UNOFFICIAL TRANSLATION

ADMINISTRACION DE JUSTICIA

NATIONAL COURT (*AUDIENCIA NACIONAL*)
CRIMINAL DIVISION (*SALA DE LO PENAL*)
SECOND SECTION

N.I.G.: 28079 27 2 2009 0002067

CASE NUMBER: APPEAL OF RULING 66/2010
ORIGINAL PROCEEDING: PRELIMINARY PROCEEDINGS ABBREVIATED 150/2009
ORIGINAL ORGAN: CENTRAL COURT INSTRUCTION NO. 5

RECORD OF PROCEEDINGS
JUDICIAL CLERK GUILLERMO FERNANDEZ REGUERA

In Madrid, on the sixteenth of May of two thousand and eleven.

I am issuing this in order to put on record that, on this day, this Section received copies of the ruling and dissenting opinion of April 6, 2011, issued by the Plenary of the Criminal Division.

It is hereby added to the case file, the parties are notified and the testimony is sent to the Court. I so attest.

NATIONAL COURT

CRIMINAL DIVISION

PLENARY SESSION

Preliminary proceedings number 150/09 of the

Central Preliminary Proceedings Court number 5.

Appeals proceeding of the Second Section no. 66/2010

ORDER

Honorable Mr. Presiding Magistrate:

Javier Gomez Bermudez.

Honorable Magistrates:

F. Alfonso Guevara Marcos.

Fernando Garcia Nicolas.

Angela Murillo Bordillo.

Guillermo Ruiz Polanco.

Angel Hurtado Adrian.

Teresa Palacios Criado.

Manuel Fernandez Prado.

Paloma Gonzalez Pastor.

Angeles Barreiro Avellaneda.

Javier Martinez Lazaro.

Julio de Diego Lopez.

Juan Francisco Martel Rivero.

Ramon Saez Valcarcel.

Clara Bayarri Garcia.

Enrique Lopez Lopez.

Madrid, April 6, 2011

BACKGROUND

1. The Public Prosecutor's office filed an appeal against the ruling of October 29, 2009 which admitted for processing the complaint filed by Lachen Ikassrien in the preliminary proceedings of Central Court number 5 summarized above.

2. Said appeal was sent to the Second Section of this Division which, in a resolution dated June 7, 2010, agreed to send it on to the president of the Division to see if he considered it necessary to refer it to the plenary according to article 197 of the LOPJ (Organic Law of the Judicial Branch).

3. As a result of a decision reached by the president of the Division on January 12, 2011, a court was called to be formed to resolve the appeal to be made up of all of the judges of the Division, and the Honorable Mr. Gomez Bermudez was appointed to be the reporting judge, and the deliberations were scheduled to start on January 27, 2011.

4. On January 24, 2011, it was shown that by mistake, the Honorable Garcia Nicolas had been omitted in the rotation of reporting judges, and a new order was issued to name that judge as the reporting judge and the proceedings were suspended until the appeal was to begin.

5. On February 1, the investigating court was asked to send a copy of a brief from the Public Prosecutor's Office submitted after the

submission of the initially sent and received copy, and as per court order of February 16, the proceedings were scheduled for February 25 and 25, 2011.

6. On the date indicated above, once the plenary session had been established with the judges listed in the first page of this resolution , the opinion of the reporting judge was not supported by the majority, and he announced a dissenting opinion, which resulted in the appointment of the Honorable Gomez Bermudez to be the new reporting judge for the majority opinion.

LEGAL FOUNDATIONS

1. Defining the scope and purpose of the appeal

The Public Prosecutor's office is appealing the court order of October 29, 2009, issued in the preliminary proceedings indicated on the cover page.

Said ruling admitted for processing *"the complaint filed by Lahcen Ikassrien, as the injured party, for torture, against the material authors and anyone else who is responsible for the acts"* (literal transcription from the effective part of the challenged order).

In addition, the resolution being appealed "dismisses" the complaint filed against the people defined in it *"because the claimed facts are not proven"* and orders the letters rogatory sent in June and October 2009 to the United Kingdom and the United States to be resent.

