



**PRELIMINARY COURT FOR CRIMINAL PROCEEDINGS No. 5  
NATIONAL COURT  
MADRID**

**PRELIMINARY PROCEEDINGS 150/2009-P**

**RULING**

In Madrid, January 13, 2012.

**FACTUAL RECORD**

**ONE.** - In the course of these preliminary proceedings, filed on April 27, 2009 by the legal representation of the Association FOR THE DIGNITY OF MALE AND FEMALE PRISONERS OF SPAIN, appearing in court as *Acusación Popular*, and through a brief dated January 7, 2011 it was requested that Major General Geoffrey Miller be summoned to appear as defendant.

Likewise, the legal representation of NAMED ABDERRAHMAN AHMED and LAHCEN IKASSRIEN in a brief presented on February 18, 2011, (repeated on May, 25, 2011 and June 22, 2011) requested that certain proceedings be carried out consisting in the following:

a. Notification of the action filed by the aforementioned legal representation through the United States Embassy in Madrid to the defendants, listed below, requesting that they give testimony as defendants:

- George W. Bush, former President of the United States and Commander-in-Chief of the U.S. Army.
- Dick Cheney, former Vice-President of the United States.
- Donald Rumsfeld, former Secretary of Defense of United States and second in command of the U.S. Army "with direct responsibility over the Guantanamo base."
- General Michael Lehner, former Commander-in-Chief of the military base at Guantanamo at the time of the events.
- General Geoffrey Miller, responsible at Guantanamo for the joint operations of detention and intelligence at the time of the events.

b. Forensic medical examination of complainants Lahcen Ikasrien and Hamed Abderrahman Ahmed.

**TWO.** - When those requests had been forwarded, on March 2, 2011 the Office of Public Prosecutor issued a report, indicating that "*inasmuch as it is known that the Criminal Division has ruled on the appeal lodged*

*by the prosecution over the jurisdiction and competence of this Court for Preliminary Criminal Proceedings, the Prosecutor says that it is proper to abide by what the Court decides, and hence*

*as soon as the ruling has been made, and in the terms agreed upon, reaching the proper determinations will be in order."*

Upon reception of the record of the April 6, 2011 ruling issued by the Plenary Criminal Division of the National Court, and upon request from the Office of Public Prosecutor a report on the execution of the previous procedures sought by the aforementioned legal representations, a new opinion was issued by the Office of Public Prosecutor recorded on June 6, 2011 reading as follows:

*"The Prosecutor in the case identified in the margins, in reply to the May 20 interlocutory order says that inasmuch as the Criminal Division determines the criterion of subsidiarity by establishing the preferential character of the jurisdiction of the United States, the Prosecutor states that it is in order, as is stated in the May 17 ruling, in the sense that until the matter of jurisdiction is settled, formalization of criminal charges is not in order. Hence once it is received and if Spanish procedure is ratified, notification of the complaint will be in order.*

*Regarding the taking of testimony from Lahcen Ikassrien, as stated in the court order the reason why such a procedure was urgent no longer obtains, and hence doing so, if indicated, will have to be resolved in the light of the outcome of the Letters Rogatory.*

*With regard to carrying out the medical examination of the results of the consequences in the complainants, taking into account the delay in performing this procedure, which may affect its result, the prosecutor agrees to it being carried out.*

**THREE.** - The legal representation for the Association FOR THE DIGNITY OF MALE AND FEMALE PRISONERS OF SPAIN through a brief filed on April 27, 2011 presented documents consisting of national and international press clippings on those wronged who are appearing in this proceeding, ABDUL LATIF EL BANNA, OMAR DEGHAYES, HAMED ABDERRAHMAN AHMED, and LAHCEN IKASSRIEN, requesting that the following procedures be carried out:

a. That the newspaper *EL PAIS* be asked to furnish the court, within its possibilities and means, a copy of all the documents that it has available on the torture committed at Guantanamo, in particular those published since April 25, 2011 *"for proper legal purposes, namely those of obtaining the evidence necessary to move this process forward in demanding that those responsible for such serious crimes be made liable."*

b. That the following be summoned to testify as suspects, since they appear as signatories of the documents attached to the brief:

- Jay W. Hood, Brigadier General of the U.S. Army

- Mitchel R. Leclaire, Brigadier General of the U.S. Army.
- James T. Payne III, Brigadier General of the U.S. Army

Translation of the clippings presented entered this Court courtesy of the Ministry of the Interior on May 25, 2011.

**FOUR.** Upon the forwarding of the documents, on May 20, 2011, the Office of Public Prosecutor, issued a report as follows:

*"In the case identified in the marginal notation, in reply to the May 10 interlocutory order on procedures filed by the acusación popular sought, a request to a media company for all the documents that it has available on torture committed in Guantanamo, and requesting that it be cited as documentation presented, the Prosecutor requests that the investigation be limited to the Order of the Plenary Criminal Division on April 6, 2011 which confirms the competence of this Court in the terms dictated by that resolution. Regarding that ruling it should be pointed out that the jurisdiction of the United States of America is a preferential jurisdiction, and hence when the information is received through the Letters Rogatory the investigating Judge must decide on the provisional dismissal of the case without prejudice or affirm Spanish jurisdiction.*

*These are the parameters within which the investigating judge may agree on carrying out the proceedings, which are valid in a court procedure, or otherwise are to be declared null and void. With regard to requests for evidence filled by the acusación popular, the prosecutor states that it is not admissible to bring into the procedure documentation that has not been obtained lawfully; with regard to the request that the newspaper 'El Pais' be required to present documentation, the same thing should be said, in the terms requested by the acusación popular, it is not a proper proceeding, because it does not meet the legal and constitutional terms for evidence, because it is a petition that is general in nature, and because it has to do with documentation whose origin in terms of obtaining it is not in keeping with the legal order, and hence should it occur the only thing proper to request is that documents referring to torture in Guantanamo as listed be brought into the court for the sake of this procedure and in accordance with the laws of procedure.*

