



**NATIONAL COURT  
CENTRAL COURT FOR PRELIMINARY CRIMINAL PROCEEDINGS ONE  
CASE 27/2007**

**RULING**

In Madrid, March 17, 2014.

**FACTS**

**ONE.** This cause is being pursued as a **crime against persons** and property **protected in the event of armed conflict**, as provided for in Article 611.1 of the Criminal Code, in relation to **article 608.3 of the Criminal Code**, in multiple offenses of homicide, as set forth and sanctioned in article 138 of the Criminal Code. The facts in question, which are set forth below, are likewise covered by articles 146 and 147 of the **Fourth Geneva Convention**, in relation to the protection of civilian persons in time of war. The Office of Public Prosecutor and the other parties in this case are in agreement with the facts and their legal classification.

From the preliminary hearings in the case it is established that, at the time of the military occupation of Iraq by the United States and allied countries - after U.S. and British troops crossed the border with Kuwait (March, 23, 2003) and made some forays into Baghdad around April 7 - early in the morning of April 8, 2003, the U.S. Army Third Infantry Division crossed the western part of Baghdad and took a position on the banks of the Tigris River. That morning vehicles of the 64th Armored Regiment, 4th battalion, belonging to Alpha Company of that Division, were positioned at one end of the Al Jumhuriya Bridge, from which they fired shots at government buildings and other Iraqi military positions. From several days before the start of the occupation, most of the international media were housed at the Palestine Hotel in Baghdad (one of the highest and most emblematic buildings in the city), to which they had moved at the suggestion of the U.S. Pentagon. The hotel was located on the east side of the Tigris River, where most of the residential areas of Baghdad were located, and hence that area was inhabited by civilians. However, the headquarters of the Arab television systems Al Jazeera and Abu Dhabi, located in residential buildings, were located on the other bank of the Tigris and east of the Jumhuriya Bridge. Prior to the invasion both Al-Jazeera and Abu Dhabi TV had told the Pentagon their exact location, also marking their headquarters with "Press" in large signs. There is no indication that there were any other places that where other media were housed or working. The aforementioned combat vehicles were about 1,700 meters from the Palestine Hotel and 300 meters from the Al Jazeera and Abu Dhabi offices. Thus the media could see, film, broadcast, and report on the activity of the vehicles.



One of the missions entrusted to that Division was to prevent international media from reporting on the military operations underway in the taking of Baghdad. To that end the Third Division had previously bombed the offices of those Arab companies (one of them - Al-Jazeera - just at the time that two people were trying to resituate the cameras on the top); then in the early hours of that morning they fired at them with the vehicles (they fired directly at the Abu Dhabi camera located on the roof of the building), thereby succeeding in preventing them from recording what happened or was going to happen, and thus broadcast it.

Besides great material damage, those attacks caused one death (the journalist Tarek Ayyoub) and wounded two people at the Al Jazeera headquarters. Then, to complete the plan, at about 11:00 a.m. the U.S. "Abrams M1" tank belonging to "A" company, fired a 120 mm. shell at the Palestine hotel at the level of the fifteenth floor. The Spanish journalist from the Telecinco television chain, Mr. José Manuel Couso Permuy, who was filming from room 1403, was hit by shrapnel from the explosion of the shell and died a few hours later at the Ibn Nafis Hospital, in Baghdad. A reporter for the Reuters agency (Taras Protsyuk), who was on the floor above, was also killed, and at least three other journalists (Samia Najul, Paul Pasquale and Faleh Kheiber) were seriously injured.

The aforementioned tank had vision equipment with which the people at the windows and on the balconies in the hotel and objects they were holding could be seen very clearly.

The person who gave the direct order to fire at the hotel was **Lieutenant Colonel PHILIP DE CAMP**, who was commanding Armored Regiment No. 64 of the U.S. Army Third Armored Infantry Division, who passed the order to **Captain PHILIP WOLFORD**, in command of the Armored Unit. He authorized the one who materially fired the shot, Sergeant **THOMAS GIBSON**, who belonged to 'A' company of Armored Regiment No. 64.

Which American higher (political or military) official planned the operation of preventing the media from reporting is not known; however, it could have been given to the Head of the General Headquarters and Third Division Commander **Buford BLOUNT**, to be carried out, and then to the head of the 2nd Brigade of the Division, Colonel **David PERKINS**.



**TWO** - Recently on March 15, LO\* 1/2014, (March 13) went into effect, and amended LO 6/1985 (July 1) of the Judiciary, having to do with universal justice. The modification affects article 23 of that law and, with regard to this case, as follows:

One. - The new section 4 of article 23 says that Spanish jurisdiction shall be competent *"to try acts committed by Spaniards or foreigners outside national territory that can be classified, according to Spanish law, as any of the following offences 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 resides habitually in Spain, or against a foreigner who is in Spain and whom the Spanish authorities have refused to extradite.*

b) ...

