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CENTRAL COURT FOR PRELIMINARY CRIMINAL PROCEEDINGS NO. 5
NATIONAL COURT
MADRID

PRELIMINARY PROCEEDINGS 150/2009-P

RULING

In Madrid, April fifteenth, two thousand and fourteen.

ELEMENTS OF ACT

ONE. – In the course of these Preliminary Proceedings initiated on April 27, 2009, by a court order dated March 17, 2014 a ruling was issued as follows: *In view of the status of these procedures, and inasmuch as on March 15, 2014, OL*[Organic Law]*/2014 which modifies the LOPJ [*Organic Law of the Judiciary] *in relation to universal justice went into effect, considering the new wording given to items 4 and 5 of article 23 of the LOPJ, and the introduction of a new section 6, and also in view of the content of the Sole Transitional Provision of the aforementioned OL1/2014, according to which "cases that are underway at the time when the Law goes into effect for the crimes referred to there shall be stayed until it is verified that the requirements laid down therein have been met," prior to deciding on the proper action to be taken on keeping the exercise of jurisdiction in this case (e.g. article 91. and 3 LOPJ), and insofar as the facts and offenses investigated in this case could be affected by the aforementioned modification in the law, it is proper, in applying what is set forth in articles 124 CE, 541 LOPJ, 1 EOMf and 773.1 LECrim, to pass the matter to the Office of Public Prosecutor to issue a report on the matter; for the sake of procedural equality, that same procedure shall also be passed on to the remaining parties involved in the proceedings, so that within three days they may make such representations as they regard as appropriate, thereby complying with what is set forth in article 9.6 LOPJ; when the foregoing takes place, the ruling shall be made."*

That deadline was extended by three days, through a new court order dated March 24, 2014.

TWO - In carrying out the transfer the following briefs have been presented:

a) The UNITED LEFT, acting as *acusasión popular*, requests the continuation of the investigation, with no agreement to any dismissal.

b) The court representation of the ASSOCIATION FOR THE DIGNITY OF MALE AND FEMALE INMATES, the CENTER FOR CONSTITUTIONAL RIGHTS OF NEW YORK, and EUROPEAN CENTER FOR HUMAN AND CONSTITUTIONAL RIGHTS OF BERLIN, acting as *acusación popular* seeks to have the rules contained in OL [Organic Law] 1/2014 (March 13), declared inapplicable, and secondarily that certain proceedings contained in their brief be carried out.

c) The court representation of JAMIEL ABDUL LATIF AL BANA and OMAR DEGHAYES, acting as private prosecution seeks the same as is being sought in the aforementioned *acusación popular*.

d) The court representation of AHMED ABDERRAMAN HAMED and LAHCEN IKASSRIEN, acting as private prosecution, seeks to have the investigation in the case carried out, and, secondarily, that the issue of unconstitutionality of be pursued, on the grounds that article 23.4 b) of the LOPJ, introduced by OL 1/2014, violates article 24.1 of the Constitution.

e) The court representation of the FREE ASSOCIATION OF ATTORNEYS (A.L.A.) and the Association for Human Rights of Spain (APDH), acting as *acusación popular*, seeks to have the investigation of this case be pursued, by ordering the proper course for carrying out the preliminary investigations sought in previous briefs.

f) Finally, the Office of Public Prosecutor issues a report to the effect that, in view of the ruling of Full Criminal Division of the National Court of March 21, 2014, and for the sake of the issues to be resolved - whether the stay of proceedings, or the continuation of the procedure or, if indicated, the posing of a question of unconstitutionality - that they be treated together and that a uniform legal response be given by the Court entrusted with rendering a judgment, it is urged that the case proceedings be initiated - taking into account the nature and seriousness of crimes under investigation and the penalties with which they are sanctioned - and that they be brought immediately before the Criminal Division for the purposes provided for in the Sole Transitional Provision of OL 1/2014 in relation to art. 627 ff. of the LECrim.

LEGAL REASONING

ONE. Introduction: Presentation of the issues disputed after the entry into force of OL 1/2014, (March 13, modifying the LOPJ, in relation to universal justice.

Prior to resolving the various issues raised by the parties with standing and by the Office of Public Prosecutor which have been referred to in the Elements of

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Fact of this ruling, in view of the current wording of article 23.4, 5 and 6 of the LOPJ, after the entry into force of OL 1/2014 (March 13), which modifies the former in relation to universal justice, and in order to allow adequate analysis of the effects that the new law is likely to produce with regard to the set of events prompting the initiation and preliminary investigation of these preliminary proceedings – which have to do with the detention, transfer and situation of the complainants during the time spent at United States naval base in Guantánamo Bay (Cuba) - the main procedural steps followed in the case determining its current state of processing should be presented, as well as the legal characterization that has been granted provisionally to the facts under investigation, should be set forth, repeating to that end the legal reasoning set forth in the ruling of January 13, 2012, whereby Spanish jurisdiction was supported for investigating and placing on trial the facts that are the object of these proceedings.

The next thing to be done, in response to the statements made by the Office of Public Prosecutor and all other parties with standing, will be to examine issues relating to the type of procedure under which the proceedings must be carried out, and the material and procedural consequences resulting from the new wording conferred by OL 1/2014 on paragraphs 4 , 5, and 6 of article 23 of the LOPJ, and relating to the effects of what is set forth in the Sole Transitory Provision of that law.

TWO. - Summary of the procedural course followed in the case up to enactment and entry into force of OL 1/2014.

As reflected in previous rulings issued in the case, i.e. ruling of January 13, 2012, the following steps in the proceedings may be indicated from the initiation of these preliminary criminal investigations up to the current status of the case:

1.- A <u>ruling on April 27, 2009</u>, ordered that **a** *"Preliminary Investigations be initiated with 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 and instigating perpetrators, necessary collaborators and accomplices of said violations."* In that ruling, after delimiting the acts committed against the alleged victim, Abdul Latif Al Banna, Omar Deghayes, Ahmed Abderrahman Ahmed, and Lahcen Ikassrien, *"during the time of their detention in various countries, all under the authority of the U.S. army, to which they were handed over in the respective places in which this occurred (Afghanistan, Pakistan or Gambia)"* and their subsequent transfer to the U.S. military base at Guantanamo (Cuba), the range of the individuals against whom the procedure was directed restricted to those *"who held the detainees under their guard and custody, and who authorized or performed the acts described, all of them being members of the American military or intelligence, as well as all those who*

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executed and/or devised a systematic plan of torture or inhuman and degrading abuse of the prisoners held in their custody, captured within the framework of the declared armed conflict in Afghanistan, and were accused of terrorism."

2.- A <u>ruling on May 26, 2009</u>, ordered:

"That International Letters Rogatory be sent to the judicial authorities of Great Britain in order that they may inform this Court as to whether there exists any criminal investigation substantiating the alleged torture, and inhuman and degrading treatment suffered by Jamiel Abdul Latif al Banna and Omar Deghayes during their detention at the Guantánamo (Cuba) military base until they were handed over to British authorities."

