REQUIEM FOR UNIVERSAL JURISDICTION? FROM THE JUSTICE MINISTRY'S FAILED PROJECT TO THE CONSTITUTIONAL COURT'S RULING ON 20 DECEMBER 2018 REJECTING THE SOCIALIST MPS' CONSTITUTIONAL APPEAL AGAINST ORGANIC LAW 1/2014

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 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". (https://www.eldiario.es/politica/Entrevista-Pedro-Sanchez_0_794770909.html).

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 (https://confilegal.com/20180827-el-gobierno-crea-una-comision-para-restablecer-la-justicia-universal/).

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 a 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 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 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, (https://www.elespanol.com/espana/tribunales/20181018/demoledor-exteriores-propuesta-justicia-universal-dolores-delgado/346216819_0.html), the Foreign Ministry document warned against the possible effects of said 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 Organic Law of Judicial Procedure (LOPJ). What is more, 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 have to be overcome in this type of legal case.

Whatever the case, the criteria of Borrell's Ministry 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 version of the LOPJ (see Esteve and De Lucas, https://www.eldiario.es/tribunaabierta/Justicia-Universal-serio-version-reforma_6_832976715.html). 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 Popular and Ciudadanos parliamentary group. 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" (https://www.eldiario.es/politica/Gobierno-renuncia-Justicia-Universal-expertos_0_846215621.html). Indeed, the amendments presented by the various parliamentary groups and published in the Official Gazette of the Spanish Parliament (BOCG) on 19 November 2018 (Congreso de los Diputados, XII Legislatura, Serie B, proposiciones de ley, nº 18-4, at http://www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-18-4.PDF) lead once more to universal jurisdiction being subject to national connecting links.

On one hand, amendment 7, presented by Unidos-Podemos, 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" (Amendment 7, pp 8-9).

Whatever the case, amendment 9 of the Ciudadanos parliamentary group, amendment 10 presented by Rafael Simancas of the Socialist group, and amendment 16 of 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."

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 appeal of unconstitutionality presented in its day by the Socialist MPs against Organic Law 1/2014, mentioned above.

Ruling on 20 December 2018
Full session of the Constitutional Court
Constitutional Appeal 3754/2014

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. 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, I should like to start by saying 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 nº 1682/2014 against closing the Tibet case, the original cause motivating 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."* 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 openly 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".*

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."* Well, 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 (starting, 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".

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 persecuted 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." A statement that seems to consider judicial decisions taken in the persecution of international crimes abroad, anomalous deviations. Which is the case, as in section c (p.18), after declaring that the reform does not constitute "a lack of protection for Spanish victims", 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. 2º 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 reviews the course taken by universal jurisdiction in Spain, emphasizing that in two rulings (on Guatemala and Falun Gong) this court determined its absolute scope based on the wording of article 23.4 of the LOPJ in 1985. 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". 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." This was not the case. The 2009 reform did not attempt to reconcile the disparate positions

of these two courts, but instead transferred to the law the Supreme Court's restrictive thesis regarding the principle of subsidiarity.

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 persecute 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."

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, 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."

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 State Official Gazette (BOE), and thus are part of the Spanish

legal system. Many of these treaties include mandatory regulations or those of *ius 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 - 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.

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."

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 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. 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 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."

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."

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 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 Geneva Conventions. 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." 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 persecution of serious violations of the Geneva Conventions; an error that reappears in this ruling.

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 where the perpetrator or victims of said harm have the nationality of the party State" (General Observation on the Application of article 14, CAT/C/GC/3, 13 December 2012). 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 (…)" (Henckaerts, Doswald-Beck: *Customary International Humanitarian Law, Volume I: Rules,* ICRC, 2005, p. 686; commentary on Rule 157). On the other hand, it must not be forgotten that other United Nations Human Rights mechanisms have questioned - some of them 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. Similarly, after examining Spain in 2014, the Special Rapporteur for the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, and the U.N. Working Group on Forced Disappearances, 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, 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 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."

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."

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 Pedráz, the judge of Central Court nº 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: "As 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. It is no surprise that soon after this verdict, the judge Pedráz 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. 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 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).

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, which was what the then Foreign Minister, García Margallo, declared publicly: the fact that 20% of Spain's national debt was in Chinese hands was the main reason that motivated the change in legislation.

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." 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 of their citizens, before the International Criminal Court." 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. The other alternative for victims is: Go find the national court of another State, as here the doors are already closed to your cases, despite their having been investigated for over a

decade and then being closed retroactively. Without a doubt, as the Constitutional Court itself admits, "both possibilities are clearly onerous for 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 of the 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 said loophole "does not violate either articles 24.1 or 125 of the Spanish Constitution, nor art. 9.3 with regard to art. 14 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." 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 argues that the single transitory disposition of Organic Law 1/2014 does not damage the right to effective judicial protection contemplated in art. 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".

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 art. 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".

This reflection on universal jurisdiction is entitled a requiem, i.e., 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 this Constitutional Court ruling both indicate that the various appeals regarding cases of universal justice will shortly be dismissed, and will all end up in Strasburg 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, and we hope that universal justice, which has now entered a phase of rest in our country, does not remain in "eternal rest" but can be reactivated. 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.

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