



**CENTRAL COURT NUMBER SIX FOR PRELIMINARY CRIMINAL PROCEEDINGS  
NATIONAL COURT  
MADRID  
PRELIMINARY INVESTIGATION No. 134/2009**

**DECISION**

IN MADRID, ON THE FOURTH OF MAY OF TWO THOUSAND NINE

**FINDINGS OF FACT**

**FIRST:** By Prosecutor D. Javier Fernández Estrada representing the Spanish Association for the Dignity of Prisoners (*Asociación Pro Dignidad de Los Presos y Presas de España*) and exercising private prosecution (*acción popular*), who has formulated a complaint to be presented to Central Court Number Five for Preliminary Proceedings of the National Court, which is conducting proceedings against certain individuals who have been in the detention camp at Guantánamo, directed against attorneys DAVID ADDINGTON, JAY S. BYBEE, DOUGALS [sic] FEITH, WILLIAM J. HAYNES, JOHN YOO, and ALBERTO R. GONZÁLEZ for the commission of offenses among those defined in Chapter III of Title XXIV of the Criminal Code, “CRIMES AGAINST PROTECTED PERSONS AND PROPERTY IN THE CASE OF ARMED CONFLICT,” based on facts described in the complaint.

**SECOND:** In a report on April 17, 2009, the Ministry of Public Prosecution stated, among other particulars, that it was admissible to return the complaint to the Clerk for subsequent delivery to the appropriate body, and it was assigned by rotation to this Central Court for Preliminary Criminal Proceedings. The aforementioned report additionally stated that:

“The proceedings are restricted to the facts relevant to the complaint filed by the Spanish Association for the Dignity of Prisoners and which are substantially the following:

After the terrible attacks committed by international terrorism in the United States on September 11, 2001, the United States Administration undertook a parallel strategy of “war” against terrorism—as an additional aspect of the military conflicts that it set into motion, first against the Taliban regime in Afghanistan and subsequently against Iraq—and issued a series of executive orders allegedly based on memoranda produced by the defendants with legal advisers or consultants, which were used by civilian and military officials against individuals suspected of ties to international terrorism, bringing about the detention and internment in facilities located outside their national territory of persons suspected of ties to Al Qaeda and the Taliban regime, the application of illegal interrogation methods against detained persons for the purpose of obtaining information, and the deprivation of rights that are recognized in relevant and operative international agreements.

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Since January 11, 2002, hundreds of individuals have been detained and interned at the facility in Guantánamo, having been transported to this facility in military and civilian aircraft –a circumstance currently under investigation with respect to certain flights in preliminary investigation 109/2006 of Central Court Number Two for Preliminary Criminal Proceedings (the “CIA flights” case)– with the object of obtaining information that could be utilized in the “war” against terrorism.

In June 2006 the United States Supreme Court ruled that the February 2002 executive order was unlawful with respect to its assertion that the Geneva Conventions of August 12, 1949 did not apply to those so detained.

On January 22, 2009, the current president of the United States unambiguously recognized the importance of international law when he issued an executive order revoking all the orders, memoranda, and recommendations relevant to this specific question that had been issued between September 11, 201 [sic] and January 20, 2009.

Without prejudice to any consideration as to whether carrying out concrete acts such as those described, if done in connection with executive decisions that were adopted, may in the context of our criminal law constitute crimes against protected persons and property in the case of armed conflict (Articles 608 et seq. of the Criminal Code), it is true that the complaint itself, its scope, and the fact that it focuses exclusively on those who drafted nonbinding legal reports and not those who issued the executive decisions authorizing such practices nor against those who carried out concrete acts liable to fall within the framework of Articles 608 and 611 of the Criminal Code, presents significant problems with respect to the applicability of criminal law:

The questionable suitability of the accused as active subjects of the crimes imputed to them given their condition as mere legal advisers lacking decision-making responsibility. These categories of offenses can only be considered to have been committed and criminal responsibility can only be assigned in keeping with a strict definition of the offense and when the subject has participated in that offense, which must in all cases relate to the execution of a concrete act.

The requirement that specific concrete acts be defined as the object of the complaint, in the absence of which we are faced with a sort of general undertaking to investigate the entire constellation of policies developed by the previous Administration in the United States, which reprehensible as these policies may have been, would be utterly incompatible with the limits, demands, and objectives of criminal actions under the Rule of Law.

The operative principle of complementarity or subsidiarity in the exercise of universal jurisdiction, established by international treaties and widely recognized in our case law (Constitutional Court rulings 23.05 of 26.9 and 227.07 of 22.10 as well as Supreme Court decisions of 2.25.2003; 5.20.2003; 11.15.2004; 3.18.2005; 6.20.2006; 12.11.2006; and 10.1.2007), requires evidence that the complainants have initiated legal action within the preferred jurisdiction (a court in the place where the crime was committed or representing the nationality of its authors), and that this court has decided not to pursue any investigation. It must be stated that there is no evidence the complainants have done so.

Thus it is obvious for the reasons stated above that the complaint can not be allowed to proceed at this time. For the purpose of establishing clear and comprehensive legal criteria with which to define

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the minimally necessary conditions for the exercise of universal jurisdiction in keeping with the aforementioned legal doctrine and with the provisions of conventional international law, the complaint will be referred for further consultation to the Office of the Attorney General for the purpose of determining the position to be adopted by that Office concerning all proceedings currently before the jurisdictional bodies of this National Court with respect to the application of the principle of universal jurisdiction as per Art. 23.4 of the Organic Law of the Judicial Branch (OLJB).”