*With regard to the allegations claimed on the basis of the documentation that is said to be provided, the prosecutor requests that it be forwarded in order to be able to be informed on this matter, in order to be able to appraise the content and manner in which the documentation was obtained. This does not mean that, given the terms*

*of the Criminal Division on subsidiarity of Spanish jurisdiction, and the reasons offered for the particular vote of seven Judges on the existing of a relevant connected tie to Spain, [that] they indicate the lack of proportionality at this time for accepting the allegations, without the Office of the public prosecutor being able to make a judgment on the specific people, since it has not seen the documents on which the allegation is based."*

Subsequently on the same matter and in the aforementioned report, which entered into the court record on June 6, 2011, the Public Prosecutor states as follows:

*Having examined volume 5 of the case, with regard to the documents provided by the acusación popular in a brief dated April 26, the prosecutor states that with regard to the party in question these are texts written in English from which neither their authenticity nor their origin be inferred, and hence as presented they cannot lead to a ruling making determinations about the status as accused."*

**FIVE.** - This Court having issued a ruling on April 13, 2011 not admitting the *European Center for Constitutional and Human Rights* of Berlin (ECCHR) to appear as *Acusación Popular*, and requiring the Center for Constitutional Rights of New York (CCR) to present within a month "*the originals of the powers-of-attorney granted by the procedures legally admitted in accordance with the Spanish legal system,"* by the victims of the crimes under complaint with express reference to this procedure processed before this Judicial Body," in order to settle on the standing in court that it is claiming as *Acusación Popular*, the following documents were presented:

- a. On May 23, 2011 the legal representation of the CCR in court presented the original of the power of attorney granted by Mr. Muhammed Khantummani to that organization in the terms contained therein.
- b. On August 18, 2011 the legal representation of the ECCHR seeking for it to be present the in proceedings as a private prosecution on behalf of Mr. Murat Kurnaz, "*former prisoner in Guantanamo and victim of the tortures performed there*" and of the ECCHR itself acting as its legal representative for the purposes of this procedure, presented the original of the power of attorney granted for such purposes and with the content described therein.

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\* [syntax of the paragraph, a single sentence in the original, unclear]

**SIX.-** On November 17, 2011, a new brief was presented by the legal representation of HAMED ABDERRAHMAN AHMED and LAHCEN IKASSRIEN repeating the proceedings sought in briefs presented on February 28, 2011, May 25, 2011, and June 22, 2011, previously mentioned, seeking to expand the complaint to Mr. George Tenet, former director of the Central Intelligence Agency (CIA), attaching to the brief various documents in English consisting of:

- Doc. 1: Report "Getting Away with Torture. The Bush Administration and Mistreatment of Detainees," prepared by the organization HUMAN RIGHTS WATCH dated July 2011.
- Doc. 2: Report "ICRC Report on the Treatment of Fourteen High Value Detainees in CIA Custody," prepared by the International Committee of the Red Cross, dated February 2007.
- Doc. 3: Report "Report on Torture and Cruel, Inhuman and Degrading Treatment of Prisoners at Guantanamo Bay, Cuba," prepared by the organization Center for Constitutional Rights, dated July 2006.
- Doc. 4: document titled "Military order of November 13, 2001."

### **LEGAL REASONING**

**ONE.** As a matter prior to resolving the various issues raised by the parties present in court and by Office of Public Prosecutor to which reference has been made in the factual background to this ruling, and so as to allow for the proper handling of the court procedures, it is appropriate to first focus on the question of the legal qualification that can be attributed provisionally to the facts under investigation in this case. That must be done by necessarily taking up the legal framework under which the detention, transfer and situation of the complainants took place during the time spent at the U.S. naval base at Guantanamo Bay (Cuba).

The events recounted by the complainants in this case, Abdul Latif al-Banna, Omar Deghayes, Hamed Abderrahman Ahmed, and Lahcen Ikassrien, have been spelled out in previous resolutions (thus court orders on April, 27, 2009, and January 27, 2010) which can be consulted, in order to avoid unnecessary repetitions, preliminarily established both by statements provided by those affected, and by forensic medical reports issued on the first two, having to do, in short, with the various kinds of physical and emotional suffering endured during the time of their custody under United States authority, from their arrest in various countries where they were present (Afghanistan,

Pakistan, or Gambia), until their subsequent transfer to the U.S. naval base at Guantanamo (Cuba), concluding with their delivery to Spanish authorities, in view of the charges pending against them before the justice system in our country. All of that within the context of the United States military intervention in Afghanistan starting in October 2001.

The legal description applied to thus acts thus far (thus, Record of filing April 27, 2009 ) was that of *"various crimes against articles 608, 609 and 611, 3 in fine and 7, in relation to articles 607 bis 1, 8 and 173 of the Spanish Criminal Code, under the Geneva Conventions relative to Treatment of Prisoners of War and Protection of Civilians of August 12, 1949, the Convention against Torture and other Cruel, Inhuman, or Degrading treatment of December 10, 1984, ratified by Spain on October 19, 1987, the European Convention for the Prevention of Torture and Cruel, Inhuman or Degrading Punishment and Treatment, November 26, 1987, ratified on May 2, 1989, and article 65 1 e) and article 23.4 of the LOPJ, and those for which those persons would have been responsible as material or intellectual executors who had the detainees under their care and custody and who authorized or carried out the acts described, all of them members of the American army or military intelligence and all those who carried out and/or designed a systematic plan of torture or mistreatment, inhuman, and degrading treatment against prisoners whom they had under their custody who had been captured in the context of the armed conflict in Afghanistan and who were accused of terrorism."* That is, these proceedings have been pursued for alleged offences against persons and goods protected in the event of armed conflict - war crimes - and crimes against humanity, and alleged crimes of torture and against moral integrity. That provisional classification has thus far has not been questioned by the public prosecutor or other parties to the case.

