ADMINISTRATION OF JUSTICE[1]
NATIONAL COURT

CRIMINAL DIVISION
PLENARY SESSION (ALL JUDGES SITTING)

APPEAL RECORD 173/98
DIVISION ONE
SUMMARY PROCEEDINGS 1/98
CENTRAL INVESTIGATIVE COURT NUMBER SIX

DECISION

CRIMINAL DIVISION. PLENARY SESSION

Presiding Judge:
Siro Francisco Garcia Pérez

Judges:
Francisco Castro Meije
Carlos Cezón González
Jorge Campos Martinez
Angela Murillo Bordallo
Juan José López Ortega
Carlos Ollero Butler
Manuela Fernández Prado
José Ricardo de Prada Solaesa
Antonio Diaz Delgado
Luis Martinez de Salinas Alonso

Madrid, November 5th, 1998

MATTERS OF FACT

ONE. Central Trial Court number Six issued the following decision on September 15th, 1998 in summary proceeding number 1/98:

"*I ORDER AS FOLLOWS*
"ONE. This Court remains competent to continue conducting the proceedings.
"TWO. An International Rogatory Commission is to be issued, addressed to the judicial authorities of Santiago, Chile, requesting them to confirm as soon as possible whether there are any proceedings pending against Augusto Pinochet Ugarte, and if so, the number of proceedings, as well as the charges that they pertain to."

TWO. The Office of the Public Prosecutor lodged an interlocutory appeal against this decision, which was dismissed by the Court on October 1st, 1998. The Office of the

[1] The original Decision is in Spanish

Public Prosecutor lodged a further appeal, and the latter was admitted for consideration in only one part.

THREE. The pertinent evidence and record were transferred to Division One of this Court, and after the first stage of the proceedings had been conducted, under article-197 of the Organic Law of the Judiciary, the Court issued an order on October 22nd of this year, deciding that all the Judges of the Court would hear the case, establishing that there would be a public hearing, setting forth the date and time it would be held.

FOUR. The hearing took place on October 29th, with the appellant Office of the Public Prosecutor represented by Ignacio Peláez and appellees Josefina Llidó Mengual, Maria Alsina and the Association of Relatives of Disappeared Prisoners, represented by counsel, Don Juan E. Garcés y Ramón.

The appeal was considered and a vote taken on the morning of following day, October 30th of this year.

At about 2 p.m., a decision having been adopted by unanimity, it was communicated to the parties, and made available to the public.

FIVE. The decision was written by Judge Carlos Cezón González.

LEGAL FOUNDATIONS

ONE. Grounds for the appeal.

The grounds for the appeal lodged by the Office of the Public Prosecutor against the decision of Central Magistrate's Court Number Six confirming that Spain is competent to continue conducting the proceedings, are as follows:

First. The Office of the Public Prosecutor does not believe that the acts being investigated constitute the crime of genocide.

Second. The Office of the Public Prosecutor believes that Article 6 of the Convention for the Prevention and Punishment of the Crime of Genocide grants jurisdiction to judge the crime of genocide only to the courts of the country where the crime was committed.

Third. The Office of the Public Prosecutor disagrees that the acts in question can be legally defined as terrorism.

Fourth. It is claimed that there has been erroneous interpretation of article 5 of the Convention on Torture of December 10th, 1984.

Fifth. The Office of the Public Prosecutor claims that there is other pending legal action, as well as *res judicata* applicable to this case.

TWO. True scope of the provision contained in article 6 of the Convention for the Prevention and Punishment of the Crime of Genocide.

The second grounds for the appeal lodged by the Office of the Public Prosecutor will be

analysed first by reproducing what the judges sitting in plenary session stated in the decision issued yesterday in appeal number 84/98 of Division Three (lodged against the decision of Magistrate's Court number Five declaring that Spain is competent to judge the events which are the object of summary proceedings 19/97, being conducted in that court, on genocide and terrorism, and which relates to events which took place in Argentina between 1976 and 1983).

