that the scope for applying article 14 is not limited to victims who have suffered harm within the territory of the party State, or to cases

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<sup>65</sup> *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 RTNU 31 (entered into force in Spain from 4 February 1953); *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 RTNU 85 (entered into force in Spain from 4 February 1953); *Geneva Convention (III) relative to the Treatment of Prisoners of War*, of 12 August 1949, 75 RTNU 135 (entered into force in Spain from 4 February 1953); *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, of 12 August 1949, 75 RTNU 287 (in force in Spain from 4 February 1953).

<sup>66</sup> Juan Carlos I, "Instruments of ratification of Protocols I and II Additional to the Geneva Conventions of 12th August 1949, relating to the Protection of Victims of International and Non-International Armed Conflicts, drafted in Geneva on 8th June 1977" (1989) 177 Spanish Official State Gazette at 23 828-23 863.

<sup>67</sup> Audiencia Nacional [National Court], 2 July 2014, Plenary of the AN's Criminal Court, Order No 38/2014, proceedings 63/2008 (Spain), cited in Lopez *supra* note 31 at 488.

<sup>68</sup> Marc Henzelin, *supra* note 12.

where the perpetrator or victims of said harm have the nationality of the party State.”<sup>69</sup> Moreover, the ICRC’s interpretation extended this understanding of universal jurisdiction to cover crimes of torture and forced disappearances, when they declared:

There are other treaties, in addition to the Geneva Conventions and Additional Protocol I, that obligate Party States to establish universal jurisdiction for specific crimes, even if they are committed during armed conflicts. These include, in particular, the Convention against Torture, the Inter-American Convention on Forced Disappearance of persons (...).<sup>70</sup>

On the other hand, it must not be forgotten that other United Nations Human Rights mechanisms have questioned - some directly - the reforms made to universal jurisdiction in Spain. In their final observations in the 5th periodic report on Spain, the Committee against Torture expressed their concern that the previous reform of the LOPJ in 2009 would hinder the exercise of jurisdiction especially regarding acts of torture in line with articles 5 and 7 of the Convention. In this sense, the International Court of Justice in the Questions relating the obligation to prosecute or extradite (*Belgium v. Senegal*) case remarked “the obligations *erga omnes partes*” under the Convention against Torture.<sup>71</sup> Similarly, after examining Spain in 2014, the Special Rapporteur for the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff,<sup>72</sup> and the U.N. Working Group on Forced Disappearances,<sup>73</sup> criticized the reform.

Nevertheless, in their sixth legal grounds the Constitutional Court, despite declaring that *Organic Law 1/2014* did not violate article 96 of the *Spanish Constitution*,<sup>74</sup> and denying the existence of a mechanism in the Spanish legal system to control Conventions, makes a point regarding treaty application. It had declared earlier that article 96 of the *Spanish Constitution* “does not attribute greater hierarchical superiority to treaties than to internal laws”, and

confirmation of a possible disagreement between an international convention and an internal rule with the force of law does not imply judgement on the

<sup>69</sup> Committee against Torture, *Implementation of the article 14 by States parties*, UNCATOR, 2012, General comment No 3, UN Doc CAT/C/GC/3.

<sup>70</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: ICRC, 2005) at 686; commentary on Rule 157.

<sup>71</sup> *Questions relating the obligation to prosecute or extradite (Belgium v. Senegal)*, [2012] ICJ Rep 144 (“The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party (...) It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* (...) and to bring that failure to an end” at para 69).

<sup>72</sup> *Informe del Relator Especial sobre la promoción de la verdad, la justicia, la reparación y las garantías de no repetición, Pablo de Greiff - Misión a España*, UNHRCOR, 27th Sess, UN Doc A/HRC/27/56/Add.1 (2014).

<sup>73</sup> *Report of the Working Group of Enforced or Involuntary Disappearances Addendum Mission to Spain*, UNHRCOR, 27th Sess, Annex, Agenda Item 3, UN Doc. A/HRC/27/49/Add.1 (2014).

<sup>74</sup> Article 96.1 of *Spanish Constitution* (1978): “Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order. Their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law.”

validity of the internal rule, but merely on its applicability, so it is not a problem of purging invalid rules from the legislation, but of determining the rule applicable for resolving each particular case, the application of which should be freely decided by ordinary judges.<sup>75</sup>

Thus, the Constitutional Court leaves this “convention analysis” - consisting in the “mere judgement of applicability” of rules - in the hands of ordinary judges. Therefore, it is important that it concludes by declaring in this respect that: “any ordinary judge can shift the application of an internal rule with the force of law in order to preferentially apply the provision contained in an international treaty”. All of which does not imply the “expulsion of the internal regulation from the legislation”, but “merely its non-application in a specific case.”<sup>76</sup>

