



defendiendo los derechos y libertades civiles

## Third party intervention in the case of Couso Permuy v Spain

*Application no. 2327/20  
European Court of Human Rights*

November 2020

## Application No. 2327/20 – Couso Permuy v. Spain

### Third party intervention of Rights International Spain

1. This is a third-party intervention submitted by Rights International Spain pursuant to leave of the President of the Court granted on 6 November 2020, acting under Rule 44 § 3 of the Rules of the Court.

2. The intervener believes *Couso Permuy* application provides an excellent opportunity for the Court to provide clear guidance to the respondent State on how legislative reforms cannot apply retroactively to pending proceedings in such a way as to take away the right of access to a court that had been already granted and recognized to a party to a proceeding. We invite the Court to develop its case law concerning the scope of the primordial principle of legal certainty -as well as the principles of legitimate expectation, vested rights and non-retroactivity that it encompasses- in relation to legislative reforms under the protection afforded by Article 6.

3. The present intervention draws upon the standards articulated by the Court, the Court of Justice of the EU, as well as Spanish legal and constitutional doctrine. This submission will therefore: (I) provide information on the reforms of article 23.4, in particular, pursuant to Organic Law 1/2014 of 13 March 2014 and the consequences of the Single Transitory Provision; and (II) address the principle of legality and legitimate expectations.

#### **I. The reform of article 23 of the Organic Law of the Judiciary brought about by Law 1/2014 of 13 March 2014 and the Single Transitory Provision**

4. The Applicant and his family filed a complaint before the Central Court of Investigation of the National Court (*Juzgado Central de Instrucción, Audiencia Nacional*) on May 27, 2003, requesting the court to carry out an investigation to clarify the circumstances of José Couso's death, identify those responsible and prosecute them. They invoked, among other provisions, article 23.4 g) of the Organic Law 6/1985, of the Judiciary, of 1 July. José Couso, was a Spanish TV cameraman who had died in Baghdad (Iraq) on April 8, 2003, due to a missile shot by a US tank at hotel Palestina.

5. The wording of article 23.4 of Organic Law 6/1985, as in force at the relevant time, reads as follows:

“The Spanish courts shall also have jurisdiction over acts committed by Spanish nationals or foreigners outside the national territory, where those acts are classified as one of the following offences under Spanish criminal law: a) Genocide. b) Terrorism. c) Piracy and unlawful seizure of aircraft. d) Forgery of foreign currency. e) crimes relating to prostitution. f) Illegal trafficking of psychotropic, toxic and narcotic drugs. g) Any other crime that should be prosecuted in Spain under an international treaty or agreement.”

6. War crimes (“grave breaches”) as defined by the four Geneva Conventions of 12 August 1949<sup>1</sup>, as well as Additional Protocols of 1977, fell under article 23.4 g) of the Organic Law 6/1985. The Spanish Criminal Code defines and punishes “offences against persons and goods protected in case of armed conflict” in Chapter III, under Title XXIV called “Offences against the International Community”, which was introduced in the Criminal Code in 1995.<sup>2</sup>

7. Therefore, at the date on which the events took place -unlawful killing of José Couso in Iraq- the applicable law did not require the physical presence of the alleged perpetrator in Spanish territory or any other condition for the investigation or initiation of judicial proceedings.

8. The Central Investigative Judge launched an investigation and conducted an enquiry, including, amongst other measures<sup>3</sup>, sending letter rogatory to the US, requesting the cooperation of US authorities to gather information on the facts, recording the testimony of a number of witnesses, travelling to Iraq to reconstruct the facts of the event, indicting and issuing international arrest warrants against the alleged perpetrators of the death of the Applicant’s brother, even officially notifying the case to the European Network for investigation and prosecution of genocide, crimes against humanity and war crimes (known as the ‘Genocide Network’), under Eurojust (Council of the European Union) to request its assistance.<sup>4</sup>

9. Article 23.4 of Organic Law 6/1985 has been reformed since 2003. On the one hand, Organic Law 3/2005, of 8 July and Organic Law 13/2007, of 19 November, incorporated new offences to the list of offences for which Spanish courts could assert extraterritorial jurisdiction.<sup>5</sup> On the other hand, Organic Law 1/2009, of 3 November and Organic Law 1/2014, of 14 March, both limited Spanish courts’ ability to investigate and prosecute crimes committed outside the national territory by introducing a number of conditions or requirements.

