centerforconstitutionalrights

ECCHR

AMICUS BRIEF
(*FINAL*)

IN SUPPORT OF
THE ASSOCIATION FOR THE DIGNITY OF MALE AND FEMALE PRISONERS OF SPAIN

IN THEIR APPEAL PENDING BEFORE THE SPANISH SUPREME COURT
IN RELATION TO CRIMINAL COMPLAINT PENDING AGAINST

DAVID ADDINGTON, JAY BYBEE, DOUGLAS FEITH, ALBERTO GONZALES, WILLIAM HAYNES, AND JOHN YOO

IN THE *AUDIENCIA NACIONAL*, MADRID SPAIN
CASE N° 134/2009

September 2012

666 broadway, 7 fl, new york, ny 10012
t 212 614 6464 f 212 614 6499 www.CCRjustice.org

I. Background

On 17 March 2009, a complaint was filed by the Association for the Dignity of Male and Female Prisoners of Spain ("Association") against six former officials of the United States government, namely David Addington, former Counsel to, and Chief of Staff for, former Vice President Cheney; Jay S. Bybee, former Assistant Attorney General, Office of Legal Counsel (OLC), U.S. Department of Justice (DOJ); Douglas Feith, former Under Secretary of Defense for Policy, Department of Defense (DOD); Alberto R. Gonzales, former Counsel to former President George W. Bush, and former Attorney General of the United States; William J. Haynes, former General Counsel, DOD; and John Yoo, former Deputy Assistant Attorney General, OLC, DOJ, in the Spanish high court, the *Audiencia Nacional*.[1] The defendants are alleged to have materially contributed to a systematic plan of torture and cruel, inhuman and degrading treatment of persons detained by the United States in the context of the so-called "War on Terror." The complaint contains charges that include torture and violations of the 1949 Geneva Conventions, the Additional Protocols thereto, and the Convention Against Torture.

This case was assigned to Judge Eloy Velasco. On 4 May 2009, Judge Velasco issued Letters Rogatory to the United States, in accordance with the 1990 US-Spain Treaty on Mutual Assistance in Criminal Matters, asking it "whether the acts referred to in this complaint are or are not being investigated or prosecuted," and if so, to identify the prosecuting authority and to inform the Court of the specific procedure by which to refer the complaints for joinder. No response to that request was received.

Judge Velasco repeated his request to the U.S. on two occasions. On 7 April 2010, he reiterated his request, noting the "urgency of responding to the International Letters Rogatory sent to the United States." On 18 October 2010, he issued an Order in which it *inter alia* recalled the Rogatory Commission sent to the U.S. government on 4 May 2009 and noted the "urgency of compliance" with the Letters Rogatory.

Finally, on 28 January 2011, Judge Velasco issued a ruling in which he set a final deadline of 1 March 2011 for the U.S. to inform him whether it was investigating or prosecuting the events set forth in the complaint. Judge Velasco specified that if no response was forthcoming, he would consider that Article 23(4) ¶¶ 2-3 of the *Ley Orgánica del Poder Judicial* (LOPJ) would be considered fulfilled.[2] Pursuant to a filing by the Office of the Public Prosecutor in which it requested that Judge Velasco inquire into the appointment of a special prosecutor in the U.S., Judge Velasco included that specific query in his follow-up to the United States.

---

[1] Filings in this case are available (in English and Spanish) at: http://www.ccrjustice.org/ourcases/current-cases/spanish-investigation-us-torture; www.ecchr.de/index.php/us-accountablity/articles/ecchr-files-legal-submission-in-spanish-guantanamo-case.html.

[2] Under Article 23(4) of the LOPJ, Spain shall exercise jurisdiction *inter alia* if it finds that "there is no other competent country or international tribunal where proceedings have been initiated that constitute an effective investigation and prosecution in relation to the punishable facts."

On 15 March 2011, the parties were informed that the United States had responded to the Judge Velasco, and the U.S. response, dated 1 March 2011 and received by the Court on 4 March 2011, was made available to the parties on 21 March 2011. The U.S. submission was in the form of a letter filed by the Office of International Affairs of the United States Department of Justice.[3] The U.S. submission provides no explanation of why the United States waited nearly two years to respond to Judge Velasco's query.