This precision of the sixth legal grounds sets out important effects that clearly refute the Supreme Court’s declarations on this point in the various rulings in which it rejected the appeals regarding the various cases of universal justice since 2014. For example, subsequent to the reform, when Santiago Pedraz, the judge of Central Court n° 1, ruled initially on 17 March 2014 in Summary proceedings 27/2007 in the Couso case, and refused to close the case, instead applying article 146 of *Geneva Convention IV* rather than the new article 23.4.a of the *LOPJ*, he was doing just what the Constitutional Court has now suggested in its recent ruling. However, in its ruling 296/2015 to close the above-mentioned Tibet case, the Supreme Court ordered that the *LOPJ* be applied instead of the international treaty. The 29th grounds of law of that fateful verdict warned the judges who were resisting closing cases of universal justice, by applying international law, that : “[a]s a result, and so that it is clear in this and in other proceedings with similar grounds of law, in compliance with the current *Organic Law 1/2014*, Spanish courts lack the jurisdiction to investigate and try crimes committed abroad against persons and goods that are protected in cases of armed conflict” unless the unlikely requirements demanded in article 23.4.a of the *LOPJ* are met.<sup>77</sup> It is no surprise that soon after this verdict, the judge Pedraz closed the Couso case, despite being convinced that the Geneva Conventions should be applied instead of article 23.4 of the *LOPJ*, for fear that by persevering with the case he would be accused of perversion of justice.<sup>78</sup> On the other hand, if from now on the judicial reasoning expressed in the Constitutional Court’s ruling is followed, judges could use that reasoning as a basis from which to apply international treaties instead of internal rules. In short, it must be reiterated that although the Supreme Court considers it quite inappropriate to apply a treaty instead of the *LOPJ* in such serious cases as those involving war crimes, it does not have any objection however, despite the reform, to applying other international treaties to the detriment of articles 23.4.d and 23.4.i regarding piracy and drug trafficking, to suppress these crimes in international waters. Thus, for example, in the Supreme Court ruling 592/2014 on 24 July 2014, the Criminal

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<sup>75</sup> Constitutional Court, *supra* note 45, 6th legal ground of law.

<sup>76</sup> Constitutional Court, *supra* note 45, 6th legal ground of law.

<sup>77</sup> Tribunal Supremo [Supreme Court], 6 May 2015, No 296/2015, 29th ground of law (Spain), case available online: < <https://supremo.vlex.es/vid/571092402>>.

<sup>78</sup> Audiencia Nacional [National Court], First instance Central Court No. 1, 9 June 2015, case No 27/2007 (Spain).

Court (appeal 1205/2014) considers that the perpetration of these crimes in “international marine spaces” does not call for the requirements established in the LOPJ, namely, that the perpetrator should have that nationality, or be in the act of committing [the crime], or for a criminal organization to exist, but only that the supposed crime be covered in an international treaty ratified by Spain, and considers that such an international rule does exist: (the 1982 *United Nations Convention on the Law of the Sea*).<sup>79</sup>

Then, in its seventh legal grounds, the Constitutional Court denies that *Organic Law 1/2014* is arbitrary and questions the principle of equality before the law. The appeal criticized the fact that the reform generated different categories of victims, considering such differential treatment to be discriminatory. However, the judges, despite admitting that the new article establishes fifteen different points of connection before Spanish jurisdiction can be activated, wash their hands and attribute full responsibility for the legal change to the politicians who designed it. They do not question the reform on this point, as it was a “completely reasonable option (...) assumed by the legislator and “in no way opposed legal security.” Thus, the evolution of universal justice is left to the legislative power, regardless of the reasons for the reform, on one hand, and of the contradictions between this and earlier rulings of this court on the Guatemala and Falun Gong cases, on the other.

Thus, this legal ground, despite admitting that “justification for the reform is generic”, declares that it is, at the same time, “rational”. Indeed, what is extremely rational is not just the motivation that led the Spanish Parliament to make the urgent change in legislation, but the fact that victims of international crimes contemplated in the Statute of Rome should have their status exacerbated in order to be able to seek justice in Spanish courts. Maybe rational refers to the reform complying with important reasons, such as reasons of State, like the important percentage of Spanish debt in Chinese hands mentioned above.

On the other hand, the Constitutional Court brushes off the blatant contradiction in interpretation regarding universal jurisdiction between the present ruling and that of the Guatemala case, by admitting that, in effect “the scope of current regulation is the same as the interpretation made in its day by the Constitutional Court regarding the principle of universal jurisdiction, but this does not necessarily mean that the new regulation is unconstitutional for violating the principle of juridical security.”<sup>80</sup> So, despite the Constitutional Court admitting the change in criteria, that same change is justified by the change in legislation, and, as a result, it can be claimed that with this ruling the Constitutional Court is not contradicting its own acts.