The facts occurred, according to the complaint, on a military base that the United States of America has in Guantanamo, Cuba.

The appeal, filed on November 13, 2009, contains 3 arguments:

a) An incongruence between the ruling part of the order being challenged and that which appears in the first and second justifications regarding the need to wait for a response from the United States of America regarding the existence of ongoing proceedings on the matter being debated before the jurisdiction where the events occurred.
b) Incongruence of omission because the resolution in question does not address all of the issues raised by the Public Prosecutor's Office in its brief of October 6, 2009.
c) Lack of jurisdiction, since the requirements imposed by the second paragraph of article 23.4 of the LOPJ, in the version given by L.O. (Organic Law) 1/2009 of November 3, are not met.

These are the terms and limits of the debate, the purpose of the appeal, the only issues that this court must respond to.

2. First and second motives for the appeal.

The challenged court order, dated October 29, 2009, cannot be understood without the order of April 27, 2009, which initiated the preliminary proceedings 150/2009 *"for alleged crimes as per articles 608, 609 and 611, in relation to articles 607 bis and 174 of the Criminal Code"* arising from events in which Lahcen Ikassrien, among others, appears as an injured party.

This first order to initiate preliminary proceedings was not appealed by the Public Prosecutor's Office, however this office, in a petition dated October 6, 2009, upon considering the notification sent to it by order of the court regarding the admission of the complaint filed by Lahcen Ikassrien, who had been injured by the events being investigated, objected to the admission of the case and to its status as an individual accusation of the person in question.

From the above, it follows that the admission of the complaint filed by Lahcen Ikassrien for processing does not imply the opening of a new proceeding, but simply the granting of the status of party to a person who already appeared as an injured party in the preliminary proceedings regarding the same events reported in the complaint, regardless of any legal ruling issued regarding these events in the interim.

Precisely because there was already a proceeding opened previously, there is no incongruence between the justifications put forth in the order being appealed and its ruling part, since the admission of the complaint does not alter nor impact the hypothetical concurrence of jurisdictions, especially when in the ruling part of the resolution the letters rogatory are to be *"resent"* to the United Kingdom and the United States of America, which are intended to determine whether or not there is an ongoing proceeding regarding the same events in a preferential jurisdiction, so that once this information is received, the presiding judge, could freely provisionally stay the proceedings or affirm Spanish jurisdiction.

In any case, the presumed injured party or victim cannot be required – as the Public Prosecutor's Office asks in its petition of October 6, 2009 – to prove that no proceedings have been initiated involving an investigation and effective prosecution of said punishable facts in any other relevant country or in an international tribunal.

This is an obligation that is not contained in the law, it is excessive and difficult or impossible to fulfill, and therefore it must be the Spanish judicial branch, on its own initiative, who must determine whether or not there is any action in the jurisdiction of the State in which the alleged facts took place – or in any other State – and in the jurisdiction of the International Community, in line with that ruled by the non-jurisdictional plenary session of this Court on November 3, 2005.

Finally, in relation to these first two reasons for the appeal, the existence or non-existence of proceedings on the same matter in other central preliminary proceedings courts exceeds the scope of an appeal against the admission of the complaint for processing. This should be resolved through the application of the rules of distribution, and in the event of a question or discrepancy, by the senior judge (article 167.2 LOPJ and similar articles of Regulation 1/2000, of July 26, of the governing bodies of the courts).

3. Relevant connection to Spain

The third and final justification for the appeal is based on the argument that the requirements listed in the next-to-last paragraph of article 23.4 LOPJ in the version given by the L.O. 1/2009 of November 3, are not met.

Said paragraph states:

"Without prejudice to anything contained in international treaties and agreements signed by Spain, in order for Spanish courts to hear the above crimes, it must be demonstrated that the alleged persons responsible are in Spain or that there are victims of Spanish nationality, or that there is some relevant linkage with Spain, and in any case, that no proceedings have been initiated that involve an investigation and effective prosecution of said punishable acts in any other country or international tribunal."

Now that the question on the final part of said precept has been resolved – regarding the existence of a proceeding in another competent country or international tribunal – since the victim is a Moroccan citizen and it has not been demonstrated that the alleged perpetrators are in Spain, the jurisdiction can only be valid if there is evidence of some linkage that connects the case in a relevant way to Spain.

