Central Court for Preliminary Criminal Proceedings
Number 6 – National Court

DPA 134/2009

TO THE COURT

I, Javier Fernandez Estrada, Attorney 561 of the Courts of Madrid and of the **SPANISH ASSOCIATION FOR THE DIGNITY OF PRISONERS**, as is established in the court records, come before the Court and in proper legal form, I STATE:

In carrying out the April 7, 2010 order of this court of which this party was notified on April 8, 2010, we hereby come TO **URGE THAT THE INVESTIGATION IN THIS PROCEDURE CONTINUE, INASMUCH AS THE AMENDMENT MADE TO ARTICLE 23 OF THE L.O.P.J. [Organic Law of the Judiciary] WOULD NOT AFFECT THIS CASE;** we base this position on the following

ARGUMENTS

ONE: Regardless of the questions that could raised constitutionally on the manner in which the amendment of the aforementioned article 23 of the L.O.P.J. was carried out, and on the current content of that provision and

the reasons prompting that amendment, the fact is that the current wording of the provision has the effect of establishing that:

> *4. Spanish jurisdiction shall likewise be competent to try deeds committed by Spaniards or foreigners outside Spanish soil which can be classified according to Spanish law, as one of the following crimes:*
>
> *a) Genocide and crimes against humanity.*
>
> *b) Terrorism.*
>
> *c) Piracy and hijacking of aircraft.*
>
> *d) Crimes related to prostitution and corruption of minors and the disabled.*
>
> *e) Unlawful traffic in psychotropic, toxic, and narcotic drugs.*
>
> *f) Unlawful traffic or clandestine immigration of persons, whether workers or not.*
>
> *g) Those related to female genital mutilation, provided those responsible are in Spain.*
>
> *h) Any other which according to international treaties or conventions, in particular conventions on international humanitarian law and protection of human rights ought to be prosecuted in Spain.*
>
> *Without detriment to what might be provided for in international treaties and conventions signed by Spain, in order for Spanish courts to be able to try the aforementioned crimes it must be established that the purported perpetrators are in Spain or that there are victims of Spanish nationality, or that there is some relevant connecting tie with Spain and, in any case, that no procedure has been initiated in another competent country or in an international court entailing an investigation and effective prosecution, if appropriate, of such punishable acts.*

The criminal action begun before Spanish jurisdiction shall be provisionally stayed when there is proof of the beginning of another court procedure on the deeds about which accusation has been made in the country or by the court mentioned in the previous paragraph.

5. If the criminal case is pursued in Spain under the circumstances regulated in the foregoing clauses 3 and 4, what is set forth in letter c) of clause 2 of this article shall in any case be applicable.

Upon examination of these articles it is obvious that the current requirements that are to be present in order to establish the competency of Spanish jurisdiction to investigate such deeds committed outside Spain are that:

a.- *it be established that the presumed perpetrators are in Spain or that there are victims of Spanish nationality,*

b.- *or that some significant connecting bond with Spain be established,*

c.- *and in any case, that no procedure has been initiated in another competent country or in an international court involving an investigation and an effective prosecution, if appropriate, of such punishable acts*

However, the requirements – which are not cumulative in nature – require a detailed and particularized analysis in terms of the deeds that are the object of this procedure which are established in our complaint and those deriving from it, as shall be analyzed in the body of this brief.

TWO: With regard to the need to establish that the first of the requirements is met, that is, establishing the presence in Spain of the presumed

perpetrators, or alternatively, the existence of victims of Spanish nationality we believe that:

It is, prima facie complex to establish whether any of the perpetrators is currently in Spain or not, fulfilling that requirement would necessitate establishing a prior investigation, a determination of all of those responsible, and then attempting to locate them, in order to state on that basis whether or not that legal requirement had been met. Obviously we have here a legal provision characteristic of any amendment of a law, made hastily, on the run, and without the necessary prior parliamentary study.

Since the amendment of the law which prompts the procedure here is public knowledge , it is obvious that the Law was modified for the sake of a specific case, and, as is to be expected, such modifications bring about questions as absurd as fulfillment or not of this requirement, whereas, as we said, it is clear that in order to determine the presence or not of one of those responsible for these deeds, those very deeds first have to be investigated and those possibly responsible determined.

THREE: With regard to the existence of victims of Spanish nationality, we can indeed establish that this requirement is met inasmuch as a series of person were held at Guantanamo, where the tortures described in the body of our complaint were applied, including: **Hamed Abderrahman Ahmed, Reswad Abdulsam, and Lahcen Ikassrien. T**he first two of them are of Spanish nationality and the second is a resident in Spain or has legal status like that of resident inasmuch as he cannot leave Spanish territory.

Obviously, matters like the Spanish nationality or residence of these persons as well as being the direct victims of these deeds is something that

will have to be determined in the pre-trial investigation phase, but since these events are public knowledge they ought to be accepted initially as relevant information in determining the continuation of this procedure by acknowledgement of Spanish jurisdictional power for investigating and prosecuting it.

However, just as it happens with the requirement examined in argument three, it is obvious that in order to determine the existence or not of Spanish victims, an investigation proper to the preliminary investigation phase would have to be made. In other words, it cannot be determined whether a requirement of these characteristics is present until the procedures aimed at determining the facts, their victims, and then their possible nationality have been carried out.

There seems to be confusion with regard to what the lawmakers had in mind and just what is said in the new wording of the provision contained in article 23 of the LOPJ inasmuch as surely the lawmakers intended to prevent access to jurisdiction, and due to their haste and lack of study, they passed legislation which – interpreted literally on the basis of article 3 of the Civil Code – makes it obligatory to investigate in order to establish whether or not the legal requirements demanded to establish whether they are or not subject to Spanish jurisdiction are met.