In short, if victims cannot find justice in Spanish courts, they should look for alternatives beyond Spanish frontiers. Thus, “victims should either activate jurisdiction in countries with laws more in favour of universal justice or urge the State to act in defence

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<sup>79</sup> Supremo Tribunale [Supreme Court], Criminal Court, 24 July 2014, Ruling No 592/2014 (Spain), case available online: <[https://supremo.vlex.es/vid/internacional-buques-bandera-extranjera-521791510?\\_ga=2.44503719.2096172558.1615066199-617340535.1614785429](https://supremo.vlex.es/vid/internacional-buques-bandera-extranjera-521791510?_ga=2.44503719.2096172558.1615066199-617340535.1614785429)>.

<sup>80</sup> Constitutional Court, *supra* note 45, 7th grounds of law.

of their citizens, before the International Criminal Court.”<sup>81</sup> It is ever so rational that, for example, a Tibetan victim or a Chinese practitioner of Falun Gong should turn to Beijing so that the People’s Republic of China, which is not a Party of the Statute of Rome, denounces the case before the International Criminal Court, which it does not recognize.

In this context, it must be remembered that Spain ratified the *Rome Statute* on 19th October 2000, and the principle of complementarity presumes a political and legal will of the States party to persecute international crimes. This complementarity of the article 17 should prevail between the national criminal jurisdictions and the International Criminal Court, that should take part in an issue when a State is unable or unwilling to exercise its jurisdiction. However, in addition to the principle of complementarity, another mainstay of the structure of the *Rome Statute* is the duty to cooperate with the International Criminal Court and fulfill all requirements it may demand from a party State. It is, therefore, quite surprising that, on the apparent grounds of fulfilling this obligation, the Spanish Parliament enacted the *Organic Law 18/2003*, whose 7.2 contradictorily inverts this principle of complementarity.<sup>82</sup> Beyond this national dysfunction, the doctrine controversy about the concurrence of these jurisdictions remains open. And while one position, holds that the *Rome Statute*

*“n’inclut finalement pas le principe d’une compétence concurrente universelle de tous les États avec la Cour pénale internationale, pour n’admettre qu’une compétence concurrente des États territoriaux et nationaux des auteurs avec celle-là.”*<sup>83</sup>

others assure “the need to expand” the domestic jurisdiction, even for the non-party-States<sup>84</sup>. Therefore, “if a State, finally, provides universal jurisdiction for crimes of competition of the Court, that State will be collaborating in the repression of them beyond what the Court itself can do”.<sup>85</sup> Definitively, that principles of complementarity and universal jurisdiction should be a “perfect match”, and not a reason of “antagonism.”<sup>86</sup>

<sup>81</sup> Constitutional Court, *supra* note 45, 7th grounds of law.

<sup>82</sup> Art 7.2 *Organic Law 18/2003 on Cooperation with the International Criminal Court* (Spain) available online: <<http://www.boe.es/boe/dias/2003/12/11/pdfs/A44062-44068.pdf>> (“ When someone lodges a complaint before a judicial organ, the Spanish Public Prosecutor or the Prosecutor’s office, in relation to a situation in which one or more crimes within the jurisdiction of the court appear to have been committed by a non-Spanish national outside Spanish territory, the said organ will refrain from proceeding and will apprise the plaintiff of the possibility of taking their claim directly to the Prosecutor of the International Criminal Court who may initiate an investigation. This does not preclude adopting, if necessary, the first urgent proceedings within their jurisdiction. Should this occur, the judicial organs and the Public Prosecutor will refrain from proceeding on their own initiative”).

<sup>83</sup> Marc Henlezin, *supra* note 12 at 392.

<sup>84</sup> Douglass Cassel, “The ICC’s New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes and Crimes Against Humanity” (1999) 23 *Fordham Intl LJ* at 378-97.

<sup>85</sup> Antonio Pigrau Solé, *La jurisdicción universal y su aplicación en España: la persecución del genocidio, los crímenes de guerra y los crímenes contra la humanidad por los tribunales nacionales*, (Barcelona: Oficina de Promoción de la Paz y de los Derechos Humanos, Generalitat de Catalunya, 2009) [translated by author].

<sup>86</sup> Britta Lisa Krings, “The principles of ‘complementarity’ and universal jurisdiction in International Criminal Law: antagonists or perfect match?” (2012) 4:3 *Goettingen Journal of International Law* at 737-763.

