RC 8005/2021

TO THE ADMINISTRATIVE LITIGATION CHAMBER OF

THE SUPREME COURT OF JUSTICE

MARTA SANZ AMARO, (Proc. nº 670), for and on behalf of **GREENPEACE ESPAÑA**, as accredited in the proceedings, acting under the legal direction of Laura Díaz Román, Abogada ICAM 27.094, before the Chamber, I appear and as best proceeding in law, I **SAY**

That on 26 May 2022 I have been notified of the order of 24 May 2022 by virtue of which I have been given thirty days to **file an APPEAL IN CASE** against Judgment 510/2021, of 15 September, handed down by the Sixth Section of the High Court of Justice of Madrid, in the Fundamental Rights proceedings 509/2020, which is hereby verified, and in accordance with the provisions of the Admission Order of 11 May 2022, the same shall be based on the following grounds

MOTIVES

FIRST.- Determination of whether, for the purposes of the right to information recognised in article 20.1 d) of the EC, the limits referred to in section 4 should include those established in article 14.1 a), b) and h) of Law 19/2013, of 9 December, on transparency, access to public information and good governance - hereinafter LTAIBG - , in this case, with regard to the export of arms.

A) The judgment of 15 September 2021 violated Articles 20(1)(d) and 20(4), 96, 10.2 EC; Article 10.1 of the European Convention on Human Rights (ECHR) and the constitutional and ECtHR case law interpreting these precepts.

In the brief in preparation of this appeal, when denouncing the infringement of these rules, it was pointed out that Article 10(1) ECHR regulates the right to freedom of expression, taking into account its dual aspect as freedom of opinion and freedom to receive or communicate information or ideas. From this dual perspective, my client invoked in his application that the case law of the ECtHR has evolved to the point of recognising that the right of access to information forms part, as an instrumental right, of the right to freedom of expression. Also that non-governmental organisations, such as GREENPEACE SPAIN, should be considered "watchdogs" of society - watchdogs in the words of the ECtHR - by channelling information that allows for the necessary debates in a democratic society, performing functions similar to those traditionally carried out by the media.

This interpretation of Article 10.1 ECHR was invoked by my client in his application, as he considered that our courts, in accordance with the provisions of Article 96 EC and the hermeneutic rule contained in Article 10.2 EC, should incorporate this new doctrine of the ECtHR to define the content of the right to freedom to freely communicate and receive truthful information, recognised in Article 20.1.d) EC. On the other hand, it was this invocation of the violation of a fundamental right that led the contested judgment itself to admit the need to process my client's appeal through the special procedure for the protection of fundamental rights, when, having admitted the connection between this right and that recognised in article 105.b) EC, it stated that failure to provide the requested information could affect this party's right to *"freely communicate or receive truthful information by any means of dissemination" (*FJ 6º).

However, the lower court also stated that, according to paragraph 4 of the same constitutional precept, "*these freedoms are limited by respect for the rights recognised in this Title, in the precepts of the laws that develop it and, especially, in the right to honour, privacy, one's own image and the protection of youth and childhood*". And it adds that in our case, "*it finds its limits precisely in the security and defence of the State and in the economic and commercial interests set out in article 14 of Law 19/2013 and Law 9/1968, on official secrets"*. In doing so, it proceeded to

dismiss the appeal brought by my client and declare that the decision contested at first instance was lawful.

It is precisely on this point that this party respectfully disagrees with the Madrid Chamber. A correct interpretation of the provisions of Article 20.4 EC should lead us to understand that, being within the scope of the right to freedom of expression, only the limits precisely established by this provision could operate here: "These freedoms are limited by respect for the rights recognised in this Title, in the precepts of the laws that develop it and, especially, in the right to honour, to privacy, to one's own image and to the protection of youth and childhood".

In no case will it be possible to extend these cases to those considered in the ruling, as neither national security, nor defence, nor the economic and commercial interests envisaged in article 14.1 a), b) and h) LTAIBG, are rights recognised in Title I EC.

As was also reasoned in the application and in the written submissions, Law 19/2013, LTAIBG, develops the right of access to information regulated in article 105.b) EC, and aims to "expand and strengthen the transparency of public activity, regulate and guarantee the right of access to information relating to that activity and establish the obligations of good governance to be fulfilled by public officials as well as the consequences of non-compliance" (article 1).

