



UNOFFICIAL TRANSLATION[§]

Proceedings: Preliminary Investigations 150/09 – N
Offense: Torture and others
CENTRAL COURT FOR PRELIMINARY CRIMINAL PROCEEDINGS
NUMBER FIVE
NATIONAL COURT
MADRID

DECISION

**IN MADRID, THE TWENTY-SEVENTH OF JANUARY,
TWO THOUSAND AND TEN**

FACTS

FIRST. – The facts under investigation are defined in the April 27, 2009 decision, completed, and with regard to Iahen Ikarrien with the petition of complaint dated September 24, 2009, which was accepted October 29, 2009, according to the April 27 Decision:

***FIRST.** -Indictment 25/03 was initiated in this Court against Hamed Abderrahman Ahmed, Ikassrien Lahcen, Jamiel Abdul Latiff Al Banna and Omar Deghayes for alleged offenses of Involvement in the Terrorist Organization Al Qaeda.*

- 1) Subsequently, the Criminal Division of the National Court handed down a sentence on 10/04/05, condemnatory against the first of those cited above (Hamed Abderraman Ahmed), even though the sentence of the Supreme Court dated 06/22/06 annulled [the lower court decision], acquitting the indicted party.*
- 2) In the second case (Ikassrien Lahcen), the Criminal Division of the National Court handed down a sentence on 10/10/2006, acquitting the indicted party.*
- 3) and 4) In the case of Mr. Al Banna and Mr. Deghayes, this Court issued European Orders for Detention dated 05/24/04, orders that were repealed on the 14 and 19 of December 2007 before the imminent arrival in the United Kingdom of said indicted*

[§] Translation provided by the Center for Constitutional Rights, www.ccrjustice.org. Page numbering differs from the original Spanish version. Please send any comments to: mkhalil@ccrjustice.org.



parties, obtaining their detention with the object of extradition.

Finally, on March 5, 2005, based on suitable medical reports, a decision was handed down by which the Decision dated 12/26/03 for provisional imprisonment was rendered invalid, cancelling the European Detention Orders for Mr. Al Banna and Mr. Deghayes dated 12/19/07, and the case was concluded by passing it up to the Court, which started proceedings under its files.

SECOND. *-On 03/23/09, the case was re-opened by transferring it to the Ministry of Public Prosecution, which, on 04/17/09, reported on what is referred to as the object of this case, "..., 2. Without prejudice to the claim that the acts, as alleged and within the framework of the adopted executive decisions, would constitute crimes under our criminal code of offenses against persons or assets protected in situations of armed conflict (arts. 608 et seq. of the Penal Code)....." "the only judicial body with jurisdiction to decide on facts that impact as passive subjects of the crime those who were originally charged by the Investigating Court for crimes of terrorism during their imprisonment at Guantánamo (Hamed Abderramam Ahmed, Lahcen Ikassrien, Jamil Abdullafit Al Bamma and Omar Deghayes), is the Central Court for Preliminary Criminal Proceedings Number Two of the National Court."*

THIRD. *-On 04/17/09, it was resolved to remit the findings to the Senior Member of the Central Court for Preliminary Criminal Proceedings of this National Court, the dispatch taking place on 04/23/09, once the evidence was on record, for its distribution, by proceedings having been sent to this Court, which is responsible for the procedure for handling an inference of extraordinary evidence of indictment 25/03, in accordance with Distribution Rule Four, which says in subsection 3 that: "[For proceedings] that have been initiated due to extraordinary evidence adduced in any of the Central Courts for Preliminary Criminal Proceedings, it is the Court hearing the case that has given rise to the release of the evidence in question that shall carry out the investigations."*

The "DAN" (a computerized registration number) was requested so as to electronically register the case, which was obtained on 04/24/09, by assigning it Preliminary Investigation Number 150/09.

FACTS

FIRST. — *Hamed Abderraman Ahmed, Lahcen Ikassrien, Jamiel Abdulatif Al Banna and Omar Deghayes, at different times, either in their testimonies during the investigation and in the court decisions, in the first two cases, or through the physicians that attended to them in the last two cases, alleged that they had suffered various acts of physical or psychological aggression on their persons, all under the authority of American military personnel to whom they had been handed over following their*

detainment in the respective locations where these acts occurred (Afghanistan, Pakistan or Gambia).