That International Letters Rogatory be sent to the competent Judicial authorities of the United States of America in order that:

a) They may inform this Court whether there exists any criminal investigation substantiating the alleged torture, and inhuman and degrading treatment suffered since their detention by the Spanish citizen Hamed Abderraman Ahmed, the Palestinian citizen Jamiel Abdul Latif al Banna, the Libyan citizen Omar Deghayes and the Moroccan national Lahcen Ikasrrien, who is a legal resident of Spain, until their respective release at the Guantánamo (Cuba) military base.

b) Whether there is a legal possibility that the victims may press such investigation, alongside the investigation that the Attorney General may commence or deny.

With regard to such requests for International Legal Cooperation, on different occasions information has been gathered on the status of its processing through the General 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, and was again repeated by a ruling on January 13, 12); the only replies to these requests have been the following:

– <u>With regard to the United Kingdom</u>: a communication of the Home Office to the effect that the concept of judicial investigation does not exist in the criminal law of England and Wales and that criminal investigations are performed independently of the judiciary and are carried out by police forces; it was also stated that the proper force, should it happen that there was any investigation into the events denounced by Jamiel Abdul Latif el Banna and Omar Deghayes, was the Metropolitan Police Force and that on June 29, 2012, it was decided that, in the case of the two mentioned, there was no need to initiate an investigation. It also noted that civil lawsuits had been filed on behalf of those two individuals against the government of the United Kingdom, and that a settlement on those demands has been reached through mediation.

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– With regard to the United States: a notice dated 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 reply, information was requested on the status of the procedure, and an official letter was received on September 16, 2011 from the aforementioned Office of International Legal Cooperation, to the effect that:

".. this Office has sent out the corresponding documents to remind judicial authorities, but thus far no reply has been received from those authorities."

However, today a new letter of reminder is being sent, requesting information about the status of the proceeding."

3.- A ruling on October 29, 2009 resolved to:

"Admit the complaint presented as injured party, filed by Lahcen Ikassrien for torture, against the material authors and any others who turn out to be responsible for the events.

Dismiss the complaint filed against the persons who are identified, on the grounds that the events claimed were not specified.

Repeat the Letters Rogatory sent to the United Kingdom and the United States on June 15, 2009, with follow up reminders on October 11, 2009."

In that ruling and with regard to the persons identified as defendants, George W. Bush, Dick Cheney, Donald Rumsfeld, General Michael Lehner, and General Geoffrey Miller, it was noted that the complaint did not have a description of specific behaviors related to the cases investigated here; that ruling stated that *"therefore the aforementioned procedure must be fulfilled by determining who are the specific persons into whose care the victims were entrusted, and the system by which they suffered physical and emotional harm, and the context in which it took place, through which techniques, and who implemented them and who designed them."*

In reply to the aforementioned October 29, 2009 ruling, an appeal was filed by the Office of the Public Prosecutor, which upon timely proceeding, was resolved by the **full Criminal Division of the National Court**, which issued a **ruling on April 6, 2011, deciding to dismiss the aforementioned appeal** (full certification of that ruling was submitted by official letter of the Judicial Secretary of the Second Division, officially entered on May 17, 2011, registered on folio pages 2469 to 2483 of the case), inasmuch as the **court found a connecting bond with Spain** in the person of the complainant Mr. Ikassrien, and in view of the personal and procedural circumstances present in it. At the same time, the Ruling of the Court, in FD 2, states that *"In any case, the alleged injured party or victim cannot be required - as requested by the Office of Public Prosecutor in its brief of October 8, 2009 — to establish that that no procedure has been initiated in another competent country or within an International Court, involving an investigation and an effective prosecution of such sanctionable acts.*

N o s u c h obligation is contained in the law, and it would be disproportionate and difficult or impossible to carry out, and hence it must be the Spanish judicial body, ex oficio, *which must establish (sic) the failure to act of the jurisdiction of the state where the deeds were allegedly committed - or of any other - and of the international community, along the lines of what was decided in the non-jurisdictional full Court of this Division on November 3, 2005."*

4.- By a **ruling on January 27, 2010**, while the aforementioned appeal was still pending, this court decided to *"Ratify the competence of Spanish jurisdiction in this case"*, while the complaints formulated by the court representation of the Association for the Dignity of Male and Female Prisoners of Spain and that presented by the court representation of the Free Association of Attorneys (ALA), United Left (IU), and the Asociación for Human Rights of Spain (APHDE), acting as *acusación popular*, were admitted upon presentation of a bond in the amount of 1,000 Euros respectively. In that resolution, and specifically, in its Second and Third Legal Arguments, the competence of Spanish jurisdiction to investigate the deeds considered in the procedure was examined, before and after the entry into force of OL 1/2009 (November 3), which gave new wording was given to article 23.4 of the LOPJ with regard to the scope of the principle of universal jurisdiction; all the parties with standing and the Office of Public Prosecutor were notified of that ruling, and it became final, inasmuch as no appeal was filed against it.

5. – A **ruling on January 13, 2012**, while ruling on certain investigation proceedings sought by the outside prosecution entities, also **affirmed Spanish jurisdiction for investigating and prosecuting the deeds that are the object of these court procedures,** and likewise requested **the report from the Office of Public Prosecutor about the persons against whom it was considered proper to direct the criminal case as presumably responsible for the deeds under investigation**, embodied in the suffering endured by the four complainants with standing as victims in the proceedings: the latter were to be officially notified of the existence of the proceeding and of the accusations and complaints thus far admitted to be considered, thereby enabling them to exercise their right of defense in terms of article 118 of the law of Criminal Trial. Various proceedings were found to be still underway, and it was ordered that they be pursued in that ruling.

6.- Finally, by a **ruling on January 23, 2014**, it was ordered that **new international letters rogatory be sent to the judicial authorities of the United States**, so that, taking into consideration the reply previously given offered to **Central Court for Preliminary Criminal Investigation number Six** in the letters rogatory sent in its previous **Preliminary Proceedings** 134/09 (reference number 2342/2009 - CAP) - by letters rogatory received on July 4, 2013 in reply to the procedure sought by the Office of Public Prosecutor, **they should inform this Court of the evolution and current status of the investigations therein mentioned or others that have taken place subsequently,** doing so ***"in order to be able to issue a balanced and rational judgment on the possible concurrence***

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of the principle of subsidiarity in the terms stated both by the Criminal Chamber of the National Court and by the second Chamber of the Supreme Court *in the foregoing resolutions, (...) while at the same time continuing to pursue the procedures in the case as stated in the ruling dated January 13, 2012, and subsequent rulings."*