The fact that Article 105.b) EC is not located in Title I EC, but rather in Title IV, "Government and Administration", cannot mean that it is denied its instrumental nature so that the fundamental right to freedom of expression can be fully exercised, in its communication and information aspect recognised in Article 20.1.d) EC, in the terms established by the ECtHR in its case law relating to Article 10 ECHR, as well as by the UN Human Rights Committee and the CJEU.

B) The judgment of 15 September 2021 also infringed my client's right to freedom of expression by violating Article 10.2 of the European Convention on Human Rights (ECHR) and constitutional and ECHR case law interpreting this provision, as well as the provisions of Article 14.2 and 16 LTAIBG.

As was also stated in the brief in preparation of this appeal, the lower court ruling violated the aforementioned legislation by failing to **apply the proportionality test required by both the LTAIBG and the doctrine of the ECtHR in order to impose limits on the exercise of a fundamental right.**

General doctrine reminds us that no fundamental right is absolute, nor can its unlimited application be predicated in all cases (see in this sense, for example, STC 254/1988, 21 December 1988, legal basis 3). In this sense, the rights to freedom of expression and access to truthful information are not unlimited either, but have limits established by law, as **long as they are aimed at safeguarding democratic societies and the principles of which they are composed.**

In our case, the judgment stated that the limits set out in (a)(b) and (c) above were applicable.
h) of Article 14.1 LTAIBG, and the debate revolves around whether the mere invocation of the same displaces what is established in Article 14.2 LTAIBG and 20.4 EC, as well as in the case law of the ECtHR on the criteria to be followed for the imposition of limits to the exercise of the fundamental rights widely raised; and whether this invocation of the same exempts the Administration from the obligation to carry out the proportionality trial required by the LTAIBG and the doctrine of the ECtHR. Interests which, in accordance with article 14.2 LTAIBG, must be weighed up by means of a justified and proportionate interpretation of their object and purpose of protection, and which in the present case has not been carried out.

Article 14.2 LTAIBG requires that the limits applied to the right of access to public information be justified and proportionate to its object and purpose of protection, and that they take into account the circumstances of the specific case, especially the concurrence of an overriding public or private interest that justifies access. This issue is also closely linked to the violation of Article 10(2) ECHR and the case law interpreting it.

Article 10(2) ECHR expressly establishes a series of limits to the exercise of this fundamental right:

> "The exercise of these freedoms, which carry with them duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety.

> public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of confidential information or for maintaining the authority and impartiality of the judiciary".

The ECtHR states that **limits on freedom of expression and the right to obtain truthful information set by law must be proportionate.** The imposition of a limit to the right referred to in Article 10 ECHR may not prevent its exercise in an absolute manner, but may restrict it only in the interest of safeguarding another essential legal good (such as democratic society, national security, etc.), subject to a proportionality test.

Throughout its case law, in its function of controlling the limits imposed by States on the exercise of the right to freedom of expression, the Court has systematically carried out a proportionality test in which it weighs the conflicting legal interests: the ECtHR balances the sacrifice imposed (the limit on the exercise of the right imposed) against the benefit obtained from the application of this limit.

The ECtHR recognises a wide margin of appreciation for States to establish the limits allowed by Art. 10.2 of the ECHR. This recognition implies that exceptions can be made to the positive obligation of public authorities to provide information requested by private citizens, which excuse the state from complying with this positive obligation to provide information, without thereby incurring a breach of the Treaty. That said, the case law of the Council of Europe is full of nuances: in the case Österreichische vereinigung... v. Austria of 28 February 2014[1]the ECtHR criticised the complete lack of publicity of the contentious cases decided by the national authority, and found a violation of Article 10 ECHR. The ECtHR did not impose a positive obligation on the State to publish, and refrained from saying how and how much should have been published in order not to have infringed the right of access to information. But it was clear from the judgment that the Tyrolean authority should regularly publish some form of information about its decisions, (paragraphs 49-57).

Secondly, the ECtHR has established a formal condition of access to information for applicants: the request for access to information must relate to a specific and concrete document or group of documents. The ECtHR considers that the fact that the

1 http://hudoc.echr.coe.int/spa?i=001-139084

information requested is ready and available, should be an important criterion in the overall assessment of whether the refusal to provide information may constitute a breach of Article 10 ECHR. See the above-cited judgment of the Grand Chamber of 8 November 2016 in MAGYAR HELSINKI BIZOTTSÁG v. HUNGARY, para. 169.[2](paragraph 169).