The Convention for the Prevention and Punishment of the Crime of Genocide is dated December 9th, 1948. Spain adhered to it on 13 September, 1968 with reservations regarding the entirety of article 9, which pertains to the jurisdiction of the International Court of Justice in matters involving disputes between the contracting parties relating to the interpretation, application or execution of the Convention, including those disputes relating to the responsibility of a State in matters of genocide or any of the other acts listed in article 3. The Convention became valid for Spain on December, 12h, 1968. The Convention observes that the General Assembly of the United Nations stated in its Resolution 96(1), dated 11 December, 1946, that genocide is a crime under international law, is contrary to the spirit and the aims of the United Nations, and is condemned by the civilized world (Preamble). It also establishes that the contracting parties undertake to prevent and punish genocide committed either in times of peace or of war (article 1), whether the responsible parties be rulers, public officials or private persons (article 4), that the contracting parties agree to enact the legislation necessary to ensure the application of the provisions of the Convention, and particularly to establish effective criminal penalties to punish persons guilty of genocide or of any of the other acts listed in article 3 (article 5), and that any contracting party may request that the competent agencies of the United Nations take—in accordance with United Nations Charter—the measures it deems appropriate to prevent and punish acts of genocide or any of the other acts listed in article 3 (article 8). Its Article 6 establishes that: "Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

The appellants (only the Office of the Public Prosecutor in this appeal), argue that the above mentioned provision (which forms part of our internal legislation, in accordance with article 96 of the Spanish Constitution, and article 1(5) of the Civil Code) would preclude Spanish jurisdiction over an act of genocide if the crime was not committed on national territory.

The judges sitting in Plenary Session did not concur with this opinion. Article 6 of the Convention does not preclude the existence of judicial agencies with jurisdictions other than the territory where the crime was committed or the jurisdiction of an international tribunal. Article 6 of the Convention establishes an international criminal tribunal and imposes on the States which are parties to the Convention a duty to ensure that acts of genocide committed in the State parties can be judged by their judicial organs. Anything else would be contrary to the spirit of the Convention, which seeks a commitment of the contracting parties to use their respective criminal laws to prosecute genocide as a crime against international law and to avoid impunity for this grave crime, to consider this article of the Convention as a limit to the exercise of jurisdiction, that might exclude any jurisdiction other than that envisaged by the provision. The fact that the contracting parties have not agreed on universal prosecution of the crime in each of their national

jurisdictions does not preclude the establishment, by a State which is a party to the Convention, of that type of jurisdiction for a crime which involves the whole world and affects the international community, and, indeed, all of humanity directly, as stated in the Convention itself. Under no circumstances do we understand article 6 to prevent signatory States from exercising any right to prosecute established in their internal legislation. It would be unthinkable that, due to application of the Convention for the Prevention and Punishment of the Crime of Genocide, Spain, for example, could not punish a Spanish national responsible for genocide who had committed the crime outside Spain and who was currently in our country, provided the requirement specified in article 23(2) of the Organic Law of the Judiciary was met. Neither do the terms of article 6 of the Convention of 1948 authorize abolition of extraterritorial jurisdiction for the punishment of genocide by a State which is a party (such as Spain) and whose law establishes extraterritoriality with regard to prosecution for such crimes in paragraph four of article 23 of the Organic Law of the Judiciary, which is not incompatible with the Convention in any way.

It must be admitted, as a result of the primacy of international treaties over internal legislation (articles 96 of the Spanish Constitution and 27 of the Vienna Convention on Treaty Law of 1969), that article 6 of the Convention for the Prevention and Punishment of the Crime of Genocide imposes deference by jurisdictions other than those mentioned in the legal provision, and thus a State should abstain from exercising jurisdiction regarding events constituting genocide which are the object of prosecution by the courts of the country in which they took place, or by an international criminal court.

THREE. Applicability at the current article 23(4) of the Organic Law of the Judiciary, as the current law on procedure.