The other alternative for victims is to go seek the national court of another State, as here the doors are already closed to their cases, despite these ones have been investigated for over a decade, but finally closed retroactively. Without a doubt, as the Constitutional Court itself admits, “both possibilities are clearly onerous for the victims, and increase their vulnerability”, but despite that, one cannot deduce “an absence of juridical security, nor the introduction of a bizarre, unpredictable or discriminatory criterion to extend jurisdiction.” We sincerely congratulate the judges of the Constitutional Court for such an exercise of intricate juridical juggling, which endorses the impunity of great commercial allies and friends despite their being accused of the most heinous international crimes. The rule of law should prevail, and the values espoused in the *Treaty on European Union*, which “is aimed at promoting peace, its values and the well-being of its peoples” (art. 3.1 *TEU*) and “is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights” (art. 2 *TEU*); values that should also be projected in their action abroad (arts. 21, 32 and 42.5 *TEU*) in countries like China, Saudi Arabia or Equatorial Guinea, to cite but a few.

Another of the most controversial arguments denounced by the Socialist MPs’ appeal was that relating to the suppression of popular action. In the eighth legal grounds, the ruling states that this loophole “does not violate either articles 24.1<sup>87</sup> or 125<sup>88</sup> of the *Spanish Constitution*, nor article 9.3<sup>89</sup> with regard to article 14<sup>90</sup> of the *Spanish Constitution*”. The ruling reiterates that the legislator has the discretionary capacity to specify the limitations to popular action that it deems opportune. Even so, despite the current suppression, the Constitutional Court admits that victims can still access jurisdiction, and that in any case “nothing prevents those who are not victims from denouncing [crimes] to the public prosecutor.”<sup>91</sup> This last option is somewhat discouraging and even a deterrent, given the prosecution’s restrictive position with regard to cases of universal justice; the public ministry’s role in these matters has not been precisely that of complainant or facilitator, but quite the opposite, with a few notable exceptions such as the *Boko Haram* case.

Finally, the ninth legal grounds argue that the single transitory disposition of *Organic Law 1/2014* does not damage the right to effective judicial protection

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<sup>87</sup> Article 24.1 of *Spanish Constitution* (1978): “Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended.”

<sup>88</sup> Article 125 of *Spanish Constitution* (1978): “Citizens may engage in popular action and participate in the administration of justice through the institution of the Jury, in the manner and with respect to those criminal trials as may be determined by law, as well as in customary and traditional courts.”

<sup>89</sup> Article 9.3 of *Spanish Constitution* (1978): “The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, the nonretroactivity of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities, and the prohibition against arbitrary action on the part of the latter.”

<sup>90</sup> Article 14 of *Spanish Constitution* (1978): “Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.”

<sup>91</sup> Constitutional Court, *supra* note 45, 8th grounds of law.



contemplated in article 24.1 of the *Spanish Constitution*. It is therefore a procedural rule and, as such, is not a question to which

the principle of non-retroactivity of sanctioning provisions that restrict or are not favourable to individual rights” should be applied. Moreover, it adds that this transitory provision not only needs to be applied while proceedings are running their course, but the rule even establishes that despite proceedings having been closed, if the points of connection are subsequently confirmed, “said closure could be suspended, and the proceedings reopened.”<sup>92</sup>

The ruling is accompanied by the concurring private opinion of the judge Narváez Rodríguez, who stresses the court’s negative ruling although he introduces a few technical disagreements. He believes that the appeal did not fully confirm that universal jurisdiction was contemplated in any international treaty, particularly in those mentioned in article 10.2 of the *Spanish Constitution*, and therefore said point in the appeal should not have been discussed, or alternatively, the court should have carried out “an analysis of the different international conventions.” But whatever the case, he states that “the right to criminal action is considered essentially *ius ut procedatur* rather than part of any other statutory fundamental law.”<sup>93</sup>

### III. From Spain’s Constitutional Court to the European Court of Human Rights

The Constitutional Court’s ruling set off a chain reaction rejecting all the appeals concerning cases that had been closed as a result of the 2014 reform. And in all these verdicts this court’s judges simply cut and pasted the juridical arguments of the above-mentioned ruling *140/2018*.

In short, the Constitutional Court’s ruling on the Tibet case, which worried the Government, rejected the appeal of constitutional protection, using the following reasoning: first, it only analysed the violation of the right to effective judicial protection in terms of accessing the courts, with no mention of the legitimacy or fairness of the proceedings, noting that this branch of the right to effective judicial protection did not guarantee in absolute terms any access to jurisdiction. On the other hand, the judges declared that the conflict of regulations between the new version of universal jurisdiction and the international obligations derived from international treaties was a matter of ordinary legality and regulatory applicability. As a result, they considered this legal conflict lay outside their competence and was a matter for ordinary judges to decide. They also declared there was no discrimination, without carrying out any tests of legitimacy or proportionality, simply declaring that the new criteria to activate universal justice were coherent and did not violate juridical safety, as this legislative option was not “extravagant, unpredictable or discriminatory”. Lastly, they concluded

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<sup>92</sup> Constitutional Court, *supra* note 45, 9th grounds of law.