Whether or not it is a *"linkage showing a relevant connection"* is a matter of law that will have to be resolved in a case by case basis, keeping in mind that the legislature, with the new version of article 23.4 LOPJ given in L.O. 1/2009 of November 3, intended to limit the so-called universal jurisdiction.

In the case at hand, it is established that the complainant, Lahcen Ikassrien, was subject to a petition for extradition sent by the Central Preliminary Proceedings Court number 5, within summary proceeding 25/03, for the crime of terrorism.

This petition was sent by the Spanish Ministry of Foreign Affairs to the United States – Verbal Note number 45 of the Embassy of Spain in the United States, June 14, 2004.

Nevertheless, Lahcen Ikassrien was delivered by the United States of America to Spain directly, outside of the extradition procedure, on July 18, 2005 to be investigated, accused and sentenced, as did in fact occur, with an Acquittal handed down by the Fourth Section of this Criminal Division on October 10, 2006 (case file 42/03 of the 4th Section, summary proceedings 25/03 JCI (Prelimnary Proceedings Court) 5), a sentence which is final – confidential note number 246 attached to pages 160 and following of summary proceedings 25/03 and copy of the sentence included in the court records.

Therefore, Spain awarded itself jurisdiction to judge the defendant for the crime of membership in a terrorist organization, based on the fact that he went from Spain to Afghanistan, via Istanbul, in November of 2000, where, after the bombing of a town located in the southern part of the country, he was captured by the United States army in 2001, remaining imprisoned in Kandahar until February 6, 2002, when he was transferred to

the prison located at the Guantanamo military base, as is noted in the proven facts of the above-mentioned sentence.

Prior to that, Ikassrien, a native of Alhucemas (Morocco), a part of the former Spanish protectorate in North Africa, had resided in Spain for more than 10 years – he came in 1988 or 1989 – and has NIE (Foreigner Identification Number) X-01347570, as appears in all of his statements contained in the appeal file.

These facts are sufficient to affirm that there is a relevant connection with Spain, since, in summary, he was born in what was Spanish Morocco – the Peñon de Alhucemas is still Spanish territory – resided in Spain legally for more than 10 years immediately prior to his detention in Afghanistan, was claimed by our country to be put on trial for membership in a terrorist organization after being handed over by the United States which waived its jurisdiction, was judged and acquitted, and therefore to now claim that these circumstances are irrelevant for determining whether or not there is a link with Spain under the terms required by article 23.4 LOPJ would ignore the content of said article.

Finally, it should not be forgotten that, in addition, in the preliminary proceedings 150/09 where Ikassrien presented the complaint, there is also a Spanish victim, Hamed Abderrahman Ahmed, which in and of itself would fulfill the requirements of the Organic Law of the Judicial Branch (LOPJ), regardless of the jurisdictions and/or the principle of subsidiarity.

By virtue of all the above, WE RULE

The appeal filed by the Public Prosecutor's Office against the court order of October 29, 2009 issued by the Central Preliminary Proceedings Court number five in preliminary proceedings 150/09 is hereby dismissed.

Notify the parties of this ruling and inform them that there this ruling cannot be appealed.

So agreed, ordered and signed by the Judges listed at the beginning.

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DISSENTING OPINION

Made by the Honorable Judges **Fernando Garcia Nicoas, Angela Murillo Bordallo, Guillermo Ruiz Polanco, Angel Hurtado Adrian, Maria de los Angeles Barreiro Avellaneda, Julio de Diego Lopez and Enrique Lopez Lopez,** in relation to the Order that dismisses the appeal made by the Public Prosecutor's Office against the Court Order of 29.10.2009 issued by the J.C.I. no. 5, in preliminary proceedings 150/09.