Since October 7, 2001, the United States has been at war with Afghanistan, having occupied its territory with U.S. troops.

SECOND. -*HAMED ABDERRAMAN AHMED, a Spanish citizen, fled, together with others, from Afghanistan after said military action, and in November 2001 was captured in Pakistan and held there for two months by that country's soldiers. From Peshawar, he was transferred by American military forces to a prisoner camp in Kandahar (Afghanistan), where he remained approximately one month until his transfer at the end of January 2002 to the detention camp at the military base under US jurisdiction in Guantánamo (Cuba).*

Since his capture, and in his testimonies, he relates having been subjected to ill-treatment, physical violence and humiliating and inhumane treatment. Specifically: 1) The cell in which he was confined at the so-called Camp X-Ray at Guantánamo left him little more than a half-meter by half-meter of space to move in;

2) For almost one year, they only allowed him and the other inmates (who, at that time, numbered in the several hundreds), to leave his cell for 15 minutes two times a week.

3) He suffered constant interrogations without legal counsel during his detention.

4) The cells were made of iron at the so-called Camp Delta, and of a metal mesh, like chicken wire, at Camp X-Ray, which intensified the heat on the detainees.

5) The cells were permanently (day and night) lit with electric lights, which produced vision and sleep disorders.

6) They constantly played loud music (American patriotic songs), intensified through loudspeakers.

He was handed over to Spain on February 13, 2004 and acquitted by the Supreme Court.

THIRD. — *LHACEN IKASSRIEN, a Moroccan citizen and resident of Spain for more than 13 years, was detained in November 2001 in Afghanistan and was transferred by American military forces from Kandahar to Guantánamo (Cuba) on 02/06/02. As he testified in Spain, they never explained to him why he had been deprived of freedom. During his stay at the American military base in Guantanamo, he allegedly:*

1) Was subjected to ill-treatment and threats.

2) Was subjected to interrogations without the presence of an Attorney.

3) *Was isolated in a cell for a long time.*

4) *Received blows to his testicles.*

5) *He relates that they inoculated him through injection with “a disease for dog cysts.”*

6) *The cell in which he remained was very white in color and constantly lit, which kept him from sleeping sufficiently and affected his vision.*

7) *They introduced into the cell very cold air and chemical substances that affected his breathing and joints.*

He was handed over to Spain on July 18, 2005 and acquitted by the Criminal Division of the National Court.

FOURTH. -*JAMIEL ABDELATIF AL BANNA, a Palestinian citizen, was detained by American military forces in November of 2002 in Gambia, transferred to Afghanistan, and then held at the US military base of Guantánamo (Cuba) from January of 2003 to December of 2007.*

During this entire period (almost 5 years) he did not have access to any of the guarantees recognized for detainees. Before arriving at Guantanamo, he was subjected to various physical and psychological attacks and ill-treatment, as well as insults and humiliations; he received strong blows to the head with a loss of consciousness, endured detention underground in total darkness for three weeks with deprivation of food and sleep, and, forced him to witness torture carried out on other prisoners in Afghanistan

Allegedly, once at the Guantánamo Military Base, Mr. Al Banna:

- 1) *Was subjected to some one thousand interrogations in sessions lasting from 2-10 hours per day, including twice per day, at any hour of the day or night, in conditions of extreme heat or cold, held by shackles on the hands and feet (wrists and ankles), in forced positions, seated on the floor with his body doubled forward and with pressure from the interrogators on his back to increase the pain until it made him scream and rendered him unable to stand upright on his feet for several hours afterwards.*
- 2) *For months, during the continuous interrogations, he received only punishment, without even being asked any questions.*
- 3) *He was subjected to threats of death by poisoning or by drowning in the sea, which produced a state of helplessness and despair in him.*
- 4) *They subjected him to humiliating and degrading treatment, such as, treatment degrading to his Islamic religion, stripping him of his clothes until he was naked, sexual provocations during interrogations, relating these types of practices in front of other detainees.*