Stated in other terms, the requirements introduced in the amendment of article 23 of the LOPJ make it obligatory to carry out a preliminary investigation phase almost as extensive as that required to issue a bill of indictment in any preliminary proceeding, or even more so, because to establish whether the requirements for jurisdiction have been met, it is necessary to establish well the victims or the perpetrators, and previously,

the events of which some would be the victims and others perpetrators must be established; all of which leads us to the moral of the story that the legal change wrought flatly entails a greater guarantee of effective judicial protection because a case cannot be dismissed without first having been investigated; otherwise it would be making a mockery of the rules for interpreting the norms established in the aforementioned article 3 of the Civil Code.

FOUR: Nor can we fail to state that it is likewise our understanding that as if the foregoing were not sufficient, another requirement is met for continuing this procedure in this venue, namely that of "…*establishing that there is some significant connection with Spain."* That is the case for various reasons, such as:

- There are other victims of the deeds committed in Guantanamo who have a special connection to Spain, such as Mr. Jamiel Abdul Latif al Banna and Mr. Omar Deghayes who, while they are not of Spanish nationality have been persons at one time sought by Spanish judicial officials and whose extradition to Spain was denied by British officials due to their unfortunate state of health as a result of the tortures suffered at that detention center by virtue of the directives issued by the accused in this procedure.

  Obviously, we have here a special connection inasmuch as it is Spain, through its jurisdictional bodies, that showed special interest in them which took the form of joint request for international judicial cooperation consisting in its respective extradition claims and hence that "*significant connection with Spain*" can now scarcely be denied,

unless the aim is to establish that that legal premise has no other meaning than the literal one.

- Nor can the publicly known fact that the government of Spain has pledged to bring to the country other victims of the events in Guantanamo not have a special bond or entail a "significant connection to Spain"; today there should be at least two persons from Guantanamo on Spanish soil; that, by virtue of actions of the state, has the effect of establishing a tie that is not only special but most special, implying fulfillment of this requirement.

  As will certainly be understood, only in cases where there is a "significant connection with Spain" would the Government have committed itself and actually brought to the country people from Guantanamo, that is, it is precisely by this "significant connection with Spain," by which action is taken to bring these people into our country, and, accordingly, we think the aforementioned requirement is likewise met.

  It cannot be argued that this special connection does not exist when it is the executive branch itself that has taken a measure that we regard as correct and that ought to be appropriately appreciated; obviously and in order withdraw from such an ignominious situation as that created in Guantanamo, governments and countries that have a "significant connection" with the defense of human rights have hastened to arrange to receive persons who for years have been abducted, tortured, and deprived of the most fundamental of their rights. While Spain has committed itself to bringing in a small number, there is no reason to keep the number of victims brought in

here from expanding. In any case, however, what is important for our position is proving, through actions that are proper to the State, that this requirement established with the legal modification done to the LOPJ is additionally satisfied in the terms set forth in the court order considered in this brief.

This party rejoices that the Spanish Government has begun to bring in victims of Guantanamo and its tortures and we are convinced that this represents progress in the area of fundamental rights and an implicit recognition of the special connection that the events that have taken place in Guantanamo have with our country.

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FIVE: in relation to the strict requirement that: "…, *in any case, no procedure has been initiated in another competent country or within an international court entailing an investigation and an effective prosecution, if appropriate, of such punishable acts*, it is also public knowledge that:

a.- There is no criminal procedure open in any other competent country,
b.- Nor is there any procedure before any international court.

It is clear that this new legal requirement will have to be developed somewhat further inasmuch as it will be the route sought by the Office of the Public Prosecutor to attempt to shelve these proceedings, and, in this regard, to indicate that:

It is not simply a matter of there being a procedure in another jurisdiction but that the case in question consists of an investigation and effective prosecution.

It does not suffice that there be mere investigation commissions within the military, as done by Israel, or in the political sphere (as some investigations have been done by parliaments in various countries), or that such investigations not lead anywhere after many years, as Israel has also done, deceiving the Office of the Prosecutor of this National Court in other cases previously opened in this court. Rather, the issue is that there be authentic criminal procedures to determine responsibilities. In this regard, it scarcely needs saying that it is publicly known that there has been no criminal procedure whatsoever in the United States, let alone the existence of any before an international court.

For the deeds of concern in this procedure there is no criminal investigation whatsoever. The best proof of that is the obstinate silence of United States authorities, who upon being summoned on the matter thus far have not provided a single document to dispel these representations. Perhaps it is the very transparency of the American administration that prevents them from sending information which would only support what we are saying, since it is public and published information which shows that there is no criminal proceeding whatsoever for these deeds.

SIX: Regardless of the amendment to the law, the rule contained in article 23, sections 4 and 5, of the Organic Law of the Judiciary must be interpreted systematically in accordance with:

a.- the rest of Spanish legislation, comprising both national legislation and international treaties signed by Spain, and

b.- in keeping with constitutional precedent issued to date with regard to the scope of Spanish jurisdiction for trying the most serious international crimes.

In other words, the aim cannot be to make a literal and linear interpretation of a rule of doubtful constitutionality, because, to do so would entail a violation of constitutionally protected fundamental rights.

The fundamental right to effective judicial protection, in its aspect of access to the courts, or the so-called *pro actione* principle, entails, in the event of violation, the right to obligate the judicial agencies to interpret the requirements for a trial proportionally *"preventing particular interpretations and applications of them from eliminating or disproportionately hindering the right to have a court body hear and decide in the law on a claim presented to it"* (for all, STC 122/1999, June 28, FJ 2).

