Reg N.º 000522/14

I, Juan Francisco Céspedes Expósito, sworn translator of English certified by the Spanish Ministry of Foreign Affairs and of Cooperation, do hereby certify that the following is a full and faithful translation of a copy of an order[1], written in the Spanish language.

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Case-Law Registry No.: AAN 256/2014 - ECLI:ES:AN:2014:256A
Cendoj (Judiciary Documentation Center) ID: 28079229912014200039
Body: [Spanish] National High Court. Criminal Division
Location: Madrid
Section: 991
Appeal No.: 17/2014
Resolution No.: 40/2014
Procedure: ABBREVIATED/BRIEF CRIMINAL PROCEDURE
Speaker: JOSÉ RICARDO JUAN DE PRADA SOLAESA
Type of Resolution: Order

[Spanish] **NATIONAL HIGH COURT**
CRIMINAL DIVISION
PLENARY SESSION
PROCEEDINGS NO. 17/2014
ROLL 8/2014 OF THE SECOND SECTION
ORDINARY PROCEDURE NO. 80/2013
Central Criminal Court No. 2
ORDER NO. 40/2014
PRESIDENT:
FERNANDO GRANDE MARLASKA GÓMEZ
MAGISTRATES:
ÁNGELA MURILLO BORDALLO
CONCEPCIÓN ESPEJEL JORQUERA

[1] TN: The original document was downloaded from the Judiciary Documentation Center (Cendoj) and has a watermark which reads: Cendoj Database.

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ANTONIO DÍAZ DELGADO
NICOLÁS POVEDA PEÑA
RAMÓN SAEZ VARCARCEL CLARA BAYARRI GARCÍA

In Madrid, on the fourth day of July in the year two thousand and fourteen.

FACTUAL BACKGROUND

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FIRST.- The Central Court No. 1 of this National High Court rendered on the fourteenth of April, 2014 the Order by which previous Proceedings 309/10 were transformed into Summary 4/14 for crimes against humanity and genocide.

In an Order of the same date, the completion of the Summary and its submission to the Second Section of the Criminal Division of the National High Court was agreed so that we rule on the concurrency of the requirements set forth in subparagraph a) of Article 23.4 of [Spanish] Organic Law of the Judiciary in order to comply with the mandate provided in the transitional provision of [Spanish] Organic Law 1/2014, of March 13, which modifies [Spanish] Organic Law 6/1985, of July 1, of the Judiciary, or a decision deemed appropriate is adopted.

SECOND.- Once received, the proceedings were sent to the Plenary for their resolution be taken by all the magistrates of the Chamber, in compliance with the agreement of last March 21, to decide on the implementation of the reform made by [Spanish] Organic Law 1/2014, of March 13, for what magistrate JOSÉ RICARDO DE PRADA SOLAESA, who dictates the present resolution with the judgement of the Chamber, was designated as speaker. The discussion was held last June 23.

THIRD.- The Public Prosecutor, dealing with the notification he was given in March 17, 2014, stated on that subject that:

"In the Resolution notified to the Public Prosecutor's Office, a report on the possibility to dismiss the proceedings is requested. This petition is based on the approval of [Spanish] Organic Law 1/2014, of March 13, which modifies [Spanish] Organic Law 6/1985, of July 1, of the Judiciary, on Universal Justice. In its Sole Transitional Provision the following is stated: "Cases that at the time of entry into force of this Law are in consideration for the offences referred to in said Law shall be dismissed until the compliance of the requirements laid down in it is recognized".

1.- The Spanish League for Human Rights and the family of the Spanish citizen Luis Manuel[2] *brings a written complaint against the head of the Ministry of Defence, the head of the Ministry of the Interior and the head of the Ministry of Foreign Affairs of the Kingdom of Morocco and against the Governor of the city of El-Aaiún. The facts described relate to the performance of the security forces of the Kingdom of Morocco against the inhabitants of the settlement Gdeim Izik (Camp of Dignity) installed in the vicinity of the city of El-Aaiún on the territory of Western Sahara.*

The facts took place between the months of October and November of 2010, during the violent eviction of the camp, in which the security forces of the Kingdom of Morocco were responsible for disappearances, physical attacks, torture and killings, among them, the violent death of the Spanish citizen Luis Manuel, which occurred on the morning of November 8, 2010, caused by the agents of the Urban Security Forces, or GUS, created ex profeso *for Western Sahara. The complainants have described these events as a crime against humanity, a crime of genocide, murder, injury, torture and kidnappings, as defined in articles 607 bis, 174, 175, 176, 177 and 139 of the [Spanish] Criminal Code.*

The Court, before admitting the complaint -Order of November 29, 2010-, resolved to issue International Letters Rogatory to the Kingdom of Morocco with the purpose of knowing whether or not there were any procedures in progress on these facts, in accordance with the provisions of article 23.4 of the penultimate paragraph of [Spanish] Organic Law of the Judiciary, modified by [Spanish] Organic Law 1/2009. It should be noted that until today Morocco has not completed the Letters Rogatory, consequently the lawsuits still hold in abeyance.