- 5) *He was under a regimen of total isolation for one year, permanently bound with shackles, subjected to continuous harassment and disturbances in 10-minute intervals for several hours, day and night, which kept him from sleeping; he was subjected to heavy, repeated blows on the doors of the cells and activation of machines next to the cell which made constant noise.*
- 6) *They subjected him to conditions of extreme cold or heat through the air conditioning system; to constant exposure to extremely loud music; to a very strong smell of disinfectants, either through the air conditioning or through their direct application to the floor, causing him coughing fits and respiratory problems.*
- 7) *Any act of resistance or lack of cooperation was treated with overwhelming force by the team known as "Emergency Reaction Force (E.R.F.)." In one of these attacks, Al Banna suffered injuries to the ring finger of his right hand, left side of his forehead and the back part of his left knee.*
- 8) *His confinement in cages of galvanized wire fencing produced asthenopia (eyestrain) in him and in other prisoners, to the point of rendering him incapable of reading.*

FIFTH. -OMAR DEGHAYES, a Libyan citizen, was detained in Lahore (Pakistan) in April of 2002, where he remained for one month, tied and subjected to death threats, kicking and punching, witnessing the torture of other prisoners with pins stuck in their flesh; as well as the death of one of these [prisoners]; threats to his family; systematic beatings; whipping with a strip of fine wood or with canes on a table with his head tied down, and electric shock.

Next, he was subjected to similar treatment in Islamabad, with torture consisting of dunking his head into water in a drum 6 or 7 times until he almost felt drowned; stress postures, such as keeping his head down all night (by doing a handstand).

Later he was moved to Bagram (Afghanistan) under American control. There they placed bags on his head and coverings on his ears, which distorted any external sound; prolonged interrogations, suspension by his arms handcuffed behind his back until they were elevated above his head with a risk of dislocation; placing of a black bag over his head; restrictions of feeding; kept in dark rooms with no lighting; as well as inside a closed box with a lock and limited air; he was subjected to repeated beatings; and he was kept nude, as part of the process of humiliation due to his religion.

Once at Guantánamo (September 2002 until December 2007) he was allegedly subjected to:

- 1) *A sexual attack in March 2004 by the Emergency Reaction Forces (E.R.F.).*

2) *Being sprayed in the eyes with mace by soldiers in March 2004, which caused him agonizing pain that kept him from seeing clearly for two weeks, to the point of not recovering any vision in his right eye.*

3) *Complete isolation for long periods.*

4) *Degrading treatment consisting of smearing feces and dunking his head underwater by guarding soldiers;*

5. *Blows by the members of the ERF to the knees and nose.*

6. *Restraint by means of shackles on his feet, hands and head at the order of the ERF team members.*

7. *Pressurized introduction of water through the nose until there was a sensation of drowning. All this in the presence of medical personnel on at least three occasions.*

8. *The ERF team sprayed Mr. Deghayes with mace; they threw him in the air and let him fall on his face, all in the presence of ERF personnel.*

9. *Up to 15 people attempted to commit suicide at Camp Delta due to the abuses of the ERF officials.*

10. *They subjected him to total or partial nudity, against the rules of Islam, which prohibits such extreme conduct.*

11. *He remained incommunicado at Camp V with a sheet, a blanket and a mattress.*

12. *Fracture of his right index finger by an American soldier.*

13. *Multiple interrogations without advice of counsel for hours per day, including twice a day, or at any time of the day or night, under conditions of extreme cold and heat, immobilized by shackles on his wrists and ankles.*

14. *Being kept in solitary confinement under very adverse conditions through harassment, sleep interruptions, and constant slamming of walls and doors.*

15. *Changing the air conditioning to create extreme cold or heat for long periods of time.*

16. *Playing of music at very high volumes.*

17. *They did not provide him with medication to alleviate the ailment to his right eye causing him to lose it.*

18. *Breaking of his nose due to blows by the guards.*

FIFTH. - *On February 18, 2008 medical reports were received on the accused signed by the doctors Jonathan Derek Fluxman and Helen Bamber, in which an opinion was given, with respect to Jamiel ABDULLATIF AL BANNA that he has suffered from:*