Finally, the ECtHR has projected its classic criteria for judging the limits imposed on fundamental rights to the specific case of access to public information: the principle of legality means that the restriction of an individual right must be provided for in a national law; the interference with the exercise of the right must pursue a legitimate aim ("national security, public safety, the economic well-being of the country, the maintenance of order and the prevention of crime, the protection of health or morals, or the protection of the rights and freedoms of others", Article 10.2 ECHR); and the measure limiting the right must comply with a strict proportionality test, which must answer the question of whether the interference was "necessary in a democratic society", a decisive and determining question in most cases for the ECtHR to decide the case.

States may establish the limits they deem appropriate, in accordance with the margin of appreciation they enjoy. Ultimately, however, it is up to the ECtHR to control whether the criteria established in the imposition of limits on the right to freedom of expression respect the application of the principle of proportionality established by the ECtHR.

For example, the case of Sunday Times v. United Kingdom of 26 April 1979[3]in which the English courts banned the publication of an article in the Sunday Times newspaper on the grounds that it interfered with the applicants' fundamental right to fair justice. The ECtHR ruled that the ban on publication of the article constituted a violation of Article 10(1) ECHR. The conflicting legal interests in this case were the right to a fair trial under Article 6(1) ECHR and the right to freedom of expression and to receive truthful information under Article 10(1) ECHR. The Court considered that the thalidomide case was of concern to public opinion, so people had a right to receive adequate information, a principle included in Article 10 ECHR: "In the present case, the families of numerous

2 https://hudoc.echr.coe.int/fre?i=001-167828
3 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-165154%22

victims of the tragedy, unaware of the legal difficulties in which they found themselves, had a fundamental interest in knowing each of the underlying facts, as well as the possible solutions posed by the case" (para. 66).

In the light of the particular circumstances, the Court reasoned: "Indeed, if the Sunday Times article had appeared in due course, the Distillers (Pharmaceutical company) might have felt obliged to develop in public, and before any trial, their arguments on the facts of the case (para. 63), ... but those facts did not cease to appear in public, as they formed the context of a pending trial. By seeking to clarify certain facts, the article could have served to curb speculative disputes by ill-informed persons" (para. 66). The ECtHR found a violation of Article 10 ECHR, basing its decision on the basis not only of the interest in the proper administration of justice, but also the interest of the press in informing the people, and the interest of the people in receiving such information.

If there is one dimension of the ECtHR's doctrine that is particularly relevant in this appeal, it is the assessment of the existence of a **'pressing social need'** to limit the exercise of the right to freedom of information. This concept is associated with the strict proportionality test and the enquiry into whether or not the limit imposed on the right is necessary in a democratic society. The notion of imperative social necessity is not synonymous with indispensable necessity (it may be lighter), but neither is it to the point of identifying this necessity with the notion of an admissible, useful, reasonable or opportune measure (Gorzelik and others v. Poland, Case No. 44158/98, 17 February 2004[4]). Moreover, the existence of such necessity, the assessment of which falls within the wide margin of appreciation enjoyed by States, must be rigorously assessed when freedom of the press is at stake (Eerikänen and Others v. Finland, No. 3514/02, 13 March 2009[5]). While the ECtHR does not always expressly rule on the existence of an overriding social need, it does analyse the relevance and sufficiency of the reasons provided by the national authorities in assessing the existence of such a need (Janowski v. Poland, No. 25716/94, 21 January 1999[6]).

As regards the criteria used by the ECtHR to assess the limits to the freedom of access to public information, the Court considers that the purpose pursued by the request for information must be taken into account (which must in no case obey the interests of the public interest).

4 https://hudoc.echr.coe.int/rus?i=001-60003
5 https://hudoc.echr.coe.int/fre?i=001-91242
6 https://hudoc.echr.coe.int/fre?i=001-163704

spurious); the nature of the information requested and that it is in the public interest; the role of the applicant with particular attention to the role of journalists and NGOs; and the prior availability of the information (Magyar Helsinki Bizottság v. Hungary judgment of 8 November 2016, p. 157).

If we apply the proportionality test described above to the present case, it can be affirmed that my client complied with the first formal condition for access to information imposed on applicants: the **request for access to information must be made in relation to a specific and concrete document or group of documents**. In this case, my client's request, made to the Ministry of Industry, Trade and Tourism through the transparency portal of the General State Administration, referred to the "copy of the administrative file or files relating to the authorisations or licences granted, as well as renewals thereof, for the export to Saudi Arabia of Alakran 120 mm mortar carriers, of the company NTGS, from 2016 to the present", so that the information requested is information that the Administration can provide without further elaboration, because it is already prepared and it is not necessary to "create it", as required by the doctrine of the ECHR.