[2] TN: Due to privacy reasons, the Judiciary Documentation Center (Cendoj) uses fake names instead of the real ones.

2. In reference to the facts in the complaint -described in a concise form in this writing- the Public Prosecutor's Office ***considers that the dismissal of the proceedings is not appropriate in accordance with the Sole Transitional Provision herein transcribed, therefore amended paragraphs 2, 4 and 5 of article 23, on the Universal Justice are not applicable****. In this case, the competency of the Spanish jurisdiction must be declared by the principle of Territoriality, covered in articles 8 of the [Spanish] Civil Code and article 23.1 of [Spanish] Organic Law of the Judiciary, which stipulate that criminal, police and public security laws apply to everyone that shall be found in Spanish territory and for crimes committed on board of Spanish ships or aircraft, without prejudice to the provisions of international treaties to which Spain is a party.*

3. At this point, the concept of territory in respect to the question of the Sahara should be examined:

Initially, from 1884 until 1958, the year in which [Spanish] Decree of July 4, 1958, on "Spanish territory of west Africa" was passed, which "divided the coastline of the Spanish territories of west Africa into two second class maritime provinces, called Ifni and the Spanish Sahara, with capital cities in Sidi Ifni and Villa Cisneros". This period is the so-called colonial.

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Later, during the so-called phase of provincialization, our legal system, specifically [Spanish] Law of April 19, 1961, established the basis on which to settle the legal system of the Province of the Sahara in its municipal and provincial regimes. Article 4 of this Law stated that "the province of the Sahara shall enjoy the right of representation in the [Spanish] Parliament and in any other relevant public bodies corresponding to Spanish provinces". As a result of the recognition of the equalization of the "stati" between peninsular and native Spanish citizens established by this Law, the right to vote for the referendum called by [Spanish] Decree of 2930/1966, of November 23, for the approval of the [Spanish] Organic Law of the State of 1967 was recognized to the Saharawi people.

In short, both formally and legally, the Spanish Sahara was considered a Spanish province, specifically it was province number 53.

Finally, in the phase of decolonization and after joining the UN and signing the Charter of the United Nations, San Francisco, June 26, 1945 -published in the [Spanish] Official State Gazette of November 16, 1990, Spain recognized the colonial nature of the Spanish Sahara, taking

on a series of obligations and becoming Administering Power. In this direction, the United Nations General Assembly approved Resolution 2072, of December 17, 1965, in which Spain is considered to be Administering Power of the Spanish Sahara. As Administering Power, Spain is obliged: "To ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement, their just treatment and their protection against abuses...", as established in subparagraph a) of article 73.

Leaving aside the fact that the preambles or explanatory statements of legal norms lack direct binding effectiveness, it is crucial that Spain recognizes its role of Administering Power in the Preamble of [Spanish] Law 40/1975, of November 19, on the decolonization of the Sahara ([Spanish] Official State Gazette No. 278, November 20, 1975, page 24234): "The Spanish State has been exercising, as Administering Power, full powers and responsibilities over the non-self-governing territory of the Sahara, which for some years has been subject in certain aspects of its administration to a special regime with similarities to the provincial regime and has never been part of the national territory".

4.- Currently there is a significant part of the legal sector that believes that Spain is still de jure *the Administering Power of Western Sahara although not* de facto, *for the following reasons:*

On November 14, 1975, the so-called Declaration of Principles between Spain, Morocco and Mauritania on the Western Sahara, also known as "Tripartite Agreement of Madrid", was officially signed in this capital city. In this declaration, six points were agreed. Among them, the second subparagraph reads: "The Spanish presence in the territory shall definitely end before February 28, 1976". The third subparagraph reads: "The opinion of the Saharawi people expressed through the Yemáa, or general assembly, shall be respected". The forth subparagraph reads: "The three countries shall inform the Secretary-General of the United Nations of the provisions determined in accordance with this document as a result of the denials developed in accordance with article 33 of the Charter of the United Nations".

Finally, the last subparagraph of this agreement, the sixth one, reads: "This document shall come into force on the day of publication of the Law on the decolonization of the Sahara in the [Spanish] Official State Gazette, which authorizes the Spanish government to implement the agreements contained in this document". In accordance with the last subparagraph, the [Spanish] Law 40/1975, of November 19, on decolonization of the Sahara was passed ([Spanish] Official State Gazette No. 278, November 20, 1975, page 24234). Its sole article declares: "The Government is authorized to perform the actions and take the necessary measures to carry out the decolonization of the autonomous territory of the Sahara, while safeguarding the Spanish

interests. The government shall inform the [Spanish] Parliament of all this". This Law has a Final and Repealing Provision: "This Law shall enter into force on the same day of its publication in the [Spanish] Official State Gazette and repeal the regulations approved for the administration of the Sahara as required by the purpose of this Law".