- *Post Traumatic Stress Disorder*
- *Sever Depression.*
- *Non-insulin dependent diabetes mellitus.*
- *Hypertension.*
- *Lumbar pain and arthrosis of the wrists and knees.*
- *Injury of the left posterior knee.*
- *Nasal Obstruction.*

and with respect to Omar DHEGAYES, that he suffers from:

- *PTSD complex*
- *Profound depression.*
- *Blindness in the right eye.*
- *Breakage of the nasal bone.*
- *Breakage of the right index finger.*

The cited reports have been analyzed by the forensic physicians Dr. Syra A. Peña López and Dr. Jose Luis Miguel Pedrero, who have given the opinion that the physical consequences of Jamiel ABDULLATIF AL BANNA and Omar DEGHAYES cannot be disputed and that the psychological ones appear perfectly related to the events that have been related; that the situations of post traumatic stress and the depressive syndrome indicate a before and after in the life and psyche of the affected parties. Recovery is uncertain and in many cases impossible or over a very long period, and in this case, the stresses only ended just two months ago. They conclude their forensic reports stating that they are in agreement with the medical quality of the medical reports brought in connection with the reported facts, with what has been examined, and with the current state of science as far as the treatment that they must follow and the prognosis.

With regard to Laheen Ikassrien, the facts gathered in the petition of complaint in numbers I to III, complaint accepted by Decision issued October 29, 2009.

TWO. – On April 28, 2009, the Association For the Dignity of Male and Female Prisoners of Spain sought to appear in court as private prosecution (*acusación popular*).

On April 30, 2009 the court representation of that Association was asked to provide a special power-of-attorney, which request it met on May 7, 2009.

On June 4, 2009 and August 11, 2009, that Association was asked to present duly translated the document provided in English which further supported what was requested by the Office of the Attorney General with regard to the issued raised about jurisdiction. The translation has been supplied as of December 3, 2009 and has been placed in the court record as of January 22, 2010.

In a brief dated May 5, 2009 (presented May 6, 2009) the aforementioned Association specified the facts of the matter of the complaint to be the **torture and ill treatment suffered by Mr. Hamed Abderraman Ahmed, Mr. Laheen Ikassrien, Mr. Jamiel Abdulatif al Banma, and Mr. Omar Deghayes, and any other persons who throughout the investigation turn out to be victims of that treatment in relation to the alleged offenses in articles 608, 609, and 611 in relation to articles 607 and 173 of the Criminal Code as well as against possible material authors ..**, that is, exactly as established in the April 27, 2009 Decision.

THREE. - 1) On June 1, 2009 the Prosecutor Mr. Granizo Palomeque presented a brief on behalf of and representing the Free Association of Attorneys (ALA – *Asociación Libre de Abogados*), United Left (IU – *Izquierda Unida*), and Association for Human Rights of Spain (APDHE- *Asociación Pro Derechos Humanos de España*) requesting standing in the court through exercise of private prosecution (la acción popular).

2) The Office of the Attorney General reported that prior to deciding on standing, they ought to establish whether they had pursued the action of the court before the preferred jurisdiction. That is, in the place where the offense was committed or nationality of the perpetrators and that that court had chosen not to pursue any investigation.

3) On August 11, 2009 the Prosecutor Mr. Granizo Palomeque was ordered to present an account of the facts and specific accusations on behalf of ALA within



a 20-day time period.

Likewise, and with regard to what was requested by the Office of the Attorney General on prior establishment of pursuit of the case in what it calls Courts of Preference, it was decided in this interlocutory judgment, “... **it is not considered necessary inasmuch as that procedure is being carried out through the Letters Rogatory dated May 5, 2009, which upon being translated, were sent on June 15, 2009 to Officials in the United Kingdom and United States of America ...**”

4) In reply to the request made by court order on August 11, 2009, the court representation of ALA, APDHE, and IU specified the facts, offenses, and persons, referring to those designated by the Association for the Dignity of Male and Female Prisoners of Spain (brief dated May 5, 2009), provided on May 6, 2009 and therefore coinciding what is set forth in the April 27, 2009 Decision.

5) On October 29, 2009 it was agreed to await the translation presented by the Association for the Dignity of Male and Female Prisoners of Spain, which occurred on December 3, 2009.