On 13 April 2011, Judge Velasco issued an order, in which he deemed that the United States was addressing the allegations in the complaint, and therefore ordered that the complaint be transferred to the United States Department of Justice for follow-up.

An appeal was lodged against that decision. In March 2012, Section Three of the Criminal Division of the National Court ruled, by majority, that the appeal should be dismissed and the decision by Central Court Number 6 upheld. Three judges dissented, issuing a lengthy and detailed critique of the legal and factual conclusions of Judge Velasco and the majority.

On 12 June 2012, the Association for the Dignity of Male and Female Prisoners of Spain filed its appeal before the Supreme Court of Spain. This amicus brief, which will be joined by additional international law organizations and experts and will be submitted in Spanish in due course, is filed in support of the Association.

II. Summary

The Center for Constitutional Rights (CCR) and the European Center for Constitutional and Human Rights (ECCHR), serving as counsel to *amici*, are organizations which have been deeply engaged in seeking redress and accountability on behalf of individuals subjected to torture and other serious violations of international law while in U.S. detention. *Amici*, listed at the conclusion of the brief, are organizations, experts and academics, with a deep interest and extensive experience in accountability for serious violations of international law. CCR, ECCHR and *amici*, file this amicus brief to demonstrate the serious errors made by the Central Court No. 6 and the majority of Section Three of the Criminal Division in finding that the complaint against the so-called "Bush 6" is being adequately investigated and prosecuted in the United States, and that Spain therefore should defer jurisdiction.

We respectfully submit that there has been, and will be, no criminal investigation or prosecution into either the treatment of the named victims or the actions of the named defendants. There have not been and are not now any criminal investigations into the actions of senior Bush administration officials who participated in the creation and/or implementation of a detention and interrogation policy under which the victims and other individuals detained at Guantánamo,

[3] United States Department of Justice, Criminal Division, Office of International Affairs, Letter from Mary Ellen Warlow and Kenneth Harris to Ms. Paula Mongé Royo, "Re: Request for Assistance from Spain in the Matter of Addington, David; Bybee, Jay; Feith, Douglas; Haynes, William; Yoo, John; and Gonzalez, Alberto; Spanish Reference Number: 002342/2009-CAP," dated 1 March 2011 and stamped 4 March 2011 ("U.S. Submission").

in Iraq, Afghanistan and in secret detention sites, were subjected to torture, cruel, inhuman and degrading treatment and other serious violations of international law.

Moreover, the United States Attorney General explicitly and conclusively shielded decisions made by the U.S. officials named in this case from investigation in August 2009, when he initiated a preliminary review of a limited number of interrogation cases which specifically excluded from prosecution "anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees."[4] *Indeed, this conclusion was reaffirmed on 30 August 2012 when Attorney General Eric Holder closed even the investigation of the deaths of two men who died while in U.S. custody – a step that followed the closing last year of a very limited and preliminary investigation into whether any federal laws had been violated in the course of certain interrogations purportedly conducted by the Central Intelligence Agency.*[5]

The recently closed DOJ investigation was the last remaining case under investigation, and all other possible lines of investigation have been declined by the Attorney General.[6]

There remains a need for a full scale, independent investigation into both the authorization and implementation of the torture program.[7]

---

[4] Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees, 24 August 2009, available at: http://www.usdoj.gov/ag/speeches/2009/ag-speech-0908241.html ("Holder August 2009 Statement").

[5] *See* Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees, U.S. Department of Justice, 30 August 2012, available at: http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html ("Holder August 2012 Statement").

[6] *See e.g.*, Editorial, *Closing the Book on CIA Torture*, Los Angeles Times, 14 September 2012, available at: http://www.latimes.com/news/opinion/editorials/la-ed-torture-20120914,0,6615797.story ("neither the inconclusiveness of criminal investigations nor changes in the law justify official amnesia about torture"); Scott Shane, *No Charges Filed on Harsh Tactics Used by the C.I.A*, New York Times, 30 August 2012, available at: http://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html?_r=1 (The closure is responsible for "eliminating the last possibility that any criminal charges will be brought as a result of the brutal interrogations carried out by the C.I.A." and "brings to an end years of dispute over whether line intelligence or military personnel or their superiors would be held accountable for the abuse of prisoners"); Glenn Greenwald, *Obama's justice department grants final immunity to Bush's CIA torturers*, The Guardian Online, 31 August 2012, available at: http://www.guardian.co.uk/commentisfree/2012/aug/31/obama-justice-department-immunity-bush-cia-torturer ("Attorney General Eric Holder announced the closing without charges of the only two cases under investigation relating to the US torture program"); Zachary Katznelson, *Torture with Impunity*, American Civil Liberties Union, 31 August 2012, available at: http://www.aclu.org/blog/human-rights-national-security/torture-impunity ("The pronouncement means that not a single CIA official will be prosecuted in federal courts for any of the abuse, torture or even death that took place at the hands of CIA officers and contractors").