10. According to Organic Law 1/2009, of 3 November:

“Article 23.4. The Spanish courts shall also have jurisdiction over acts committed by Spanish nationals or foreigners outside the national territory, where those acts are classified as one of the following offences under Spanish criminal law: .... Without

<sup>1</sup> All four Geneva Conventions were ratified by Spain on 4 August 1952. Additional Protocols I and II were ratified by Spain on 21 April 1989. It must be noted that Article 10.2 of the Constitution establishes that “the rules on fundamental rights and freedoms recognised in the Constitution will be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on the same issues ratified by Spain”. Moreover, Article 96.1 stipulates that: “validly concluded international treaties, once published officially in Spain, will form part of the internal legal system. Their provisions will only be derogated, amended or suspended in the manner envisaged in the treaties themselves or in accordance with general rules of international law”.

<sup>2</sup> Articles 608 to 614 of the Spanish Criminal Code (Organic Law 10/1995, of 23 November, of the Criminal Code, Official Gazette - B.O.E. n° 281 of 24 November 1995).

<sup>3</sup> A brief chronology of the case is available at El Diario.es: [https://www.eldiario.es/politica/cronologia-caso-couso\\_1\\_3763510.html](https://www.eldiario.es/politica/cronologia-caso-couso_1_3763510.html)

<sup>4</sup> <https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-network>

<sup>5</sup> Female genital mutilation and illegal trafficking or smuggling of migrants, Official Gazette - B.O.E n° 163, of 9 July 2005 and B.O.E., n° 278, of 20 November 2007, respectively.

prejudice to the provisions of international treaties and agreements signed by Spain, in order for the Spanish courts to have jurisdiction over the aforementioned offences, it must be established that the **alleged perpetrators are present in Spain, that there are victims of Spanish nationality or that there is some relevant link with Spain and, in any event, that no other competent country or international court has initiated proceedings**, including an effective investigation and, where appropriate, prosecution, of such crimes. Criminal proceedings initiated in a Spanish court shall be temporarily stayed where it has been established that proceedings based on the alleged acts have been initiated in a country or by a court referred to in the previous paragraph.”<sup>6</sup> (emphasis added)

11. The 2009 amendments restricting the scope and reach of Article 23.4 did not have an impact on the criminal proceedings against the alleged suspects of the death of the Applicants’ brother and the Investigative Judge continued ordering enquiry measures.

12. According to Organic Law 1/2014, of 14 March:

“Article 23.4. The Spanish courts shall also have jurisdiction over acts committed by Spanish nationals or foreigners outside the national territory, where those acts are classified as one of the following offences under Spanish law, subject to the stated conditions: (a) Genocide, crimes against humanity or **crimes against protected persons or property in situations of armed conflict, where proceedings are brought against a Spanish national, a foreign national who habitually resides in Spain or a foreign national present in Spain whose extradition has been refused by the Spanish authorities**; (...) (p) Any other offence in respect of which prosecution is required under a treaty that is in force for Spain or under other normative instruments of an international organization of which Spain is a member, in the cases and circumstances specified therein. The Spanish courts shall also have jurisdiction over the above-mentioned offences, where such offences are committed outside the national territory by a foreign national present in Spain whose extradition has been refused by the Spanish authorities, if this is required under a treaty that is in force for Spain.”<sup>7</sup> (emphasis added)

<sup>6</sup> Official Gazette – B.O.E. n° 266, of 4 November 2009. This reform included the “principle of subsidiarity”.

<sup>7</sup> Official Gazette – B.O.E. n°. 63, de 14 de marzo de 2014.