Article 23(4) of the Organic Law of the Judiciary states that Spain has the authority to hear cases involving certain acts by Spaniards or foreigners outside national territory which can be defined, according to Spanish criminal law, as one of the crimes listed in the article. It is not applied retroactively when the proclaimed jurisdiction is exercised while the provision is valid, as it is in this case, irrespective of when the events being dealt with took place. The said article 23(4) of the Organic Law of the Judiciary is not a provision for punishment, but rather a procedural one. It does not define or punish any action or omission and merely proclaims Spanish jurisdiction over crimes which are defined and punished by other laws. The procedural provision in question does not establish sanctions and does not restrict individual rights, and consequently its application for the purpose of criminal prosecution of acts which took place before it became valid is not contrary to article 9(3) of the Spanish Constitution. The legal consequence, which restricts rights, arising from the commission of a crime of genocide - the punishment - is the result of the legal provision punishing genocide and not of the procedural law which assigns jurisdiction to Spain to punish the crime. The principle of legality (article 25 of the Spanish Constitution) establishes that acts must constitute a crime - in accordance with Spanish law, according to article 23(4) above mentioned - at the time they take place and that the sentence which may be handed down be determined by a law in force when the crime took place, but it does not require that the jurisdictional and procedural provisions be in force at the time of the criminal act. Jurisdiction is a premise of the proceedings, not of the crime.

Consequently, it is not necessary to resort, in order to establish Spain's authority to prosecute a crime of genocide committed abroad by nationals or foreigners during the years 1976 to 1983 --up to the time the Organic Law on the Judiciary came into force- to the provisions of article 336 of the Provisional Law on the Organisation of the Judiciary dated 15th September, 1870, revoked by the Organic Law of the Judiciary of 1985, which assigned jurisdiction to the Spanish courts to judge Spanish or foreign nationals who had committed the crime of genocide outside Spanish territory since this crime was included in the Criminal Code current in force at the time by Law 47/1971 dated 15th November, under the heading of crimes against the external security of the State. However, the argument that extraterritorial prosecution for the other crimes against the external security of the State was covered by the principle of protection has no legal relevance.

This paragraph is a transcription of paragraph three of the Legal Reasons section of the decision issued by the judges sitting in plenary session yesterday on the above mentioned appeal appearing in Record 84/98 of Division Three; only one reference has been adjusted in view of the case examined in this decision.

FOUR. Matters of Fact alleged in the summary proceedings.

In order to issue a decision on the appeal, it will be necessary to determine whether the matters of fact alleged in the summary proceedings can be defined, according to Spanish criminal law, as crimes of genocide or terrorism. This does not require any opinion on the consistency or rationality of the evidence supporting the allegations. The appeal does not challenge the scope of incrimination or the content of the matters of fact which must be qualified as genocide or terrorism for the purposes of challenge to jurisdiction . The parties to the appeal have not denied that the alleged events consist of deaths, illegal arrests and torture for reasons of ideological cleansing or different understanding of national identity and values, attributed to the rulers and members of the Armed Forces or security forces, and other organised groups, all of whom acted clandestinely in these events which took place in Chile during the military regime, which took power on September,11th 1973.

FIVE. Whether the alleged events can be qualified as genocide according to Spanish criminal law.

The first part of this appeal will now be considered, and the above mentioned decision issued yesterday will be referred to.

Article 23(4) of our Organic Law of the Judiciary establishes that Spain is authorized to deal with acts of Spanish or foreign nationals which take place outside Spain and which can be defined, according to Spanish criminal law, as one of the crimes listed in this provision, starting with genocide (letter a) and continuing with terrorism (letter b) and including, lastly, any other crime which "*according to international treaties or conventions, is to be judged in Spain*" (letter g).

Genocide is a crime consisting of the total or partial extermination of a human race or group, by killing or neutralising its members. This is understood on a social level, without any need for a definitional formula. It is a concept which is felt by the international community, that is, by individuals, States and international organisations.

Genocide has been experienced throughout history by many groups. Technology placed at the service of the accurate documentation of past events enabled humanity to appreciate the specific horrors of the persecution and holocaust suffered by the Jewish people during the Second World War. Consequently, genocide is a reality which is known, understood and felt by society. In 1946, the General Assembly of the United Nations (Resolution number 96) adopted the recommendation of the VI Commission and recognized that genocide is a crime against the Law of Peoples, and that the parties responsible, whether they be private persons, agents or official representatives of the State, must be punished for it.