FIRST. The first discrepancy that the undersigned judges must point out is that, for procedural reasons, but which we feel could have legal repercussions on the right to effective judicial protection that all parties in any proceeding enjoy, because the decision being adopted now, which is based on a law that did not exist when the resolution being appealed was issued, is going to be taken in a second forum, without there having been a first forum for debate, taking into account the same terms that are now going to be used to decide, and therefore violating the principle of the right to two forums (trial and appeal), since this second forum (appeal) has become the first (trial), and there is no right to appeal against the resolution issued herein, unless one follows such broad criteria as those

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recently found in a ruling of the Supreme Court dated February 28, 2010, issued in case 20780/2010 (following the line established in Supreme Court Sentence 327/2003, of party disagrees with, but even if that was the case, one forum to disagree with has been taken away.

Given the above, those of us who disagree with the majority, know that *"criminal jurisdiction is always non-deferrable",* because that is was is established in art. 8 L.E.Crim. and repeated in article 9.6 LOPJ which, in addition, adds that *"the judicial bodies will determine on their own the lack of jurisdiction, and will resolve on the matter in a hearing with the parties and the Public Prosecutor's Office";* what happens is that the decision that allows for this legal provision should not be made without respecting a certain procedural regimen and treatment, which we feel is not respected, if it is made because of an appeal, regardless of the insistence that the court can determine this on its own at any time, since it is a question of public order.

In the case at hand, this Criminal Division, which has been charged with hearing this appeal for reasons of functional jurisdiction, is going to make a decision that affects a question of objective

jurisdiction, when it is the body whose jurisdiction is being questioned and for this reason, the first that would have to rule on this matter. That is how we understand what should happen, in light of the text that we take from S.T.C. 86/2002, of April 22, 2002, which states that *"in allegations put forth under the terms similar to those of this appeal for constitutional protection, this Tribunal has declared that the decision on a court's own jurisdiction should be made by the Judges and Tribunals before whom the action is being carried out. This matter is based, in principle, in the field of ordinary legality, and the declaration that a judicial body makes regarding its own lack of jurisdiction, which prevents it from analyzing the content of the arguments presented, does not affect the right to effective judicial protection, unless when that omission of a trial on the facts of the matter is not due to the lack of a procedural requirement or the opinion of the judicial body is not arbitrary, unreasonable or patently wrong (STC 177/2001, September 17)."*

Functional jurisdiction is a jurisdiction that is subordinate to another that precedes it, whether objective, or territorial, so that it must be the judicial body whose primary jurisdiction is being challenged which should make a pronouncement first about this matter, as we understand from a reading of art 9.6 LOPJ, when it says that *"the*

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Judicial bodies will determine the lack of jurisdiction on their own…"

It is true that the subject of the appeal is the challenges of the parties, but, to the extent that these parties have to argue about the factual and legal evidence that are at their disposal, if later other legal or factual evidence is applied or taken into account in the ruling, which the parties have not had the opportunity to review, the right to a defense is being violated. We say this, because, taking into account that ours is a system of limited double forums, it has to be limited to a simple review of what was decided by the judge whose decision is being reviewed, which implies determining if that decision is correct or not, as a function of the factual and legal material and evidence that existed when the decision in question was made, because that is the way in which the two judicial bodies, the *"a quo"* and the "*ad quem",* can be in the same situation. Operating in any other way means going outside of the terms of the debate and issuing a resolution without hearing the parties on issues that are fundamental for the decision being made.

In the case at hand, we feel that that is what has happened, because, in looking at the ruling being challenged on universal jurisdiction, it was issued before

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the reform to article 23 LOPJ made by L.O. 1/2009 of November 3 (B.O.E. of November 4), which has implied a fundamental change when it comes to applying criteria to establish the jurisdiction of Spanish courts in this area, to the point that, if in the opinion of the "a quo" judge to establish his jurisdiction to hear the alleged criminal acts affecting Lahcen Ikassrien, according to said article before the reform, coverage could be found. The issue is not so clear after the reform, as is evidenced by the fact that the resolution being dissented with, which is signed by sixteen magistrates, is disagreed with by no less than seven, through this dissenting opinion, for fundamental reasons, since they believe that there is no link that makes it possible to hear those allegedly criminal acts committed to Lahcen Ikassrien.