<sup>93</sup> Tribunal Constitucional [Spanish Constitutional Court], 20 December 2018 (2019), *Voto concurrente que formula el Magistrado don Antonio Narváez Rodríguez en relación con la sentencia dictada en el recurso de inconstitucionalidad 3754/2014*, 22 Official State Gazzete, No 140/2018 (Spain) at 9.

that the ordinary courts that had investigated this case were not obliged to apply international law in order to preserve the right to access the courts. Even so, the Constitutional Court admitted that this modification was clearly onerous for the victims, as it made them more vulnerable.<sup>94</sup>

But in a matter of months, it was not just the Tibet case that was closed, as the same fate befell the Falun Gong cases,<sup>95</sup> the case of the crimes committed in the Ashraf refugee camp in Baghdad,<sup>96</sup> the Guantanamo case,<sup>97</sup> the Couso case for the war crime committed against the Spanish journalist in the Iraq war,<sup>98</sup> and the case of genocide in Rwanda that included Spanish victims.<sup>99</sup>

Meanwhile, the Spanish Supreme Court similarly buried the case for war crimes and terrorism committed in Syria<sup>100</sup> by members of Al-Assad's Government.

After exhausting Spain's internal mechanisms, the victims' representatives presented their cases to the European Court of Human Rights. The Strasbourg Court should determine whether there has been a violation of article 6.1 of the *European Convention of Human rights* regarding the right to a fair trial. In fact, the retroactive closing of the cases could be considered a denial of an effective judicial remedy for the victims of international crimes who anyway have the right to claim compensation derived from an action of civil responsibility, as the Court itself admitted.<sup>101</sup>

Article 1 of *Protocol 12 of the Convention*, which has been ratified by Spain, establishes a general prohibition of discrimination.<sup>102</sup> Thus, a specific prohibition exists against different discriminatory treatments in the enjoyment of any rights established by law. In the Spanish cases that were closed, the victims of international crimes with Tibetan, Syrian or Chinese nationality do not have the same access to the Spanish courts as do the Spanish victims of torture and forced disappearances, to whom the new law of universal justice grants this right. In fact, article 3.4 of the above-mentioned *Organic Law 1/2014* enables these international crimes to be prosecuted if the victims were

<sup>94</sup> Tribunal Constitucional [Constitutional Court], 25 February 2019, 73 Official State Gazzete, No 23/2019 (Spain).

<sup>95</sup> Tribunal Constitucional [Constitutional Court], 28 January 2019, 46 Official State Gazzete, No 10/2019 (Spain).

<sup>96</sup> Tribunal Constitucional [Constitutional Court], 11 February 2019, 67 Official State Gazzete, No 15/2019 (Spain).

<sup>97</sup> Tribunal Constitucional [Constitutional Court], 25 March 2019, 99 Official State Gazzete, No 36/2019 (Spain).

<sup>98</sup> Tribunal Constituconal [Constitutional Court], 17 June 2019, 177 Official State Gazzete, No 80/2019 (Spain).

<sup>99</sup> Tribunal Constitucional [Constitutional Court], 11 April 2019, ruling rejecting to admit the case of 11th April 2019, appeal 993-2016-J.

<sup>100</sup> Tribunal Supremo [Supreme Court], 13 March 2019, No 1397/2019, appeal 226/2018 (Spain).

<sup>101</sup> *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], No 5809/08 (21 June 2016) at para 126.

<sup>102</sup> Council of Europe, *Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4 November 2000, 77 ETS 1 ("Article 1 – General prohibition of discrimination 1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1").

Spanish when the crimes were committed. Victims who subsequently acquired Spanish nationality are thereby discriminated against and prevented from accessing justice. The *ECHR* has ruled that when a law establishes different treatment among citizens, those who have always had that nationality and those who subsequently acquired it all fall within the protective category of nationality, as do cases in which a difference is established as a function of the time that certain individuals have been citizens of a Contractual State.<sup>103</sup> Discrimination can occur in these cases, as an individual who was born a Spaniard has the right to exercise criminal action whenever they are a victim, regardless of where the crime was committed, whereas individuals of other national origins, who subsequently became Spanish, are discriminated against and do not have the right to access justice.

