



**SUBJECT** : **SUMMARY PROCEDURE**  
**Number** : **2/2014**

**CENTRAL COURT FOR PRELIMINARY CRIMINAL  
PROCEEDINGS NUMBER 5**

**NATIONAL COURT**

**MADRID**

**RULING**

In Villa de Madrid, July 17, 2015

**FINDINGS OF FACT**

**ONE.** - In these proceedings a Ruling was issued on April 15, 2014, ordering that a preliminary procedure be initiated for alleged crimes of torture and crimes against humanity, along with several crimes against persons and property protected in the event of armed conflict - war-crimes - continuing the investigation of the case.

Likewise the following was ordered:

- Have a second expert verify the expert reports in the proceedings.
- Make a presentation to the Second Chamber of the Supreme Court in accordance with the provisions of art. 23.5 LOPJ, in the terms set forth in FJ 5 of the ruling.
- For the fulfillment of the foregoing, reiterate that it is urgent that the United States of America reply to the international letters rogatory sent January 23, 2014.

**TWO.** - When an appeal was filed by the Prosecutor against this ruling, the Criminal Division of the Court in Full issued a Ruling on October 21, 2014, dismissing it.

**THREE.**- In view of the recent STS 296/2015, and insofar as it might affect whether exercise of jurisdiction in this case would or would not be maintained, so that it might be resolved first, an injunction was issued on June 23, 2015, ordering



that the matter be transferred to the Office of Federal Prosecutor, so that it could pronounce on the matter; for the sake of the principle of procedural equality, that proceeding was also passed on to the other parties with standing in the proceedings, so that they could present such claims as they thought appropriate within three days.

The Office of Public Prosecutor presented its claims on July 1, 2015, requesting that the matter be stayed, as set forth in Sole DT of the LO, January 2014.

The Attorney Mr. Javier Fernández Estrada, on behalf of Mr. **JAMIEL ABDUL LATIF AI BANNA** and Mr. **OMAR DEGHAYES** presented his arguments on July 2, 2015, requesting that the Spanish courts continue to exercise jurisdiction.

The attorney Mr. Javier Fernández Estrada, on behalf of the **UNITED LEFT**, the **FREE ASSOCIATION OF ATTORNEYS** and the **ASSOCIATION FOR HUMAN RIGHTS OF SPAIN** presented his arguments on July 2, 2015, also requesting that the Spanish courts continue to exercise jurisdiction.

The attorney Ms. Carmen Echevarria Terroba, on behalf of Mr. **AHMED ABDERRAHMAN HAMED** and Mr. **LAHCEN IKASSRIEN**, presented her arguments on July 2, 2015, requesting that the Spanish courts continue to exercise jurisdiction.

## LEGAL REASONING

**ONE.-** The starting point of this ruling is the concise description of the facts under investigation that is contained in the various complaints and that, now as in previous rulings issued in this case, will serve for the subsequent jurisdictional analysis.

In this regard it was stated in the Ruling of April 15, 2014, that these Preliminary Proceedings have to do with the transfer and situation of the complainants during the time spent at the naval base of the United States of America at Guantánamo Bay (Cuba).



A Ruling was issued in the case on April 27, 2009, ordering that preliminary proceedings be filed under number 150/2009 for alleged crimes of articles 608, 609 and 611, in relation to articles 607 bis and 173 of the Criminal Code, against the possible perpetrators and their accessories, necessary cooperators and those complicit in them.

In that ruling, after restricting the deeds under consideration in the procedure to acts committed against the injured parties, **ABDUL LATIF EL BANNA, OMAR DEGHAYES, AHMED ABDERRAHMAN HAMED** and **LAHCEN IKASSRIEN**, "during the time of their arrests in different countries, always under the authority of the American army, to which they were handed over at the respective places in which this happened (Afghanistan, Pakistan, or Gambia)" and their subsequent transfer to Guantánamo (Cuba) U.S. military base, the scope of subjects against whom the procedure was directed was limited to "the persons who had the detainees under their guard and custody, those who authorized or performed the acts described, all of them members of the U.S. military or military intelligence, and all those who executed or designed a systematic plan of torture or inhuman or degrading mistreatment against prisoners whom they had in custody and who had been captured in the framework of the declared armed conflict in Afghanistan and who were accused of being terrorists."