SECOND. At the center, this case must be resolved taking into account the current legislation existing in our country with respect to the so-called Principle of Universal Prosecution of crimes, and concretely after the reform passed by Organic Law 1/2009 of November 3, which is complementary to the law reforming procedural legislation to establish the new judicial office, which modifies

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Organic Law 6/1985, of July 1, of the Judicial Branch.

This reform was originated with a **Resolution approved by the Congress of Deputies** which calls on the government to urgently reform article 23 of the LOPJ, in order to limit and clarify the reach of universal criminal prosecution, according to the principle of subsidiarity and jurisprudence of the Constitutional Tribunal and the Supreme Court; that is, it should be shown that the alleged perpetrators are in Spain or that there are victims who are Spanish nationals, and in any case, that there are no criminal proceedings which have begun in the country where the criminal acts took place or before an international tribunal which include an investigation and effective prosecution of said punishable acts. The resolution also established that a criminal proceeding initiated within Spanish jurisdiction will be provisionally suspended when there is evidence that another proceeding has begun on the events being denounced in the country, or by the Tribunal for those referred to in the previous paragraph.

This resolution went on to literally present the reasons for the reform law as follows: *"In compliance with the mandate issued by the Congress of*

Deputies, in a resolution adopted on May 19, 2009 during the debate on the State of the Nation, a change is being made in the treatment of what has come to be called "universal jurisdiction", through a modification of article 23 of the Organic Law of the Judicial Branch, in order to, on the one hand, incorporate types of crimes that were not included and the prosecution of which is protected in the conventions and customs of International Law, like crimes against humanity and war crimes. On the other hand, the reform makes it possible to adapt and clarify the precept according to the principle of subsidiarity and the doctrine emanating from the Constitutional Tribunal and the jurisprudence of the Supreme Court."

The legal text (art. 23.4 LOPJ) ended up reading as follows: *"Without prejudice to anything contained in international treaties and agreements signed by Spain, in order for Spanish courts to hear the above crimes, it must be demonstrated that the alleged persons responsible are in Spain or that there are victims of Spanish nationality, or that there is some relevant linkage with Spain, and in any case, that no proceedings have been initiated that involve an investigation and effective prosecution of said punishable acts in any other country or international tribunal. Any criminal proceeding initiated within Spanish jurisdiction will be provisionally*

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suspended when there is evidence that another proceeding has begun on the events being denounced in the country, or by the Tribunal for those referred to in the previous paragraph."

From all of these background facts, it is clear what the legislature's intent was, which is what was in fact expressed in the legal reform that was adopted, and therefore in order to interpret the law, the first rule would be that of authentic interpretation. And that is where we see that the intention of the Congress of Deputies was to implement a legal reform **to limit and clarify the scope of the principle of universal criminal jurisdiction, in accordance with the principle of subsidiarity and the jurisprudence of the Constitutional Tribunal and the Supreme Court;** that is, it is clear that the legislature's intent was to limit the application of the principle of universal prosecution, and this intent, regardless of any personal opinions that one might have, must be taken into account as a criteria for interpretation. This intention was translated into the presentation of the motivations for the reform to the LOPJ, with the intention of adapting and clarifying the precept in accordance with the principle of subsidiarity and the doctrine issued by the Constitutional Tribunal and the jurisprudence of the Supreme Court. To do this, one must also take into account the doctrine established by these high courts, especially the Constitutional Tribunal, Second Chamber, Sentence 237/2005 of Sept. 26, 2005, which deems that the appeal filed against the decision

made by the Supreme Court, Second Criminal Division, of February 25, 2003. This sentence states that the law before it was reformed granted, in principle, a very broad scope to the principle of universal justice, since the only express limitation introduced to it is *res judicata*; that is, the criminal cannot have been acquitted, pardoned or convicted abroad. In other words, from an interpretation of the literal sense of the precept, as well as of the will of the legislature, it is necessary to conclude that the LOPJ establishes a principle of absolute universal jurisdiction, that is, that are not subject to any restrictive criteria of correction or eligibility, and without any hierarchical order with respect to the rest of the rules of jurisdictional allocation, since, as opposed to other criteria, the universal justice criteria is based on the particular nature of the crimes being prosecuted. In addition, the abovementioned resolution already stated that, based on its theoretical formulation, the principle of subsidiarity should not be understood as a rule that opposes or differs from the rule introducing the so-called principle of concurrence, because, in the face of concurring jurisdictions, and in order to prevent a duplication of processes and a violation of the interdiction of the *ne bis in idem* principle, it is essential to introduce some rule of priority. Since it is a common commitment (at least at the level of principles) of all States