Likewise, the Constitutional Court has declared that:

> *For the sake of a thorough understanding of the scope and inclusion of the* pro actione *principle under the protective sphere of art. 24.1 CE, it is not improper to insist that* ***the more incisive character of the rule of access to court procedure in the sense that judicial interpretations of procedural legality that satisfy the test of reasonability, and of those "whose correctness from a theoretical standpoint" might be claimed, may entail a "denial of access to jurisdiction based on an excessively rigorous consideration of applicable law"*** **(**STC 157/1999, September 14, FJ 3**) and *thereby violate the right to effective judicial protection in that aspect.***

With regard to the obligation of all states in the international community to pursue these very serious crimes, we may cite the minority opinion of the dissenting magistrates in the case of the crimes of Al Daraj – Gaza (dissenting vote to Ruling 1/2009 of the Court in the Criminal Division) – a legal text that is obligatory reading for any lover of the law. In it they stated impeccably that:

> *"By virtue of the principle of universal jurisdiction any State may exercise jurisdiction in the face of grave offenses against the interests of the international community, regardless of the place where the crime was carried out and the nationality of the perpetrator or the victim (thus is it stated in the presentation of reasons in LO 13/2007, which brought clandestine immigration into the list in art. 23.4 LOPJ, and art. 5.1 of the Statute of the International Criminal Court).* ***The very reason that a universal jurisdiction exists is to prevent the (enormous) impunity of these crimes; such impunity is largely due to the position occupied by the perpetrator in the power structure of the State****; because war crimes, those of genocide and of crimes against humanity, torture, and forced disappearance share one feature: they are crimes of the state, in its worst meaning. Hence the difficulty, which often becomes impossibility, of pursuing grave international crimes, either because their perpetrators wield power, they are heads of state, or because they have the capability to neutralize court action. This case is a clear instance: the respondents at the time of the aerial attack that caused the death of innocent civilians were in the top positions in the government and in the military command structure of the state of Israel.*

> ***Universal jurisdiction seeks to dispense a minimal protection for basic human rights, starting with life itself, by means of a procedural guarantee. The idea must be repeated: some crimes are so horrible that they must not remain unpunished.*** *The decision of the Court ignores this dimension of the problem, impunity and the need to bring it to a halt.*

This same meaning has already been given form in the well known Constitutional Court ruling 237/05, case of Guatemala:

> *The international and trans-border prosecution that the principle of universal jurisdiction intends to compel is based exclusively on the particular characteristics of the crimes yielded to its authority. The injurious nature of these crimes (exemplified in the case of genocide) transcends the particular victims and reaches the international community as a whole.*
>
> ***Consequently, its prosecution and punishment constitute, not only a commitment, but also a shared interest of all of the States*** *(as we affirmed in STC 87/2000, on March 27, FJ 4), whose legitimacy does not depend upon the specific subsequent interests of each one of them. Similarly, the conception of universal jurisdiction in current active international law is not formulated around the points of connection based on particular State interests. This is illustrated in Article 23.4 LOPJ, the cited German law of 2002, or, to provide more detailed examples, the decision adopted by the Institute of International Law in Krakow on August 26, 2005, where, after expressing the aforementioned commitment of all the states, universal jurisdiction is legally defined as "the competence of a state*

> *to prosecute and, in cases where they are found guilty, punish the alleged delinquents, regardless of where the crime was committed and without considering active or passive nationality or other rules of jurisdiction recognized by international law.*

Therefore the guiding idea of the internationally enshrined principle of universal jurisdiction is simply that of preventing impunity, and hence there ought to be no impediment to implementing it, inasmuch as it is conceived as an absolute principle.

Along the lines of the foregoing, it is well to be reminded of constitutional jurisprudence in this regard, and for that purpose starting with **STC 21/1997, February 10** which declared:

> "*it is well to be reminded here, on the one hand, that Spanish authorities are just as subject to the Constitution when they act in international relations ... as in exercising their authority domestically, as has been said in the Declaration of this Court on July 1, 1992, juridical basis 4, and that applies applicable to officials and employees under those authorities …*
>
> *. ..if the mandate of art. 10.2 CE makes it obligatory that provisions of the constitution be interpreted in accordance with the international norms on the protection of human rights, it should also be kept in mind that the European Court of Human Rights has declared in relation to art. 1 of the Rome Convention of 1950,* ***for the purposes of protection that this instrument guarantees, the realm of state jurisdiction is not circumscribed to the territory of the nation."***

A faithful reflection of the values contained in the foregoing ruling is **STC 91/2000**, which in its FJ 6º tells us that:

> *"Examining first the presupposition that* ***the Spanish authorities can violate fundamental rights "indirectly" when they recognize, approve, or give validity to rulings made by foreign authorities, it must be stated unequivocally that it is supported on the repeated precedence of this Court****. Our statements along these lines have to do with both cases of extradition, and judicial decisions of approval of rulings issued by foreign courts, through the mechanism of the* exequatur*; both are instances in which Spanish court bodies have to take a position on the constitutional validity of rulings issued by non-Spanish courts, even though the Spanish Constitution governs solely within the country.* ***They of course include the extraterritorial activity of our national authorities.****"*

The same ruling continues on FJ 7º reasoning that:

> *"With the possibility of "indirect" infringements of fundamental rights thus established, and moving on to analyze its basis, it is clear that the foregoing presentation entails, at least prima facie, a paradoxical result. The fact of the activity under examination from the constitutional standpoint is that of Spanish courts does not wholly eliminate it****; for the fact is that the assessment of whether the national courts have violated the Constitution or not is based on a prior assessment, on whether the past or future activity of the agencies of a foreign State (obviously not subject to the Spanish Constitution) turns out or can turn out to violate the fundamental***

rights recognized in it, to the point of invalidating the general principle of excluding all investigation in this regard.