(p) *Any other offence the prosecution of which is **imposed on a mandatory basis 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 set forth therein."*

Two.- Moreover, the new paragraph 5 of article 23 stipulates that "the offences referred to in the preceding paragraph shall not be prosecutable in Spain under the following conditions:

a)...

(b) ***When a procedure** for investigation and prosecution **has been initiated** in the state of the place where the acts were committed or in the state of the nationality of the person accused of them, provided that:*

1 °) *The person accused of committing the acts is not in Spanish territory.*

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\* [LO = Organic Law]



Three - The sole transitional provision states that "*cases that are underway at the time when the Law goes into effect for the crimes referred to there shall be stayed until it is verified that the requirements laid down therein have been met.*"

**THREE. - Article 146 of the Fourth Geneva Convention, on the protection owed to civilians in time of war**, (adopted on August 12, 1949 by the Diplomatic Conference for the Establishment of International Conventions to Protect War Victims, held in Geneva from April 12 to August 12, 1949 - entry into force: October 21, 1950), having to do with criminal sanctions stipulates that:

**"I. General Considerations:**

*The High Contracting Parties undertake to enact any legislation necessary to provide effective criminal 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.*

**LEGAL REASONING**

**ONE.** - As is evident, the new paragraph 4.a) Article 23 of the LOPJ [Organic Law of the Judiciary], in addition to introducing new requirements of prosecutability introduces *ex novo* offences *against persons and property protected in the event of armed conflict*. To that end, the justification of the legislative initiative of this introduction of "new offenses" was done on the grounds that "*the law unquestionably expands the possibilities of our courts and*



*tribunals acting beyond the territory of our country when the list of crimes that can be prosecuted beyond our borders is expanding, because new crimes are being added"* (Debate on the modification in the Senate this past March 12). However, the truth is that these crimes could already be prosecuted previously with no need for express mention (the proof is this Case), simply because they were already enshrined in paragraph h) of the previous article 23.4: *Any other which, according to the international treaties and conventions, in particular, the conventions of international humanitarian law and of protection of human rights, **must be prosecuted in Spain.***

The Treaty for this case is the Fourth Geneva Convention of 1949, on the protection due to civilians in time of war. Spain signed, ratified, and published that convention (in force since 1952) and hence **it is part of our legal system** (art. 96.1 CE\* and 1.5 CC).

This Convention refers to crimes against **persons** and property **protected in the event of armed conflict**. According to the previously quoted article 146, Spain was obligated to issue appropriate legal provisions for the criminal punishment of such behavior. Articles 608 ff. of the Criminal Code (which expressly refers to the aforementioned Convention) emerged in compliance with that obligation, and it is precisely those articles that apply to this case upon the death of Spanish journalist Mr. Couse at the hands of American troops (the Supreme Court itself confirms it - STS 1240/2006 and 691/2010).

As follows from the aforementioned article 146, Spain – upon signing the Treaty - **is obligated to pursue the crime** (search for persons and bring them before the court) **regardless of the nationality of the perpetrators and wherever they are**. The obligation is clear and decisive, and is not reduced, as in other treaties, to a capability of the party state:

There are treaties which *authorize* (they do not obligate like that of the Fourth Convention) states which, through their national laws, may take on for themselves a greater protection and guardianship of the international legal goods that the conventions are intended to

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\* [CE = Spanish Constitution]



protect. In the use of that power, Spain granted maximum protection, and has played a leading role (absolute universal justice in some cases and concurrent in others) until the modification in 2009. Since then it has been limited, and now, no doubt, clearly restricted, given the requirements of prosecutability imposed. But as is said of the party states in such treaties it is only optional and the Spanish legislature, with the new modification made, has decided to limit the competence of Spanish jurisdiction to the terms set forth in article 23. That decision of the legislature may or may not prompt debates about whether it allows for possible impunity; but it is not the role of judges to question such a decision, given their constitutional function; unless they entail a matter of unconstitutionality.

**TWO.** - As follows the from the new modification of article 23. 4 a), prosecution is restricted to situations in which the defendants are Spaniards or foreigners who customarily reside in Spain, or foreigners who are in Spain and whose extradition has been denied by the Spanish authorities.

Thus, inasmuch as the defendants are foreigners who are not in or residing in Spain, in accordance with the aforementioned modification, the indicated course would be simply to shelve this case.