to **prosecute** such atrocious crimes because they affect the International Community, a reasonable procedural and political-criminal element has to give priority to the jurisdiction of the State where the crime was committed. The Supreme Court, full of common sense but without the proper legal support, attempted to limit the scope of the principle of universal prosecution to the presence of national victims or the existence of a national interest, and the Constitutional Tribunal considered these criteria to be limiting of the right to effective judicial protection in terms of access to jurisdiction, since it demands that the connection to national interests be evident in direct relation to the crime that is serving as the basis to assert jurisdiction, expressly excluding the possibility of more relaxed interpretations (and thus more in agreement with the *pro actione* principle) of said criteria, such as that of linking the connection to national interests with other crimes connected to the crime in question, or more generically, with the context surrounding the crimes. But it is obvious that the reasoning of the Supreme Court was based on the absence of a legal provision, a situation which we find ourselves in at this very moment. Of all of the possible limiting criteria, our legislature chose the following:

- that the alleged perpetrators of the crime are in Spain

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- that there are victims of Spanish nationality

- that there is some relevant linkage with Spain

In addition it reinforced the principle of subsidiarity with the phrase "that in any other relevant country or in an International Tribunal no proceedings have been initiated which involve an investigation and an effective prosecution of said punishable acts."

THIRD: LACK OF JURISDICTION BECAUSE OF NO ESTABLISHED RELEVANT LINK OR CONNECTION TO SPAIN (next-to-last paragraph of art. 23.4 LOPJ in the version given by L.O. 1/2009 of November 3, which is literally transcribed in the Foundation of Law No. 3 of the Ruling of March 30, 2011, which is respectfully being disagreed with).

It is true that what a "relevant connecting link" is, is a question of law that has to be decided upon case by case, since the legislature, with the new version of art. 23.4 LOPJ contained in L.O. 1/2009 of November 3, wanted to limit the so-called universal jurisdiction.

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It is true that since the victim is of Moroccan nationality and there is no evidence that the alleged perpetrators are in Spain, the jurisdiction can only be asserted if there is evidence of a "relevant connecting link with Spain" and that the content of this connecting link is a question of law that has to be resolved case by case.

The majority is basing their establishment of said link on various factors. However, we disagree that these factors meet the legal requirement, for the reasons stated below:

1) That Ikassrien is a native of Alhucemas, a part of the former Spanish protectorate of Morocco, is incontrovertible.

But we are far removed from the colonial era, Morocco is a sovereign country, and any link with the former empire beyond simple geographic proximity and normal diplomatic relations has been dissolved.

2) That IKASSRIEN had legally lived in Spain for over ten years – he came in 1988 or 1989 and had Foreigner ID Number X-01347570, is not exactly true, because in an investigatory legal testimony that he gave on July 18, 2005, in summary proceeding 25/03 of J.C.I. no. 5, he says that

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He was living in Spain for thirteen years with papers, but he was in prison for three and a half years for marijuana trafficking and therefore his papers were revoked. Then, he applied for them and was denied. And he never had problems with the Moroccan police because of terrorism (p. 143). In early November 2000, he left Spain (p. 22, volume 1), and did not return until 18 July, 2005, when he was handed over by the U.S.

According to the complaint filed on his behalf on September 24, 2009, by attorney Morales (page 920 and following, 2nd Volume bis), he applied for asylum, and he was denied, notification of which was sent on September 29, 2009 (p. 1313 and 1316).

In the documents attached to the complaint, there is a report from the Central Unit of Foreign Information, according to which he had legal residency in Spain and was engaged in the retail sale of drugs and telephone cards (p. 1268).

In the complaint, he asked to be considered as a protected witness, and when his asylum was denied, he re-submitted the petition (p. 1313), which the Court denied in another order of the same date of the order being appealed, October 19, 2009, but which guaranteed his ability to remain in Spain as a victim-witness (p. 1327).