...For indeed, in order to carry out this determination, the Spanish Constitution of 1978, ***in proclaiming that the basis of "of the political order and social peace" resides first of all, in "the dignity of the person"*** *and in "the inviolable rights inherent in him or her" (art. 10.1) it expresses a claim of legitimacy and, at the same time a criterion of validity, which* ***by their very nature are universally applicable****. As we have said on various occasions when "projected onto individual rights, the rule of art. 10.1 CE means that as 'spiritual value and morality inherent in the person' (STC 53/1985, April 11, FJ 8)* ***dignity must remain unaltered regardless of the situation in which the person finds himself or herself ... constituting consequently an inviolable minimum that any legal framework must assure*** *" [STC 120/1990, June 27, FJ 4; also STC 57/1994, February, FJ 3 A)]. And hence* ***the Spanish Constitution absolutely safeguards those rights and those contents of rights "that belong to the person as such and not as citizen, or to put it another way... those that are absolutely necessary for guaranteeing human dignity"*** *(STC 242/1994, June 20, FJ 4; along the same lines, SSTC 107/1984, November 23, FJ 2 and 99/1985, September 30, FJ 2)."*

...Only the irreducible core of the fundamental right inherent to the dignity of the person can reach universal projection; but in no way could the specific configurations with which our Constitution recognizes it and grant it efficacy have it. Thus, upon analyzing this question in relation to the guarantees contained in art. 24 CE, the

SSTC 43/1986, FJ 2 and 54/1989, FJ 4, they have indicated that ***while indeed foreign Courts are not bound by the Spanish Constitution nor by its list of rights protected by the appeal for protection of rights [recurso de amparo], fundamental rights are indeed violated by rulings of the Spanish court bodies that approve "a foreign judicial ruling under the circumstances in which it ought to have been repelled by the public order of the court, because it is contrary to the essential principles contained in art. 24 of the Constitution."***

*This last idea " has thus acquired in Spain a different content, imbued in particular with the demands of art. 24 of the Constitution," inasmuch as "****although the fundamental rights and public liberties guaranteed by the Constitution only reach full efficacy where the exercise of Spanish sovereignty is in effect, our public officials, including the judges and courts, cannot recognize or accept rulings issued by foreign authorities that entail violation of the fundamental rights and public freedoms guaranteed constitutionally to Spaniards, or if applicable, to Spaniards and foreigners****" (STC 43/1986, FJ 4).*

In short, we believe that the legal introduction of the principle of subsidiarity as applied to universal jurisdiction through the amendment of the often cited article 23 of the LOPJ is nothing but a juridical creation contrary to our legislation whose constitutionality is more than dubious.

That said, in the case before us not only is there no subsidiarity – because nothing is being investigated there – but rather all the requirements of current legislation for continuing with this investigation are met.

SEVEN: In order to better support our position, this party has believed it useful to have a legal report issued jointly by the ***CENTER FOR CONSTITUTIONAL RIGHTS*** in New York (USA) and the ***EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS*** in Berlin (Germany) in which a series of data and reasons are presenting leading to the conclusion that Spain, in general, and this Central Court in particular not only may, but indeed must, investigate the deeds that are the object of this procedure.

In this case that legal report serves not only to support our positions, but also as an expert report the ratification of which is presented in a separate pleading.

At this time, and for reasons of time it is presented as a copy – DOCUMENT ATTACHED – and this party promises to provide the original as soon as possible.

EIGHT: All the foregoing notwithstanding, this party believes– as we have been arguing – that there is an obvious unconstitutionality in the norm contained in article 23 of the LOPJ, an unconstitutionality deriving both from its content and from the way in which that norm has been introduced into our legislation.

It suffices to recall that there are even some proposals or petitions presented to the Ombudsman to attempt to achieve an official statement that that rule is unconstitutional. In one of them a passage reads as follows:

Although mention is made of what is set forth in international law, the reference to "without prejudice to what may be set forth in international treaties and conventions signed by Spain" abstracts precisely from what the latter order. In this sense it should be recalled that article 10.2 of the Spanish Constitution states that:

> *Norms related to fundamental rights and to the freedoms recognized by the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights and the treaties and international agreements on the matter ratified by Spain.*

Moreover, article 96.1 of the same legally-binding text states that:

> *Validly entered international treaties, once published officially in Spain, shall form part of domestic legislation. Their provisions may only be abrogated, modified, or suspended in the manner set forth in the treaties themselves or in accordance with the general norms of international law.*

The Vienna Convention on the Law of Treaties (May 23, 1969) to which Spain is a state party which in many of its provisions reflects customary international law, certainly establishes within the body of international law the primacy of international law over domestic law, once the former is embraced by a state. Article 27 of the Vienna Convention specifies that a party may not invoke the provisions of its domestic law as justification for non-fulfillment of a treaty." Thus, any international treaty, convention, pact, or agreement– whatever its form or legal designation – made in writing between states and

governed by international law, duly ratified or approved by Spain, constitutes a norm higher in standing than any provision of domestic law.[1]

According to the principle pacta sunt servanda[*] *(article 26 of the Vienna Convention and fundamental principle of international law as indicated by Resolution 2625/XXV of the General Assembly of the United Nations), States must carry out treaties and the international obligations flowing from them in good faith. This general principle of international law has as a corollary that States (which are responsible as a whole) cannot claim obstacles of domestic law in order to withdraw from their international commitments. Thus, the norms for the exercise of jurisdiction ought to be applied, while respecting the legal commitments that have been specified in the conventions and treaties ratified by Spain.*

With the new wording enacted for article 23.4 of Organic Law 6/1985, July 1, of the Judiciary, the aim is then to restrict the applicability of the principle of universal jurisdiction by subjecting it to a number of requirements such as:

1) Prior conditions:

A) That the presumed perpetrators of the crime in question be in Spain;

B) or that there be victims of Spanish nationality;

C) or that some significant connection with Spain be established.

[1] Likewise, see, Annemie Schaus, *Les Conventions of Vienne sur le droit des traités. Commentaire article par article*, Olivier Corten & Pierre Klein (dir), Bruxelles, Bruylant-Centre of droit International-Université Libre of Bruxelles, 2006, article 27, p. 1136.

[*] [Agreements must be kept.]