By means of a Ruling on May 26, 2009, it was ordered that international letters rogatory be delivered to court authorities of the United Kingdom to inform this Court whether there was or is any criminal investigation to investigate the alleged torture, and inhuman and degrading treatment suffered by **JAMIEL ABDUL LATIF AI BANNA** and **OMAR DEGHAYES** during their detention at the military base at Guantánamo (Cuba) until they were handed over to the British authorities. At the same time, another letter rogatory was sent to the competent judicial authorities of the United States of America to inform this Court whether there was or is any open judicial inquiry in that country to ascertain the alleged torture, and inhuman and degrading mistreatment suffered since their arrest by **AHMED ABDERRAHMAN HAMED, JAMIEL ABDUL LATIF AL BANNA, OMAR DEGHAYES** and **LAHCEN IKASSRIEN**, until they were released from the military base at Guantánamo (Cuba); and if there is any legal possibility for the victims to pursue such an investigation, in addition to the one which the Office of Public Prosecutor might file or refuse, as the case may be.

Notification from the United Kingdom was received from the Home Office to the effect that on June 29, 2012 the Metropolitan Police Force had decided that, in the case of **JAMIEL ABDUL LATIF AI BANNA** and **OMAR DEGHAYES**, there was no need to initiate an investigation. It was also stated that the aforementioned two men had filed civil



suits against the Government of the United Kingdom and that a settlement had been reached by mediation with respect to those lawsuits.

No communication of any kind has been received from the United States.

By a Ruling on October 29, 2009, a ruling was issued admitting the complaint made by **LAHCEN IKASRIEN** for torture filed against the perpetrators and any others that may be responsible for the deeds. When an appeal was filed by the Prosecutor against this ruling, the Criminal Division of the National Court in Full issued a Ruling on April 6, 2011, ordering that the appeal be dismissed, when the Full Court found that there is a relevant connection between Spain and the person of the complainant Mr. **IKASSRIEN** and in view of the personal and procedural circumstances concurring therein.

By a Ruling on January 27, 2010, while the result of the aforementioned appeal was still pending, this court decided to "ratify the competence of Spanish jurisdiction in this case."

By a Ruling on January 13, 2012, while deciding on certain investigatory procedures sought by the parties with prosecutorial standing, Spanish jurisdiction for investigating and trying the deeds was affirmed. A report was likewise received from the Office of Public Prosecutor about the persons against whom it was regarded as relevant to direct criminal action as those presumed to be responsible for the deeds under investigation embodied in the sufferings suffered by the four complainants with standing as those suffering damages in the court proceedings, who had to be notified of the existence of the procedure and of the accusations and complaints thus far admitted into the proceeding, enabling them to exercise of their right of defense in accordance with article 118 LECrim.

By a ruling on January 23, 2014, it was ordered that new International Letters Rogatory be sent to the judicial authorities of the United States, in order for them to inform this Court of developments and the current status of the investigations therein mentioned or others that may have been subsequently carried out "in order to be able to issue a considered and rational judgment on the possible relevance of the principle of subsidiarity in the terms expressed both by the Criminal Division of the National Court and by the Second Chamber of the Supreme Court in the preceding rulings (...) while meanwhile continuing to carry out the proceedings underway as ordered in a Ruling dated January 13, 2012, and subsequent rulings."

Finally, through the aforementioned Ruling of April 15, 2014, it was ordered that the aforementioned international letters rogatory be sent to the judicial authorities of the United States. No reply to that request for international judicial assistance has been received thus far.



**TWO.** - The second decisive aspect is the characterization provisionally given to the deeds under investigation.

In this regard, the April 15, 2014 Ruling must be consulted. It took into account the considerations set forth in the Ruling of January 13, 2012, where this matter was examined in terms shared by the Office of Public Prosecutor - thus reported on March 26, 2014. There it was stated that:

"The facts related by the complainants in this case, **ABDUL LATIF AI BANNA, OMAR DEGHAYES, HAMED ABDERRAHMAN AHMED, and LAHCEN IKASSRIEN**, have been characterized in detail in previous rulings (thus, Rulings on April 27, 2009 and January 27, 2010) the content of which should be consulted to avoid unnecessary repeats; they are backed by evidence both from the statements made by the presumed victims, and by forensic medical reports issued for the first two, referring in short to the various physical and the emotional sufferings endured during the time of their custody under the authority of the United States of America, from their detention in various countries where they happened to be (Afghanistan, Pakistan, or Gambia), to their subsequent transfer to the United States naval base at Guantánamo Bay (Cuba), concluding when they were turned over to the Spanish authorities, in view of the responsibilities that had pending before the justice system in our country. All of this was set in the context of the military intervention of the United States in Afghanistan which unfolded starting in October 2001 ."