The feature which characterises genocide, according to the abovementioned Resolution 96, is the extermination of a group for racial, religious, political or other reasons, this being an act which affects the conscience of society. It constitutes a crime against humanity to take action leading to the extermination of a human group, whatever the definitional features of the group may be. The Statute of the Court of Nuremberg mentioned, along the same lines, "*crimes against humanity, namely murder, extermination, enslavement, deportation and other inhuman acts against any civilian population before or during the war, or persecution for political, racial or religious reasons...*" (article 6).

In 1948, the Convention for the Prevention and Punishment of the Crime of Genocide was signed. We have already referred to it in paragraph Two of these Legal Reasons. The Convention states that genocide is a crime under international law, is contrary to the spirit and the aims of the United Nations, and is condemned by the civilised world. The Preamble states that during all periods of history, genocide has resulted in great loss of life, and it states that to free humanity from such an odious scourge, international cooperation is required.

Article 1 of the Convention states as follows: " *The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish*."

Article 2 defines genocide as " *any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*".

And these acts committed with the aim of exterminating a group are, according to the article 2 of the Convention to which we have referred: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group, forcibly transfering children of the group to another group.

These are horrendous actions which justify the words "*odious scourge*" used in the Preamble to the Convention. The description of behaviours is associated with the social concept - which is understood and felt - of genocide that we have referred to. The required intention to destroy the group totally or partially is an aspect of the actions affecting a group.

In 1968, Spain signed the Convention, and in 1971, by virtue of Law 44/71 dated 15th November, it included the crime of genocide in the Criminal Code then in force - article

137 bis- as a crime against the rights of people. Genocide was defined as follows: "*Those who, with the intention of totally or partially destroying a national ethnical, social or religious group, commit any of the following acts...*". And the Spanish Criminal Code current at the time went on to mention specific acts of genocide (deaths, injuries, subjection to conditions of existence endangering life or seriously affecting people's health, the enforced displacement of people, and others).

It must be pointed out that the word "*social*" (contrary to the definition given in the 1948 Convention) responds to what we have called the social idea or interpretation of genocide, a concept which is understood by society without any need for a definitional formula. The idea of genocide remains incomplete if the features of the group enduring the horrors and the exterminating action are limited. Moreover, the lack of a comma between the words "*national*" and "ethnical" cannot give rise to any conclusions about any limitation in our internal legislation, existing up to the time of the Criminal Code of 1995, of the definition of genocide in relation to the international concept of genocide.

In 1983, when a partial and urgent reform of the Criminal Code took place, the word "*social*" was replaced by "*racial*" in the said article 137 bis, although a comma between "national" and "*ethnical*" would still be absent. In 1995, when the penultimate reform of the now revoked Code took place, apology for genocide was criminalized.

The new Criminal Code includes genocide among the crimes against the international community in its article 607, and defines it, in accordance with the 1948 Convention, as "*the aim to destroy, in whore or in part, a national, ethnical, racial or religious group*"

These are the first paragraphs of Legal Reason number Five of the decision issued by the Plenary Session yesterday, which has been frequently referred to.

With regard to the events which took place in Chile alleged in the summary proceedings and to which this appeal relates, the Public Prosecutor maintains that the matters of fact alleged cannot constitute genocide, since the persecution which took place in Chile during the military regime from 11th September, 1973 onwards was not carried out against any national, ethnical, racial or religious group. The alleged plural and multi-personal action, in the terms in which it is mentioned in the summary proceedings, was against a group of Chilean nationals or persons resident in Chile who could be distinguished by certain features, and who undoubtedly were the object of a distinction made by the parties responsible for their persecution and harassment, and such acts of persecution and harassment consisted of deaths and illegal arrests, and in many cases the fate of the arrested parties is still unknown. They were abducted without notice from their homes and suddenly and for ever expelled from society, thus giving rise to the uncertain concept of the "*disappeared*", subjected to torture and imprisonment in clandestine or improvised detention centres, with no observance of the rights assigned to arrested persons by any legislation, and imprisoned or sentenced in penitentiary centres without their relatives being informed of their whereabouts. The events alleged in the summary proceedings undeniably reflect the intention to exterminate a group of the Chilean population, without excluding resident foreigners with similar characteristics. It was an act of persecution and harassment intended to destroy a certain sector of the population, which was a varied group, but one which could be distinguished by certain features. The group that was persecuted and harassed consisted of citizens who did not represent the type determined by the promoters of repression to