In short, as already concluded in the ruling on January 13, 2012, in view of all the foregoing, the provisional characterization of the deeds under investigation - which will be treated later, and which will undoubtedly have to be delimited throughout this preliminary investigation, with regard to those persons against whom criminal action is directed, as alleged perpetrators of the deeds under investigation in the suffering endured by the four people who as complainants and victims in the procedure - constituted, at least until the entry into force of OL 1 (March 13, 2014) sufficient basis for **reiterating** as anticipated in the ruling on January 27, 2010 (final), **affirmation of Spanish jurisdiction in investigation of the deeds considered in the proceedings**; it is likewise obvious that the grounds previously required by art. 23.4 of the LOPJ after the modification made by OL 1/2009 (November 3) are met, namely: a) **the existence of a *"relevant connecting tie with Spain"*** - a requirement described by the Supreme Court, in a ruling on October 6, 2011 (Tibet case), as a *'conditio sine qua non'* which conditions the extension of Spanish jurisdiction, and which is explicitly present in this case in Lahcen Ikassrien, as recognized by the full Criminal Division in a ruling of April 6, 2011, as well as the Spanish nationality of another of the victims and complainants, Hamed Abderrahman Ahmed, *"which by itself would impel the requirement of the Organic Law of the Judiciary, without prejudice to the concurrence of jurisdictions or and/or the principle of subsidiarity"* (Ruling of the full Criminal Division on April 6, 2011); and **b) the lack of any formal indication thus far and at this stage of the procedure**, more than four years and ten months after initiation of the case, and as is clear from the successive certifications issued by the General Office of International Legal Cooperation of the Ministry of Justice in the case record, of any ***"procedure entailing an investigation and an effective pursuit, where indicated, of such sanctionable acts"*** in another competent country or in an international court, given the lack of reply to the letters rogatory submitted and repeated by this Court to the competent judicial authorities of the United States, as a country whose jurisdiction - along with the of the United Kingdom in the case of victims of English nationality - could be considered to be "another competent country" - criterion of subsidiarity - in terms of the LOPJ itself.

Finally, the ruling of January 13, 2012, noted how "the conditions established by article 23.4 of the LOPJ *should be interpreted in a manner favorable to the pro actione principle (art. 24 CE* [Spanish Constitution]*), as has been declared by the Constitutional Court itself, such as in SSTC 237/2005, (September 26), and 227/2007 (October 22)* (Resolution of the Ombudsman on January 19, 2010). Along the same lines was the recommendation made to Spain by the UN Human Rights Council, during the eighth period of sessions held in Geneva May 3-14, 2010, where after taking note of the previous legislative modification introduced in our country (OL 1/2009) with regard to the application of universal jurisdiction for international crimes, it urges the Spanish state "to

ensure that the reform will not hinder the exercise of its jurisdiction over all acts of torture".

THREE. - The legal characterization of the deeds to be investigated here.

The considerations expressed in the January 13, 2012 ruling, where this issue was examined, in terms shared by the Office of Public Prosecutor, need to be taken up anew - thus the report of March 26, 2014—.

At that time it was said that the deeds reported by the complainants in this case, Abdul Latif Al Banna, Omar Deghayes, Hamed Abderrahman Ahmed, and Lahcen Ikassrien, have been delimited in great detail in previous resolutions (thus, rulings on April 27, 2009 and January 27, 2010). Their content should be consulted so as to avoid unnecessary repetitions, and their reliability is established both by the statements provided by the victims, and by the forensic medical reports issued with respect to the first two, referring, in short, to the various physical and emotional sufferings endured during the time of their detention under the authority of the United States of America, from the time they were arrested in several countries where they were present (Afghanistan, Pakistan or Gambia), until their subsequent transfer to the United States naval base in Guantánamo Bay (Cuba), and concluding when they were turned over to Spanish authorities in view of their responsibility before the courts in our country. All of that is set in the context of the military intervention of the United States in Afghanistan, which took place starting in October 2001.

The legal characterization which until then was being made of those deeds (thus, judicial decree for initiation dated April 27, 2009) was that of *"several violations of 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, in relation to the Geneva Convention on the treatment of prisoners of war and protection of civilians, dated August 12, 1949, the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatments or Punishments, dated December 10, 1984, ratified by Spain on October 19, 1987, the European Convention for the Prevention of Torture and Humane [sic – Tr.] and Degrading Treatment and Punishments, dated November 26,1987, ratified on February 5,1989 and Articles 65(1)(e) and 23(4) of the LOPJ and of those who were responsible either materially or intellectually for the persons who were under their care, all of them being members of the American military or intelligence, as well as all those who executed and/or devised a systematic plan of inhuman and degrading torture or abuse -treatment against the prisoners held in their custody, captured in the context of the declared armed conflict in Afghanistan, and accused of terrorism."*

At that time it was said that this characterization must be considered as merely provisional at this state in this proceedings, solely for the purpose of determining the criminal quality of the deeds that were the object of the various complaints presented and admitted into the proceedings, and hence susceptible to coming under Spanish jurisdiction; this investigatory judge nevertheless agreed

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with the specifications made subsequently, and without prejudice to what might subsequently result from carrying out the procedure, that the acts perpetrated against the persons of the complainants and alleged victims Abdul Latif Al Banna, Omar Deghayes, Hamed Abderrahman Ahmed, and Lahcen Ikassrien during their detention, transfer, and subsequent custody at the military base of Guantánamo, set in the context previously described in earlier resolutions (thus, the deeds under investigation are defined in the ruling of April 27, 2009, supplemented with regard to Lahcen Ikassrien in a bill of complaint dated September 24, 2009, admitted into the proceedings by a ruling dated October 29, 2009, which was confirmed by the full Criminal Division of the National Court in a ruling dated April 6, 2011), could reasonably be regarded as presumptively constituting the crimes of torture and against persons protected in the event of armed conflict, in accordance with national and international law in force when the events took place, thus satisfying the jurisdictional provisions covered in letter h) of art. 23.4 of the LOPJ - according to the legal wording then in effect - and section e) of art. 65.1 of that same law.

The provisional characterization or qualification of the deeds under investigation was thus deepened, and to that end it became necessary to pause to consider the legal framework applicable to the situation of detainees held at the Guantanamo base, including the four victims in this case, under the coverage of the various international treaties on human rights and international humanitarian law applicable to the case, and also in view of jurisprudence emanating from different international courts and of the legal doctrine of the United Nations Human Rights Commission and other international organizations on the subject, placing all of this in relation to the requirements set forth in the LOPJ on the jurisdiction and competence of this judicial body.

1.- First**, article 23.4 of the LOPJ, in the former paragraph h)** (prior to modification made by OL 1/2014) granted competence to Spanish jurisdiction to try acts committed by Spaniards or foreigners outside the territory of the country that could be characterized, according to Spanish law as *"Any other* (crime)*which, according to treaties and international conventions, in particular conventions of international humanitarian law and protection of human rights, should be prosecuted in Spain."*

In accordance with the new legal wording made by OL 1/2014, article 23.4 of the LOPJ covers situations in which the competence of Spanish jurisdiction is recognized *for prosecuting deeds committed by Spaniards or foreigners outside the territory of the country that may be characterized, according to Spanish law, as one of the following crimes when the conditions set forth are met:*

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a) *Genocide, crimes against humanity, or* ***against persons and property protected in the event of armed conflict,*** *provided the procedure is directed against a Spaniard or against a foreign citizen whose usual place of residence is in Spain, or against a foreigner who is in Spain and whose extradition has been refused by the Spanish authorities.*

b) *Crimes of torture and against the moral integrity of articles 174 to 177 of the Penal Code, when*

1. the procedure is against a Spaniard; or

2. the victim had Spanish nationality at the time when the deeds were committed and the person accused of committing the crime is on Spanish soil.