Furthermore, in relation to the legal classification, it was stated that the legal classification which until then was being made of such acts (thus, Record of Filing, April 27, 2009) was that of crimes of torture and crimes against humanity, provided for and sanctioned in arts. **173 ff.**, and of crimes against humanity provided for and sanctioned in article **607 bis.1 CP**, together with one or more offenses against persons and property protected in the event of armed conflict - war crimes - provided for and sanctioned in chapter III of Title XIV - offenses against the community international - of the criminal code, in particular in arts. **608.2 and 3** (which considers persons protected for the purposes of the code to be "prisoners of war protected by Third Geneva Convention August 12, 1949 or



by additional Protocol I of June 8, 1977" and "the civilian population and individual civilians protected by the Fourth Geneva Convention August 12, 1949, or by the Additional Protocol I of June 8, 1977 "), **art. 609** (which punishes by 4 to 8 years of imprisonment anyone who "on the occasion of an armed conflict, abuses by deed or places in great jeopardy the life, health or integrity of any protected person, or subjects that person to torture or inhuman treatment, including biological experiments, causes him or her great suffering, or subjects him or her to any medical act which is not indicated by their state of health or in accordance with generally accepted medical standards, which the party responsible for the activity would apply under similar medical circumstances, to his or her fellow citizens not deprived of their liberty"), and Article **611.6** of that the same Legal Text (which sanctions with 10 to 15 years of imprisonment one who on the occasion of an armed conflict "performs, has performed, or maintains against any protected person inhumane and degrading treatment based on other adverse distinctions, involving violation of upon personal dignity ").

All of this in relation to the Geneva Convention on Treatment of prisoners of war and protection of civilians of August 12, 1949, the Convention Torture and other Cruel, inhuman or Degrading Treatment or Punishment of December 10, 1984, ratified by Spain on October 19, 1987, the European Convention for the Prevention of Torture and Inhuman and Degrading Punishment and Treatment of November 27, 1987, ratified on May 2, 1989, and article 65, 1 e) and article 23.4 of the LOPJ.

These are offenses said to have been committed as perpetrators or intellectual authors by the persons who had the detainees under their guard and custom, those who authorized or performed the acts described, members, all of them of the US Army or military intelligence, and all those who carried out or designed a systematic plan of torture in inhuman and degrading abuse against prisoners whom they had under their custody and who had been captured in the context of the armed conflict declared in Afghanistan and who were accused of terrorism.

**THREE.** - After the provisional description of the deeds that are the object of this case, it must be examined, whether, in view of the legislative change introduced in the LOPJ by LO 1/2014, after it has been interpreted by the Second Chamber of the Supreme Court in Full, there is sufficient basis to affirm that Spanish jurisdiction extends far enough to carry out this investigation.

It is true, as the Prosecutor notes, that this case is pending the reply of international letters rogatory sent to the American authorities



which in principle would order that completion of the aforementioned instrument of international judicial assistance ought to be awaited inasmuch as the ruling is final after its confirmation by Ruling on October 21, 2014, of the Criminal Chamber of the National Court. But likewise decisive is the fact that more than six years have gone by and the international judicial assistance expected has not been forthcoming, despite successive reminders from this Court and from the General Office of Juridical Cooperation of the Ministry of Justice, over a year since the last reminder.

That would not be any obstacle, however to continuing to insist and reiterate to the U.S. judicial authorities that they must comply with the requests sent for international judicial aid. However, there is a circumstance which is decisive: the recent STS that interprets the scope of the bases for the exercise of universal jurisdiction referred to in article 23.4 LOPJ.

This circumstance makes it obligatory, despite the existence of an investigation procedure ordered and not met due to the lack of response from the US judicial authorities, to review, for reasons of procedural economy, whether the circumstances required for this court to exercise jurisdiction over the deeds under investigation are in fact present.