The United Nations has maintained a consistent position on the "Tripartite Agreement of Madrid", by finding it null and without legal effect, therefore, has always considered Spain as the Administering Power, with the obligations laid down in articles 73 and 74 of the Charter of the United Nations.

In Resolution 3458 B, the United Nations General Assembly admitted the "Tripartite Agreement", provided that the signatories of the "Agreement" would hold a referendum. However, anticipating that the referendum would not be held, the United Nations General Assembly passed on December 10, 1975, Resolution 3458 A, which recognizes Spain as the Administering Power in subparagraphs 7 and 8 of the ruling.

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On January 29, 2002, the United Nations Legal Counsel ruled the invalidity of the "Tripartite Agreement": "The Madrid Agreement did not transfer sovereignty over the territory, nor did it confer any of the signatories the status of an Administering Power, a status that Spain alone could not have transferred".

In short, in accordance with what has been said so far, the resolutions adopted by the United Nations General Assembly and the reports of its Secretary-General, the Administering Power of Western Sahara is still Spain, although "de jure" *and not* "de facto".

5.- The [Spanish] Supreme Court and the [Spanish] National High Court, in various rulings to grant nationality to those born in the Spanish Sahara and in accordance with the provisions of article 22 of the [Spanish] Civil Code, recognize that the Sahara was Spanish territory and give the Spanish nationality during the so-called period of "provincialization" (rulings of the Administrative Division of the [Spanish] Supreme Court, November 20, 2007 and November 7, 1999; of the Civil Division of the [Spanish] Supreme Court, February 22, 1977 and October 28, 1998; of the Administrative Division of the [Spanish] National High Court, May 12, 2005 and May 23, 2006).

To put an end to this writing, it is worth mentioning the ruling of November 7, 1999, passed by the Administrative Division of the [Spanish] Supreme Court. This resolution makes a distinction between metropolitan and colonial territory.

Thus, the details of this ruling should be noted. The fourth paragraph of the Legal Basis examines the concept of Spanish territory in relation to the question of the Sahara: "Fortunately, in this particular subject we can take into account two resolutions of the [Spanish] Council of State, one on Guinea (Resolution No. 36017, of June 20, 1968), and another on Ifni (Resolution No. 36.227, of November 7, 1968), which can be found in "Recopilación de doctrina legal", 1967-68, Madrid 1971, pages 21-31 and in "Recopilación de doctrina legal" 1968-69, Madrid 1972, pages 613-20. These two resolutions served as the basis for a detailed doctrinal analysis in which the problem of the Sahara is also addressed and that is described in pages 356-418 of the compilation book of the [Spanish] State Council published in 1972 by the then called Instituto de Estudios Políticos (Institute of Political Studies). A briefer but very clear approach of the problem that is based on the works that we have just quoted and that was published together with other studies on territorial division and decentralization in 1975 by the Instituto Nacional de Administración Local (National Institute of Local Government) facilitates access to historical data that are essential for understanding the problem".

The Court justifies the reference of the sources consulted: "The aforementioned national advisory body developed the notion of "national territory", a concept that inspired the approach to which the Spanish Government adjusted the entire process of decolonization and that is key for solving the underlying problem...".
Within this Legal Basis, the Chamber considers that: "The territory is the spacial area on which international law recognizes sovereignty to the State. The so-called metropolitan territory is a bound, imperishable, inalienable imprescriptible and essential space (as it is inherent to the definition of State and without it there would not be a particular State), and whose integrity, precisely because of all this, is specifically and strongly protected. On the contrary, the colonial territory is at the State's disposal and is a perishable, alienable, prescriptible, accidental (not essential), regularly protected and quantitatively measurable territory. It is quantitatively measurable as to how much can be taken from it (and in fact this is the reality) as a physical magnitude (referring to specific ideas and, in this case, rudely chrematistic ones). The Court continues by saying: "Well, Guinea, Ifni, and Sahara were Spanish territories that were not part of the national territory. And because of this, the integrity of the national territory was not breached for the carrying out of the legal and political actions that determined the independence

of Guinea (which until that time was dependent of Spain), the cession or, in other words, the "backcession" of Ifni to Morocco and the initiation of the process of self-determination of the Sahara. Only a territory with a community of Spanish citizens with full rights, established as an administrative unit of the Spanish local administration -in this case, part of one of them- and, whatever its organization, does not have another international personality or another right to self-determination different to the one that corresponds to the nation as a whole can be regarded as "national territory". Finally, the Court concludes this section by saying: "We repeat: the Spanish Sahara -and both Ifni and Equatorial Guinea- was, despite its provincial name, Spanish territory -that is to say: a territory under the authority of the Spanish State- but not national territory".