And then in the **current paragraph p)** it grants competence to Spanish jurisdiction for trying *"Any other crime the prosecution of which is obligatory due to a treaty in effect for Spain or to other legal legislative acts of an international organization of which Spain is a member, under the circumstances and conditions determined therein.*

In reference the previous legal wording (in effect until this past March 15, 2014), it had been argued in the January 13, 2012 ruling that the express reference to the conventions of international humanitarian law contained in the previous article 23.4 h) of the LOPJ was attributed specifically to the four Geneva Conventions of 1949 and their two additional protocols, and that in the present case, as will be examined further on, that both the Geneva Convention relative to the Treatment of Prisoners of War (Third Convention) and the Geneva Convention relative to the Protection Civilian Persons in Time of War (Fourth Convention) August 12, 1949, to which both the United States and Spain are parties, might be applicable, along with the first Additional Protocol to the Geneva Conventions of June 8, 1977.

Accordingly, as derived from articles 129 of the Third Convention and 146 of the Fourth Convention, "*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 the aforementioned 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.'"* Next the grave violations 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 Third Convention and art. 147 IV Convention).

It was also noted how both Spain and United States are party to various human rights treaties applicable to the situation of the people held in Guantánamo Bay - including the four complainants in these proceedings - emphasizing, due to their relevance to the deeds that are the object of the procedure, the International Covenant on Civil and Political Rights of December 16, 1966, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (hereinafter Convention against Torture) of December 10, 1984 - entry into force on June 26, 1987 and the International Convention on the Elimination of all Forms of Racial Discrimination of December 12, 1965. In General Observation no. 31 (2004), the U.N. 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. For its part, in the Convention against Torture, torture is defined (art. 1.1: "*For the purposes of this Convention, 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."* Measures that the state parties should adapt to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment are established. Paragraph 2 of article 2 of the Convention declares 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 inhuman, cruel, or degrading treatment or punishment is a right that does not admit suspension, and therefore no exceptional circumstances of any kind may be invoked to justify it. The Human Rights Committee and the Committee Against Torture have insisted on the absolute nature of the prohibition of torture, and have stressed that this prohibition does not admit suspension under any circumstances, even in times of war or in the fight against terrorism. The prohibition of torture contained in the relevant international standards, in particular the Convention Against Torture, also includes the principle of non-return (art. 3), the obligation to investigate allegations of violations promptly and prosecute the perpetrators, and the

prohibition of the use of evidence obtained under torture in judicial proceedings. Specifically article 5.1 states 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 and complicity or participation in torture – *in the following cases: (...) When the victim was a national of that State if that State considers it appropriate."*

Finally, the prohibition of torture and offenses against personal dignity, particularly humiliating and degrading treatment, in addition to being part of the "jus cogens" - since it is a maxim of international law that does not admit of exception and applies to every person regardless of the circumstances surrounding it, inasmuch as it entails a head-on assault against the human dignity of the victim - is also contained in common article 3 to the Geneva Conventions of 1949. Even though that norm is meant for the case of non-international armed conflicts, it establishes some minimum rules of humanitarian law that have become international customary law.

Delving deeper into the matter of the consideration or characterization of the persons detained at the US base at Guantanamo as persons protected by the Geneva Conventions of 1949, it was also said at that time (Ruling of January 13, 2012) that this judicial investigator was aware that the matter is disputed and not settled harmoniously in legal doctrine, specifically regarding the legal status of "prisoners of war" (Third Geneva Convention). That condition is not recognized by the US authorities who, nevertheless, attributed to the detainees - including these complainants – the definition or status of "unlawful enemy combatants," thereby preventing them from meriting the guarantees contained in the Geneva Conventions, especially the Third, concerning the treatment of prisoners of war. Nevertheless, and without prejudice to the different positions on the issue, and the conclusion that the court body might reach, it was noted how that interpretative construal contrasts with the provisions set forth in the different international treaties applicable to the matter to which Spain is party.

Thus, it was noted, first, that the Third Geneva Convention itself, in article 5, states that *"The present Convention shall apply to the persons referred to in Article 4,* - which catalogs 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 Convention is not applicable to those held at Guantanamo (in particular, the present complainants, of whom at least Lahcen Ikassrien was in Afghanistan when he was

detained and then handed over to U.S. military forces in November 2001, just prior to 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), because they are not regarded as fitting the categories or requirements contained in article 4 of that convention so as to be taken as "prisoners of war", it seems at least non-controversial from the standpoint of international law, and thus it has been again stressed by the Council of Europe (Opinion n. 245 – 2003-) that they will in any case continue to hold the status of Protected Persons, under the protection of the Fourth Geneva Convention on the Protection of Non-combatants in Time of War of 12 August 1949 (e.g., articles 4 and 5). Indeed, ultimately, with regard to individuals who are believed to have taken part in hostilities but do not meet the requirements for being considered prisoners of war and do not benefit by more favorable treatment under the Fourth Geneva Convention, they would be also protected under the First Additional Protocol to the Geneva Conventions of 1949, relating to the Protection of the Victims of International Armed Conflicts of 8 June 1977 - ratified by Spain and in force as of October 21, 1989. Article 75 of that protocol, which, by reference 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 favourable treatment under the Conventions or under this Protocol"* who *"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, colour, 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, honour, convictions and religious practices of all such persons."* Article 2 of that legal requirement prohibits, *(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; ... b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; ... e) threats to commit any of the foregoing acts."*

Along these lines, it was pointed out how this last protection would be reserved to persons whose right to the status of prisoners of war is not recognized and 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 law, and hence in principle it could be claimed that none of the complainants in these proceedings would be excluded from the consideration of protected person for the purposes of the provisions of international humanitarian law. In this regard, it should be concluded that even though the aforementioned First Additional Protocol 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 international customary law and a minimum standard for the protection of all individuals, and thus in any case it is a right directly applicable by this body to the case under examination.

Accordingly, the conclusion was reached - in terms which have then remained unchanged until today, and which are not contested by the Office of Public Prosecutor or by the private prosecutors or *acusaciones populares* with standing in the court - that the deeds investigated in these proceedings may reasonably be classified as **crimes of torture and against moral integrity**, provided for and sanctioned in **arts. 173 ff**. of the Criminal Code, along with one or more **offences against persons and property protected in the event of armed conflict - war crimes** - provided for and sanctioned in Chapter III of Title XIV - Offences against the International Community - of the Criminal Code, in particular in **arts. 608.2 and 3** (which considers people protected for the purposes of the Code to be *"prisoners of war protected by the Third Geneva Convention of August 12, 1949, or by Additional Protocol I of June 8, 1977"* and "*the civilian population and individual civilians protected by the Fourth Geneva Convention of August 12, 1949, or by Additional Protocol I of June 8, 1977"),* **art. 609** (which sanctions with four to eight years of imprisonment one *"who on the occasion of an armed conflict, abuses in deed or places in serious jeopardy the life, health, or integrity of any protected person, subjects that person to torture or inhuman treatment, including biological experiments, causes him or her great suffering or subjects him or her to any medical act which is not indicated by his or her state of health or in accordance with the generally recognized medical standards that the party responsible for such action would apply, under similar medical circumstances, to its citizens not deprived of liberty"),* and **art. 611.6** of the same Law (which sanctions with ten to fifteen years in prison one "who on the occasion of an armed conflict *"performs, orders to be performed, or maintains, with respect to any protected person (...) inhuman practices and degrading treatment based on other distinctions of an unfavorable character, entailing an offense against personal dignity ").*