LEGAL ARGUMENTS

ONE. - Upon examination of the account of facts specified in the briefs of the prosecutors Mr. Fernandez Estrada and Mr. Granizo Palomeque, it is established that the scope of this procedure is that set forth by the April 27, 2009 decision (**final ruling**). That object is absolutely differentiated from any others that there may be in Spanish jurisdiction and particularly in the National Court, as is clear by Central Court for Preliminary Criminal Proceedings instruction no. 2, dated May 5, 2009, in court orders 109/06, and by the decision of the President of the Central Courts for Preliminary Criminal Proceedings, dated April 23, 2009.



TWO. - On this point it must be emphasized that Ahmed Abderraman Ahmed is a **Spanish citizen**, and hence by the fact alone, **Spanish jurisdiction is competent to investigate these facts, before and after Organic Law 1/09 (November 3, 2009) went into effect, if, as is the case, the requirement of non-concurrent jurisdiction applies.**

The close connection existing between the persons, the events, the place of commission, and Spain must also be demonstrated in relation to the other cases to which the investigation extends, and that notwithstanding the fact that the very existence of this case is already a substantial connection to our country.

To show that that is the case, some concurrent circumstances need only be listed:

- 1) the four persons who appear as victims, and whose standing in court is admitted, were processed in case file 23/03 of this court for alleged offenses committed in Spain or related to a Spanish investigation.
- 2) This Court sought extradition of the four from the American authorities, but the petition was not processed.
- 3) Ahmad Abderraman Ahmed was handed over to Spain, tried, and found guilty by the National Court and subsequently absolved. The Second Chamber of the Supreme Court, specifically among other arguments for the situation of “limbo in the Legal Community” at Guantánamo. For that purpose it suffices to examine the June 22, 2006 Ruling of the Supreme Court, which reads: “... **the detention of hundreds of people, among them the appealing party, without charges, without guarantees and therefore without control and without limits, at the Guantánamo base maintained by the United States military, constitutes a situation that is impossible to explain, much less justify, from the legal and political reality in which it is found embedded.**”

One could well say that Guantánamo is a veritable “limbo” in the Legal Community defined by a multitude of Treaties and Conventions signed by the International Community, making it a perfect example of what some scientific doctrine has defined as “Criminal Law for the Enemy.” This criminal law for the enemy, as opposed to the criminal law for citizens, would be reserved for those who would be considered responsible for attacking or endangering the bases for coexistence and for the Rule of Law...”(Fifth Legal Finding from STS No. 829/06, majority opinion writer the Honorable Dr. Joaquín Jiménez García).

That is, the alleged torture and mistreatment inflicted at Guantánamo are the grounds for the acquittal of the victim and produced a direct effect in the Spanish proceeding.

- 4) Something similar has happened with regard to Lahcen Ikassrien, and moreover in this case the victim is in Spanish territory, where he has remained, after his acquittal, in a situation of helplessness and now unable to get out of it by court decision, and hence he should be given the classification of de facto Spanish victim.
- 5) In the cases of Mr. Al Banna and Mr. Omar Deghayes, it has been the alleged torture and mistreatment inflicted at Guantánamo during their imprisonment which has made this Court not carry out the European Order of Detention and Delivery against them by Decision dated March 5, 2008.

In view of these circumstances and the interrelatedness of the facts set forth as stated by the (final) Decision on April 27, 2009, from a systematic standpoint the joinder of action cannot be divided, denigrating three cases, when as assumed in the court decisions it is clearly stated that the international treaties are in order and apply (Geneva Convention on Treatment of Prisoners of War And Protection



of Civilians August 12, 1949, art 3), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of December 10, 1984 (art. 5.1.c) ratified by Spain on October 19, 1987, the November 26, 1987 European Convention on the matter, ratified May 2, 1989; the International Agreement on Civil and Political Rights (art. 15.2); and the European Agreement for the Projection of Human Rights and Fundamental Liberties (Art. 7.2), over any other circumstance, and therefore Spanish jurisdiction at this time is solely competent. Doing otherwise would entail accepting that there is no jurisdiction and opting for impunity.