This classification should be considered at this stage of the case as merely provisional, solely for the purpose of determining the quality of criminal acts of the events that are the object of the various complaints lodged and admitted for processing, and which are apt for to being included under Spanish jurisdiction. Accordingly, this investigating judge shares the precisions that will be stated subsequently, and without detriment to what may subsequently result from the processing of the procedure, that the actions perpetrated against the persons of the complainants and those adversely affected, Abdul Latif al-Banna, Omar Deghayes, Hamed Abderrahman Ahmed, and Lahcen Ikassrien, during their detention, transfer, and subsequent custody in at the Guantanamo

military base, set within the context of activity previously described in previous resolutions (in this sense, the facts under investigation are defined in the court ruling of April 27, 2009, supplemented with regard to Lahcen Ikassrien in brief of complaint dated September 29, 2009, admitted to processing by court order dated October 29, 2009, which was confirmed by the full Criminal Division of the National Court in a ruling on April 6, 2011), they might reasonably be held as presumably constituting the offences set out above - in any case, as crimes of

torture and against persons who are protected in the event of armed conflict. It is considered more difficult for it to be defined as a crime against humanity, in accordance with national and international legal standards at the time when the events took place, thereby fulfilling the jurisdictional provisions based on letter h) of art. 23.4 of the LOPJ and section e) of art. 65.1 of that same legal code.

In this sense, as already mentioned, delving deeper into the provisional description or classification of the facts under investigation, there must be a deliberation on the legal framework applicable to the legal status of persons detained at the Guantanamo base, including the four here in this case who have been wronged, under the provisions of the various international treaties on human rights and of international humanitarian law applicable to the case, also keeping in mind the legal precedent emanating from various international courts and the legal doctrine of the United Nations Human Rights Commission and other international bodies on the matter. All of this must be situated in relation to the standards contained in the LOPJ on jurisdiction and competence of this judicial body.

**1.-** To begin with, **article 23.4 LOPJ in subparagraph h)** grants competence to Spanish jurisdiction to try acts committed by Spaniards or foreigners outside the country which may be described, according to Spanish law, as *"any other (crime) which according to international treaties and conventions, in particular the conventions of international humanitarian law and protection of human rights, should be prosecuted in Spain."*

The explicit reference to conventions of international humanitarian law has to do specifically with the four Geneva Conventions of 1949 and their two Additional Protocols. Both the Geneva Convention relative to treatment of prisoners of war (Third Convention) and the Geneva Convention relative to protection of civilians in wartime (Fourth Convention) of August 12, 1949, to which both the United States and Spain are parties, along with the Additional First Protocol to the Geneva Conventions of June 8, 1977, are applicable to this case in the terms to be analyzed below. As derived from article 129 of Convention III and article 146 the Convention IV, *"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 – of those Conventions - 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.* While below such serious offences are specified as "those involving any of the following acts, if committed against persons or property protected" by both conventions: "(...)" torture or inhuman treatment ... willfully causing great suffering or serious injury to body or health, (...)" (art. 130 Convention III and art. 147 Convention IV).

Moreover both Spain and the United States are parties to various human rights treaties applicable to the situation of persons held at the Guantanamo base - including the four complainants appearing in these

proceedings. Noteworthy because of their importance with regard to the events that are the object of this procedure are the International Convention on Civil and Political rights of December 16, 1996, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the Convention Against Torture) of December 12, 1984 - which went into effect on June 26, 1987, and the International Convention on the Elimination of all Forms of Racial Discrimination of December 21, 1965. In its General Comment No. 31 (2004), the UN Human Rights Committee has established the complementarity of international humanitarian law and human rights law in situations of armed conflict.

Thus, article 7 of the International Covenant on civil and political rights explicitly affirms the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Likewise, the Convention against Torture defines torture (art 1.1: *"For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions)* and measures established that should be taken by Party States to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment. Paragraph 2 of article 2 of the Convention States that: *"No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture."*

The right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment is a right that does not admit being suspended, and therefore no type of exceptional circumstances may be invoked to justify it. The Human Rights Committee and the Committee Against Torture have continued to stress the absolute character of the prohibition of torture and to underscore that this prohibition does not admit suspension under any circumstances, not even in times of war or in the struggle against terrorism. The ban on torture contained in the relevant international standards, in particular the Convention Against Torture also includes the principle of non-refoulement (art. 3), the obligation to investigate allegations of violations promptly and to prosecute perpetrators, and the prohibition of the use of evidence obtained under torture in judicial proceedings. In particular, article 5.1 establishes that *"Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 - acts of torture, attempt at and complicity or participation in torture - in the following cases: (...) (c) When the victim was a national of that State if that State considers it appropriate."*

Finally, the prohibition of torture and of assaults on personal dignity, particularly humiliating and degrading treatment, in addition to being

part of the "jus cogens" (since it is a maxim of international law which does not admit any exception and which applies to every person regardless of the circumstances surrounding him or her, because it entails a direct attack on the human dignity of the victim) is also contained in the common article 3 of the Geneva Conventions of 1949. Although that precept is envisioned for the case of non-international armed conflicts, it enshrines some minimum rules of humanitarian law that have become customary international law.