This latter characterization coincides with that contained in the Statute of Rome of the International Criminal Court adopted on July 17, 1998, which in article 8 characterizes as "war crimes" - when they are committed as part of a plan or policy or as part of the massive perpetration of such crimes - grave breaches of the Geneva Conventions of August 12, 1949, including among such acts *"subjecting to torture or other inhuman treatment"* (paragraph ii) or "*deliberately inflicting great suffering or seriously violating 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 **jurisprudence** on the matter from supra-national

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judicial bodies, and as relevant to the alleged crimes under investigation in these proceedings, as again referred to in the frequently mentioned ruling of January 13, 2012, it should be reiterated that recognition of the *jus cogens* nature of international crimes and their subjection to the principle of universality on torture has also been recognized in various rulings. Thus, we find the following pronouncements of special relevance and application on the matter: a) the Judgment of the International Criminal Court for Yugoslavia of the United Nations of December 10, 1998, in the Furundzija case notes that *"at the individual level, that is, that 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 treaty-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 aboard. 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 held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes."* Par. 145 likewise specifies that *"all States parties to the relevant treaties have been granted, and are obliged to exercise, jurisdiction to investigate, prosecute and punish offenders";* **b**) The Judgment of the European Court of human rights in the case Ould Dah v. France (No. 13113/03), March 30, 2009, which states that the urgent need for the prohibition of torture and possible prosecution of persons violating this universal rule, and the exercise by a signatory state of the universal jurisdiction provided for in the Convention Against Torture would be emptied of content if only the jurisdiction of that state were recognized, but without admitting the applicability of the relevant legislation of that State; it argued that the lack of implementation of this legislation for the sake of decisions or related laws adopted by the state where the violations occurred, acting to protect its own citizens or, under the direct or indirect influence of the perpetrators of these violations, in order to exculpate them would lead to paralyzing any exercise of universal jurisdiction and would reduce to nothing the objective pursued by the Convention against Torture of 10 December of 1984; **c**) Likewise, the resolution of the Court of Appeal in the House of Lords on March 24, 1999 in the so-called "Pinochet case" includes among its grounds // the following: *"the* jus cogens *nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed."*

FOUR.- The extent of Spanish jurisdiction to try the deeds here under

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investigation following the entry into force of OL 1/2014.

Now that the provisional characterization of the deeds under consideration in this case has been made, what remains is to examine whether, in view of the legislative modification made in the LOPJ by OL 1/2014, there is sufficient basis for affirming at this point the extent of Spanish jurisdiction to carry out this preliminary investigation, by virtue of the conditions of a procedural nature that are required by article 23.4 LOPJ, after the new wording given to that law by OL 1/2014 (March 13).

Thus, and by virtue of the legal analysis presented above, with respect to the specific deeds with which this procedure is concerned, it should be concluded:

1.- That the conditions expressed in paragraphs a) - crime against persons protected in the event of armed conflict - and b) - crimes of torture and against moral integrity — of the new paragraph 4 of article 23 of the LOPJ are not entirely met, inasmuch as in this case, even though one of the victims - Ahmed Abderraman Hamed - had Spanish nationality at the time when the deeds took place, what is lacking is the condition that the procedure be against a Spaniard or a foreigner usually resident in Spain, or against a foreigner who is in Spain and whose extradition has been refused.

2.- That, nevertheless, the provision **of paragraph p) of article 23.4 LOPJ recognizes the competence of Spanish jurisdiction to try *"Any other offense the prosecution of which is imposed on a mandatory basis by a treaty in force for Spain*** *or by any other normative acts of an international organization of which Spain is a member, in the cases and conditions set forth therein."*

3.- That in this sense the previously analyzed provisions contained in international treaties signed by Spain cannot be ignored, in particular articles **129 and 130 of the Third Geneva Convention, and article 5 of the Convention against Torture,** which comprise part of our legal system (art. 96.1 CE), **and which impose the obligation to prosecute in cases of grave violations of the Geneva Conventions** (in this case by obligation) (*"Each High Contracting Party* ***shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons regardless of their nationality, before its own courts."-*** art 129 Third Geneva Convention - and the commission of acts of torture sanctioned by the Convention against Torture (in this case, however, with a certain discretionary nature, inasmuch as the obligation of prosecution in the event of torture against Spanish victims is conditioned to whether the Spanish State *"considers it appropriate"* - article 5.1. c) of the Convention), as a priori would be the case in the deeds under investigation in this case.

4.- That consequently we would be faced with an apparent **collision between regulation under domestic law of the law enabling criminal jurisdiction to be extended, and the obligations accepted by Spain by virtue of the previously ratified international treaties which are part of our legal system,** in the sense that Spanish lawmakers have subjected the institution and extent of Spanish jurisdiction to considering and prosecuting deeds such as those

that are under consideration in these proceedings - acts of torture and war crimes - to meeting conditions and circumstances, which in addition to entailing a restriction on the obligation of prosecution assumed internationally by Spain in response to the most serious violations of human rights and international humanitarian law so as to prevent situations of impunity in such cases, they are not at all bound by those treaties, nor do they sympathize with spirit that according to the "Presentation of Legal Grounds" of OL 1/2014 is said to inspire that legal modification when it is stated that *"the extension of national jurisdiction beyond one's own borders into the realm of the sovereignty of another state, should be circumscribed to areas which, provided for by international law, ought to be assumed by Spain in fulfillment of the international commitments that it has acquired: the extension of Spanish jurisdiction beyond Spanish territorial limits must be legitimized and justified by the existence of an international treaty that provides for or authorizes it (...)"*

The foregoing notwithstanding, and without prejudice to the solution that might be found for such an obvious conflict of law, attention should first be given to the impact on the present case that might result from the new wording provided by paragraph 5 of article 23 of the LOPJ, to which the following legal argument shall be devoted.

FIVE. – The new regulation of the principle or criterion of subsidiarity, case-law precedent and jurisprudence, and the relevance of directing reasoned exhibition to the Second Division of the Supreme Court.

OL 1/2014 provides new regulation to paragraph 5 of article 23 of the LOPJ, modifying the previous wording that OL 1/2009 had conferred on article 23.4 of the LOPJ in paragraphs 2 and 3, wherein the criterion or rule of subsidiarity was placed as a the limit to the principle of universal justice - vis-à-vis the principle of concurrence of jurisdictions enshrined in international law as a mechanism for preventing impunity in the prosecution of the most serious crimes under international law, which had been recognized by the jurisprudence of our Constitutional Court (thus, Judgments 87/2000, 237/2005-227/2007)-.

In this regard, the Presentation of Grounds of OL 1/2014 states:

"The competence of the Spanish courts is delimited negatively, clearly defining the principle of subsidiarity. Thus, the jurisdiction of Spanish courts is ruled out when a procedure has already been initiated in an international court or by the jurisdiction of the country in which [the crimes] *were committed, or of the nationality of the person alleged to have committed them; in these latter two cases provided that the person to whom the deeds are attributed is not in Spain or, being in Spain is to be extradited to another country or transferred to an International Tribunal, under the established terms and conditions.*

In any case, Spanish judges and courts reserve the possibility of exercising their jurisdiction, if the State exercising it is not willing to carry out the investigation or really cannot do so. The assessment of these circumstances, which because of their importance will fall to the Second Chamber of the Supreme Court, will be formed in accordance with the criteria laid down in the Statute of the International Criminal Court".