Secondly, the first requirement of the proportionality test in the imposition of a limit on the exercise of a right is met: the **principle of legality**. In the present case, the limits to the exercise of the fundamental right to freely receive and communicate truthful information under examination - national security, defence and economic and commercial interests - are provided for in article 14.1.a) b) and h) of the LTAIBG.

Thirdly, the limit imposed must **pursue a legitimate interest**, which are listed in Article 10(2) ECHR and are as follows: "national security, public safety, the economic well-being of the country, the maintenance of order and the prevention of crime, the protection of health or morals, or the protection of the rights and freedoms of others". We therefore find that the limits provided for in Article 14.1. a) and b) of the LTAIBG are among the legitimate objectives that the restriction of a fundamental right may pursue, but the same is not true of the limit provided for in Article 14.1 h) of the aforementioned law, relating to the economic and commercial interests of the company.

In relation to the objective of national security and defence, it is necessary to mention that the Spanish Council for Transparency and Good Governance itself has established (in other similar refusals of information, resolutions of 12 May 2016 -

R/0054/2016-, and 4 December 2019 -R/0648/2019), that **it is not national security that is at stake with the declassification of secret information, but the economic interests of the arms exporting company**.

The objective of safeguarding national security and defence, which, according to that public body, are not put at risk by access to the commercial information of arms exporting companies, thus disappears. Thus, the only remaining objective for limiting access to my client's information is the protection of the economic and commercial interests of NTGS.

This brings us to the last of the requirements established by the ECtHR in order to finalise the proportionality test, which is necessary to determine whether we are dealing with a legitimate limitation of a fundamental right: the **strict proportionality test.** Given that, according to the CTBG - a body belonging to the General State Administration - it is not national security that is at stake with the declassification of secret information, but rather the economic interests of the arms exporting company, the proportionality test would be made between the economic interests of the company and the fundamental rights at stake.

In our case, that the objective pursued with the imposition of the limit to the exercise of the fundamental right by my client is in fact the protection of the economic interest of the company NGTS, or the commercial interests of Spain, is made clear in the report of the Ministry of Industry, Trade and Tourism, entitled "**Denegación información venta armas Arabia Saudí DFU 509/2020 IMPORTANCIA RELACIONES ECONÓMICAS ESPAÑA-SAUDI ARABIA",** submitted as evidence by the State Attorney's Office in its response to the complaint. In this report, the "main operations carried out by Spanish companies in Saudi Arabia" are explicitly cited, with the clear aim of demonstrating that these commercial interests justify the denial of information and the use of official secrets regulations to achieve this objective. Thus, it can be said that the government's objective is to protect the commercial activity of the arms exporting company, not national security.

The ECtHR establishes the need to carry out a balancing test between the conflicting legal interests. In the present case, we find that, on the one hand, there is the good

the functioning of the company's economic activity (which, if the information were made public, could benefit other potentially competing companies to the detriment of the Spanish company NTGS). On the other hand, there is the exercise of the right of access to information by my client, which is an NGO actively working for peace and disarmament, and which needs access to the aforementioned information in order to exercise its right to freedom of expression, in the exercise of its role as a *"watchdog"* or watchdog of power in society.

The balancing test should have tipped the balance in favour of my client, since the information requested by Greenpeace Spain meets an undeniable public interest: the need to obtain information on arms exports and their compliance with international humanitarian law. This party considers that the export of arms by Spain is a matter about which the public has an interest in being informed, as it is an important social issue because of its link to the protection of human rights (Magyar Helsinki Bizottság v. Hungary, pp. 161-162).

It is essential to recall the **role played by my client within the framework of the control of public power, expressed in the expression of the *"watchdog"*** referred to above. It should be stressed that the ECtHR attributes to NGOs a privileged position in the access to information held by the State. This is expressed in the ECHR in Társaság a Szabadságjogokért v. Hungary; Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria and Youth Initiative for Human Rights v. Serbia, all cited in the application (p. 74).

In the present appeal, as has been argued in the preceding paragraphs, the conflict between the protected legal interests 'right of access to truthful information' and 'economic and commercial interest of the company NTGS' is evident, which must be resolved in favour of the former for the reasons set out in this section. It should not be forgotten that the purpose of access to information is to control the legality of arms sales to third States, with the ultimate aim of protecting the right to life and physical integrity of persons living in third States, in accordance with international law to which Spain is a signatory, and therefore the essential legal right "human life and integrity" is present in the request for information requested by my client.

physical and moral".