Delving deeper into the issue of the consideration or classification of the persons held at the U.S. base in Guantanamo as persons protected by the 1949 Geneva Conventions, this investigating judge is well aware that this matter is disputed and not settled in legal doctrine, specifically with regard to the legal status of "prisoners of war" (Third Geneva Convention). That condition is not recognized by the US authorities, who however, apply to the detainees - including the complainants here - the classification or status of "unlawful enemy combatants," thereby preventing them from being entitled to the guaranties contained in the Geneva Conventions, particularly convention three relative to treatment of prisoners of war. Without prejudice to the different positions taken on the matter, and the conclusion that might be reached by the court body ruling, that hermeneutic construction stands in contrast to what is set forth in the various international treaties applicable to the matter to which Spain is a party.

Thus, it should be kept in mind, first that The Third Geneva Convention itself, in article 5, stipulates that *"The present Convention shall apply to the persons referred to in Article 4 – which catalogues the different categories of those who are to be considered prisoners of war - from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."*

Moreover, even if it were taken for granted that the Third Geneva Convention does not apply to those held at Guantanamo (specifically, the complainants appearing here, among which at least Lahcen Ikassrien was in the territory of Afghanistan at the time of his arrest and subsequent handing over to American military forces in November 2001, shortly before the United States military intervention in Afghanistan - an "armed conflict" to which Geneva Conventions apply according to Resolution No. 1340 of the Parliamentary Assembly of the Council of Europe), on the grounds that they do not meet the categories or requirements found in article 4 of that convention for them to be regarded as "prisoners of war," it seems at least settled from the standpoint of international law, as once more highlighted by the Council of Europe (Opinion n. 245-2003-) that they will in any case continue to enjoy the status of protected persons, certainly under the protection of the Fourth Geneva Convention on the protection of civilians in wartime, August 12,

1949 (e.g. articles 4 and 5) and ultimately with regard to individuals

who are considered to have taken part in hostilities but who do not meet the requirements for being considered prisoners of war and do not benefit from more favorable treatment under the Fourth Geneva Convention, they would also be protected under Additional Protocol I to the Geneva Conventions of 1949, relative to the protection of the victims of International Armed Conflicts of June 8, 1977 - ratified by Spain and in force since October 21, 1989. Article 75 of which by a provision made by article 45.3, expressly protects *"persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol."* They *"shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honor, convictions and religious practices of all such persons."* In article 2 that same law prohibits *"at any time and in any place whatsoever, whether committed by civilian or by military agents: (a) violence to the life, health, or physical or mental well-being of persons, in particular: ... (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation; (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; ... and (e) threats to commit any of the foregoing acts."*

Accordingly, this last protection would be reserved for persons who are not recognized as being entitled to the status of prisoners of war and those to whom the definition of protected persons in article 4 of the Fourth Geneva Convention on civilian population would not apply because they do not meet the criteria of nationality imposed by that mandate. Hence, in principle it could be said that none of the complainants in these proceedings would be excluded from being regarded as a protected person under the provisions of international humanitarian law. It should thus be concluded in this regard that even though the aforementioned Additional Protocol I to the Geneva Conventions has not been ratified by the United States, it is usually recognized that the provisions of article 75, given their fundamental nature, constitute part of the international customary law and a minimum standard of protection for all individuals. In any case it is a right directly applicable by this body to the case at hand.

In view of the foregoing, the facts investigated in these proceedings might reasonably be qualified as crimes of **torture and against moral integrity**, which are provided for and sanctioned in arts. **173 ff.** of the Criminal Code, combined with one or more **crimes against persons and goods protected in the event of armed conflict - war crimes** - provided for and punished in Chapter III of Title XIV - Crimes Against the International Community of the Criminal Code, specifically articles **608.2 and 3** (which considers as protected persons under the Code as *"prisoners of war protected by the III Geneva Convention of August 12, 1949 or by Additional Protocol I of June 8, 1977, and "the civilian population and civilians protected by the IV Geneva Convention August 12, 1949 or by Additional protocol I of June 8, 1977)* **art. 609** (which punishes with 4 to 8 years in prison *"one who during an armed conflict,*

*mistreats in deed or*

*gravely endangers the health or integrity of any protected person, subjects him/her to torture or inhuman treatment, including biological experiments, that cause him/her great suffering or her submits him/her to any medical act not indicated by his/her state of health or with the generally recognized medical standards that the party responsible for the action would apply in similar circumstances to his/her own fellow citizens not deprived of their freedom and art. 611.6 of the same Legal text (which punishes with 10 to 15 years in prison anyone who "at the time of an armed conflict "Performs, orders performed, or maintains, with respect to any protected person (...) inhuman and degrading treatment based on other distinctions of a negative character, entailing an assault against personal dignity").*

This last definition is in line with that contained in the Statute of Rome of the International Criminal Court adopted on July 17, 1998, which in article 8 defines as "war crimes" - when committed as part of a plan or policy or as part of the large-scale commission of such crimes - grave breaches of the Geneva Conventions of August 12, 1949, including such acts "subjecting to torture or other inhuman treatment" (paragraph ii) or "deliberately inflicting great suffering or seriously threatening the physical integrity or health" (section iii), when they are directed "against persons or property protected under the provisions of the relevant Geneva Convention."