#### IV. Towards Universal Jurisdiction Exclusively for Prosecuting Terrorism: Questioning a Universal Juridical Conscience

This apparent discriminatory treatment in the reformed law of universal justice denounced in the European Council of Human Rights is not only based on the victims' nationality, but also on the type of crime. The unequal and complex treatment granted by the law when persecuting different crimes is striking. Spanish jurisdiction is thus granted privileged treatment for prosecuting crimes of terrorism, if so, much as one of the eight connecting points listed in the new wording is accredited, such as for example if there are Spanish victims. This regulation comes as no surprise, as it only reinforces the legislative changes that "should be concerned with the persecution of anyone who takes part in the financing, planning, preparation or carrying out of acts of terrorism or provides support for these acts", as established in the Preamble of *Organic Law 2/2015*, which mentions several UN Security Council resolutions.<sup>104</sup>

It must also be stressed that the most blatant and reprehensible thing about the reform lies in the fact that the juridical regime for the most heinous international crimes is much more onerous. Thus, in cases of genocide, crimes against humanity and war crimes, in addition to the victims' nationality, there is the additional requirement of

<sup>103</sup> *Biao v Denmark* [GC], No 38590/10 (24 May 2016) ("(...) However, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention (see *Gaygusuz v Austria*, 16 September 1996, § 42, Reports of Judgments and Decisions 1996-IV; *Koua Poirrez v France*, no. 40892/98, § 46, ECHR 2003-X; *Andrejeva v Latvia* [GC], no. 55707/00, § 87, ECHR 2009; and *Ponomaryovi v Bulgaria*, no. 5335/05, § 52, ECHR 2011)" at para 7).

<sup>104</sup> *Organic Law 2/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, en materia de delitos de terrorismo* (Spain), available online: <<https://www.boe.es/buscar/doc.php?id=BOE-A-2015-3440>> "(...) La Resolución del Consejo de Seguridad de Naciones Unidas 2178, aprobada el 24 de septiembre de 2014, recoge la honda preocupación de la comunidad internacional por el recrudecimiento de la actividad terrorista y por la intensificación del llamamiento a cometer atentados en todas las regiones del mundo (...) la Resolución 2178 pide a los Estados que se cercioren de que sus leyes y otros instrumentos legislativos internos tipifiquen delitos graves que sean suficientes para que se puedan enjuiciar y sancionar las conductas terroristas que se describen, de tal forma que quede debidamente reflejada la gravedad del delito." Preamble).

showing that the aggressor is Spanish, or a foreigner who habitually resides in Spain or is present on Spanish soil,<sup>105</sup> which only “confuses alarmingly the essence of the universal principle with other criteria for the extraterritorial application of criminal law”<sup>106</sup>.

Thus, the more lenient regulation of article 23.4 of the *LOPJ* for crimes of terrorism has even resulted, at the urging of the public prosecutor, in new proceedings being set in motion by the First Instance Central Court N° 5. The case against the leader of the terrorist group Boko Haram for serious human rights violations in Nigeria began its course after a complaint was presented at the public prosecutor’s office and after it was shown that one of the victims - the Spanish nun, Sister María Jesús Mayor - had Spanish nationality,<sup>107</sup> As a result, the public prosecutor lodged a lawsuit against the leader of the jihadist group Boko Haram for having committed acts of terrorism in March 2013 in the city of Ganye in Nigeria. It argued that this terrorist group’s generalised attacks on the population were aimed at creating an Islamic State in this part of the African continent. However, the series of criminal acts described in the lawsuit, which consisted in assassinations, torture, sexual aggression and human trafficking, and could be classified as crimes against humanity, only fell within the competence of the Spanish courts because they were denounced as crimes of terrorism, given the required national connection.

Be that as it may, if a government’s political choice is not to prosecute those accused of genocide, not even war criminals, (as these judicial investigations can muddy and interfere with the State’s foreign actions), the *de facto* repeal of universal justice should go hand in hand with other measures. As it has been pointed out, in order to be coherent with international law, *Organic Law 1/2014* should be accompanied by Spain’s “denunciation and refusal to participate in any future treaty advances or belated reservations” in the various international treaties concerned with human rights.<sup>108</sup>

Coherent or not, it is clear that the universal persecution of terrorism is a priority. This becomes evident not only in the above-mentioned favourable treatment granted to the prosecution of terrorism by *Organic Laws 1/2014* and *2/2015*, but also in the fact that within the UN Spain heads the diplomatic offensive for establishing an

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<sup>105</sup> *Organic Law 6/1985, de 1 de julio, de Poder Judicial* (Spain), available online: <[https://noticias.juridicas.com/base\\_datos/Admin/r41-lo6-1985.11t1.html](https://noticias.juridicas.com/base_datos/Admin/r41-lo6-1985.11t1.html)> (“4. *Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley española, como alguno de los siguientes delitos cuando se cumplan las condiciones expresadas: a) Genocidio, lesa humanidad o contra las personas y bienes protegidos en caso de conflicto armado, siempre que el procedimiento se dirija contra un español o contra un ciudadano extranjero que resida habitualmente en España, o contra un extranjero que se encontrara en España y cuya extradición hubiera sido denegada por las autoridades españolas*”).