Article 23.5 of the LOPJ states as follows:

"The offences referred to in the preceding paragraph shall not be prosecutable in Spain under the following conditions:

a) *When a procedure has been initiated for investigation and prosecution in an International Court set up in accordance with the treaties and conventions to which Spain is party.*

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

1. the person accused of committing the acts is not on Spanish soil.

2. a procedure has been initiated for his or her extradition to the country of the place where the deeds were committed or of the nationality of the victims, or to place him or her at the disposal of an International Tribunal to be tried for them, unless extradition has not been authorized.

What is set forth here in section b) shall not be applicable when the state exercising its jurisdiction is not willing to carry out the investigation or really cannot do so, and it is so assessed by the Second Division of the Supreme Court, to which the Judge or Tribunal makes the reasoned exposition.

In order to determine whether or not there is a willingness to act in a determined matter, it shall be examined whether or not one or various of the following cases may be present, as the case may be, taking into account the principles of a procedure with the proper guarantees recognized by international law:

a) That the trial has been or is underway or that the national decision has been adopted for the purpose of removing the person who is said to be criminally responsible.

b) that there has been an unjustified delay in the court process which, given the circumstances is incompatible with the intention of placing person in question on trial.

c) That the case has not been or is not being conducted independently or impartially, and has been or is being conducted in a manner that is, given the circumstances, incompatible with the intention of bringing the person in question to trial.

(...)

Indeed, in order to verify this possible "absence of justice," the new

regulation establishes the same standards as article 17 of the Statute of Rome.

Above it was noted that article 129, Clause 2, of the Third Geneva Convention to which both Spain and the United States are parties, recognizes the possibility of the other contracting parties, *if they so prefer, and according to the conditions set forth in legislation, turning over* (persons accused of having committed or having ordered the commission of grave violations of the Geneva Conventions) *to be tried by another contracting Party concerned, if the latter has filed sufficient charges against them."*

For a full examination of the aforementioned principle or criterion of subsidiarity, under national and international law, inasmuch as the jurisdictional antecedents are varied in this regard, (among the most recent, the Supreme Court ruling of March 4, 2010, which lays down the obligation to modulate the principle of subsidiarity in relation to the concrete case, pointing out that the principle of universal jurisdiction is not absolute), the proper procedure is to present, because it is an accurate and exhaustive compendium on the matter, the legal arguments recently invoked by the full Criminal Division of the National Court, as well as the Second Division of the Supreme Court, in connection with their respective consideration of motions for appeal and appeals for reversal to the Supreme Court, filed in response to the ruling which ordered the staying of procedure DP 134/2009 of Central Court for Preliminary Criminal Proceedings No 6, also filed for deeds connected to the Guantánamo base.

Thus, to begin with, the Dissenting Opinion to the **Ruling of March 23, 2012 of the full Criminal Division of the National Court,** in the case submitted for its consideration - although indeed with conclusions that can be applied to this case – pointed out that **"***The sole limitation on Spanish jurisdiction would be determined by* bis in idem *or* res judicata*, and should some preference for another jurisdiction be recognized due to the occurrence of a conflict between them - something unprecedented in the area of the most serious international crimes, because these are massive, systematic repeated state crimes which usually go unpunished, as in the Guantanamo case - it should be settled according to criteria of effective prosecution, assessed by rigorous standards, and in terms of the best position for prosecution and judgment."*

"The ECHR has declared that effective investigation does not mean the opening of a criminal investigation in every case, but it has stated that the right to effective judicial protection must be judged violated if the investigation is not opened or is closed (Preliminary Criminal Investigation)"when there is reasonable suspicion that the offense has been committed and when it has been shown that such suspicions could be clarified," (Rulings of 16 December 2003 (Kmetty v. Hungary ap. 37) and 2 November 2004 (Martinez Sala et al. v. Spain ap. 156). (. .)"

"Likewise, the International Criminal Court (ICC) has ruled on the

application of the principle of complementarity with the jurisdiction of States governing their actions, establishing clear jurisprudence on when it must act by default and on the characteristics of the investigation or procedural action of a national court, for default action not to take place.

These criteria, to the extent they have unfolded in the scarce case record existing thus far, are standards applicable to this case."

Among the elements required by case-law:

a) Identity of the case ("Same conduct" test). In various resolutions the Division of Preliminary Matters has established the requirements of the identity of the case for the purposes of complementarity, requiring that there be a complete identity of person and conduct (subjective and objective identity).

b) In order to assess the existence or absence of investigations or prosecution (art 17.1-a and b), the ICC must take into account: (i) whether under the principles of due process according to international standards, (ii) the process or the decision was taken in order to "protect" the person in question from criminal liability, (iii) there is unjustified delay in the procedure, (iv) the procedure has not been carried out independently and impartially.

Indeed, the ICC determines the admissibility of the case (establishes its supplementary action) based on: the specific facts as they are at the time when they are presented to it; the absence of information or evidence with a sufficient degree of specificity and probative force of the claims in the proceedings before the national courts; the absence of procedural or substantive legislation in effect allowing for criminal prosecution to be carried out; the lack of proof of actual investigative actions into, specifically the same person, and substantially the same behavior; proven lack of willingness to pursue, investigate, or prosecute a certain person.

Nor may it be forgotten that recognition by our courts of the effectiveness of investigation that is only apparent could constitute an indirect violation of the Constitution. That is what the Constitutional Court has said, "Spanish authorities may indirectly violate fundamental rights when they recognize, approve, or give validity to resolutions adopted by foreign authorities ... The oversight of the Spanish judiciary on the conformity to fundamental rights of the activity of a foreign government authority .... does not disappear ... There is an absolute core of fundamental rights in accordance with which Spanish courts can and must assess the impact of the acts of government authorities of foreign States" (STC 123/2009, and also SsTC 224/07, 34/2008, 52/2008, 63/2008, 107,2008, and 123/2008).

For its part, the **Supreme Court** addresses the same issue in the process of admitting the appeal for reversal to the Supreme Court, in response to the ruling issued by the National Court (confirming the dismissal issued by JCI No. 6 in its DP 134/2009 JCI), on the occasion of **Ruling 1916/2012 of December 20, 2012** (Rapporteur Judge Saavedra Ruiz) rejecting admission of appeals for reversal presented against the Ruling of the Criminal Division of the National Court of

March 23, 2012 in reference to the case pursued before Central Court for Preliminary Criminal Proceedings Number Six under Preliminary Proceedings 134/09 (from which come the letters rogatory received in these proceedings under number 8/13).

In that ruling, the Second Division of the Supreme Court makes certain considerations on the jurisdiction of Spanish courts under circumstances similar to those in the matter of these proceedings, and in particular with regard to the so-called Principle of Subsidiarity set forth in current article 23.5 of the LOPJ (considerations which even though they have to do with the previous legal wording must be - with nuances - taken into consideration under the new regulations effected by OL 1/2014).