2. With regard to case-law affecting the matter from supranational court bodies, and with regard to the alleged crimes under investigation in these proceedings, it should be noted that the recognition of the nature of *jus cogens* of international crimes and their subjection to the principle of universality on torture also has been recognized in various rulings. Thus we find the following statements of special relevance and application in the matter: a) the ruling of the UN International Criminal Tribunal for Yugoslavia of December 10, 1998 in the Furundzija case, paragraph 156, states that, "*at the level of ... criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed it would be inconsistent, on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treat-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been said that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.*" b) The Ruling of the European Human Rights Tribunal in the Ould Dah vs. France Case (No. 13113/03) March 30, 2009, which states that the absolute necessity of the ban on torture and possible prosecution of people who violate this universal rule, along with the exercise by a

signatory state of the universal

jurisdiction envisioned by the convention against Torture, would be devoid of content, if only the jurisdictional competence of such a state were recognized, but without admitting the applicability of that state's relevant legislation; on the grounds that the lack of implementation of this legislation in support of relevant circumstantial decisions or laws adopted by the state where the violations took place, acting to protect their own citizens, or conceivably under the direct or indirect influence of the perpetrators of these violations, with a view to absolving them, would lead to halting any exercise of universal jurisdiction and would nullify the aim sought by the Convention against Torture of December 10, 1984.; (c) Likewise, the ruling of the Court of Appeal of the House of Lords on March 24, 1999 in the so-called "Pinochet case" includes among its arguments of law the following: *"The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed."*

Under the analysis of law just presented, it follows that Spain is jurisdictionally qualified to try the deeds under consideration in these proceedings, which may be classified as crimes covered in art. 23.4 LOPJ under the rule or principle of universal justice.

**TWO.** - Now that the events with which this case is concerned have been provisionally classified, what remains is to examine whether, in the light of the procedural stages through which it has passed there is sufficient basis to assert the extension of Spanish jurisdiction to carry out this investigation, in terms of the steps of a procedural nature that are required by art. 23.4 LOPJ itself after the new wording of that provision by the LO 1/2009, on November 3.

To that end, the existing wording of article 23.4 LOPJ in paragraphs 2 and 3 in effect expresses the criterion or rule of subsidiarity, as a limit to the principle of universal justice - vis-à-vis the principle of concurrence of jurisdictions enshrined in international legal practice as a mechanism for preventing impunity in the prosecution of the most serious crimes of international law and that had been recognized by the jurisprudence of our Constitutional Court (thus, Rulings 87/2000, 237/2005 and 2007/227)- when it states that:

*"Without prejudice to what might be provided for in international treaties and conventions signed by Spain, in order for Spanish courts to prosecute the aforementioned crimes, it must be established that their alleged perpetrators are in Spain, or that there are victims of Spanish nationality, or there must be found some significant connecting tie to Spain, and that and, in any case, an investigation has not been undertaken in another competent country or within an International Tribunal, a procedure entailing an investigation, and actual prosecution, if appropriate, of such punishable acts.*

*The criminal procedure initiated before the Spanish jurisdiction shall be provisionally stayed when there is proof of that another court process has begun on the events alleged in the country or by the Tribunal referred to in the previous paragraph."*

For an adequate analysis of the issue, the following procedural course followed in the case must be kept in mind:

1. A **court ruling of April 27, 2009** ordered that "*prior proceedings be begun under number 150/2009 for alleged violations of articles 608, 609 and 611, in relation to articles 607 bis and 173 of the Criminal Code, against the possible material authors and those inducing, and their necessary cooperators and accomplices.*" In that ruling after limiting the deeds covered by the procedure to acts committed against the victims, Abdul Latif Al Banna, Omar Deghayes, Ahmed Abderrahman Ahmed, and Lahcen Ikassrien, "*during the time of their detentions in different countries, always under the authority of the American Army, to which they were handed over in the respective places where this took place (Afghanistan, Pakistan, or Gambia)*" and their subsequent transfer to the United States military base in Guantanamo (Cuba), the scope of the individuals at which procedure was directed was limited to "*persons who had the detainees under their care and custody and who authorized or carried out the acts described, all of them members of the American army or military intelligence, and all those who carried out and/or designed a systematic plan of torture or mistreatment, inhuman, and degrading treatment against prisoners whom they had under their custody who had been captured in the context of the armed conflict in Afghanistan and who were accused of terrorism.*"

**2 °.- A court ruling of May 26, 2009**, ordered that:

*"International Letters Rogatory be sent to the judicial authorities of Great Britain so that this court may know whether there is any criminal investigation examining the alleged torture and inhuman and degrading treatment endured by Jamiel Abdul Latif al-Banna and Omar Deghayes during their confinement at the Guantanamo (Cuba) military base until they were handed over to British authorities.*

*International letters Rogatory be sent to the competent judicial authorities of the United States of America in order to:*

*a) Report to this Court whether there is any judicial inquiry opened in that country to investigate the alleged torture, mistreatment, inhuman and degrading treatment suffered since his arrest by the Spanish citizen Hamed Abderrahman Ahmed, the Palestinian citizen Jamiel Abdul Latif el Banna, the Libyan citizen Omar Deghayes and Lahcen Ikassrien of Moroccan citizenship, with residence permit in Spain, until they were placed in liberty at the Guantanamo (Cuba) military base.*

*b) Whether there is a legal possibility for the victims to pursue such an investigation, above and beyond that which the Office of Public Prosecutor may initiate or reject, as the case may be."*

With regard to such requests for international legal cooperation, information on the status of the procedure has been gathered on

different occasions through the Office of International Legal Cooperation of the Ministry of Justice (specifically on August 11, 2009, October 30, 2009, January 4, 2011, and September 19, 2011). The only replies to these requests are the following:

For the United Kingdom: communication recorded October 28, 2009 from the central authority of the United Kingdom, requesting more information for replying to the letters rogatory sent through this Court. That request was supplemented on October 27, 2010, and it has been repeated through an official letter sent to that Office on September 19, 2011; and

With regard to the United States: communication recorded November 16, 2009, reporting that the request sent to the United States was forwarded to the Department of Justice on July 22, 2009; in view of the lack of response information was requested on the state of the procedure; an official letter was received on September 16, 2011 from that Office of International Legal Cooperation, stating as follows:

*... the corresponding written reminders have been sent from this office to U.S. judicial authorities, and so far no response by those authorities has been received."*

*Nevertheless, a new written reminder is being sent today, requesting information about the status of its processing."*