2) To the foregoing must be added that even when these conditions are met, it must also be established that "no procedure entailing investigation and effective pursuit of such punishable deeds, if appropriate, has been initiated in another competent country or in an international court."

3) Finally, it is ordered that the criminal procedure initiated before Spanish jurisdiction must be stayed provisionally when it is established that another case has begun in another country or by an international court on the accusations.

Thus, the new wording of article 23.4 of the Organic Law 6/1985, (July 1) of the Judiciary in many cases violates the obligations of Spain, by virtue of treaties and international conventions, to create or establish a universal jurisdiction for the prosecution and investigation of crimes of importance to the international community, without being subjected to conditions such as those introduced by the new amendment, especially the additional demand that there be established the "lack of investigation and effective pursuit" in another competent country and the provision for closure relating to stay of proceedings.

In this regard, and with no intention of being exhaustive, it is well to recall that in accordance with the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (Convention against Torture) of 1984 and in effect in Spain since 1987, the state where a person suspected of having committed an act of torture must assure that its courts can exercise all possible forms

of jurisdiction, including universal jurisdiction, in those cases in which it is not in a position to extradite that person to another State or hand him or her over to an international court. Thus the Convention against Torture expressly incorporates the rule/principle aut dedere aut iudicare[2] *which is very closely related to the principle of universal jurisdiction.*

Thus article 5 establishes the obligation for any state party to have what is necessary to exercise its jurisdiction over the crimes mentioned in the Convention. According to article 7, if a State does not extradite, it must send the case to the competent authorities for purposes of prosecution. If the decision not to prosecute and/or investigate has been taken based on arguments that are not permissible and that are inconsistent with the independence of the competent authority, that is, if the case has not been investigated independently, or if the legal procedure is sheer parody whose purpose has been to exempt the defendant of criminal responsibility.[3] *That obligation by agreement is hard to reconcile with the conditions introduced in paragraphs 2, end, and 3 of the new article 23.4 since*

[2] In order to prevent a deed regarded as criminal from going unpunished, by virtue of this principle a state may not protect a person suspected of having committed particular classes of crimes, and thus it is obliged to exercise its jurisdiction (which in some cases will necessarily entail the exercise of universal jurisdiction) in order to bring to trial a person suspect of a crime of international law or to extradite that person to a state capable of doing so and willing to do so. That is, by virtue of that obligation, when a person who presumably has committed a crime of international law or a crime that is significant for the international community is found to be in the territory of a state, he or she must be submitted to a criminal procedure unless that state decides to extradite to another state or hands him over to an international court. Naturally, when this person is a foreigner who has commuted the crime outside the territory of the state against foreign persons, the exercise of jurisdiction by that state shall take place on the basis of the principle of universal jurisdiction.

[3] Article 7: "1. The state party in the territory in whose jurisdiction is located the person who is assumed to have committed any of the crimes mentioned in article 4, under the circumstances set forth in article 5, if his/her extradition is not in order, shall submit the case to its own competent authorities in order to bring it to trial. 2. Thus authorities shall make their decision under the same conditions as those applicable to any crime of serious character, pursuant to the legislation of that state. In the cases set forth in paragraph 2 of article 5, the level of proof necessary for bringing to trial or finding guilty shall not be in any case less strict that those applied in the cases set forth in paragraph 1 of article 5. 3. Any person prosecuted in relation to any of the crimes mentioned in article 4 shall receive guarantee of fair treatment at all phases of the procedure".

they open the door to defrauding justice. To be consistent with that obligation, Spanish law ought to allow the courts to reject such positions, all the more in cases having to do with crimes of international law, the prosecution and investigation of which is of interest to the entire international community. Along these lines, in explaining the scope of article 7 of the Convention against Torture, the Committee Against Torture has concluded that:

> *The Committee notes that by virtue of article 7 of the Convention "[the] state party in the territory in whose jurisdiction is located the person who is assumed to have committed any of the crimes mentioned in article 4, under the circumstances set forth in article 5, if it does not extradite him/her, shall submit the case to its own competent authorities for purposes of prosecution." In this regard it observes that the obligation to prosecute the presumed perpetrator of acts of torture does not depend on the previous existence of a request for his extradition. This alternative which is offered to the state party by virtue of article 7 of the Convention exists only if that demand for extradition has actually been formulated, and therefore presented, to the state party in the situation of choosing between a) carrying out that extradition or b) submitting the case to its own judicial authorities to begin the criminal action, since the purpose of the provision is to prevent the impunity of any act of torture.* [4]

The Geneva Conventions adopted August 12, 1949 and ratified by

[4] Case Suleymane Guengueng et al. v. Senegal, para. 9.7, Communication No. 181/2001, CAT/C/36/D/181/2001 May 19, 2006.

Spain August 4, 1952, which establish the obligation to exercise universal jurisdiction for very serious violations–the most serious category of war crimes – and therefore, its obligation to investigate such crimes and prosecute suspects,[5] illustrate the way in which international humanitarian law should be respectfully observed. For example, the Geneva Conventions do not require the existence of any relationship between the accused and the state bringing to trial, in particular that the accused be present in that State or have fallen into its hands.[6] The Geneva Conventions require that States pursue persons who presumably have committed or ordered the commission of grave violations, and that they prosecute or extradite them. As established by the International Committee of the Red Cross, most states comply with that obligation by "establishing universal jurisdiction for such crimes in their national legislation."[7]

Thus, the report drawn up by the independent commission appointed by the UN and headed by Judge Richard Goldstone to investigate the crimes committed in Gaza in December 2009 supports universal jurisdiction as a way states have to investigate serious violations to the 1949 Geneva Conventions, in order to prevent impunity and promote international responsibility,[8] and it urges state parties to the 1949 Geneva Conventions to begin/initiate criminal investigations by its national courts on the basis of universal jurisdiction when they have sufficient evidence of the commission of a grave violation of the Geneva Conventions and that