However, inasmuch as the aforementioned article 146 of the Fourth Geneva Convention is openly contradicted by the new paragraph 4 a) of article 23, **closing the case is not in order:**

**Otherwise, we would be admitting the possibility that a domestic law would modify or repeal a provision of a treaty or international agreement in force for Spain; that cannot be allowed two reasons:**

First, because doing so would violate the Vienna Convention on the Law of Treaties, also signed by Spain, which stipulates that:

Article 26: "*Pacta sunt servanda*". *Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*

Article 27. *Internal law and observance of treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*



Indeed, the legislature in the Presentation of Reasons for the modification, implicitly so recognizes: *to this end, the positive and negative limits of the possible extension of Spanish jurisdiction are required: the legislature must determine, **in a manner in keeping with the content of international treaties**, which crimes committed abroad can be prosecuted by Spanish justice and which cases and under what conditions.*

Secondly, because the Spanish Constitution itself provides a specific procedure for modifying or nullifying a provision of a treaty (article 96.1 CE): *the provisions of a treaty may **only** be repealed, amended, or suspended as stipulated in the treaties themselves or in accordance with the general rules of international law;* that obviously is not the case in this instance. Thus, article 146 may only be modified or repealed by following this procedure.

**TWO . -** The solution of the conflict is evident: **the judge must override the new law.** The rule of law requires the existence of independent bodies to oversee the rights and freedoms of citizens, impartially applying the laws that express the popular will and monitoring the actions of public authorities. The combination of such legal bodies charged with this task is called the Judiciary. And in the Spanish Constitution, the Judiciary, in addition to wielding the judicial function by itself, exercises a vigilance over the executive and the legislative branches through the ordinary courts (aside from constitutional legal oversight) . And, thus, by overriding an internal legal provision contrary to a provision of a treaty, the judge is exercising that oversight. That is nothing more than **full implementation of the principle of legality**, to which indeed the Presentation of Reasons in the aforementioned modification alludes : *This is the sense that inspires the modification now being implemented, to clearly delimit **full implementation of the principle of legality**, and enhancing legal certainty, // the situations in which the Spanish jurisdiction can investigate and try crimes committed outside the territory in which Spain exercises its sovereignty.* It is also a constitutional requirement, since judges are subject solely to the rule of law (art. 117 CE).





Moreover, there is no doubt of the primacy of International Law over Domestic Law, especially in the area of International Humanitarian Law. Thus the Constitutional Court has stated - STC 78/82 - that treaties on these matters (Human Rights) must be considered a criterion of interpretation of the legal requirements relative to fundamental rights and liberties, under the terms of article 10.2 CE. And indeed, the four Geneva Conventions are considered the core of International Humanitarian Law.

Moreover, as noted, in order to modify a Convention, the Constitution (96.1) designates a procedural course, when it states that the provisions of the Treaty may only be repealed, amended, or suspended in the manner set forth in the treaties themselves or according to the general rules of International Law, using the same procedure as set forth for enactment (art 96.2 CE). Recognition is thereby being given to "a special resistance or passive force" to the treaties in relation to domestic law (STC 36/91), which assumes the primacy of the treaty, although this is not a hierarchical relationship, but rather a relationship of competence, which should be decided in the ordinary courts.

Moreover, in this modification, the legislature itself recognizes the primacy and mandatory nature of treaties:

– in the Debate in the Senate this past March 12, 2014, after which this modification was passed, when the Grupo Popular Senator Ms. Franco Gonzalez who was in favor of the modification said *according to our Constitution international treaties have supremacy over any organic or ordinary law, and hence, in the event of a conflict between an organic law such as this one and an international treaty the provisions of the international treaty will always prevail.*

– in the Presentation of Reasons: *the extension of national jurisdiction beyond our own borders into the realm of the sovereignty of another state, should be circumscribed to areas which, provided for by international law, ought to be assumed by Spain in fulfillment of the international commitments that it has acquired: the extension of Spanish jurisdiction beyond*





*Spanish territorial limits must be legitimized and justified by the existence of an international treaty that provides for or authorizes it, the consensus of the international community.*

– and in the new paragraph 4 p) of Article 23 LOPJ: *Spanish jurisdiction shall be competent to try acts committed by Spaniards or foreigners outside national territory that can be classified, according to Spanish law, as any of the following offences: [...] **any other offence whose prosecution is imposed on a mandatory basis by a treaty in force for Spain.***

And indeed there are no treaties clearer than the aforementioned Fourth Convention which imposes this mandatory prosecution.

**THREE.** - It might be thought that the solution would be to bring a question of unconstitutionality before the Constitutional Court. However, in these cases that is not possible; both because of what is set forth above, and because international conventions and treaties are not of a higher rank than the constitution, but, on the contrary, they must be subordinated to the Constitution, for that is apparent from article 95.1 CE. Moreover, they require a prior review of constitutionality (art. 95.2 CE) and subsequent review of constitutionality, in this respect made equivalent to the law (art. 161. 1st) CE).