**3 °.- A court ruling of October 29, 2009** orders that:

- *"The complaint for torture formulated by Lahcen Ikassrien as injured party against the material perpetrators and any others that are responsible for the events be admitted.*
- *The complaint made against the other persons identified be dismissed, inasmuch as the deeds of which they are accused were not substantiated.*
- *The letters rogatory be resent to the United Kingdom and the United States of America in on June 15, 2009 with a reminder sent on October 11, 2009."*

In that ruling and with regard to those persons identified as defendants, George W. Bush, Dick Cheney, Donald Rumsfeld, General Michael Lehner, and General Geoffrey Miller, it was clear that in the complaint there was no description of specific behaviors having to do with the cases here investigated. It pointed out that *"therefore the aforementioned procedure must be completed to determine who have been the specific people who had the victims under their custody and the system by which they suffered physical and emotional harm and in what context the deeds took place, through which techniques and who carried them out and designed them."*

The Office of Public Prosecutor appealed that ruling of October 29, 2009. After the proper proceeding, **it was resolved by the Plenary Criminal Division of the National Court, issuing a ruling on April 6, 2011, by which it was ordered that the aforementioned appeal be dismissed.** (full certification of that ruling was forwarded through the Judicial Clerk of Section Two, recorded on May 17, 2011, and found on

pages 2469 to 2483 of the case record), inasmuch as **the Full Court found that there was a relevant connection to Spain** in the person of the complainant Mr. Ikassrien and in view of his personal procedural circumstances. At the same time the ruling of the full court in FD 2, states that *"In any case, the party presumably wronged or the victim cannot be required (as sought by the Office of Public Prosecutor in its October 6, 2009 brief) to show that in another competent country or within an international court no procedure involving an investigation and effective prosecution of such punishable acts has been initiated. This is an obligation not contained in the law that is disproportional, and difficult or impossible to carry out, so it must be the Spanish legal body, on its own*

*authority which must verify (sic) the inactivity of the jurisdiction of the State where the deeds were presumably committed - or of any other - as well as of the international community, along the lines of what was ruled in the non-jurisdictional plenary session of this court on 3, 2005 ."*

**4.- By a ruling on January 27, 2010,** (while the determination of the aforementioned appeal remained pending) this Court ordered that "the competence of the Spanish jurisdiction in this case be ratified," while at the time allowing the processing of the complaints presented by the legal representation of the Association For the Dignity of the Male and Female Prisoners of Spain, and that made by the legal representation of the Free Association of Attorneys (ALA), United Left (IU) and the Association For Human Rights of Spain (APHDE), exercising *Acusación Popular*, after first posting a bond of 1,000 Euros respectively. In that ruling, and specifically in legal arguments two and three, the competence of Spanish jurisdiction for investigating the facts in the matter at hand were analyzed, both before and after LO 1/2009 of November 3 went into effect, providing new wording to article 23.4 of the LOPJ with regard to the scope of the principle of universal jurisdiction. All the parties involved and the Office of Public Prosecutor were notified of that ruling, and it became final, since no appeal was lodged against it.

In short, in the light of all the foregoing, it must be concluded that the provisional classification of the facts under investigation as referred to previously - which will undoubtedly have to be specified throughout this investigation, against those persons at whom the criminal action is directed, as those presumably responsible for the deeds under investigation embodied in the sufferings endured by the four individuals who as complainants and those harmed in the procedure - constitutes at this time a sufficient basis for reiterating as anticipated in the ruling dated January 27, 2010 (final), **the assertion of Spanish jurisdiction in investigating the deeds that are the object of the proceedings.** It is also obvious that what is required by article 23.4 LOPJ after its modification, has been met, namely: to) **the existence of a "link of a relevant connecting tie to with Spain."** That requirement recently described by the Supreme Court, in a ruling on October 6, 2011 (Tibet case), as *"conditio sine qua non"* which makes conditional the extension of Spanish jurisdiction, and is explicitly

verified in this case in Lahcen Ikassrien, as recognized by the plenary of the Criminal Division on April 6, 2011, along with the Spanish nationality of another of the victims and complainants, Hamed Abderrahman Ahmed, *"which by itself would satisfy the requirement of the Organic Law of the Judiciary, without detriment to the concurrence of jurisdictions and/or the principle of subsidiarity"* (Ruling of the Plenary Criminal Division on April 6, 2011 and b) the fact that thus far and at the present stage of the proceedings, over two years and eight months after the case was filed, and as is clear from the certification issued by the Office of International Legal Cooperation of the Ministry of Justice on September 16, 2011, **there is still no "procedure entailing an investigation and actual prosecution, if indicated, of such sanctionable deeds"** in another competent country or within an international tribunal, given the lack of reply to the letters rogatory sent by this court to the competent judicial authorities of the United States and the United Kingdom, as countries whose jurisdictions could be regarded as of "another competent country" - criterion of subsidiarity - in terms of the LOPJ itself.

Finally it must be kept in mind how *"the conditions laid down in article 23.4 of the LOPJ must be interpreted in keeping with the pro actione principle (art. 24 EC), as the Constitutional Court itself has established, inter alia in rulings 237/2005 of September 26, and 227/2007 of October 22"* (Resolution of the Ombudsman on January 19, 2010). The recent recommendation made to Spain by the UN Human Rights Council, during eighth period of sessions held in Geneva May 3-14, 2010 should be taken in the same sense. After taking note of the legislative modification introduced in our country on the implementation of universal jurisdiction for international crimes, the Spanish state is urged to ***"ensure that the revision does not hinder the exercise of its jurisdiction over all acts of torture."***