The law also included a new paragraph 5: “The offences referred to in the preceding paragraph shall not be prosecutable in Spain in the following cases: (a) Where proceedings to investigate and prosecute the offence have been initiated by an international court established in accordance with a treaty or agreement to which Spain is a party; (b) Where proceedings to investigate and prosecute the offence have been initiated in the State in which the offence was committed or in the State of nationality of the accused person, if: 1. The accused person is not present in Spanish territory; or 2. Proceedings have been initiated to extradite the accused person to the country in which the offence was committed or to the country of nationality of the victims or to bring the accused person before an international court or a court or in one of the aforementioned countries, unless the extradition is not authorized. The provisions of subparagraph (b) shall not apply where the State that has jurisdiction is unwilling or unable genuinely to carry out the investigation; this shall be determined by the Second Division of the Supreme Court, which shall be presented with a reasoned statement by the relevant judge or court. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. In order to determine inability in a particular case, the Court shall consider whether, due to

13. In addition, and importantly, Organic Law 1/2014 includes a **Single Transitory Provision**, which states the following: “**Proceedings** relating to the offences referred to in this Law **that are in progress at the time of its entry into force shall be stayed** until it can be verified that the requirements established therein have been met” (emphasis added). That is, the law specified that it would apply not only to future investigations but retroactively to open proceedings, pending before the Spanish courts, regardless of the stage reached in each case.

14. During the Parliamentary debate in Congress, the rapporteur of the Parliamentary Popular Group, which sponsored the bill, stated that the reform responded to the need to **strengthen legal certainty**<sup>8</sup> and establish mechanisms that could objectively ensure the **effectiveness of the judicial response in order to avoid disappointing the legitimate expectations of victims who seek justice** in Spanish courts.<sup>9</sup> According to the rapporteur, the new regulation would not generate spaces of impunity, but rather it would allow international crimes to be prosecuted and tried more effectively and efficiently than before, without creating false expectations for victims.<sup>10</sup>

15. On 19 February 2014, the Prosecutor’s Office of the National Court held an extraordinary meeting in order to assess the draft bill that was being debated in Congress. All 19 prosecutors unanimously agreed to convey their concerns to the State Attorney General over the scope of the proposed amendment of article 23 and the negative consequences that it could have on the investigation and prosecution of serious crimes committed outside the Spanish national territory. Among the approved conclusions, the prosecutors affirmed that the application of the new provision would lead to the **arbitrary stay of almost all the proceedings** based on the exercise of universal jurisdiction before the National Court, thus **depriving of any content basic constitutional rights such as access to a court and effective judicial protection**.<sup>11</sup>

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a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.” Translation available at [https://www.un.org/en/ga/sixth/71/universal\\_jurisdiction/spain\\_e.pdf](https://www.un.org/en/ga/sixth/71/universal_jurisdiction/spain_e.pdf)

<sup>8</sup> Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente, X Legislatura, núm. 174, de 11 de febrero de 2014, p. 19, available at

[http://www.congreso.es/public\\_oficiales/L10/CONG/DS/PL/DSCD-10-PL-174.PDF](http://www.congreso.es/public_oficiales/L10/CONG/DS/PL/DSCD-10-PL-174.PDF)

See also Javier Chinchón Álvarez “Del intento por acabar con la jurisdicción universal para el bien de las víctimas y del Derecho internacional: examen crítico de la Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal”, *Revista de derecho Penal y Criminología*, ISSN 0034.7914, nº 5, 2014, pp. 161-176.

<sup>9</sup> “[S]i no establecemos mecanismos que garanticen con objetividad la eficacia de esta respuesta penal, seguiremos defraudando las legítimas expectativas de aquellos que acuden a nuestros tribunales y, con ello, estaremos haciendo un flaco favor a la justicia, también a la universal”, *Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente, X Legislatura, núm. 174, de 11 de febrero de 2014, p. 25.*

<sup>10</sup> “[L]a regulación proyectada ...ni crea espacios de impunidad para nadie, sino que muy al contrario permitirá que estos crímenes, sin crear falsas expectativas, puedan ser perseguidos y juzgados de manera más efectiva y eficaz que antes” *Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente, X Legislatura, núm. 174, de 11 de febrero de 2014, p. 20.*

<sup>11</sup> “(...) acarreará de forma indiscriminada el archivo de la práctica totalidad de los procedimientos relacionados con el ejercicio de la jurisdicción universal que se tramitan ante los órganos judiciales de la Audiencia Nacional, vaciando de contenido derechos constitucionales básicos como el acceso a la jurisdicción y la tutela judicial efectiva frente a la ejecución de tan graves delitos y la protección de los derechos de las víctimas”, *Fiscalía General del Estado, ‘Memoria elevada al Gobierno de S.M. Presentada al inicio del año judicial por el Fiscal*