With regard to Article 16 LTAIBG, this imposes the obligation to grant partial access to information, after omitting the information affected by the limit applicable in each case. The unjustified manner in which the administrative decision was issued, validated by the judgment under appeal in cassation, without having analysed the specific documents requested, or reasoned about their possible actual content and thus decided which could be subject to partial access and which could give rise to some kind of impact on the interests invoked, constitutes a clear violation of this legal precept. My client already indicated in the initial request for information, dated 20 August 2020, that in accordance with the interpretative criteria of the CTBG, the information should be provided partially, if any of the limits provided for in the transparency law were to apply.

But the judgment under appeal also disregards this legal precept and accepts the full content of the resolution of the Directorate General for Trade Policy, in a totally uncritical manner, without agreeing to examine the content of the documents requested beforehand, in order to agree to hand over those documents, in full or in part, whose information does not endanger the legal interests of "national security and defence", and without making any proportionality assessment in accordance with the provisions of Article 10(2) ECHR and Article 14.2 LTAIBG, the doctrine of the ECtHR, and the very content of Article 20.4 EC.

For all of the above reasons, and in compliance with the provisions of article 92.3.b) LJCA, the judgement to be handed down must annul the judgement of the Madrid Court of 15 September 2021, and after upholding the contentious administrative appeal filed, declare the right of my client to obtain the information requested in the terms in which it was requested.

SECOND.- To determine the scope of the classification of certain documents as classified and secret material in relation to the right of access to information.

The brief in preparation of the appeal also invoked as infringed the regulations governing Law 9/1968, of 5 April, on State Secrets -LSO-.

In this brief, it was made clear that the Judgment of 15 September 2021 violated the LSO, by assuming that the latter prevents the delivery of the documentation requested by Greenpeace Spain, when the reality is that the 1968 law only states the possibility that the Council of Ministers can declare some documents "classified matter" in certain cases, but nothing specifically says about licences for arms exports to third States.

The seriousness of what is described in the 'Facts' section of the complaint justifies the need to audit the Government's activity in the area of authorising the arms trade, as there is a well-founded suspicion that national legislation on the sale of arms and international treaties in force in Spain could be being violated. But the aforementioned control can only be carried out through access to the requested information, which has been denied to my client. **The barrier to access to information imposed by the Government through secret classification constitutes an absolute limit to the possibility of monitoring arms exports by any social or institutional actor.** Therefore, the right of access to public information acts in this case as an indispensable prerequisite for exercising the right to freedom of information, and thus to exercise control over the effective compliance with the legislation on the control of arms sales. Recognition of the right of access to information is a *sine qua non* requirement for exercising control over compliance with the regulations on arms sales.

As the judgment under appeal does not recognise the right of access to information as a fundamental right, it assumes the possibility of limiting it in defence of other rights. However, the OSA only allows the application of this regulation, which exempts the right of access to public information, to **matters that jeopardise the security and defence of the State.** Only in these cases may a matter be declared classified by the Council of Ministers (Articles 2 and 4 LSO).

Thus, the contested judgment, by validating the administrative decision appealed by this party, imposed an absolute limit on the right of access to information, in the way in which it is understood by my client and which has been set out throughout the judicial proceedings, as well as in the present appeal: as a right intimately linked to the right to information, and as a right which, in the present case, is not only a right of access to information, but also a right which is not only a right of access to information, but also a right which is closely linked to the right of access to information.

information, in line with the international jurisprudence cited above.

It should be recalled that, in accordance with the provisions of the LSO, the Council of Ministers adopted the **Agreement of 18 March 1987**, in which the minutes of the Interministerial Board for the Regulation of Foreign Trade in Arms and Explosives, which is the body that existed in 1987, were classified as secret.

At present, the body responsible for verifying that arms export licences comply with the provisions of the Arms Trade Treaty and Law 53/2007 of 28 December 2007 on the control of foreign trade in defence and dual-use material is not the Board referred to by the Council of Ministers in 1987, but the Interministerial Board for the Regulation of Foreign Trade in Defence and Dual-Use Material - hereinafter the JIMDDU. My client requested the administrative files relating to the licences granted for exports to Saudi Arabia of the Alakran 120 mm mortar carriers, specifying that such a file should in any event include the minutes of the *"meeting of the Interministerial Board for the Regulation of Foreign Trade in Defence and Dual-Use Material - JIMDDU", a* request which was denied by the Resolution of the Director General for Commercial Policy of 15 September 2020, in application of the exception decreed in the Agreement of the Council of Ministers of 18 March 1987.