**THREE.** - Now that the jurisdiction and competence of this judicial body for investigating this case has been established in terms of what has been argued, what remains is to rule on the relevance, need, suitability and proportionality of the investigation procedures that have been requested by the parties to the proceedings, as presented in the factual background of this ruling. In any case, the proceedings must be given the impulse necessary for verifying the facts under investigation and their alleged perpetrators, inasmuch as the procedural conditions required for doing so are present, complying with existing provisions of internal legality (arts. 23.4 h), 65.1 e) and 88 LOPJ) as provided for in the various international treaties signed by Spain, as previously set forth in the first point of the legal arguments of legal reasoning, striving thereby to guarantee the fundamental right to effective judicial protection (art. 24.1 CE) of the victims and parties to the proceedings; all this without prejudice to again sending the letters rogatory sent by this court to the judicial authorities of United States and United Kingdom, which will be ordered in this ruling, inasmuch as the office of the public prosecutor has so requested. However, the lack of a record of the existence of other proceedings initiated in other competent countries entailing that they are being investigated and prosecuted, given the silence or delay in reply by the competent judicial authorities

asked to send information (United Kingdom and United States) cannot not in any case lead to a relinquishment of the jurisdictional obligations of this judicial body (again, ruling of the Plenary National Court on April 6, 2011 and the Ruling of the Supreme Court\* on June 6, 2011).

Along these lines, article 311 of the Law of Criminal Procedure provides: "The judge investigating the case shall carry out the procedures proposed by the Office of Public Prosecutor or any of the parties, provided he does not regard them as useless or prejudicial."

For regarding as legitimate the investigation or evidence procedures, without detriment to the analysis of relevance provided for in article 311 of the Law of Criminal Procedure, the jurisdictional aspect involved must be weighed and the investigatory activity must be suited to the object and purpose and to the proportionality between the measure proposed and the result sought. All of this must be done in light of established precedent, including the ruling of the Supreme Court of September 14, 2006 (with citation of previous rulings, and also of the Rulings of the European Tribunal of Human

Rights on July 7 and November 20, 1989 and September 27 and December 19, 1990) which specifies that in the ruling on whether to admit the evidentiary proceedings sought, or not, the judge must weigh whether the evidentiary means sought is: a) relevant, in the sense of concerning or pertaining to what the specific procedure is about, i.e., that it is "to the point" of the object of the trial, and has an authentic relationship to it; (b) necessary, because as a result of it being carried out, the Judge may draw information on what must be provided for the decision on some essential aspect; it must therefore not only be relevant but also have a bearing on the final decision of the Court; and c) possible, inasmuch as the judge may not be required to perform procedures that go beyond the reasonable exhaustion of the possibilities of producing evidence, which sometimes from the outset is revealed as feasible in some fashion.

Applying the foregoing jurisprudence doctrine to the present case, and with regard to the specific measures sought by the parties involved in the proceedings, the following considerations are in order:

1.- First, in relation to the steps requested by the legal representation of Hamed Abderrahman Ahmed and Lahcen Ikassrien, inasmuch as it is a step viewed favorably by the Office of the Public Prosecutor and there is no doubt that it should be allowed to go forward, inasmuch as it is obviously in order, proper, and in proportion, the forensic medical

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\* [assuming AN = *Audiencia Nacional* and ATS = *Auto del Tribunal Supremo* ]

examination of the aforementioned victims is to be carried out, so that two forensic physicians may, in the light of the medical documentation and previous reports issued on the complainants in the court records, and after they have been examined, issue two forensic reports, ruling on the existence of injuries or consequences in Hamed Abderrahman Ahmed and Lahcen Ikassrien having to do with the deeds that are the object of the procedure, that may have entailed or currently entail physical or mental suffering, the suppression or reduction of their faculties of knowledge, discernment or decision making, or any other injury against their moral integrity.

However, at this stage, notification of complaints filed by the aforementioned legal representation against the persons of George W. Bush, Dick Cheney, Donald Rumsfeld, Michael Lehner and Geoffrey Miller, and the expansion of the complaint to include George Tenet shall not move forward, inasmuch as the Ruling dated October 29, 2009 allowing the processing of the complaint filed by the legal team of Lahcen Ikassrien (subsequently confirmed by the Plenary of the Criminal Division on April 6, 2011) in its conclusion orders that the "*Complaint formulated against the persons identified be dismissed, since the deeds of which they are accused are not specified.*" It is indeed true, as already stated in this ruling, that other complaints have been admitted into the court procedure (thus the ruling on January 27, 2010 which admits into the court proceeding complaints presented by the legal team of the Association For the Dignity of Male and Female Prisoners of Spain and that presented by the legal team of the Free Association of Attorneys (ALA), the United Left (IU), and the Association For Human Rights in Spain (APHDE), and at the same time a variety of documents provided by the ECCHR and the CCR have been brought into the case, and hence this investigating judge believes that in view of the result of the investigation thus far, as soon as Spanish jurisdiction for trying the deeds under investigation has been reaffirmed in the manner that the Office of Public Prosecutor deems may be required, after deciding on whether it is opportune, and bearing in mind the criminal lawsuits filed in the proceeding by the various outside-party prosecutions, it will be proper to receive instructions from the Office of Public Prosecutor,

about people against whom he considers it proper to direct criminal action as those presumably responsible for the deeds under investigation, specifically the sufferings endured by the four complainants present here as victims in the proceedings, and who should be informed of the existence of the procedure and of the accusations and complaints thus far admitted into the proceeding. The exercise of the right of defense shall be allowed in terms of article 118 of the Law of Criminal Procedure. Issuance of the ruling that General Geoffrey is a defendant, as sought by the Association For the Dignity of Male and Female Prisoners of Spain shall not be admitted for now, all in terms of consistency and proportionality.