16. In sum, when a **court receives a complaint it verifies compliance with admissibility criteria that exist at that moment**. Once the court is satisfied that these criteria are met and declares the case admissible and the proceeding thus moves forward according to the applicable rules in force, the applicant **trusts and expects** the court to proceed to examine the merits and take a decision. The applicant has gained access to a court and exercises the right to the proceeding. This right cannot be eliminated because the rules governing admissibility, or the conduct of the proceeding change while the case is ongoing. This is at odds with legal certainty and the right to an effective legal remedy.

17. The complaint filed by the Applicant and his family before the National Court had been declared admissible in 2003. The requirements to obtain judicial protection pursuant to the applicable law in force at the time were satisfied and thus the Investigative Judge launched an investigation, ordering all necessary investigative actions to clarify the circumstances of the death and identify the perpetrators. Indeed, the investigation had progressed quite far: indictments were issued, as well as international arrest warrants against the US military officers, alleged perpetrators of the death of the Applicant's brother; in fact, the court had considered that the facts could amount to war crimes. **The Applicant was exercising his right to access to a court and was obtaining effective protection from the court**. However, the Applicants' right was taken away when Law 1/2014, of 13 March came into force and was applied to the case, thus leading to the unexpected termination of the proceeding. The right to a court and an **effective legal remedy had been real and effective** for the Applicant, the legitimate expectations of justice were being fulfilled up until the doors of the courts were closed because admissibility requirements were changed 11 years into the proceeding.

## II. The Principle of Legal Certainty

18. The principle of legal certainty is a fundamental principle of Western Law with a broad recognition in EU law<sup>12</sup>. It is implied in the European Convention on Human Rights and constitutes one of the **basic elements of the rule of law**<sup>13</sup>. It can be defined as an umbrella principle as it contains several other principles, including the principles of legitimate expectations, of vested rights and of non-retroactivity<sup>14</sup>.

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General del Estado Excmo. Sr. D. Eduardo Torres-Dulce Lifante' (2014), p. 235, text available at

[https://www.fiscal.es/memorias/memoria2014/FISCALIA\\_SITE/recursos/pdf/MEMFIS14.pdf](https://www.fiscal.es/memorias/memoria2014/FISCALIA_SITE/recursos/pdf/MEMFIS14.pdf)

See also Javier Chinchón Álvarez, "The Reform(s) of Universal Jurisdiction in Spain: For Whom the Bells Tolls?" (2014) Spanish Yearbook of International Law, 18, pp. 207-213 available at

[https://www.academia.edu/11311083/Chinch%C3%B3n\\_%C3%81lvarez\\_Javier\\_2014\\_The\\_Reform\\_s\\_of\\_Uni\\_versal\\_Jurisdiction\\_in\\_Spain\\_For\\_Whom\\_the\\_Bells\\_Tolls\\_Spanish\\_Yearbook\\_of\\_International\\_Law\\_18\\_pp\\_207\\_213?email\\_work\\_card=title](https://www.academia.edu/11311083/Chinch%C3%B3n_%C3%81lvarez_Javier_2014_The_Reform_s_of_Uni_versal_Jurisdiction_in_Spain_For_Whom_the_Bells_Tolls_Spanish_Yearbook_of_International_Law_18_pp_207_213?email_work_card=title)

<sup>12</sup> Court of Justice of the European Union, *Sermes*, C-323/88 (11/07/1990), ECR I-3027, p. I-3050. C107/2010.

<sup>13</sup> European Court of Human Rights, *Beian v. Rumania*, 30658/05 (06/12/2007), para 39; *Baranowski v. Poland*, 39742/05 (28/03/2000), para 58.

<sup>14</sup> Groussot, *General Principles of Community Law* (2006), Hogendorp Papers, p.24.