Regarding this Agreement of the Council of Ministers, it should be noted that although the resolution of 15 September 2020 refers to it as an Agreement of 13 March 1987, the reality is that it was adopted on the 18th, as was made clear in the copy of the Agreement provided with the application as document number 1. The document also shows that the body referred to is not the JIMDDU, but the Interministerial Board for the Regulation of Foreign Trade in Arms and Explosives. Despite this, the Judgment of 15 September 2021 still considers that it is the minutes of the JIMDDU that were declared secret by the Government.

The problem therefore lies not so much with the provisions of the LSO as with the Agreement of 18 March 1987, which, when applied to the minutes of the JIMDDU, develops them in a way that is incompatible with the Constitution. The solution advocated by this party is to make a

reading of Articles 2 and 4 LSO that is compatible with Art. 20.1.d EC in connection with Art. 105 EC, understood in the light of the provisions of the ECtHR in application of Art. 10.2 ECHR.

To this end, it is necessary to apply the proportionality test required by the ECtHR in its doctrine, in order to apply a limit to the exercise of a fundamental right.

Firstly, it is necessary to examine whether **the principle of legality applies,** according to which the limit to the exercise of the fundamental right must be laid down in a law. The limit imposed by the Directorate General for Trade Policy on my client, with the denial of access to the information requested, stems from the Government's application of the LSO, since the aforementioned law does not expressly contemplate the secret nature of arms export authorisations. It was the Council of Ministers that adopted an Agreement in 1987, which declared all the minutes of the Interministerial Board for the Regulation of Foreign Trade in Arms and Explosives to be classified as secret.

Even if it were accepted that the ECtHR does not formulate a formalist definition of the requirement of the principle of legality, **what cannot be accepted is that an agreement adopted in 1987, for a different body to the one that exists today,** and in a historical and social context totally different from the current one, **could cover the requirement of legal foresight required by the ECtHR**.

The judgment under appeal assumes that the mere invocation of the presence of a matter classified as "secret" exempts the Administration - or the judicial body - from analysing whether we are really dealing with an official secret, the protection of which merits completely limiting the exercise of the fundamental right to freedom of expression, without carrying out the proportionality test required by the case law of the ECHR. In the present case, the judgment *a quo* has not even adequately considered the date and the body to which the Agreement of the Council of Ministers referred, which in 1987 classified as secret the minutes of the Interministerial Board for the Regulation of Foreign Trade in Arms and Explosives.

The judgment under appeal uncritically assumes the arguments of the decision of 15 September 2020, without even taking account of the clear errors in that decision, which this party

duly accredited. Thus, in the 6th FJ it limited itself to stating:

> *"As for the minutes of the Interministerial Board for the Regulation of Foreign Trade in Defence and Dual-Use Material, it must be taken into account that by Agreement of the Council of Ministers of 13 March 1987, these minutes were declared classified as secret and as such constitute classified documentation in accordance with article 4 of Law 9/1968, of 5 April, on Official Secrets".*

This leads the Court of First Instance to conclude, a little further on in the same reasoning:

> *"Therefore, in the present case, the Administration has not infringed the right invoked by the appellant (article 20.1.d), since the information in question contains data on third parties outside the Administration, in addition to being a reserved matter in accordance with Law 19/2013 and Law 9/1968 on official secrets, and the appeal must therefore be dismissed in this case".*

The contested judgment did not even take into account the fact that this party proved that the alleged Agreement of the Council of Ministers of 13 March 1987 - to which the administrative decision also referred - was in fact dated 18 March 1987, and that the minutes which were declared classified as secret were not the minutes of the JIMDDU, but of the body which in 1987 was responsible for the authorisation of the arms trade. As was also alleged in the complaint, these were different bodies, in a very different social reality. The reality at that time was marked by a serious problem of terrorism, and the reality today is marked by the international commitments assumed by Spain in relation to the arms trade (incorporated into Spanish domestic law), which establish special obligations to control arms exports so that they are not used to commit serious violations of international humanitarian law and human rights.

In the current regulatory paradigm, it is not possible to refuse the files requested by my client without having accredited that the information requested could affect the security of the State, national defence, foreign peace or constitutional order. Nor can the mere thaumaturgical invocation of an Agreement of the Council of Ministers, of which neither the date nor the body whose minutes were declared secret was known, be sufficient to deny access to the requested documentation, when what is at risk is the exercise of the appellant's right to freedom of expression. Still less can

accept that within this new order established by the ATT, to which Spain is a signatory, the economic and commercial interests of arms exporting companies can be protected through the powers that the Official Secrets Act places in the hands of the Administration, so that it can protect the security of the State or national defence.