THREE - Article 23.4 of the Organic Law of the Judicial Power has been modified by Organic Law 1/2009, and the Office of the Attorney General takes that amendment as its basis in this case to establish that a decision must be made between the lack of jurisdiction, for which it opts, or for its existence, as the investigator holds.

Thus:

1. – In the matter at hand, given the classification of the Crimes (April 27, 2009 decision) not disputed by the Office of the Attorney General, the presumption clearly falls within the area of application of the so-called Principle of Universal Criminal Jurisdiction under letters a) (crimes against humanity) and h) (any other which according to international treaties and conventions, in particular Conventions on international humanitarian law and protection of human rights, must be pursued in Spain) of that article.

It seems that when it is a matter of alleged offenses of torture and mistreatment carried out systematically and intended for a purpose, namely breaking the will of the victim while at the same time depriving him/her of the most elemental rights by means of techniques prohibited in national and



international law, there is no doubt that they are included in article 23.4 of the LOPJ [Organic Law of the Judiciary]. To this should be added the case law of the Spanish Constitutional Court and of the TEDH. [Spanish Court of Human Rights]

2. As has been said previously, the International Conventions signed and ratified by Spain impose prosecution of crimes against humanity and torture, and hence the limitations set forth in art. 23.4, next to last paragraph, would always be subordinated to what is established in these treaties.

That provision states that in order for Spanish jurisdiction to apply it must **be established ... that there are Spanish victims** (they exist in this case), **or that there is some tie of significant connection to Spain** (there are several in this case and they have already been mentioned in the second legal argument, as well as the interrelationship of the offenses investigated).

“... and in any case, that no other country competent to exercise jurisdiction not international tribunal has begun proceedings that suppose an investigation and effective prosecution, in such cases, of the punishable acts.”

As established in these Proceedings, which by decision on May 26, as a prudent measure, it was ordered that letters rogatory be sent to both the United Kingdom and the United States, with the aim of informing this Court whether there was any investigation of the alleged torture, mistreatment, and inhuman and degrading treatment suffered since their detention by the Spanish citizen Hamed Abderraman Ahmed, the Palestinian citizen Jamiel Abdulatif Al Banna, the Libyan citizen Omar Deghayes, and Lhacen Ikassrien, of Moroccan nationality, albeit residing in Spain, until their respective releases at the military base in Guantánamo (Cuba) and whether there was a possibility that the victims would initiate such an investigation, in addition to whatever one the Office of the Attorney General might initiate, if applicable, or reject. Since Organic Law 1/09 went into effect that concern no longer exists.

Indeed, pursuing court action within Universal Criminal Jurisdiction, backed by international Treaties and Conventions (as has been made clear in the November 2009 judgment of the United Nations Human Rights Council, and by the doctrine of the Constitutional Court), **must be guaranteed in any case, and pursuing the matter in court may not be made to fall to the party seeking action but upon the one opposed to it. That is, the limitation resulting from a possible competence in another country or International Court must be established in the procedure by the party claiming it, but it cannot be accepted that the court or the victim have to perform detective work to know where there is a procedure open and to try to establish a negative fact.**

The procedure must be begun if the main requirements exist together (as is the case), ... **Spanish victims**, de facto or de jure; **provision in treaties and tie or connection to Spain**, and **solely at the time when it is established**, in this case by the Office of the Attorney General, those allegedly responsible, or by the corresponding country that that there is another procedure, **would stay of procedure be posed, once it has been so established in the matter.**

In this case, filed before that amendment went into effect, prudentially, the procedures that would be necessary for assuring the object of the case have not been carried out. Now, given the lack of assistance from the competent authorities, especially those of the United States, **who have not replied to the request for information made in May 2009**, with the sending of the Letters Rogatory in June, nor have they answered the reminder, as has been stated by the Office of International Juridical Cooperation on November 16, 2009, it is proper to set the case in motion by carrying out the procedures that are relevant, and with the decision on the admission to proceed pursuant to what is set forth in art. 312 of Spanish criminal law, of the complaints and standing in court claimed by the private prosecution actions presented. Thus, the aim is to safeguard minimally the fundamental right of effective judicial protection (art 24.1 Spanish Constitution) of

the parties represented, without abandoning the request for international juridical cooperation.