**FOUR.-** Universal justice (STS 592/2014, July 24) has undergone a significant evolution, insofar as, initially following the enactment of the LOPJ, it was defined as pure universal jurisdiction, while it lacked any legal conditioning; a second conception, ushered in by the modification made in 2009 (LO 1/2009, of 3 November), which we can describe as universal justice with the requirement of a national connection, or a significant bond connecting us to the deed being pursued; and the current conception, which arises with LO 1/2014, March 13, in which the emphasis is on the shape of international treaties and the degree of attribution of jurisdiction granted to the signatory States. This last modification, as indicated by the STS 296/2015, May 6, "specifies, case by case, which connecting links are relevant for Spanish jurisdiction to be able to try deeds committed by Spaniards or foreigners outside national territory which, under Spanish law, may be characterized as some of the crimes set forth therein."

With this purpose, sections four, five and six of article 23 LOPJ were modified by Organic Law 1/2014 (March 13) establishing the following legal regime:

1. Regime of the attribution of jurisdiction to the Spanish courts:



In section four, the modification specifies, case-by-case, which conditions of connection are relevant for Spanish jurisdiction being able to try deeds committed by Spaniards or foreigners outside national territory, which can be categorized, according to Spanish law, as some of the offenses set forth there.

**2. Principle of subsidiarity.**

Section five establishes in which cases the offenses set forth in the preceding paragraph shall not be subject to prosecution in Spain:

- a)** When a procedure has been initiated for them to be investigated and prosecuted in an international court pursuant to treaties and conventions to which Spain is party.
- b)** When a procedure has been initiated for them to be investigated and prosecuted in the State of the place where the acts were committed or in the State of the nationality of the person accused of committing them, provided that:

- 1.** The person accused of committing the deed is not in Spanish territory; or,
- 2.** If a procedure has begun for the person to be extradited to the country of the place where the deeds are said to have been committed, or of the nationality of the victims, or to place him before an International Tribunal to face charges for those deeds, unless the extradition has not been authorized.

**3. Causes of the exception of exclusion .**

The principle of subsidiarity shall not be applicable when the State exercising its jurisdiction is not willing to carry out the investigation or really cannot do so, and such is the assessment of the Second Chamber of the Supreme Court, to which the judge or court will make a presentation showing the reasoning.

**FIVE.** - In the case before us, the complainant parties and the Court itself have thus far believed that the Spanish courts had jurisdiction to hear the deeds that are the object of this case, even after LO 1/2014 went into effect.



The starting point of this analysis is article 23.4 LOPJ, which in establishing the framework for attributing jurisdiction to the Spanish courts, makes the competence of Spanish jurisdiction for trying acts committed by Spaniards or foreigners outside national territory susceptible to being classified, according to Spanish law, as one of the following offenses when the conditions stated are met:

- a) Genocide, **crimes against humanity or against persons and property protected in the event of armed conflict**, provided that the procedure is directed against a Spaniard or against a foreign citizen who usually resides in Spain, or against a foreigner who is in Spain and whom the Spanish authorities have refused to extradite.
- b) Crimes of **torture and crimes against humanity** as in articles 174 to 177 of the Criminal Code, when:
  - 1. The procedure is directed against a Spaniard; or
  - 2. The victim had Spanish nationality when the deeds were committed and the person accused of committing the offense is situated in Spanish territory.
- p) and then, in the current section p), it grants competence to Spanish jurisdiction for trying "**any other offense** the prosecution of which is made mandatory by a treaty in force for Spain or by other normative acts of an international organization of which Spain is a member, in the cases and conditions therein determined.

In this case the treaties that must be invoked as in effect for Spain under international humanitarian law are the four Geneva Conventions of 1949 and their two Additional Protocols; those applicable to this case are the Geneva Convention on the protection due to civilians in time of war (Fourth Convention), of August 8, 1949, and the First Additional Protocol to the Geneva Conventions of June 8, 1977.

Moreover, other international treaties signed by Spain are also noteworthy for their importance in relation to the deeds in the procedure, such as the International Covenant on Civil and Political Rights of December 16, 1966, and the Convention against Torture



and Other Cruel, Inhuman and Degrading Abuse or Punishment (hereinafter Convention against Torture) of December 12, 1984 - entry into force June 26, 1987.

**SIX.-** The offenses under investigation in this case do not fit under letters a) - crime against persons protected in the event of armed conflict - and b) crimes of torture and crimes against humanity - of art. 23.4 LOPJ.