[5] See Geneva Convention I (1949), art. 49; II Geneva Convention (1949), art. 50; III Geneva Convention (1949), art. 129; IV Geneva Convention (1949), art. 146.
[6] See commentary on rule 157, Jean Marie Henckaerts and Louise Doswald-Beck, *Customary International Law. Volume I: Rules*, International Committee of the Red Cross.
[7] See commentary on rule 158, which should be read together with rule 157.
[8] See paragraph 1654, in http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf

upon such investigations, when appropriate, that they arrest and prosecute those suspect, in accordance with international standards of justice/due process.[9]

The International Convention for the Protection of All Persons from Forced Disappearances, ratified by Spain in September 2009 contains provisions on jurisdiction, including the principle aut dedere aut judicare *[extradite or prosecute] in a sense similar to the Convention against Torture.*[10] *Thus, article 11 states that:*

> *The state party in the territory of whose jurisdiction the person who is assumed to have committed a crime of forced disappearance is located, if it does not move to extradite him, or to hand him over to another State in accordance with its international obligations, or to transfer him to an international criminal venue whose jurisdiction it has recognized, shall submit the case to the competent authorities to carry out criminal action.*
>
> *2. Those authorities shall make their decision under the same conditions as those applicable to any common crime of grave nature, pursuant to the legislation of that State. In the cases considered in paragraph 2 of article 9, the level of evidence necessary for prosecution or accusation shall not in any manner be less strict that what is applied in the cases set forth in paragraph 1 of article 9.*

[9] *Op. cit*, paragraph 1772.
[10] In addition, in the same terms expressed by the United Nations Declaration on the Protection of All Persons from Enforced Disappearance, Res. 47/133, December 18, 1992, article 14, which brings together customary rules on the matter.

> *3. Any person investigated in relation to a crime of forced disappearance shall receive guarantees of fair treatment in all phases of the procedure. Any person placed on trial for a crime of forced disappearance shall enjoy the legal guarantees before a competent, independent, and impartial court or tribunal of justice, established by law."* [11]

Likewise, in the Martinez de Peron case, the Spanish National Court, while rejecting a request for extradition presented by Argentina against a person presumed responsible for detentions, forced disappearance, and torture in the period between July 1, 1974 and March 24, 1976, stated that, if the extradition was not granted, Spain was obligated to present the case to its competent authorities in order to initiate prosecution:

> *Therefore, if the choice is made to refuse extradition*[*] *for this case, the state petitioned assumes the obligation of prosecuting the person sought in its own territory, upon request by the petitioner party (*aut dedere aut punire*). It seems evident that for this assumption of competence to take place, it seems necessary that the petitioning authorities so wish, and that they fulfill the legal requirements and formalities for legal action to be taken for it to be prosecuted, pursuant to domestic legislation (...)."*[12]

Although the Convention for the Prevention and Punishment of the Crime of Genocide of 1948, to which Spain adhered through Law

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[11] Read together with article 9 which establishes the obligation of to set up jurisdiction over crimes of forced disappearance.

[*] [The Spanish *extracción* assumed to be a misprint for *extradición*]

[12] National Court, Criminal Division, Section Two, Case File Number 12/2007, Extradition 1/2007, Central Court For Preliminary Criminal Proceedings no. 3, April 28, 2008.

44/1971 (November 15), does not expressly provide for universal jurisdiction, it cannot be denied that from its text, its context, and purpose and goal can be derived the power of all states to exercise it.[13] *The Constitutional Court has stated that:*

> *it is contradictory to the very existence of the Convention on Genocide, and to the purpose and goal that inspire it [principle of preventing impunity], that the signatory parties should agree on refusing to have a mechanism for prosecuting the crime, especially bearing in mind that the primary criterion of competence (territorial) will remain on many occasions diminished in terms of its possibilities for really being exercised due to the circumstances that may come into play in the various cases.*[14]

Spain is likewise party to numerous international treaties that seek to curb a series of crimes important to the international community (such as counterfeiting currency,[15] *terrorism,*[16] *piracy,*[17] *drug*

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[13] See, for example, Eric David in *Principes de Droit des Conflits Armés*, second edition, Bruylant, Bruxelles, 1999, p.666 (" Shall the Convention be limited merely to providing only for a territorial type of competence? Such an interpretation would largely deprive the Convention of its scope and usefulness. In reality, this restriction does not mean that other states cannot try the crime: it confers only a primary competence to the court of the state where the crime has been committed, but it does not rule out the competence of other states."); William A. Schabas, in *Genocide in International Law*, Cambridge University Press, 2000, p. 367 ("The practice of states, legal doctrine, and the decisions of national and international courts suggest a growing willingness to accept universal jurisdiction and go beyond the terms of Article VI of the Convention ."); Bruce Broomhall in *International Justice and the International Criminal Court*, Oxford, 2003, p. 112 ("What can be said with certainty is that customary international law authorizes states to exercise universal jurisdiction on genocide, crimes against humanity, and war crimes, and that this authorization could be evolving toward an obligation."); Nina Jorgensen in *The Responsibility of States for International Crimes*, Oxford, 2003, p.35 ("(…) These discussions have been overtaken by customary law, which defines genocide as a crime subject to universal jurisdiction").

[14] Constitutional Court, ruling number 235/2005 (September 26), Legal Basis Five.

[15] On April 28, 1930, Spain ratified the International Convention for the Repression of the Counterfeiting Currency (April 20, 1929).