Finally, and in analysis of the new provision of the LOPJ, it must not be forgotten that it speaks of the requirements “for the Spanish courts to hear the aforementioned offenses..” That is, that it is referring to the concurrence of each of these requirements at the time after cognizance **as equivalent of trial by the Court and not to the initiation of the preliminary investigation, at which the sole requirement would be the defining of a defined crime as one of those entailed in art. 23.4 of the LOPJ.**

This interpretation is supported: 1) by the content of the provision inasmuch as when foreign or international courts are mentioned, it speaks of beginning the procedure, investigation and **an effective prosecution**, terms different from hearing or rendering judgment. Likewise in the second paragraph it says that the choice will be for provisional stay, “when **there is proof** that another process regarding the incident in question has been opened in the competent country or by the Tribunal, both referred to in the previous paragraph.”

2) by the systematic interpretation of this provision with that contained in c(2) of that same, article which in speaking of the extraterritorial competence of Spanish courts in the case of Spaniards or those with Spanish nationality acquired later, they require the concurrence of there being no dismissal, pardon, or punishment as limit to prosecution or the amount of the punishment, which necessarily entails prior investigation and court preliminary investigation of the facts.

This section is applicable to art. 23.4 of the LOPJ, according to point 5 of that article: **“If a criminal case is prosecuted in Spain for the situations governed by the foregoing sections 3e and 4 it shall in any case be applicable to what is set forth in letter c of section of this article.”** That is, the proceeding

of the criminal case is assumed, and only at the time of trial shall the limitations of the res judicata established therein be applied.

Therefore **its establishment (that of the foreign criminal case) has to be provided by the parties** but not investigated by the Court or Tribunal, and in any case, **initiation of the investigation is obligatory once the criminal action has been filed**, as it has been here by the four direct victims of the deeds, and therefore as aggrieved party from the moment of appearing before the court and **until**, pursuant to art. 23.4 final paragraph of the LOPJ, the case concludes in accordance with the **Law of Criminal Trial** or “**the beginning of another case on the deeds under accusation in the country or by the Court mentioned in the previous paragraph**” is established or demonstrated. Under no circumstance therefore may the Spanish case be halted or left to depend on the arrival of a hypothetical communication from the country in question, because, as stated by the January 19, 2010 Resolution adopted by the Ombudsman in relation to the request for appeal of unconstitutionality on art. 23.4 of the LOPJ modified by the November 3 Organic law 1/2009, “. . . *the conditions established by art. 23.4 of the LOPJ must be interpreted on the side of the proactione principle (article 24 S.C.) as has been established by the Constitutional Court itself, as in SSTC237/2005, September 26 and 227/2007 October 22.*” That is, an interpretation of this principle must and can be done from within this principle, in accordance with the Constitution, thereby avoiding the possibility that there might not be a judicial response to the actions presented.

FOUR. - Pursuant to what is set forth in articles 72, 277, and 281 of the Law of Criminal Trial, in relation to art. 101 of that same Law and art. 125 of the Spanish Constitution, it is proper to allow complaints filed because of the events under investigation in this procedure to move forward, and in the terms set forth in the April 27, 2009 Decision and in the October 29, 2009 Decision, provided that the bond to be posted is met.



Accordingly, and upon examination of the articles of general application

I HEREBY DECIDE

TO RATIFY the competence of Spanish jurisdiction in this case.

TO ALLOW TO PROCEED the complaints formulated by the prosecutor Fernandez Estrada on behalf of and representing the Association For the Dignity of Male and Female Prisoners of Spain, and the complaint filed by the Prosecutor Granizo Palomeque on behalf of and representing the Free Association of Attorneys (ALA), United Left (IU), and Association for Human Rights of Spain (APDHE) in the exercise of private prosecution, provided the complainants post bond in the amount of 1000 Euros respectively.

Thus ruled, ordered, and signed by BALTASAR GARZON REAL, Judge of Central Court for Preliminary Criminal Proceedings number five.

In witness whereof

E/

PROCEDURE. Ruling immediately carried out, in witness whereof.