As for the other requirements demanded by the ECtHR to overcome the proportionality test - applicable when the exercise of a fundamental right is to be limited - it should be borne in mind that the ECtHR also establishes that the limits to freedom of expression and the right to obtain truthful information established in laws must be proportional. The imposition of a limit to the right referred to in Article 10 ECHR cannot prevent its exercise in an absolute manner, but may be restricted only in order to safeguard another essential legal right (such as democratic society, national security, etc.), subject to a proportionality test.

The contested judgment, by upholding the decision by which the Administration came to understand that the special powers granted to it by the Official Secrets Act may serve to protect the economic interests of arms exporting companies, or the economic interests of the State, infringes my client's fundamental right to freedom of expression and information in the terms set out in the previous plea.

Therefore, it is necessary to have an interpretation of the Official Secrets Act that determines whether the powers conferred in that law for the safeguarding of "State security", or "national defence, foreign peace or constitutional order", can be used to preserve the "economic and commercial interests" of companies engaged in the arms trade. And this is in the terms set out in the contested judgment, which considers that the administrative decision to deny the information contained in the minutes of the JIMDDU - on the grounds that they are classified as secret - and that my client's knowledge of those minutes could be detrimental to economic and commercial interests, is in accordance with the law.

As stated in the preceding sections - in relation to the analysis of the limits set out in article 14 LTAIBG - providing my client with information on arms exports does not jeopardise national security, according to the public body CTBG. The defendant itself in its response to the complaint,

explicitly stated that it was in fact the economic and commercial interests of NTGS, or even the commercial interests of the State, which the refusal to provide the requested information was intended to protect. The contested judgment, in validating the administrative action, assumes that the rules on official secrets can be used to protect such economic and commercial objectives.

And it does so, moreover, without carrying out the mandatory proportionality test. In our case, it was a question of weighing up the protected legal interest "**economic and commercial interest of the company NTGS**" and the exercise of the fundamental right of access to the requested information, regulated in article 105 EC in connection with article 201.d) EC, by Greenpeace España. In order to carry out this strict proportionality test, the Madrid Chamber should have analysed whether the interference with the exercise of the fundamental right was **"necessary in a democratic society**".

The aforementioned balancing test, in the present case, should have tipped the balance in favour of my client, whose aim is to exercise his freedom of expression in order to fulfil his statutory purposes - to work actively for peace and disarmament, in his role recognised by the ECtHR doctrine of "*watchdog*" or watchdog of power in society - and for this purpose needs access to the denied public information. Following the investigation carried out and published in 2020 (p. 15 et seq. of the application), this party considers that the provision of the requested information would have enabled my client to check whether arms could be being exported from Spain to Saudi Arabia, contrary to Spanish and international regulations on arms sales. This could be causing **serious human rights violations to** be committed **against the population of Yemen in the** terms that were explained throughout the administrative contentious procedure. In this way, not only would national and international law on the arms trade be violated, but the lives of thousands of Yemeni citizens could also be put at risk, as life is the most precious legal asset in our legal system.

My client's purpose is none other than to have access to information held by a public authority, in order to exercise the freedom to receive and communicate information without any other spurious interest, (applying the test contained in Magyar Helsinki Bizottság v. Hungary, 8 November 2016, p. 158). Access to the requested information is an essential element of the exercise of the right to freedom of information of the applicant.

Greenpeace España (art. 20.1.d EC in connection with art. 105 EC, both read in the light of art. 10.2 ECHR), because the collection of the requested information represents an important preparatory stage in the exercise of the NGO's activities, aimed at opening a public debate on the control of arms sales to countries in conflict by Spanish companies. Access to the information requested by my client could demonstrate what to date is only a suspicion or even an "open secret": that arms are being sold contrary to the provisions of national and international law (in this regard we apply the provisions of the ECHR of 14 July 2009, Társaság a Szabadságjogokért v. Hungary, P. 27-28).

Thus, it can be affirmed that **the aim pursued** by the limitation of my client's right of access to information, **to protect the economic and commercial interest of the company NTGS**, is not only **not "necessary in a democratic society"** (as opposed to the guarantee of access to truthful information for citizens, in order to form solid opinions in a democratic state), but **can be considered spurious** in the face of the legal interests at stake, freedom of expression and the right to life.