be the appropriate type for the new order which they sought to impose in the country. The group consisted of citizens who opposed the military regime imposed on September 11th, people who did not agree in with the understanding of the nation's identity and values held by the new rulers, and also of citizens who were indifferent to the regime and to its understanding of national values. The repression did not seek to change the attitude of the group, but rather to destroy the group by means of arrests, torture, disappearances, deaths and harassment of the members of that group, which was clearly defined by, and identifiable to, the parties responsible for repression. It was not a random and indiscriminate action. According to the report drawn up by the National Commission for Truth and Reconciliation set up by the democratic government in Chile in 1990, between 11 September, 1973 and 10 March, 1990, the number of deaths in the country for which State agents were responsible amounted to 1068, and the number of persons who disappeared to 957.

We can now return to the Legal Reasons contained in the decision issued yesterday.

These alleged events constitute the crime of genocide. We know why the term "*political*" or the words "*or others*" do not appear in the 1948 Convention, whose article 2 lists the features of the groups which are the object of the destruction characteristic of genocide. But silence does not signify inevitable exclusion. Whatever the intentions may have been of the people who worded the text, the Convention acquired validity by virtue of the subsequent signing and adhesion to the treaty by members of the United Nations who shared the view that genocide was an odious scourge which they must undertake to prevent and punish. Article 137-bis of the revoked Spanish Criminal Code and article 607 of the current Criminal Code, which took into account the worldwide concern that gave rise to the 1948 Convention, cannot exclude from their definitions events such as those alleged in these proceedings. The necessary implication of the obligation felt by countries that were parties to the 1948 Convention to punish genocide and to prevent it from being committed with impunity - as it was considered a horrendous crime under international law- is that the phrase "*national group*" must mean not "*a group of persons who form part of the same nation*", but simply a national human group, a human group distinguished by certain characteristics which forms part of a greater group. The limited interpretation of this type of genocide, which the appellant seeks to make, would prevent the definition as genocide of acts as odious as the systematic elimination by the people in power, or by a gang, of AIDS sufferers as a group with a particular characteristic, or of the elderly, also as a group distinguished by a particular feature, or of foreigners residing in a country who, despite coming from different nations, may be considered to be a national group in relation to the country in which they live, where they are distinguished precisely by not being nationals of that State. This social concept of genocide, which is felt and understood by the community, and which gives rise to the community’s rejection of and horror at the crime, would not allow for exclusions such as those just mentioned. The prevention and punishment of genocide as an international crime and as an evil which directly affects the international community, according to the intentions of the 1948 Convention -which can be inferred from the text- cannot be effective if we exclude from consideration certain national groups distinguished by particular features, discriminating against them with respect to others. Neither the 1948 Convention nor our current Criminal Code nor the revoked criminal code expressly preclude this necessary inclusion.

In these terms, the events alleged in the summary proceedings constitute genocide, and

consequently article 23(4) of the Organic Law of the Judiciary is applicable to the case. At the time of the events in the country in which they took place, efforts were made to destroy a national group with certain features, namely those who could not be included in the national reorganisation plan or those who, according to the persecutors, did not fit in. The victims included foreigners, and in particular a large number of Spaniards. All the actual or potential Chilean or foreign victims formed part of a group with certain features, which the persecutors endeavoured to exterminate.

SIX. Definition of the alleged events as terrorism.

Again reference will be made to the Legal Reasons of the decision issued by the plenary session on the appeal appearing in record number 84/98 of Division Three. They constitute a reply to the third alleged grounds for this appeal.