Thus, the Supreme Court notes: *Indeed, according to that legal norm, in order for the Spanish courts to be able to try the offences set forth there, including those mentioned in the complaint, it must be established that the alleged perpetrators are in Spain, or that there are victims of Spanish nationality, or some significant link with Spain must be established, and, in any case, states the law, that no procedure has been initiated in another competent country or in an international tribunal entailing an investigation and effective prosecution, if indicated, of such sanctionable deeds. As we said in the ruling of this same court on October 6, 2011, the current paragraph 4 of article 23 of the LOPJ, in the area of the extension of Spanish jurisdiction, written in accordance with the modification made by Organic Law 1/09 (November 3), as stated in the presentation of the reasons of the law introducing it, has made "a change in the treatment of what has come to be called 'universal jurisdiction,' by modifying article 23 of the Organic Law of the Judiciary in order to incorporate types of offences that were not included, the prosecution of which is covered in the conventions and practice of international law, such as those that are crimes against humanity and war crimes. In addition, the modification makes it possible to adapt and clarify the legal norm in accordance with the principle of subsidiarity and the legal doctrine produced by the Constitutional Court and the precedent of the Supreme Court."*

Specifically, this legal doctrine had been holding that the principle of universal jurisdiction is not absolute, generally considering the criterion of subsidiarity to have higher priority than that of concurrence, and that it must all be modulated in each concrete case.

Certainly, as the legal norm states, should it be established that the sanctionable deeds presented in the complaint were being investigated in another competent country or in an international tribunal, the Spanish judicial bodies would not be competent to prosecute them.

Indeed, the existence or not of such an investigation in another competent country, particularly in the United States, is precisely the issue that is contested by the appellants, who believe, as we have already said, that the investigations and judicial processes instituted by the authorities of that country, to which the decision being appealed refers, do not really constitute an effective investigation

of the facts that are object of the complaint in terms of article 23.4 of the LOPJ; some appellants argue in detail on the content and result of each one of them and hold that these were neither sufficient, nor, as we have said, effective.

These arguments however should not be admitted.

As set forth in the ruling issued by the Criminal Division of the National Court, the United States authorities, as the latter reported in replying to the letters rogatory sent in due course to Central Court for Preliminary Criminal Proceedings No. 6, have investigated or are investigating the events at the Guantánamo detention center. They have carried out the administrative procedures listed there and have also initiated the criminal investigations which are also listed therein.

These include an administrative procedure carried out by the Office of Professional Responsibility of the U.S. Department of Justice, in which the activity of two of the defendants - Jay Bybee and John Yoo - was investigated for their involvement in the preparation of memoranda on norms of conduct and interrogation techniques on alleged terrorists (these latter are acts of which they are also charged in the complaint). As recognized by the appellants themselves, that investigation lasted some five years, and concluded with a 261-page report. It is true that it was an administrative procedure, as we have said, clarifying whether they might have incurred some type of disciplinary responsibility in their professional activity by their relationship with such documents; but its outcome, and in particular its final report, as the appellants themselves explain, was sent in due course to be studied by the then deputy attorney general, David Margolis. As noted, he dismissed the case, and did not initiate any administrative or criminal action whatsoever against these people or against anyone else involved in the aforementioned memoranda. The fact that the investigation began in the administrative realm, as we understand it, would not have prevented criminal actions from being carried out, had there been indications of criminal actions by the persons under investigation.

Second, it should be noted that, as it can be inferred from the documentation submitted by the US authorities, and explained by the appellants themselves, in 2009, the Attorney General, Mr. Holder, agreed to initiate a preliminary investigation on the treatment of some of the detainees at the detention center at Guantánamo. That investigation is still ongoing, according to the United States Department of Justice. It was entrusted to the Deputy Attorney General, John Dirham, who previously, as is clear from the public statement made by Mr. Holder, which is included in the claims made by the appellants, had specifically investigated the alleged destruction by the Central Intelligence Agency (CIA) of videotapes containing some interrogations of detainees.

Certainly neither this latter investigation nor that initiated at the request of Attorney General Holder is centered on the defendants, or on the specific activity of which each of them is accused in the complaint. What it does, as we have said, is investigate the treatment to which some of the people held at the Guantánamo center were subjected, but it is obvious that the possible liability of the former would derive from the proof that that treatment constituted torture and inhuman and degrading treatment as claimed by the appellants. *Precisely*

what the defendants are accused of, as we have said, is that it was they who created the "legal architecture" needed to establish a systematic plan of torture and cruel treatment of the detainees, by preparing the various documents described in the complaint.

Third, and finally, according to the information provided by the United States Department of Justice, the U.S. Attorney's Office for the Eastern District of Virginia is also investigating complaints of abuse against detainees held at Guantánamo.

Likewise it should be noted that in 2006, as also shown in the information sent by the American authorities, the United States Supreme Court issued a ruling in Hamdan v. Rumsfeld, 548 US.557 (2006) declaring, against the criteria maintained by the defendants in the documents that they are accused of preparing, that article 3 of the Geneva Convention of 1949 was applicable to persons detained in the aforementioned detention center at Guantánamo.

In short, to greater or lesser extent, the United States has investigated the events at Guantánamo; in fact the preliminary investigation on treatment of detainees there ordered by Attorney General Holder in 2009 is still ongoing.

It is true that there is no record that criminal charges were made as a result of those investigations, and that Attorney General Holder himself announced in the aforementioned statement, that the Department of Justice would not bring charges against those who had acted in good faith within the legal framework established at the time by the Office of Legal Counsel regarding the interrogation of detainees; ***but that does not simply mean, as claimed, that the investigations carried out so far have not been effective, so that the criterion of subsidiarity provided for in section four of article 23 of the LOPJ would not apply, or that the investigation now underway, has been fruitless.***

This same Court took a similar stand in its March 4, 2010 ruling, when it confirmed the lack of jurisdiction of the Spanish courts to investigate particular deeds attributed to certain political and military commands of the state of Israel*. Likewise in that instance the complaints received by the attorney general of that state, related to the actions that were the object of the complaint, had led to an internal investigation that in the end was filed away, as the proceeding in that country was assessed, in relation to such deeds, not only of proceedings of criminal nature, but also military, and even civil proceedings.*

Moreover, we must insist, in line with the claims made by the appellants, that the applicability of the principle of discretionary prosecution in the American criminal justice system, as in other legal systems, a discretionary opportunity moreover, where the Prosecutor indeed decides whom to accuse and for which crimes, does not mean that such a decision is exercised arbitrarily, or that it is made, as stated by the complainants, on the basis of purely political considerations, or that the principle of legality is not respected in that system. It is a system that follows a different conception about what the role of the public prosecutor's office is, what the purpose of criminal proceedings is, and what the involvement of the victims should be; it is not for us to judge that conception, nor does it in itself call into question the impartiality and the organic and functional

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separation of the office of prosecutor from the executive."

That legal doctrine of the Supreme Court was drawn on by the present investigating judge in the recent **ruling of January 23, 2014,** prior to the amendment made by OL 1/2014, and also made reference to the ruling in this case by the **Criminal Court, Section 2, and a ruling dated July 1, 2013**, where in denying a motion for appeal filed by the private prosecution against the January 31, 2013 ruling of this court, refusing to undertake criminal action against any person until the procedures underway are carried out, the Court rules as follows: "**The investigation is still pending the completion of various letters rogatory aimed at finding out whether there are investigations in the United States, which would serve to serve to evaluate the concurrence of the principle of subsidiarity enshrined in our procedural system both in article 23.2 c and 23.4 of the LOPJ in this case"** (according to the previous legal regulation).