The consequence of the application of this limit, which prevents both civil society and the other branches of government from knowing the JIMDDU's reasons for authorising or denying any arms exports, is the establishment of an area of impunity for the authorities in this area, totally incompatible with the rule of law, especially if this could be validating that the arms export authorisations currently being granted by the JIMDDU could violate the aforementioned regulations on the arms trade or international humanitarian law. In the terms in which my client considers that this is happening, and was demonstrated with the result of the investigations published in the newspaper .es, dated 20 August 2020, as well as 11, 12 and 13 May 2021, provided to the files.

Finally, also in Spain, the Supreme Court imposed limits and exceptions to the imposition of limits to the right of access to information, in **judgments nº 2359/1997, 2391/1997 and 2389/1997 of 4 April 1997, referring to the GAL case**, set out in detail in the body of the application (pp. 62 et seq.).

In that case, after carrying out a detailed weighing of the facts, the SC agreed to declassify the documents requested by the complainant, as it considered that the effect on the

In that case, the security of the State clashed with other legal interests that deserved higher consideration. In this case law, the SC considers that in the case of the successful prosecution of several murder cases, there were no good reasons why the mere internal security of the State should prevail over the effective judicial protection of Article 24 EC, when the latter was used to proceed against attacks on life, which is a fundamental right enshrined in Article 15 EC. Therefore, this jurisprudence is inclined to declassify documents when, after carrying out a balancing test, it is concluded that the protection of fundamental rights prevails, when the publicity of classified information does not constitute a real risk to security, but rather a suitable mechanism to cover up illegal acts of the State.

Therefore, despite the fact that in the aforementioned SSTS of 4 April 1997, the balancing test is carried out between State secrecy and Articles 24 and 15 EC, and not Article 20.1.d) EC as in the present case, it constitutes a precedent of the utmost interest for the purpose of this appeal, as it is the only case in which the SC ordered the declassification of documents after carrying out a balancing test with the fundamental rights affected by the aforementioned secrecy.

The decision challenged in the present appeal maintains the *status quo* of 1987, when the concept of State security was very different from today's, as evidenced by the case-law handed down in the 1997 judgments in the GAL case. The assumptions on which the judgment under appeal is based are far removed from the social reality of the year 2022, in which the real dangers for a democratic society are to be found in the spread of "fake news" and disinformation, (although also in the abuse of power that uses State secrets to violate the law). To combat all this, the legal system has provided for new transparency regulations, in which access to public information plays an important role. Suffice it to recall Order PCM/1030/2020, of 30 October, which published the Procedure for action against disinformation -BOE 5-11-2020-, which clearly states that access to truthful and diverse information is one of the pillars underpinning democratic societies.

In accordance with the foregoing, the question raised in the Admission Order on the determination of the scope of the classification of certain documents as classified and secret matter in relation to the right of access to information, must be

The Court ruled that it is not possible in our legal system to establish an area of impunity in which the mere mention of the existence of a classified matter automatically authorises the automatic denial of the requested information. On the contrary, the

The presence of classified information in the request for information should, in the first place, lead to the verification that such classification as secret really deserves to be so, in view of the legal assets that could be really affected. In our case, an examination of the Council of Ministers Agreement of 18 March 1987 would have allowed us to understand that it does not refer to the JIMDDU, but to the body in existence at that date, and the Administration should then proceed to provide the information requested by my client, in accordance with the provisions of the ordinary legislation on transparency. But what is not possible under any circumstances is to make use of the regulations on official secrets to achieve purposes other than those provided for in the Law itself, which justify the application of these exceptional regulations.

For all these reasons,

THE COURT I REQUEST THE COURT OF FIRST INSTANCE, considering that this application has been lodged in due time and form, to consider the **APPEAL IN APPEAL** against Judgment 510/2021, of 15 September 2021, handed down by the High Court of Justice of Madrid - 6th Section - in the Fundamental Rights Proceedings 417/2020, which dismissed the contentious-administrative appeal brought by this party against the decision of 15 September 2020, and following the appropriate formalities, issue a judgment upholding and annulling that decision and, upholding the contentious-administrative appeal, also annul the contested administrative decision and declare this party's right to obtain the information requested.

In Madrid, 6 July 2022

NAME DIAZ ROMAN LAURA - TIN 51340060N

Digitally signed by NOMBRE DIAZ ROMAN LAURA - NIF 51340060N
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This letter is 49,752 characters long and spaced, which is hereby certified.