19. This fundamental principle requires that “rules of law be clear, precise and predictable as regards their effects”<sup>15</sup> as well as its application be “foreseeable by those subject to them”<sup>16</sup>. In this sense, the European Court of Human Rights has also ascertained this very principle of predictability<sup>17</sup>. Laws must satisfy requirements of clarity, stability, and intelligibility so that those concerned can, with relative accuracy, calculate the legal consequences of their actions as well as the outcome of legal proceedings. In other words, the principle of legal certainty determines that the law must provide citizens with the ability to regulate their conduct as well as to protect themselves from the arbitrary use of the state power.

20. The principle of legal certainty forms part of the Spanish constitutional framework, protected under article 9.3 of the Spanish Constitution, which reads as follows:

The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, the non-retroactivity 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.

21. The principle of legitimate expectation was developed after and is complementary and strongly intertwined with that of legal certainty. It protects **the legitimate expectations that the confidence in a normative action could have generated**. According to the existing EU case law we can distinguish four criteria relevant to the protection of legitimate expectations<sup>18</sup>: (1) temporal dimension, which relates to the requirement that the legitimate expectations have arisen before the contested act in question; (2) the expectation must be based on law, or a reasonable interpretation of it<sup>19</sup>; (3) good faith; (4) permanence, related to the discretionary powers and competences of the authorities.

22. The Spanish legal doctrine considers the **principle of legitimate expectations to be incardinated in that of legal certainty**. This principle was defined through several decisions of the Constitutional Court to encompass this EU legal principle of German origin. In this sense, the Spanish Constitutional Court has established that the legislator must always seek “clarity and not normative confusion” in such a way that “citizens and legal operators know what to expect”<sup>20</sup>, as “a confuse, obscure and incomplete law renders its application more

<sup>15</sup> Court of Justice of the European Union, *Costa*, C-72/10 (16/02/2012) EU:C:2012:80, para 74.

<sup>16</sup> Court of Justice of the European Union, *Plantanol GmbH & Co KG v. Hauptzollamt Darmstadt*, C-201/08 (10/09/2009), ECR. I-8343, para. 46.

<sup>17</sup> European Court of Human Rights, *Berasategui Escudero and other v. Spain*, 33637/17 and 34083/17, (26/11/2019), para 42 (sensu contrario).

<sup>18</sup> Mäenpää in Raitio, *The Principle of Legal Certainty in EC Law* (2003), Springer, p.218.

<sup>19</sup> The question is whether a “prudent man” would have had the expectation. See: Court of Justice of the European Union, *Union Nationales des Coopératives Agricoles de Céréales*, 95-98/74 15100/75 (10/12/1975) ECR 1615, esp. P.1640, para. 45; *Merkur*, 97/76 (19/05/1977) ECR 1063, esp. pp.1077-1078, para 5 and p. 1079 para. 9; *Lührs*, ECR 169 (1978), esp. p.178 para 6.

<sup>20</sup> Spanish Constitutional Court, 46/1990 (15/03/1990); 146/1993 (20/04/1993).

difficult and undermines legal certainty as well as the confidence of citizens, which can tarnish the value of justice”<sup>21</sup>.

23. Thus, the Spanish Constitutional Court considers that the principle of **legal certainty protects the confidence of citizens**, which adjust their conduct to current law, from non-predictable changes of the law, as the **possible retroactivity of a norm cannot transcend the prohibition of arbitrariness**<sup>22</sup>.

24. In the case under examination, the Applicant filed a complaint before a competent court in order to seek justice for the death in Iraq of his brother, the Spanish cameraman José Couso. The complaint was declared admissible and the competent investigative judge launched an investigation that led -after 11 years and many particular developments during the investigation- to the identification and indictment of five US military officers as alleged perpetrators of war crimes and murder. The fact that international arrest warrants were issued against them, increased the legitimate expectations that they would be prosecuted. Thus, **before the 2014 legal reform** of Article 23.4, the Applicant had a **well-founded legitimate expectation** that the investigation into the death of his brother would bring those responsible to justice. The Applicant **could not have foreseen in any way the adoption of a measure that could affect his acquired rights**, which were being already pursued before the Spanish courts.

#### **II.A. The Single Transitory Provision in light of the principles of legal certainty and legitimate expectations**

25. Although the retroactive application of norms is accepted, it is a general principle that retroactive application cannot affect acquired or safeguarded rights by constitutional guarantees.