**Such has been the understanding of the Constitutional Court itself (SSTC 49/88, 28/91, 64/91, 214/91, 142/93 37/94):** these conditions do not have constitutional significance in the absence of a problem of the constitutional validity of the law, inasmuch their compliance with the Constitution is not affected, given that it is a matter of the applicability of a law to the specific case, which is to be resolved by the judicial bodies. /// Therefore, it is the judicial bodies which have the task of deciding, in their use of their power to interpret legal rules, whether the national law is contrary to a norm of international law, and if so to override it.

Hence, the proper course is to override the aforementioned section of article 23 of the LOPJ, and in its place to apply the aforementioned section 4 p); thereby reaffirming that **Spanish legislation is INDEED competent** to try the deeds at stake in this case.



**FOUR.** - The **new paragraph 5 of article 23** which would require previously verifying that it be verified whether the United States had *started a procedure for investigating it and placing the person involved in its commission on trial* is not a hindrance. It should also rightly be overridden: for it again enters into contradiction with article 146 of the Fourth Convention: as set forth there, Spain could *also, if it so prefers, and according to the conditions laid down in its own legislation, hand them over to be tried by another Contracting Party concerned, if it has filed sufficient charges against that person.* The reason is simple: the United States has not signed this Fourth Convention, and hence it is not a "Contracting Party". There is no possibility of ceding jurisdiction to the United States.

Moreover, as is clear from the court records, the US authorities have not made any charge whatsoever against the present defendants.

Indeed, in the United States no procedure whatsoever has been pursued or is underway in the sense *of a process with the due guarantees recognized by international law*, because the information provided by the American authorities leaves no room for doubt that what they have "investigated" goes no further than a mere investigation (a file) and not a legal procedure as such. Moreover, taking into account that what is at stake is a crime against the international community, and the purpose of international criminal law includes remedying the most serious violations to human rights that have jeopardized not only their direct victims - the individual people - but even the international community, it is essential that the victims (in this case the relatives of Mr. Couso) have the right to appear and to participate during the respective processes: in such extreme situations, the victims seek to be heard, express their pain and anguish, and obtain a remedy. It is obvious that those authorities have not summoned them. Finally, U.S. authorities themselves stated they had not initiated judicial proceedings. Thus, it is plain that there is no "process" whatsoever on the part of the American authorities.

**FIVE.** Finally, the **sole transitory Provision** which reads that *"the cases that are underway for the crimes mentioned in it when this Law goes into effect shall be stayed until*



*fulfillment of the requirements established therein are verified"* must properly be overridden.

// Notwithstanding that the fact that the requirements would already be met, there is also another clear contradiction, for how it possible to pursue a crime if the case is stayed? Stay means shelving it. That is obviously not possible. And the Fourth Convention makes no provision for any requirement of prosecutability. The obligation is clear and without limitations, *to seek the persons accused of having committed, or ordered to commit, any of the grave violations, and it must bring them before the courts themselves.*

And, above all, the aforementioned Transitional Provision would also entail a suspension of article 146 of the Fourth Convention (its application is suspended until the requirements are present); that would mean ignoring the aforementioned mandatory procedure established by Constitution in article 96.2 CE for suspending a treaty provision (the same as for repealing or modifying it).

**SIX. -In short,** the new article 23.4 a) of the LOPJ introduces *ex novo* offences against persons and property protected in the event of armed conflict, and subjects them to subject to a requirement that they be prosecutable. However, it runs into contradiction with the Fourth Geneva Convention which makes it mandatory to pursue these crimes with no limitation. Given the primacy of treaties and that a treaty cannot be modified by a domestic law, the new law is inapplicable and the provision in the treaty remains.

This non-application assumes the application of the new section p) of article 23.4 of the LOPJ, which encompasses the Fourth Convention: any other offence whose prosecution is imposed on a mandatory basis by a treaty in force for Spain.

Therefore, the Spanish justice system is INDEED competent to try the facts and offences at stake in this Case.

Accordingly, and in view of the legal provisions cited, and those of general application,



ADMINISTRACION  
DE JUSTICIA

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

**I ORDER:** The non-application in this case of sections 4 and 5 of article 23 of the LOPJ, modified by Organic law 1/2014 (March 13), which modifies Organic Law 6/1985 (July 1), of the Judiciary, concerning universal justice, as well as the Single Transitional Provision; thus this case is not to be stayed and shelved.

Ruled and signed by Hon. Santiago J Pedraz Gomez, Magistrate - Judge of the Central Court for Preliminary Criminal Proceedings Number One. In witness whereof.