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As a result, from all of this information, one can conclude that the complainant ISSKARIEN lacks the necessary roots in Spain to make this a factor, which together with the one analyzed above, could justify this relevant connecting link required by art. 23.4, second paragraph, LOPJ.

3) That LAHCEN ISSIKARIEN was accused by our country to be tried for membership in a terrorist organization in summary proceedings No. 25/03 of the J.C.I. No. 5, in which the Spanish Ministry of Foreign Affairs requested his extradition from the U.S.A. via Verbal Note number 45 of the Embassy of Spain in the United States dated June 14, 2004, and was delivered by the United States of America to Spain, outside of the extradition procedure, on July 18, 2005 to be put on trial, as did in fact occur, when he was acquitted in a sentence handed down by Section 4 of this Criminal Division on October 10, 2006 (Case file 42/03 of Section 4, arising from summary proceeding No. 25/03 of J.C.I. No. 3), appearing in pages 22 and following of Volume 1, a sentence which is final. But this situation does not have enough evidentiary weight , neither in and of itself nor in light of the previous factors analyzed, to constitute a relevant connecting link with Spain.

And that is because the accusation for which he was acquitted in our country was not linked to acts that occurred

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abroad for which Spain claimed universal jurisdiction, but rather on the basis of his alleged recruitment and membership in Spain of a terrorist organization (recruitment, membership and funds provided by the person responsible for the Al Qaeda network in Spain, Imad Edwin Barakal Yorkas, a.k.a. Abu Dahdah, who was convicted of the crime of belonging to an armed group in a sentence handed down by Section 3 of this Criminal Division on September 26, 2005, and confirmed by the Supreme Court on May 31, 2006). Therefore, action was taken on the basis of the ordinary principle of territoriality, and there can be no connection shown between the case in which he was prosecuted and acquitted and this case about torture received on the U.S. military base at Guantanamo (Cuba), which establishes Spain's duty to extent its jurisdiction to a case that it does not reach according to the repeatedly referred-to second paragraph of article 23.4 LOPJ, in the version given by L.O. 1/2009 of November 3, and which would be contrary to the mandate of articles 8 LECrim., and 9 LOPJ, which determine that Criminal Jurisdiction is always non-extendable.

4) That in addition, in these preliminary proceedings 150/09 where IKASSRIEN presents a complaint, there is also a Spanish victim, Hamed Abderrahman Ahmed, which by itself meets the requirement of the LOPJ,

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Regardless of the concurrence of jurisdiction and/or the principle of subsidiarity.

However, on the one hand, this interpretation would lead to the absurdity of extending Spanish jurisdiction to all people who have been or who are interned on the Guantanamo Military Base, and on the other, the legal reform is conclusive, since in the current state of the case it is not feasible to continue the proceeding except for crimes committed against Spanish victims, but not against those committed against foreign victims, unless there is evidence of some relevant connection to Spain, which is not the case within this appeal, as is defined in the Legal Foundation 1 of the Ruling of the Plenary Session.

For all of these reasons, we feel that the appeal for reversal filed by the Public Prosecutor's Office against the Order of October 29, 2009, issued by the Reporting Judge of the Preliminary Proceedings 150/09 of J.C.I. No. 5, should have been granted.

In Madrid, on April sixth, two thousand and eleven.

Thus signed the Magistrates who form part of this dissenting opinion.

RECORD. In Madrid, on the thirteenth of May of two thousand and eleven. I, the Secretary, am issuing this record, in order to certify that we received in this Division on this date the dissenting opinion issued by the Honorable Magistrates Fernando Garcia Nicolas, Angela Murillo Bordallo, Guillermo Ruiz Polanco, Angel Hurtado Adrian, Angeles Barreiro Avellaneda, Julio de Diego Lopez and Enrique Lopez Lopez, in relation to the ruling of the Plenary session dated April 6, 2011. Copies are to be made of said ruling and the dissenting opinion and sent to the Second Section to be incorporated into the records of court 66/2010 and sent to the parties; I so certify.