Even though one of the victims - **AHMED ABDERRAMAN HAMED** – had Spanish nationality at the time when the offenses were committed, the condition that the procedure be aimed against a Spaniard or foreigner usually resident in Spain, or against a foreigner present in Spain and his extradition has been refused (letter a) or who is on Spanish soil (letter b) is not present.

This legal framework introduced by 1/2014 LO 1/2014, moreover, is not incompatible with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the other treaties applicable to this case, in accordance with the recent STS 296/2015, May 6.

This STS declares first that "article 5 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that any Party State shall have what is necessary to establish its jurisdiction over such offenses when they are committed in any territory under its jurisdiction or on board an aircraft or a vessel registered in that State; when the alleged offender is a national of that State; and when the victim is a national of that State and the latter deems it appropriate. Likewise any Party State shall take the necessary measures to establish its jurisdiction over such offenses in cases where the alleged offender is present in any territory under its jurisdiction and that State does not grant extradition. Accordingly, in this Convention, while the possibility of States establishing a more ambitious model of universal jurisdiction is not excluded, no absolute or pure model is imposed, but rather it is conditioned around particular criteria, and in any case it is established with a general character for situations in which the party responsible is in the territory of the State Party."

Second, it establishes that "treaties invoked as applicable in this case, (...), and which are those that shape international treaty Criminal Law, applicable to the case, do not make mandatory the establishment in each signatory State a model of absolute and unconditional Universal jurisdiction, and hence it cannot be claimed that LO 1/2014 is in contradiction with



them," regardless of the personal or doctrinal opinion that could be held with respect to this law. Consequently no conflict of laws should be seen between the new LO 1, 2014, and the Treaties, which in accordance with article 96 CE are part of our domestic legal framework."

**SEVEN.-** The foregoing notwithstanding, the complainants and the Court have believed that, while the modification of article 23.4 LOPJ, brought about by Organic Law 1/2014 limits jurisdiction over the crimes of genocide, crimes against humanity, and crimes against persons and property protected in the event of armed conflict to very strict bonds of connection related to active personality that same modification in section p) includes in Universal Jurisdiction "any other offense whose prosecution is imposed on a mandatory basis by a treaty in force." It was likewise judged that this paragraph p) is applicable to crimes against persons and property protected in the event of armed conflict, which is how grave breaches of the Geneva Convention are classified in our legal system.

To that end, and so as to be able to give a considered and rational judgment on the possible occurrence of the principle of subsidiarity (article 23.5 LOPJ), the Court ordered first in a ruling on January 23, 2014 and then in a Ruling on April 15, 2014, to both continue the investigation, continuing to perform the proceedings already underway according to what is ordered in Ruling on January 13, 2012, and subsequent rulings, and to send a new letter rogatory to the judicial authorities of the United States, in order for them to report to this Court about the progress and current status of the investigations mentioned therein or others that it may have carried out later. All this to give full compliance to the legal provisions contained in the current article 23.5 LOPJ.

However, the offenses under investigation cannot be encompassed under letter p) of article 23.4 LOPJ. Doubts about the interpretation of the scope of this law have been resolved with the aforementioned STS 296/2015, of May 5.

Along these lines, the aforementioned STS states that "Article 23 4 of the LOPJ does not apply to the circumstances specifically governed in the previous sections of the law, for it is a closing clause applicable solely to other circumstances that could be the considered in a Treaty not envisioned in the previous regulation." It argues as follows:

- First, literally, "the interpretation of the obligation according to the meaning of its words leads clearly to understanding that it refers to "any other offense," not to the same crimes that are already covered in the previous sections of the law. To



interpret it otherwise is an obvious error, because the precept is absolutely clear and "in claris non fit interpretatio."

- Second, "from a viewpoint of logical interpretation of the law, it makes no sense to introduce as a conclusion of a long and detailed precept, such as the one being examined, a final rule that renders null the content of the previous rules.
- Third, from the standpoint of the purpose of the law, which is to regulate in detail and precision all the circumstances of the exercise of Universal Jurisdiction cases, the closing rule can only refer to circumstances not contemplated in the preceding rules, because otherwise they would lose any sense and purpose, inasmuch the determination of the circumstances for the application of Universal Jurisdiction that the law seeks to establish with precision and clarity would be relegated to a subsequent case-by-case interpretation in the courts.