**LEGAL REASONING**

**FIRST:** The jurisdiction of the National Court with respect to criminal matters, and by extension that of the Central Courts for Preliminary Criminal Proceedings at the stage of preliminary proceedings, is stipulated in Article 65 of the Organic Law of the Judicial Branch (OLJB), which establishes that the National Court is a specialized jurisdictional body, competent to conduct proceedings with respect to such matters.

This specialization is subject to two fundamental premises, which are strict adherence to the legal norms established in criminal law and applied by the National Court, and the rigorous interpretation of the norms that establish this jurisdiction, excluding expansive interpretations that could distort the specialization as it is configured, but without precluding the consideration of connected criminal acts, as the Law itself stipulates.

Article 65(1) e) of the Organic Law of the Judicial Branch (OLJB) establishes that “The Criminal Section of the National Court will hear cases related to crimes committed outside the national territory when the authors of these crimes are subject to prosecution in Spanish Courts as provided by law or treaty.

In all cases, the jurisdiction of the Criminal Section Of the National Court will be extended to include proceedings concerning crimes connected to all of those outlined above.”

Article 23(4) i) of the OLJB and Article 23(5) of the OLJB, referring to Article 23(2) c) of the OLJB, require that “the defendant has not been acquitted, pardoned, or punished outside the national territory, or in the latter case the sentence has not been carried out. If the sentence has been carried out only partially, this will be taken into account in order to proportionally reduce the prescribed punishment.”

**SECOND:** From the above it can be deduced that jurisdiction is primary and decision secondary. Thus it is pertinent to consider whether this Central Court does or does not have jurisdiction to judge persons accused of the acts enumerated in the complaint.

With respect to the Articles mentioned above and to the question of jurisdiction, it can be inferred:

–Whether as a question of war crimes if it is understood that the acts reported in the complaint took place in a context of armed conflict (Art. 608 et seq. of the Criminal Code), and referred to prisoners protected by the Third Geneva Convention of August 12, 1949 or the First Additional Protocol of June 8, 1977.

–Or as a question of crimes against humanity (Art. 607 bis 8 of the Criminal Code) relating to torture, with respect to which Spain permits direct referral to the Courts under the principle of

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universal jurisdiction (Art. 96 of the Spanish Constitution and 23(4) i) of the OLJB) as required by the Instrument of Ratification adopted on October 19, 1987 in New York regarding the December 10, 1984 Convention against Torture and other Cruel, Inhuman, or Degrading Punishments, and the Optional Protocol of the same Convention adopted on December 18, 2002, also in New York.

That the act or acts described in the complaint constitute one or more crimes committed by persons without Spanish citizenship and outside the national territory of Spain and even if such crimes are in violation of International Law or subject to universal prosecution, the National Court has only subsidiary jurisdiction as stipulated in Art. 23(2) c) of the OLJB and has such jurisdiction only in the case that the country in the best position to try the authors of these crimes (that country which has at its disposal the most exhaustive body of evidence, which is the territory within which such crimes may have been committed, or is the country where those who may have committed such crimes hold citizenship –in this case the United States– and disregarding the nationality of those who may have been victims of such crimes) is not currently investigating or prosecuting them, or if it is going to investigate or prosecute them and at an early stage of the prosecution of these crimes it appears that our complex system of universal prosecution of crimes against humanity is a more expedient means to obtain information in a timely fashion, then that country should consent in conformity with the provisions of Art. 19 of the Treaty on Mutual Legal Assistance in Criminal Matters entered into by the Kingdom of Spain and the United States of America in Washington on November 20, 1990, and an International Rogatory Commission established by the Central Authority of the United States should ascertain whether the acts referred to in this complaint are or are not being investigated or prosecuted by the Authorities of that country and in the case that an investigation or prosecution is being carried out, to indicate the specific Authority which is conducting that investigation or prosecution and identify the specific procedure by which the complaints may be joined or the complaint may be referred, in keeping with Art. 19 of the aforesaid Bilateral Treaty.

Having reviewed the legal provisions and other factors of general and relevant application.

**DECISION**

**I ORDER:** That before deciding on the admissibility or inadmissibility of going forward with the complaint formulated by Prosecutor D. Javier Fernández Estrada, representing the Spanish Association for the Dignity of Prisoners (*Asociación Pro Dignidad de Los Presos y Presas de España*) and exercising private prosecution (*acción popular*) against attorneys DAVID ADDINGTON, JAY S. BYBEE, DOUGALS [sic] FEITH, WILLIAM J. HAYNES, JOHN YOO, and ALBERTO R. GONZÁLEZ, the International Rogatory Commission be directed to address an inquiry to the United States in order that this Central Court be provided with information to the effect of whether the acts pertinent to this complaint are or are not now being investigated or prosecuted by any Authority of that country or in the case that an investigation or prosecution is to be carried out, to indicate the specific Authority that may be doing so and identify the specific procedure to be followed.

It is hereby ordered that this resolution be communicated to the interested parties, and that they be informed that appeals and/or pleadings may be filed within the period and in compliance with the requirements stipulated in Art. 766 of the Law of Criminal Procedure.

Thus it is ruled, ordered, signed, and attested by the Honorable Mr. D. ELOY VELASCO NÚÑEZ, Judge-Magistrate of Central Court Number Six for Preliminary Criminal Proceedings.

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**THE COURT ORDERS:** It is attested that this order was immediately executed.