[16] Spain has ratified the 16 international conventions for the suppression of various "acts of terrorism" which encompass a broad range of activities, including hijacking aircraft. See http://untreaty .un.org/English/terrorismo.asp

*trafficking,[18] human trafficking, and trafficking in migrants,[19] and so forth) which make it necessary to take the steps necessary to define the prohibited behavior as a criminal violation, sanction them with penalties adequate to their seriousness, and to establish rules on jurisdiction, including the obligation to extradite or prosecute (*aut dedere aut judicare*) or universal jurisdiction, properly so-called.[20] In none of these treaties do any of the restrictive conditions introduced by the amendment appear. Moreover, the preamble of the Statute of the International Criminal Court of 1998 –ratified by Spain through a legal instrument on October 24, 2000 – reaffirms that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes," and its rules make it possible to reject those decisions or rulings that have been a violation of the criminal justice process.[21]*

Furthermore, it should be kept in mind that before the November 2007 amendment introduced extraterritorial persecution of human trafficking or clandestine immigration trafficking,[22] in a series of rulings of the Supreme Court of Justice, among which that of June

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[17] Spain is party to both the Convention on the High Seas (April 29, 1958), and the United Nations Convention on the Law of the Sea (December 10, 1982).

[18] Spain is a State Party to the 1971 Convention on Psychotropic Substances, since entering it on July 20, 1973, and the 1988 United Nations Convention against Traffic in Narcotic Drugs and Psychotropic Substances, since its ratification on August 13, 1990.

[19] By legal instrument on February 21, 2002 Spain has ratified the Protocol to Prevent, Suppress, and Punish Traffic in Persons, Especially Women and Children, and the Protocol Against the Smuggling of Migrants by Land, Air and See which complement the 2000 United Nations Convention Against Transnational Organized Crime (also ratified by Spain March 1, 2000).

[20] For example, the principle of universal jurisdiction is taken up in article 19 (High Seas) and articles 100 and 105 (Law of the Sea); articles 9 and 10 of the Convention on the Counterfeiting of Currency make it obligatory to prosecute and place on trial, and, if applicable, to extradite; articles 4 and 7 of the Convention for the Suppression of the Unlawful Seizure of Aircraft, the provisions on jurisdiction, including the principle *aut dedere aut judicare*; article 22.2 on the obligation to extradite or judge in the Convention on Psychotropic Substances and article 4 of the Convention against the Traffic in Narcotic Drugs; and articles 15, 16.9 and 16.10 of the Convention against International Organized Crime, applied mutatis mutandis to the Protocols that complement it, include the principle *aut dedere aut judicare*.

[21] See article 20.

[22] Organic Law 13/2007, (November 19), for the extraterritorial prosecution of unlawful trafficking or the clandestine immigration of persons.

27, 2007 deserves mention, in ruling on appeals that questioned the lack of Spanish jurisdiction for prosecuting deeds that presumably constituted a crime of human trafficking or clandestine immigration, it was said that Spain could exercise universal jurisdiction on non-Spanish citizens purportedly responsible for bringing in immigrants clandestinely, even if they were on the high seas, by virtue of what is set forth in the Organic Law of the Judiciary and the 1982 Convention on the Law of the Sea in stating that:

> *the principle of universality or of worldwide justice also expands the scope of Spanish jurisdiction, inasmuch as it serves for the protection of goods essential to humankind recognized by all civilized nations, regardless of the nationality of the participants and of the place of commission, inasmuch as, in essence, it focuses on prosecuting crimes that are properly international (...). The scope of Spanish jurisdiction would not be sufficiently outlined without making mention of the so-called principle of supplementary justice, also called the criminal right of representation, which is operative in the event that there is no request for or no granting of extradition, since it allows the state where the perpetrator is located to put him on trial by applying the criminal law. The basis for this principle is simply that of the gradual harmonization of the various bodies of legislation as a consequence of the similar structure of international treaties, inasmuch as they design some typical definitions of punishable offenses and normally make states obligated to put them in their legislation. Hence the incorporation of such criminal definitions into domestic law allows the application, if appropriate, of the rule "*aut dedere

auto iudicare*", if extradition is not granted.*[23]

As a general consideration, and referring only to constitutional jurisprudence,[24] *which, as is known, only had the effect of correcting the position sustained by the Supreme Court of Justice in its February 25, 2003 ruling,*[25] *which was properly accepted by that same court in its subsequent ruling on June 20, 2006,*[26] *it must be emphasized that:*

> *International cross-border prosecution which seeks to impose the principle of universal justice is based exclusively on the particular characteristics of the crimes submitted to it, whose harm (...) transcends the specific victims and affects the international community as a whole. Consequently, prosecuting and sanctioning them constitutes not only a commitment but also a shared interest of all states (...), the legitimacy of which, accordingly does not depend on the particular ulterior interests of each of them. Likewise, the conception of universal jurisdiction in current international law is not shaped around bonds of connection based on particular state interests.*[27]

Thus, a first general conclusion on which our request is based may be drawn inasmuch as with regard to universal jurisdiction, the

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[23] Ruling of the Supreme Court of Justice, Criminal Division, Section 1, appeal no. 2027/2006, ruling number 554/2007 (June 27, 2007). Legal Basis three.
[24] Cf. Ruling of the Second Chamber of the Constitutional Court, September 26, 2005, Ruling No. 237/2005.
[25] Cf. Ruling of the Criminal Division of the Supreme Court of Justice February 25, 2003, Ruling No. 327/2003.
[26] Cf. Ruling of the Criminal Division of the Supreme Court of Justice, June 20, 2006, Ruling No. 645/2006.
[27] *See* Ruling of the Second Chamber of the Constitutional Court on September 26, 2005, Ruling No. 237/2005, Legal Basis Nine.

establishment of demands different from "particular characteristics of the crimes submitted to it, whose harm (...) transcends the specific victims and affects the international community as a whole" would entail not only substantial alteration of the very essence of universal jurisdiction, but it implies a regulation contrary to the one established by the Constitutional Court itself in relation to this principle likewise for Spanish law.