<sup>106</sup> Manuel Ollé Sesé, *Crimen internacional y jurisdicción penal nacional: de la justicia universal a la jurisdicción penal interestatal* (Navarra, Thomson Reuters Aranzadi, 2019).

<sup>107</sup> Audiencia Nacional [National Audience], Juzgado Central de Instrucción nº 4, 27 May 2015, proceedings No 38/2015 (Spain).

<sup>108</sup> Esperanza Orihuela Calatayud “La regulación de la jurisdicción universal en España. Reflexiones a la luz de las últimas reformas (2014 y 2015)” in Orihuela (coord.), *Crímenes internacionales y justicia penal. Principales desafíos*, (Bilbao, Thomson Reuters Aranzadi, 2016) at 283-317, 314.

International Criminal Court for crimes of terrorism.<sup>109</sup> An initiative that is somewhat contradictory to the foreign affairs of some Western States. Aiming to establish a new international judicial body to try terrorists, whilst maintaining privileged geostrategic links with Arab monarchies that arm and finance those whom we aim to sanction, leads to foreign policy decisions that are far from inspiring.

Nevertheless, it must be concluded that the universal prosecution of terrorism is not incompatible with persecuting the most serious international crimes. On the contrary, the fight against impunity is complemented. In fact, when the last peaceful resource left to some peoples with which to claim their fundamental rights and their desire for justice and reparation is squashed in this way, a feeling of despair and impotence is generated that in many cases sows the seeds of subsequent violent reactions. In short, we must not only fight the effects of terrorism, but also the roots that give rise to it, in order to counter all ideological arguments that try to justify terrorist atrocities. The Parliamentary Assembly of the Council of Europe warned against this when it declared that “Injustice breeds terrorism and undermines the legitimacy of the fight against it.”<sup>110</sup>

Faced with these alarming signs that threaten the fight against impunity, we must unhesitatingly support the strict observance and application of the universal social contract, even at the risk of once again annoying political and economic world powers. And this must be so because, as the judge of the International Court of Justice, Cançado Trindade, has declared repeatedly, the effective guarantee of peoples’ rights and specifically those of the victims, comes before reasons of state because:

The search for full safeguards and the prevalence of rights inherent to human beings, in any and all circumstances, belong to today’s new ethos, in a clear manifestation, in our part of the world, of the universal juridical conscience at the beginning of the 21st Century. The awakening of this conscience - the material source of all law - carries with it the unequivocal acknowledgement that no State can consider itself above the law, whose rules are aimed at human beings.<sup>111</sup>

In view of all that has happened, for legislation and the judiciary to evolve in line with constitutional and European values, universal jurisdiction should not merely be legally reinstated in its original place. In an exercise of coherence and undeniable courage, universal prosecution of the most serious international crimes should be

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<sup>109</sup> *España apoyándose en el actual y privilegiado estatuto de miembro no permanente ante el Consejo de Seguridad de Naciones Unidas ha solicitado la creación de dicho tribunal.* See “España pedirá desde el Consejo de Seguridad un Tribunal Internacional contra el Terrorismo”, *ABC España* (8 junio 2016), online: <[https://www.abc.es/espana/abci-espana-propondra-diciembre-creacion-tribunal-penal-contra-terrorismo-201606081111\\_noticia.html](https://www.abc.es/espana/abci-espana-propondra-diciembre-creacion-tribunal-penal-contra-terrorismo-201606081111_noticia.html)>.

<sup>110</sup> Parliamentary Assembly of the Council of Europe: Resolution 1634 (2008) on the “Proposed law on forty-two-day pre-charge detention in the United Kingdom”, 2 October 2008: “terrorism can and must be fought with means that fully respect human rights and the rule of law, excluding all forms of arbitrariness. Injustice breeds terrorism and undermines the legitimacy of the fight against it”.