2. - Secondly, as regards the proceedings sought by the Association For the Dignity of Male and Female Prisoners of Spain in its April 27, 2011 brief, in view of the terms of the report of the Office of Public Prosecutor which on this point this investigating judge shares, and in order to be

able to have in the court records valid and effective evidentiary documentation for the purposes of the investigation, a possible nullification of which from art. 11.1 LOPJ is by no means likely, it is in order to request that the daily newspaper EL PAIS, in collaboration with the Department of Justice (art. 17 LOPJ), through its legal service or whichever is most suitable in this respect, tell this Court whether it has in its possession any documentation concerning the treatment received by complainants Abdul Latif el Banna, Omar Deghayes, Hamed Abderrahman Ahmed, and Lahcen Ikassrien while held at Guantanamo, and if so, to specify where that documentation is from, and such evidence as exists on its official character, authenticity, and origin, in order to determine whether it is appropriate that it be placed in the court record, without violation of fundamental rights and procedural legality in effect in our legal system. Once the foregoing has been done, it may then be proper to hear testimony from those who apparently signed those documents (as indicated in the copy provided to the court by the party) Jay W. Hood, Mitchel R. Leclair, and James T. Payne III. In any case there is no basis or foundation for having them appear in court as defendants as sought by the party filing the procedure.

3. - Thirdly, with regard to the briefs presented by the ECCHR and CCR legal representations seeking to have standing in the procedures, the proper step is to refer the matter to the Office of Public Prosecutor so that it may issue a report, in view of the terms of the ruling dated April 13, 2011 issued by this Court.

4.- Finally, with regard to the new procedures of documentary evidence provided by the court representation of Ahmed Abderrahman Ahmed and Lahcen Ikassrien, the proper step is to bring it into the court records. That legal representation is requested to provide the court as soon as possible with the corresponding official translations of the documentation accompanying its brief, since all of it apparently in English, so as to later have it forwarded to the Office of Public Prosecutor to issue a report on whether it is to be admitted, and whatever proceedings may have to be carried out in this regard, and at the same time in relation to document no. 1 (report "Getting Away with Torture. The Bush Administration and Mistreatment of Detainees," prepared by the organization HUMAN RIGHTS WATCH and issued in July 2011), if it regards it as proper that Mr. Reed Brody who appears as author of the document give testimony.

Upon examination of the articles mentioned and other of general and relevant application,

### **I ORDER**

**1.- That Spanish jurisdiction for investigating and prosecuting the deeds that are the object of these court procedures be affirmed.**

**2.- That the report from the Office of the Public Prosecutor be obtained, having to do with the persons it is judged that criminal action be directed as those allegedly responsible for the deeds**

**under investigation**, namely the sufferings endured by the four complainants who appear in the court proceedings as those wronged, and who are to be told of the existence of the proceedings and of the accusations and complaints thus far allowed into the proceeding; they are to be allowed to exercise the right of defense in terms of article 118 of the Law of Criminal Trial.

However notification of the complaint filed by the legal representation of Lahcen Ikassrien against those persons identified as defendants is not in order, nor is it in order to decide on expanding the complained filed with respect to Mr. George Tenet, nor to declare Mr. Geoffrey Miller a defendant as sought by the legal representation of the Association For the Dignity of Male and Female Prisoners of Spain.

**3.- That the following procedures be carried out:**

a) Proceed with the forensic medical forensic examination of Hamed Abderrahman Ahmed, Lahcen Ikassrien, so that two forensic doctors, in the light of the medical documentation and previous reports issued on the complainants in the court records, and upon examination of them two separate forensic reports may be issued determining whether there are injuries or consequences in the aforementioned victims related to the deeds under consideration, that have entailed or currently entail physical or mental suffering, the suppression or reduction of their faculties of knowledge, discernment or decision making or any other injury against their moral integrity.

b) Solicit from the newspaper EL PAIS, in collaboration with the Department of Justice through its legal service or whatever means it finds most appropriate in this regard to report to this Court whether it posses any documentation on the treatment received by the complainants Abdul Latif Al Banna, Omar Deghayes, Hamed Abderrahman Ahmed, and Lahcen Ikassrien, and if so, to explain the origin of such documentation, and whatever record there may be about its official character, authenticity and origin. This request shall be processed through the head of the Press Office of this National Court.

All that is to be done in order to determine whether that documentation is to be brought into the court record and whether Jay W. Hood, Mitchel R. Leclair, and James T. Payne III, are to be brought into court as witnesses, even though they are not to be summoned as defendants.

c) Order that the documentation submitted by the legal representation of Hamed Abderrahman Ahmed and Lahcen Ikassrien in its November 17, 2011 brief be placed in the court records. That legal representation is asked to present to the court as soon as possible the corresponding official translations into Spanish of the documentation submitted with its brief, which is to be then forwarded to the Office of Public Prosecutor so that it may issue a report on their admission and whatever proceedings may need to be carried out in this regard, specifically, in relation to document no. 1 (report "Getting Away with Torture. The Bush Administration and Mistreatment of Detainees," prepared by the



organization HUMAN RIGHTS WATCH and dated in July 2011) whether it believes it appropriate that the author of that document, Mr. Reed Brody appear as a witness.

**4. Forward the briefs presented by the legal representations of ECCHR and CCR to the Office of Public Prosecutor** so that it may issue a report on what is sought therein, taking into account the terms of the ruling issued on April 13, 2011 by this Court.

**Resend the letters rogatory sent to the United Kingdom and the United States of America** on May 26, 2009, with reminders on August 11, 2009, October 30, 2009, January 4, 2011, and September 19, 2011.

Let notice of this ruling be sent to the Office of the Public Prosecutor and other parties involved, informing them that it is not final, and that requests for its modification and/or appeal may be filed within three/five days following its notification.

Thus ruled, ordered, and signed by Pablo Rafael Ruz Gutierrez, magistrate judge of the Central Court for Preliminary Criminal Proceedings of the National Court.

**PROCEDURE.** - What is ordered is carried out at once, in witness whereof.