The definition of the alleged events as terrorism does not contribute anything new to the resolution of the case, since the alleged events have already been considered susceptible to definition as genocide and are the same events which are being considered. Terrorism is also a crime for which international prosecution is contemplated, as stated in article 23(4) of our Organic Law of the Judiciary, and it has already been mentioned (in paragraph Two of these Arguments of Law) that the provision, which is a current procedural one, is applicable irrespective of when the crimes were committed. However, the Court must state whether the events alleged in the summary proceedings, which are susceptible to definition as genocide, can also be defined as terrorism. The Court believes that it cannot be precluded from defining these events as terrorism simply because our law requires existence of an intention to subvert the constitutional order or to commit a serious breach of public order, and the alleged events are not contrary to Spanish constitutional order. The subversive tendency relates to the legal or social order of the country in which the crime of terrorism is committed or the country which is directly affected by it as the target of the attack, and this necessary transfer of an element does not preclude definition as terrorism according to Spanish criminal law - article 23(4) of the Organic Law of the Judiciary. Moreover, we find in the deaths, injuries, coercion and illegal arrests which are the object of the proceedings the particular characteristic of having been carried out by persons forming part of an armed group, irrespective of the institutional functions discharged by such persons, since we must recognize that the said deaths, injuries, coercion and illegal arrests were effected clandestinely and not in the course of the regular discharge of official functions, although the latter were taken advantage of for the purpose. The association to carry out illegal acts of destruction of a group of persons distinguished by certain features was a secret one and developed parallel to the institutional organisation of which the authors formed part, but it cannot be confused with the latter. Furthermore, the following elements also existed: a structure (a stable organisation), a result (the production of insecurity, anxiety or fear in a group or encouragement of such fear among the general population) and a purpose (understood as the rejection of the legal order prevailing in the country at the time), which were unique to the armed band.

Antonio Quintano Ripollés wrote the following in the 1950s: "*One form of terrorism has been the regrettable proliferation in our time, so marked for State monopolies, is the form of terrorism from above, that is, practised by the State openly or in secret, through its official or unofficial agencies. It is clear that this goes beyond internal criminal law proper, although it might be covered by international criminal law in the*

dimension of so-called crimes against humanity or genocide. It is without doubt the vilest aspect of terrorism, as it eliminates all risks and takes advantage of authority to commit its crimes under the cover of official duty and even of patriotism".

SEVEN: Crimes of torture. The fourth ground for the appeal.

Once again, the text of the decision issued yesterday will be referred to.

The alleged torture is part of the greater crime of genocide or terrorism. Therefore, it would be useless to consider whether the crime of torture is, according to our law, a crime for which there is universal prosecution according to article 23(4) of the Organic Law of the Judiciary, as related to article 5 of the Convention of 10th December, 1984 against torture and other cruel, inhuman or degrading punishments. If Spain has jurisdiction to prosecute for genocide abroad, then the investigation and trial must necessarily extend to crimes of torture which are an aspect of genocide, and not only in the case of the Spanish victims as might be inferred from article 5(1)(c) of the said Convention, which is not a duty imposed on the signatory States. Spain would have its own jurisdiction deriving from an international treaty in the case of paragraph 2(5) of the said Convention, but as we have already said, this matter is legally irrelevant for the purposes of the appeal and the summary proceedings.

EIGHT. *Res judicata* and existence of pending legal action.

The Office of the Public Prosecutor alleged that there was another lawsuit pending decision, and res *judicata*, in its petition to conclude the summary proceedings, dated 20 March of this year (page 5.531 of the record), repeated these argument in the interlocutory appeal lodged prior to this appeal, on which a decision was issued, and repeated them again during the hearing held on 29 October. The reasons invoked were: that in Chile the events being judged in these proceedings had already been the object of a trial, and the existence of criminal proceedings dealing with the same events currently being conducted at the Court of Appeal at Santiago, Chile, instituted pursuant to two complaints for crimes of multiple homicide and kidnappings instituted against the former president of Chile, Augusto Pinochet Ugarte.

Thus, it is being alleged that the court lacks authority to rule because it does not meet the requirement established in paragraph two of article 23 of the Organic Law of the Judiciary ("*if the criminal has not been acquitted, pardoned or sentenced abroad, or, in the latter case, if he has not served his sentence*").