In short:

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a) Spain, with its entry into the United Nations, assumed the colonial status of the Spanish Sahara, and became the Administering Power, Resolution 2072 of December 17, 1965, passed by the United Nations General Assembly.

b) Spain, in the preamble of the [Spanish] Law 40/1975, of November 19, on decolonization of the Sahara ([Spanish] Official State Gazette No. 278, November 20, 1975, page 24234) admits having acted as Administering Power: "The Spanish State has been exercising, as Administering Power, full powers and responsibilities over the non-self-governing territory of the Sahara, which for some years has been subject in certain aspects of its administration to a special regime with similarities to the provincial regime and has never been part of the national territory".

c) The aforementioned case-law, for the purpose of granting citizenship to those born in the Sahara, proves that the Sahara was Spanish territory, both in the "provincialization" and in the colonial phase.

d) In conclusion, Spain is still de jure, *although not* de facto, *the Administering Power, and as such, until the end of the decolonization, has the obligations contained in articles 73 and 74 of the Charter of the United Nations.*

e) Finally, it should be noted that, if in accordance with international legality, a territory cannot be considered Moroccan, nor can Morocco be accepted as the preferential jurisdiction of the place of commission of the offence. From all of the above; it can be concluded that:

The Public Prosecutor's Office considers that the dismissal of the proceedings is not appropriate in accordance with the Sole Transitional Provision herein transcribed, therefore amended paragraphs 2, 4 and 5 of article 23, on the Universal Justice are not applicable. In this case, the competency of the Spanish jurisdiction must be declared by the principle of Territoriality, covered in articles 8 of the [Spanish] Civil Code and article 23.1 of [Spanish] Organic Law of the Judiciary, which stipulate that criminal, police and public security laws apply to everyone that shall be found in Spanish territory and for crimes committed on board of Spanish ships or aircraft, without prejudice to the provisions of international treaties to which Spain is a party.

II.- LEGAL REASONING

FIRST.- This Plenary agrees with the criteria of the Public Prosecutor's Office with regard to the fact that Spain is still *de jure*, although not *de facto*, the Administering Power of the territory, and as such, until the end of the decolonization, has the obligations contained in articles 73 and 74 of the Charter of the United Nations, including the provision of protection, even of jurisdictional nature, to its citizens against all abuse. For this reason, its territorial jurisdiction should be extended for facts such as those described in the complaint the present procedure is tied to.

The legal status of Western Sahara in the terms indicated by the Public Prosecutor's Office corresponds to that reflected in the document addressed to the President of the United Nations Security Council by the Deputy Secretary-General for Legal Affairs on January 29, 2002, which is expressly quoted in the backgrounds of recent resolution of the European Court of Human Rights in the matter A. C and others v. Spain, Lawsuit No. 6528/11, of April 22, 2014.

This Chamber agrees with the Public Prosecutor's Office that the criminal court sender of the proceedings has jurisdiction to hear the facts of the complaint in accordance with the criteria of territoriality of article 23. 1 of the [Spanish] Law of the Judiciary and not with those of universal jurisdiction of article 23.4 of the [Spanish] Law of the Judiciary, therefore it is not affected by recent reform of said article and, consequently, the sole transitional provision of the [Spanish] Organic Law 1/2014 is not applicable either.

SECOND.- Since the investigation is not completed and the provisional dismissal anticipated in the [Spanish] Organic Law 1/2014 is not appropriate, the order of termination of the Summary dictated by the criminal court must be revoked and the case returned to continue with its processing.

For all of these reasons, this **CHAMBER AGREES**:

III.- RULING.

THAT THERE IS NO CAUSE FOR DISMISSAL of the proceedings in the Central Criminal Court No. 2 of this [Spanish] National High Court of the Ordinary Procedure No. 4/2014.

TO REVOKE the order of termination of the Summary dictated by the criminal court.

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This resolution should be notified to the Public Prosecutor's Office and to the procedural representation of the complainants, letting them know that an appeal may be lodged following the legal procedures and deadlines.

It is so ordered."

This translation appears on ten pages, numbered from 1 to 10, each of which carries my signature and seal.
Witness my hand this twenty-first day of November, 2014.
Signed: JUAN FRANCISCO CÉSPEDES EXPÓSITO

Don Juan Francisco Céspedes Expósito, Traductor-Intérprete Jurado de Inglés, certifica que la que antecede es una traducción fiel y completa al inglés de un documento redactado en español.
En Madrid, a veintiuno de noviembre de dos mil catorce.
Firmado: JUAN FRANCISCO CÉSPEDES EXPÓSITO

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