All this serves to reach the following two conclusions:

1. "It must be established clearly and firmly, for this and for other similar circumstances, that section p) of article 23 4 LOPJ does not apply to the cases which are already specifically governed by the previous sections of the law, and specifically to offenses against persons and property protected in the event of armed conflict."
2. "Section p) of article 23 4 of the LOPJ does not apply to Grave Violations of the Geneva Convention, whatever the name applied to them, such as war crimes, crimes against persons protected in the event of armed conflict, or crimes against International Humanitarian Law." Only section a) applies. "

**EIGHT** .- From another perspective, it should be kept in mind that STS 296/2015, May 6, states emphatically what article 146<sup>1</sup> of the Fourth Geneva Convention of August 12

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<sup>1</sup>The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case.



1949 **"establishes, with mandatory character, that all the signatory States must search for persons accused of having committed, or ordered to commit, any grave violation, if these people have taken refuge or hidden in their country, and must have them appear before their own courts, regardless of their nationality and the place where the offense was committed."**<sup>2</sup>

To which it adds that "it is true that the Geneva Convention, unlike other treaties, establishes a mandatory system of Universal Jurisdiction. But it does so in the sense of imposing on any signatory country the obligation to track down war criminals who hide there, and bring them before its courts, assuming extraterritorial jurisdiction to try them irrespective of the place where the events took place and irrespective of their nationality, solely on the basis of the nature of the offense."

Accordingly, the system of universal justice regulated by the LO 1/2014, "although it is very restrictive," "does not violate what is set forth in the Treaties or international judicial practice," which admits its limitation by the States, and yet this restriction does not constitute a violation of international treaties, customary international criminal law and, in particular, the Geneva Convention for offenses against persons and property protected in the event of armed conflict, because:

1. The "essential content of Universal Jurisdiction" is maintained "in the sense of acknowledging the extraterritorial jurisdiction of Spanish courts to try these crimes on the basis of their nature, irrespective of the place where they are committed and the nationality of the Perpetrators, with regard to anyone responsible for a Grave Violation of the Geneva Convention who is on Spanish territory."
2. It is limited to "circumstances in which the procedure is directed against a Spaniard or against a foreign citizen who is in Spain."

All of the foregoing leads to the aforementioned STS 296/2015, May 6, to assert that

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Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. In all circumstances, the accused persons shall benefit by safeguards of proper trial and defense, which shall not be less favorable than those provided by Article 10 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

<sup>2</sup> Bold in the original



**"Consequently, and to make it clear in this and other procedures with similar basis, according to the current Organic Law 1/2014, the Spanish courts do not have jurisdiction to investigate and prosecute crimes against persons and property protected in the event of armed conflict committed abroad, except when the procedure is directed against a Spanish or a foreign citizen normally residing in Spain" , or against a foreigner who is in Spain and whose extradition has been refused by the Spanish authorities. Such jurisdiction may not be understood to be "in absentia" on the basis of the nationality of the victim or of any other circumstance. "**<sup>3</sup>

**NINE.** The various legal parties with standing as prosecution also understand that STS 296/2015, May 6, does not constitute precedent nor may it have binding authority for the lower courts, unless it is constant and repeated. Thus, following this legal doctrine is tantamount to violating articles 96 and 117 CE, which in turn jeopardizes effective judicial protection (art 24.1 CE) and access to the ordinary judge as ordered in the law (art. 24.2 CE).

In STC 237/2005 (Guatemala case), and then again in STC 227/2007 (Falun Gong case), the Constitutional Court ruled that the rules of assignment of competence do not have a single canon of interpretation, and that its exegesis may be guided by further regulatory criteria which may even restrict its scope of application. Ever keeping in mind, of course, that "the boundaries defining a strict or restrictive interpretation of what, as the opposite of analogy, would be conceived as a teleological reduction of law, characterized by excluding from the framework of application of the law circumstances that could undoubtedly be included in its semantic core. From the angle of the right to access to jurisdiction, such teleological reduction would move away from away from the hermeneutic principle pro actione and would lead to a rigoristic and disproportionate application of the Law contrary to the principle enshrined in article 24.1 CE."