26. The Single Transitory Provision introduced by Organic Law 1/2014 involves an **uncommon and higher degree of retroactivity with a stronger effect**, which can be referred to as “enhanced retroactivity”. This is so, because not only this legal provision establishes que interdiction of opening new proceedings unless complex and restrictive conditions are met (standard retroactivity), but it also provides the stay of all open and existing universal jurisdiction proceedings that do not meet the new restrictive requirements (enhanced retroactivity). Furthermore, the “enhanced” retroactive clause introduced in the law **deprives judges of their capacity to interpret the law, leaving no margin of appreciation**. This constitutes a **limitation of the right to access to court of unprecedented nature** in the Spanish legal system: decisions to close cases are not taken by the courts on a case by case basis, but largely by virtue of the “enhanced” retroactive clause in a law. No other legal disposition in the Spanish criminal law (including rules of procedure) has had such an impact, stripping parties to a proceeding of a right that was being exercised, with retroactive effect and without a transitory period.

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<sup>21</sup> Spanish Constitutional Court, 50/1990 (26/03/1990).

<sup>22</sup> Spanish Constitutional Court, 173/96 (31/11/1996), FJ 3; STC 273/2000 (15/11/2000), FJ 6; See also: Ugartemendia Eceizabarrena, El concepto y alcance de la seguridad jurídica en el Derecho constitucional español y en el Derecho comunitario europeo: un estudio comparado. *Cuadernos de Derecho Público* (2006), num.28 pp.17-54.



27. In addition, this **unprecedented legislative technique** employed by the Spanish legislator in the Single Transitory Provision has a **negative effect in citizens' confidence in justice**. On the one hand, it adds an element of uncertainty as regards the effects of law and, in addition, it produces legal uncertainty when applied to each individual proceeding affected by this new provision.

## **II.B. Effects of the limitations imposed by the Single Transitory Provision in the right of access to a court**

28. Article 6 § 1 of the Convention determines the right of access to a court. This right is not absolute; thus, it may be subject to limitations<sup>23</sup>. Nonetheless, the Court has established in its case law that the limits applied to the right to a court must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, the Court considers that “a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved”<sup>24</sup>. This test is equally applicable to the revision of limitations that are a consequence of the retroactive effects of laws<sup>25</sup>.

29. The Single Transitory Provision introduced by Organic Law 1/2014 **limited the Applicant's right to justice in such a way that, in practice, it proved impossible for the Applicant to continue exercising this right**.

30. The legal mechanism used to apply this limitation was the imposition of a special provisional dismissal of all open proceedings which would not comply with the new legal requirements, regardless of the stage reached. Nonetheless, **the legislator could have chosen other less restrictive mechanisms**. For example, Organic Law 1/2014 could have introduced an open retroactivity clause, giving judges a wider margin of appreciation when applying it to each individual case. However, the legislator chose to introduce a special form of provisional

<sup>23</sup> European Court of Human Rights, *Deweert v. Belgium*, 6903/75, (17/02/1980), para. 49; *Kart v. Turkey* [GC], 8917/05, (3/12/2009), para 67.

<sup>24</sup> European Court of Human Rights, *Arrozpide Sarasola and other v. Spain*, 65101/16, 73789/16 and 73902/16, (23/10/2018) para. 98-100; *Zubac v. Croatia*, 40160/12, (05/04/2018), para 78.

<sup>25</sup> See also US case-law where due process review of retroactive laws employs a version of the deferential rational basis test that normally applies to most legislation: the law needs only to be “supported by a legitimate legislative purpose furthered by rational means.” *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Nonetheless, courts consider the retroactive application of a statute separately from any prospective application, subjecting retroactive laws to somewhat more exacting scrutiny than prospective laws. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Supreme Court rejected the notion that “what Congress can legislate prospectively it can legislate retrospectively,” explaining that justifications for prospective legislation may be insufficient to support retroactive effect. However, the Turner Elkhorn Court also noted that “legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.” Rather, retroactive civil legislation violates due process only if it is “particularly harsh and oppressive” or “arbitrary and irrational.” *R.A. Gray & Co.*, 467 U.S. at 733.

dismissal that in **practical terms meant the automatic stay of all open proceedings**<sup>26</sup>. This in fact casts serious doubts on the proportionality of the means used to achieve the limitation of the scope of the principle of universal jurisdiction. The stay of almost all of open proceedings, regardless of the stage reached in each individual case, is of an unprecedented nature in Spain, and **thus can be deemed as disproportionate**.