Together with the general consideration set forth, the Constitutional Court has also expressly taken a position on the specific requirements now established by Organic Law 1/2009 (November 3), concluding as follows:

1) Starting with the presence of the purported perpetrator on Spanish soil, for the Constitutional Court, "it is an absolutely necessary requirement for placing on trial and possibly finding guilty (...). But that conclusion cannot lead to making that circumstance a sine-qua-non *requirement for the exercise of judicial competence and opening the process, especially when proceeding in such a manner would subject access to universal jurisdiction to a such an extreme restriction (...); a restriction that moreover would be contradictory to the basis and purposes inherent in the institution."*[28]

2) With regard to the other two aspects indicated (points 1.B and 1.C of REASON TWO), that is, the introduction of two other connecting bonds: that of passive legal standing making universal competence depend on the Spanish nationality of the victims, and the connection of

[28] See, Ruling of the Second Chamber of the Constitutional Court , September 26, 2005, Ruling No 237/2005, Legal Basis Seven.

crimes committed to other significant Spanish interests, which is nothing else but a generic reformulation of the so-called royal principle , of protection or defense, the Constitutional Court clearly stated that it would be "radically restrictive of the principle of universal jurisdiction embodied in (then) art. 23.4 LOPJ, overflowing the boundaries of what is constitutionally permissible from the framework established by the law of effective judicial protection enshrined in art. 24.1 CE," because they are criteria "that plainly show themselves to be contrary to the purpose that inspires the institution, which is altered to the point of making unrecognizable the principle of universal jurisdiction as it is conceived in international law"[29].

With regard to the additional condition which we identify as point 2 (...), namely, that "no procedure entailing an investigation and an effective prosecution, if indicated, of such punishable acts has begun in another competent country or in an international court," the Constitutional Court has also laid down a clear doctrine that the modification enacted by Organic Law 1/2009 has the effect of violating. Thus:

> *... for activation of extraterritorial universal jurisdiction it would then be sufficient that serious and reasonable indications be provided either* ex officio *or by the plaintiff of judicial inactivity that would be tantamount to establishing either unwillingness or inability to effectively prosecute the crimes. Notwithstanding the December 2003 ruling taking an*

[29] *See* Ruling of the Second Chamber of the Constitutional Court, September 26, 2005 Ruling No. 237/2005, Legal Basis Seven.

> *enormously restrictive interpretation of the rule of subsidiarity which the same National Court had delimited, it goes further and requires of the accusers a full establishment of legal impossibility or of prolonged judicial inactivity, to the point of even requiring proof of actual rejection of the accusation by the Guatemalan courts. Such a restrictive assumption of the international jurisdictional competence of Spanish courts established in art. 23.4 LOPJ entails a violation of the right to have access to the jurisdiction recognized in art. 24.1 CE as primary expression of the right to the effective protection of judges and courts. On the one hand, (...) with the requirement of proving negative facts, the plaintiff is confronted with the need to take on a task impossible to complete, to perform a* probatio diabolica. *On the other hand, it has the effect of frustrating the very purpose of universal jurisdiction (...), inasmuch as it would be precisely the very judicial inactivity of the state where the events took place, not replying to the filing of a complaint and thereby preventing the proof required by the National Court, which would block the international jurisdiction of a third state and would end in the impunity of the genocide. In short, such a rigoristic restriction of universal jurisdiction, in blatant contradiction of the hermeneutic rule* pro actione, *merits constitutional reproach for violation of art. 24.1 CE.*[30]

Along the same lines, and with regard to what we identified as point 3 (...), this last view also shows itself to be hardly reconcilable with

[30] See, Ruling of the Second Chamber of the Constitutional Court September 26, 2005, Ruling No. 237/2005, Legal Basis Four. Check also Legal Basis Five.

article 24 of the Constitution, for according to its literal interpretation, the mere presentation of a complaint in the country where the deeds were committed would entail automatic provisional stay of procedures in Spain. Thus, effective judicial protection would be constantly threatened with blockage or continuous paralysis of the cases set in motion in our country, and moreover, in cases in which litispendence is dragged out this measure would be singularly contrary to the rights both of the person potentially to be brought to justice and the victims (effective judicial protection and fair process without undue delay) if, for example, such stay were to take place in Spain when the preliminary investigation was completed, and at this time the procedure were to be initiated in the country where the deeds were carried out.

In short, it is not uncontroversial to claim that that rule is constitutional and, in any case, it is possible that that question may have to be raised officially. In any case, however, what matters for the case before us is that the requirements for advancing in this procedure are met here.

NINE: For the purposes of advancing with the investigation of these deeds and to prevent further motions by the Office of the Public Prosecutor aimed at shelving these proceedings for failure to comply with the requirements established in the new wording of article 23 of the LOPJ, certain steps in the investigation must be taken, namely:

1. That the Civil Registry be required to issue information on the nationality of **Mr. Hamed Abderrahman Ahmed and Mr. Reswad Abdulsam.**

2. That the Ministry of the Interior be asked to issue information on the situation of **Mr. Lahcem Ikasrrien in Spain.**
3. That the Ministry of the Interior be required to report on how many former Guantanamo prisoners are now on Spanish soil and under what legal status.
4. When their nationalities and legal status in Spain has been established, they be summoned to give testimony and that the offering of legal actions be carried out.
5. Once the attached expert report be admitted, a date be set for ratifying it; the aforementioned expert may be summoned through this party.

In view of the foregoing,

I ASK THE COURT that it regard this brief as presented on time and in the proper manner, that it process it and hold the brief as having responded to the resolution of this court dated April 7, 2000 of which this party received notice on April 8, 2010, in the sense previously set forth, and in view of what is here claimed, of what is entered into the proceedings and of the time that has gone by with no reply from the American authorities, that it proceed without further delay **TO ISSUE A DECISION ADMITTING THE COMPLAINT INTO THE RECORD,** agreeing to carry out the proper procedures.

What I request being just, in Madrid April 27, 2010.

Gonzalo Boye Tuset
Attorney

Javier Fernandez Estrada
Representing Attorney