Thus it is clear that both the TS and TC believe that the exercise of universal jurisdiction by the Spanish courts may be subject to regulation, setting elements of connection (which normally coincide with those laid down in treaties) such as the Spanish nationality of the victims (principle of passive personality) or the presence of alleged perpetrators in Spanish territory (principle of supplementary justice or criminal law of representation). It is clear that these laws in turn should be interpreted jurisprudentially, as it has in this case had been done by the TS in the aforementioned

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<sup>3</sup> Bold in the original.



STS 296/2015, May 6. All this notwithstanding, along the lines of the argumentation set forth by the TC, the legal limits established by the organic law or jurisprudential interpretation can be so rigid as to prevent or greatly hinder access to jurisdiction and especially to effective judicial protection, which could result in a response of the TC along these lines.

However, at this moment, that is not the case. The TS has set a very strict and hard (because restricted), interpretive canon for article 23.4. p) LOPJ and article 146 of the Fourth Geneva Convention of 12 August 1949. But it is the interpretive canon. And as such it should be applied by the courts.

It is not for judges to supply for the lawgiver (art. 117 CE and art. 1 LOPJ). Even though it is true that STS 296/2015, May 6, lays down a jurisprudential doctrine that, for obvious reasons of time, is not constant and repeated, it cannot and must not be ignored that it is destined (as moreover expressly stated in the text) to set a clear and stable interpretative canon on the scope of these laws, which now must be respected and applied.

**TEN.** - The representations with prosecutorial standing also claim that this Court for Preliminary Criminal Proceedings remains competent to hear this case, inasmuch it has not been established that any procedure for the investigation and prosecution of these deeds has been initiated.

However, it should not be forgotten that the presence of the cause of the exception of the exclusion of jurisdiction entailed by the principle of subsidiarity (article 23.5 LOPJ) does not imply an unconditional exercise of jurisdiction. It is contingent, as the law itself indicates, upon the presence of an absolutely necessary presence of the determination that Spanish jurisdiction extends to the deeds in question, as set forth in an authorizing internal organic law (art. 23.4 LOPJ). And in this case, as indicated, domestic laws do not authorize the extraterritorial application of Spanish law, in accordance with the interpretation of them laid down by the Second Chamber of the TS.

**ELEVEN.** - The conclusion derived from the preceding arguments is that, in accordance with legal doctrine set by the repeatedly mentioned STS 296/2015, May 6, the deeds under investigation in this case do not fall under sections a), b) or p) of art. 23.4 LOPJ. Hence, Spanish jurisdiction cannot be said to extend to investigating and try these deeds insofar as the conditions of relevant connection at this time are not present



for Spanish jurisdiction to be able to try the deeds committed by Spaniards or foreigners outside the country's boundaries:

- In the case of letters a) and b), because the conditions of connection are not present, and, in particular, that the persons against whom the procedure is directed be present in Spain.
- In the case of letter p), because, as closing clause, its application is excluded in cases of offenses set forth in the remaining sections of article 23.4 LOPJ.

Inasmuch as Spanish jurisdiction is not competent, the proper course, in accordance with Sole DT LO 1/2014, March 13, is that the case be dismissed and filed until the condition of legally established connection is present, that is, until any of the foreign persons against whom the procedure is directed is in Spain.

However, since this case is a summary procedure, competency for so ordering does not pertain to this court, but rather to the Criminal Chamber of the National Court. Hence, the proper course is to leave the pending investigatory procedures null, conclude this summary proceeding, and present it to that Court, so that after the appropriate steps, it may issue the ruling that it deems pertinent.

In view of the above-mentioned legal provisions and others of general and relevant application, the following

#### **RULING**

is issued.

#### **I ORDER:**

**THAT THE PENDING INVESTIGATORY PROCEDURES IN THIS CASE BE RENDERED NULL AND VOID.**

**THAT THIS SUMMARY PROCEDURE BE DECLARED CONCLUDED, AND IT BE SENT TO THE HONORABLE CRIMINAL CHAMBER OF THE NATIONAL COURT, UPON NOTIFICATION OF THE PARTIES FOR A PRIOR PERIOD OF TEN DAYS.**

Let notice be given to the parties with standing and the Office of Public Prosecutor.

\*\*\*UNOFFICIAL TRANSLATION\*\*\*



Decided, ordered and signed by Don José de la Mata Amaya, Judge Magistrate of Central Court of Preliminary Criminal Proceedings Number 5, in witness whereof.

**PROCEDURE** . Record to assure that what is ordered is carried out at once. In witness whereof.