31. The legislator did not clearly specify in the explanatory section of Organic Law 1/2014 the reasons that justified the closure of almost all open and ongoing proceedings related to universal jurisdiction<sup>27</sup>. This justification becomes even more necessary given the severe consequences: **where courts had already afforded protection to victims, by virtue of the new provision, victims were stripped of this protection, leaving judges no margin to minimize the impact**. The Single Transitory Provision thus does not have a sufficient rational justification and is hardly compatible with the pursue of a legitimate end. The means used (limitations to the access to justice introduced through a retroactive provision, which affects the principle of legal certainty) are disproportionate in relation to an end minimally respectful with justice and the rights that victims -like the Applicant- were exercising in their right to justice.

32. In fact, the new Transitory Provision caused great confusion among the Investigative Judges of the National Court. Some judges considered it gave rise to a conflict between international law and the new domestic provision and expressed doubt on the primacy of the latter over the obligations to prosecute international crimes under international law<sup>28</sup>. In fact, the introduction of this new form of provisional dismissal for universal jurisdiction cases precluded the possibility for judges of carrying out a conventionality control of domestic norms in light of international treaties<sup>29</sup>. Thus, the limitations in access to a court retroactively ordered

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<sup>26</sup> In fact, this affected 12 out of the 13 proceedings on universal jurisdiction under prosecution at the time of the legal reform. The only proceeding that complied with the new requirements was the Jesuits' case, prosecuted as a terrorism case.

<sup>27</sup> Academics and practitioners have raised important questions of the political and economic interest behind the introduction of a special provision ordering the closure of almost all open and ongoing universal jurisdiction proceedings. It is of public knowledge that some of the open proceedings in 2014 caused highly sensitive diplomatic issues with strategic allies. See <sup>27</sup>See for example: [https://www.bbc.com/mundo/noticias/2014/02/140211\\_espana\\_reforma\\_ley\\_jurisdccion\\_internacional\\_men](https://www.bbc.com/mundo/noticias/2014/02/140211_espana_reforma_ley_jurisdccion_internacional_men); <https://www.publico.es/opinion/cambio-renunciamos-jurisdccion-universal.html>; <https://www.lavanguardia.com/vida/20181027/452567226913/justicia-universal-un-caso-vivo-y-seis-durmientes-tras-la-reforma-del-pp.html> ; [https://apdhe.org/wp-content/uploads/2015/07/justicia\\_universal\\_derecho\\_internacional\\_apdhe.pdf](https://apdhe.org/wp-content/uploads/2015/07/justicia_universal_derecho_internacional_apdhe.pdf); <https://www.lavanguardia.com/politica/20140211/54400172263/congreso-aprueba-limitar-jurisdccion-universal-pp.html>.

<sup>28</sup> See for example: Auto Audiencia Nacional de 15 de abril de 2014 (Guantanamo torture case), available here <http://www.rightsinternationalspain.org/uploads/noticia/76438d276f5d83118d6f3cf7cb3bc5b12428e48f.pdf> ; Auto Audiencia Nacional de 20 de mayo de 2014, Auto Audiencia Nacional de 9 de junio de 2015.

<sup>29</sup> The conventionality control is a tool fostered by the Spanish Constitutional Court. See: Spanish Constitutional Court, 140/2018, (20/12/2018).

by the Single Transitory Provision created a climate contrary to the promotion of justice regarding international crimes<sup>30</sup> and the protection of life (Article 2 ECHR).

33. In sum, the limitations in access to a court imposed by the Single Transitory Provision entail an unjustified retroactive limitation, unreasonable and disproportionate of the Applicant's right of access to court, which seriously affects his right of having legitimate expectations of justice and thus, affecting legal certainty, in breach of Article 6 § 1 of the Convention.

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<sup>30</sup> See: United National General Assembly, Resolution 60/147, 16/12/2005, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.