<sup>111</sup> Antonio Cançado Trindade, *Reflexiones sobre los tribunales internacionales contemporáneos y la búsqueda de la realización de ideal de la justicia internacional*, (Bilbao: Servicio editorial de la Universidad del País Vasco, 2011) at 17-95, 49.

extended to include transnational companies as they are key players in the vast majority of the cases denounced and remain unpunished. Moreover, as so accurately stated by the Madrid-Buenos Aires Principles of Universal Jurisdiction sponsored by Fibgar, universal persecution urgently needs to be extended to economic and environmental crimes.<sup>112</sup> Furthermore, such transcendental matters for human rights, as are this questioning of universal jurisdiction or the very serious refugee crisis, not only affect the victims, but all humanity. Which brings this reflection to an end, with the recent words of Chinese artist and refugee Ai Wei Wei who lucidly identified the problem of this alarming deterioration of values in our civilisation in which

The main cause for much of this crisis is that we prioritise economic gains over a person's fight to satisfy their basic needs. The West has abandoned its faith in humanity and its support for the beautiful ideals described in the Universal Declaration of Human Rights. The West has sacrificed these ideals in its pursuit of avarice and cowardice (...) There are many frontiers to be torn down, but the most important ones are in our hearts and minds. These are the frontiers that are dividing humanity.<sup>113</sup>

In conclusion, this reflection on universal jurisdiction in Spain is entitled a requiem, a plea for the souls of the deceased, for the victims for whom the doors of justice are being closed. The failure of the Justice Ministry's project and the last Constitutional Court ruling both indicate that the various appeals regarding cases of universal justice will shortly be dismissed and will all end up in Strasbourg without much hope for reparations. However, the above-mentioned requiem left a question unanswered. Requiem in Latin means "rest", and although its best-known meaning is the liturgical act for burying the dead, in this case we would prefer it if the doors of hope were left open for the victims who invoke the principle and values enshrined in universal jurisdiction. Therefore, it would be desirable, although naïve, that universal justice, which has now entered a phase of rest in our country, would not remain in "eternal rest", but that could be resurrected. As the Constitutional Court insisted repeatedly in its ruling on 20 December 2018, the matter now lies in the hands of the political will of the legislator.

At the same time, we have to keep an open eye to Strasbourg, but with scepticism, as the European Court of Human Rights sitting on 5th December 2019 has already declared the application of the Rwanda case to be inadmissible.<sup>114</sup> It seems not to be a good omen, that the Grand Chamber of this Strasbourg Court in the *Naït-Liman* case has already declared regarding the universal civil jurisdiction, that States had a margin of appreciation to regulate access to justice of international crimes victims. But in any case, it could be concluded with a wishful thinking perspective, as in this

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<sup>112</sup> Fibgar, *Principios de Madrid-Buenos Aires de Jurisdicción Universal*, 2015, en ligne: <<http://fibgar.org/upload/proyectos/35/es/principios-de-jurisdiccion-universal.pdf>>.

<sup>113</sup> Ai Wei Wei, "La crisis de los refugiados no les concierne solo a ellos sino a todos nosotros", (5 February 2018), online : <[https://www.eldiario.es/internacional/theguardian/crisis-refugiados-concierne-solo\\_129\\_1103119.html#:~:text=La%20crisis%20de%20refugiados%20no,por%20satisfacer%20sus%20necesidades%20b%C3%A1sicas](https://www.eldiario.es/internacional/theguardian/crisis-refugiados-concierne-solo_129_1103119.html#:~:text=La%20crisis%20de%20refugiados%20no,por%20satisfacer%20sus%20necesidades%20b%C3%A1sicas)>.

<sup>114</sup> *Vallamajo i Sala v Spain*, No 53453/2019 (5th December 2019).

judgement “the Court did not shut the door for similar claims in the future”<sup>115</sup> and it could mean this verdict “a starting point for the creation of a new custom on an ‘almost’ universal jurisdiction ”.<sup>116</sup> But facts seem to go in the opposite direction. Recently the Secretary of the European Court of Human Rights has just announced the dismissal of the applications in the Tibet case. The Court’s adoption of a decision taken by a single judge on 17 December 2020, “is definitive and cannot be the object of an appeal.” With this verdict, the Strasbourg Court certifies the death of universal justice for Tibetan victims, as it has been declared that in these complaints the right to a fair trial and to an effective remedy have not been violated.<sup>117</sup> These resolutions may have been the last notes of the requiem for universal jurisdiction in Spain and for its victims.

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<sup>115</sup> Daniel Rieteker, “The case of *Naït-Liman v Switzerland* before the European Court of Human Rights: where are the limits of the global fight against torture?” (2019), online: *Harvard International Law Journal* <<https://harvardilj.org/2019/03/the-case-of-nait-liman-v-switzerland-before-the-european-court-of-human-rights-where-are-the-limits-of-the-global-fight-against-torture/>>.

<sup>116</sup> Maria Chiara Marullo, “‘Almost’ universal jurisdiction”, (2019/2020) 21 *Yearbook of Private International Law* at 568.

<sup>117</sup> *Sherpa Sherpa v Spain*, No 47547 (17th December 2020); Decision *Case of Comité de Apoyo al Tibet and Fundación Casa del Tibet v Spain*, 3rd December 2020.