Accordingly, in the January 23, 2014 ruling, the Court decided, **in order to be able to issue a balanced and rational judgment on the possible concurrence of the principle of subsidiarity in the terms expressed both by the Criminal Division of the National Court, and by the Second Division of the Supreme Court in the foregoing rulings**, while continuing to carry out the proceedings underway, as ordered in the ruling dated January 13, 2012, and subsequent rulings, **to send new Letters Rogatory to the judicial authorities of United States, so that,** taking into consideration the reply previously offered to Central Court for Preliminary Criminal Investigation Number Six in Letters Rogatory sent in its Preliminary proceedings (reference number 2342 / 2009 - CAP), they **inform this Court of the progress and current status of the investigations mentioned therein or others that may be carried out subsequently and which in turn will be decided as opportune by this Court.**

Those letters rogatory were sent to the United States authorities, through the Ministry of Justice, on February 25, 2014, but no reply has been received thus far; hence, they will have to be repeated with the insistence that they be answered as soon as possible, in order to fully comply with the legal provisions in current article 23.5 LOPJ, in terms which will be noted in the concluding part of this ruling, **bringing before the Second Division of the Supreme Court the corresponding Argumentation so that**, in keeping with the information in the case, **it may be determined whether there is in the United States an investigation procedure into the deeds that are the object of this preliminary investigation,** and consequently **its willingness to act on them.**

SIX.- Objective condition of admissibility: complaint of the injured party or of the Office of Public Prosecutor.

The current section 6 of article 23 of the LOPJ, in the wording conferred by LO 1/2014, states:

"6. The offenses set forth in paragraphs 3 and 4 may only be prosecutable

in Spain, upon filing of complaint by the aggrieved or by Office of Public Prosecutor."

In this regard, the Presentation of Grounds of the modified law states that *"the prosecution of crimes committed outside Spain is exceptional in nature and hence the opening of procedures should be conditional upon submission of complaint by the Office of Public Prosecutor or the person aggrieved by the offence".*

In this case, as already noted above, by a ruling on October 29, 2009, partial admission was granted to the procedure of the complaint filed by the procedural representation of LAHCEN IKASSRIEN, who suffered injury and was directly wronged by the events reported in the complaint; that ruling was confirmed by the Ruling of the Full Criminal Division of the National Court dated April 6, 2011, and hence there is a record of compliance with the new requirement, or the objective condition of admissibility set by the legal change made by OL 1/2014.

SEVEN.- Suitability of the procedure and Decision on the dismissal of the proceedings.

Article 760 of the Law of Criminal Procedure (LECr) states that when an action has been filed in accordance with the rules of the summary procedure, when it appears that the deed is not included in any of the situations in article 757, the general provisions of the law are to be followed, i.e. those of preliminary criminal proceedings, without going back in the procedure except when some procedure must be carried out or procedures have to be performed in keeping with trial rules.

In view of all the proceedings conducted during this preliminary investigation, and the characterization which has been given to the deeds under consideration in these proceedings, in the terms set forth above (Legal Argument Three) inasmuch as the alleged crimes under investigation carry a sanction of over nine years, exceeding the framework of the summary procedure, it is appropriate, in accordance with what has been sought by the Office of Public Prosecutor, to continue the proceedings as set forth for the ordinary criminal procedure, and it is not regarded as necessary retrace the procedure, and it should be tried by the Criminal Division of the National Court, by application of the provisions of article 14.4 of the LECr.

The foregoing having been established, and with regard to the processing of the Case, unlike Preliminary Proceedings of the Criminal Summary Proceedings, where the investigatory judge can order the provisional or final dismissal of the case, under article 779.1 LECrim. in accordance with articles 641

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and 636, in the Ordinary or Summary Procedure, article 632 of the LECrim grants the Trial court, in this case the Criminal Division of the National Court, once the conclusion of the case by the investigatory body has been confirmed, if that is the case, competence to handle requests for opening of the oral trial or dismissal that the parties have made previously, proceeding in accordance with what is set forth in articles 634 to 645 of that Law.

That notwithstanding, the proper course is not what is sought by the Office of Public Prosecutor, namely *"the immediate passing of the Case after its necessary conclusion to the Criminal Division for the purposes specified in the single transitional provision of OL 1/2014 in relation to Article 627 ff. of the LECrim,"* inasmuch as a case may not be declared closed while there remain procedures to carry out, or at least those that are absolutely necessary for processing it; in this case that includes among those still underway there are those aimed at strict compliance and subjection to the principle of subsidiarity under the terms imposed by the new legal regulations, in particular the new paragraph 5 of article 23 of the LOPJ, introduced by OL 1/2014, which makes it improper to order dismissal as in the Sole Transitory Provision of the aforementioned Organic Law, inasmuch as the procedures necessary for the compliance of letters rogatory sent to the United States could scarcely be pursued, as well as then taking a reasoned case to the Second Criminal Division of the Supreme Court, with the procedures filed away.

Accordingly, this investigative judge does not believe that it is proper, at the stage of preliminary proceedings, to issue a statement on any dismissal of the proceedings, as envisioned in the aforementioned Transitory Provision, especially when, as has been set forth and as reported by the Office of Public Prosecutor, there are sufficient grounds for it to continue by the procedures of the Court, which is what is ordered in this ruling, so that as of this moment in the proceedings, it falls to the Trial Court and not to the preliminary investigatory body, to make the final decision about the dismissal of the proceedings that is sought, for the time when the conclusion of the case is completed and it is to be brought before the Court, which, in view of what is set forth above, is understood not to be now.

In view of the articles cited and others that are of general and specific application,

I ORDER

FIRST.- FILE ORDINARY PROCEDURE for alleged crimes of torture and against moral integrity, along with one or more **offences against persons and property protected in the event of armed conflict - war crimes,**

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which shall be followed with the number **2/2014,** giving the timely reports of filing to the Hon. Mr. President of the Criminal Division of the National Court and to the Office of Public Prosecutor, **continuing the preliminary investigation of this case.**

The expert reports in the case record are to be confirmed by a second expert.

TWO . – PRESENT A REASONED PRESENTATION TO THE SECOND DIVISION OF THE SUPREME COURT, pursuant to article 23.5 of the LOPJ. in the terms set forth in the **Legal Argument Five** of this ruling.

THREE. - For fulfillment of what is set forth in the previous paragraph, it must be repeated that it is urgent that the UNITED STATES OF AMERICA reply to letters rogatory sent January 23, 2014; to that end a notice must be sent by official channels (OFFICE OF INTERNATIONAL LEGAL COOPERATION AND RELATIONS WITH RELIGIONS CONFESSIONS, OFFICE OF INTERNATIONAL LEGAL COOPERATION, MINISTRY OF JUSTICE,) and through the Delegation of International Legal Cooperation of the United States Embassy in Madrid, together with an attested copy of this ruling properly translated.

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

Thus decided, ordered, and signed by Hon. Pablo Rafael Ruz Gutierrez, Magistrate Judge of Central Court of Preliminary Criminal Proceedings Number Five of the National Court.

PROCEDURE. What is decided is immediately carried out, in witness whereof.