The Justice Department has expressly quoted cases involving the disappearance of Antonio Llidó Mengual (a Spanish priest arrested by security agents in Santiago in October, 1974 and imprisoned in a detention centre, there having being no information on his fate since then), the disappearance of Michelle Peña (arrested in Santiago by agents of the DINA in June, 1975 and taken to a detention centre, there being no information since then on her fate or on that of the child she was expecting, as she was pregnant when she was arrested) and the death of Carmelo Soria Espinoza, a Spaniard who held dual Spanish-Chilean nationality and who was arrested in Santiago on 15 July, 1976 by agents of the DINA (he was found dead the next day), as crimes on which the Chilean justice system has already ruled.

In all three cases, the courts of Chile dismissed the prosecution by virtue of the application of Decree-Law 2.191 of 1978 issued by the Government Council of the Republic, pardoning the parties responsible for crimes (with certain express exceptions) committed during the state of siege, namely between ll September, 1973 and 10 March, 1978, provided they were not being tried or had not been sentenced. The court decisions appear on pages 5743 et seq. and 5752, 5753 and 5756 et seq. of the summary proceedings.

It also appears in the summary proceedings, on pages 5.783 et seq. that the proceedings conducted against two persons conducted as a result of the death of Spanish priest Juan Alsina Hurtos (who was arrested on 19 September, 1973 by a military patrol of the Yungay Regiment of San Felipe and executed by the parties who arrested him at the Bulnes bridge over the river Mapocho on the same day) were dismissed by virtue of the same Decree-Law.

The crimes to which reference has been made are to be deemed not already adjudicated. Irrespective of whether Decree-Law 2.191 of 1978 can be considered to be contrary to international *ius cogens,* it cannot be considered to be a true pardon according to Spanish legislation applicable to these proceedings. It is merely a provision which abolishes punishment for reasons of political convenience, and consequently it is not applicable to the case of an accused party acquitted or pardoned abroad (article 23(2)(c) of the Organic Law of the Judiciary). That certain behaviour is not punishable, by virtue of a subsequent legal provision abolishing punishment, in the country where the crime is committed (article 23(2)(a) of the said Law), is not relevant in any event in cases of extraterritoriality of Spanish jurisdiction by virtue of the principles of universal protection and prosecution, in view of the provisions of the above mentioned article 23(5) of the Organic Law of the Judiciary.

The four cases mentioned above (among many other, similar ones) cannot be deemed to have been tried or dismissed in Chile, and they justify maintenance of the jurisdiction which is being challenged.

NINE. Article 2(1) of the Charter of the United Nations is not a legal provision which can invalidate, in this case, article 23(4) of the Organic Law of the Judiciary. Final considerations.

To conclude, Spanish courts have the authority to judge the events which are the object of these proceedings.

Article 2(1) of the Charter of the United Nations ("The Organisation is based on the principle of the sovereign equality of all its Members") is not a legal provision which invalidates the proclamation of jurisdiction made in article 23(4), which has been quoted frequently in this decision.

When the Spanish courts apply the said legal provision, they are not interfering in the sovereignty of the State where the crime was committed, but rather they are exercising Spanish sovereignty with regard to international crimes.

Spain has jurisdiction to judge the events by virtue of the principle of universal

prosecution for certain crimes - a category of international law - recognized by our internal legislation. It also has a legitimate interest in the exercise of such jurisdiction because more than fifty Spanish nationals were killed or disappeared in Chile, victims of the repression reported in the proceedings.

Therefore,

THE JUDGES IN PLENARY SESSION AT THE CRIMINAL DIVISION OF THE NATIONAL COURT AGREE TO DISMISS THE APPEAL AND TO CONFIRM SPANISH JURISDICTION TO JUDGE THE EVENTS WHICH ARE THE OBJECT OF THE PROCEEDINGS.

This decision is unappealable.

Notice of this decision is to be given to the Public Prosecutor Office and to the appellees.

This is the order of the Judges listed above.

I, JOAQUIN CASSINELLO OLARES, SECRETARY OF THE CRIMINAL DIVISION OF THE NATIONAL COURT, hereby certify that this photocopy is a true copy of the original appearing in Appeal Record 173/98 (Section 1).

Madrid, 5th November, 1998

STAMP OF THE SECRETARY'S OFFICE
CRIMINAL DIVISION NUMBER ONE
OF THE NATIONAL COURT