[7] *See, e.g., US: Torture and Rendition to Gaddafi's Libya: New Accounts of Waterboarding, Other Water Torture, Abuses in Secret Prisons*, Human Rights Watch Report Press Release, September 2012, available at: http://www.hrw.org/news/2012/09/05/us-torture-and-rendition-gaddafi-s-libya ("HRW U.S./Libya Report") ("The scope of Bush administration abuse appears far broader than previously acknowledged and underscores the importance of opening up a full-scale inquiry into what happened."); *Getting Away with Torture: The Bush*

CCR and ECCHR have previously submitted three expert opinions to Judge Velasco regarding the case against the six former officials from the Bush Administration: two submissions have focused on what, if any, proceedings, investigations or prosecutions are on-going in the United States in relation to the subject-matter of this case,[8] and one submission set out the applicable legal framework for holding the defendants, as former government lawyers, criminally liable and key evidence against the defendants.[9] These expert opinions are annexed hereto, in English and Spanish, for the benefit of the Court. Based on the findings in these expert opinions, CCR and ECCHR determined that it is proper for the Central Court for Preliminary Proceedings No. 6 to exercise jurisdiction over this case.

Administration and Mistreatment of Detainees, Human Rights Watch Report, July 2011, available at: http://www.hrw.org/sites/default/files/reports/us0711webwcover_1.pdf ("HRW Getting Away with Torture") (finding that despite significant evidence of torture and illegal activity, there has yet to have been a comprehensive independent investigation); *Torture, war crimes, accountability: Visit to Switzerland of former US President George W. Bush and Swiss obligations under international law: Amnesty International's memorandum to the Swiss authorities*, Amnesty International, AMR 51/009/2011, February 2011, available at: http://www.amnesty.org/en/library/info/AMR51/009/2011/en ("any investigations that were undertaken failed fully to cover the range of crimes or perpetrators necessary to meet international obligations"); Stephanie Nebehay, *U.N. Special Rapporteur on Torture Juan Ernesto Mendez, Interview: UN expert urges full U.S. torture investigation*, Reuters, 16 November 2010, available at: http://af.reuters.com/article/zimbabweNews/idAFLDE6AF1DR20101116?pageNumber=1&virtualBrandChannel=0&sp=true ("The United States has a duty to investigate every act of torture. Unfortunately, we haven't seen much in the way of accountability"); *Torture, war crimes, accountability: Visit to Switzerland of former US President George W. Bush and Swiss obligations under international law: Amnesty International's memorandum to the Swiss authorities*, Amnesty International, AMR 51/009/2011, February 2011, available at: http://www.amnesty.org/en/library/info/AMR51/009/2011/en ("any investigations that were undertaken failed fully to cover the range of crimes or perpetrators necessary to meet international obligations"). *See also* International Center for Transitional Justice, *Prosecuting Abuses of Detainees in U.S. Counter-terrorism Operations*, November 2009, available at: http://ictj.org/sites/default/files/ICTJ-USA-Criminal-Justice-2009-English.pdf.

[8] *See* Joint Expert Opinion, 26 April 2010, available in English and Spanish at: http://ccrjustice.org/files/FINAL%20Expert%20Opinion%20final%20es.pdf and http://www.ccrjustice.org/files/FINAL%20EXPERT%20OPINION%20ENG_0.pdf ("April 2010 Expert Opinion"), appended hereto in Appendix A; and Supplemental Filing to 26 April 2010 Joint Expert Opinion, 11 December 2010, available in English and Spanish at: http://www.ccrjustice.org/files/Spain%20Supplemental%20Final_English%20-%20EXHIBITS.pdf and http://www.ccrjustice.org/files/Spain%20Supplemental%20Submission_SPANISH%20-%20FINAL%20with%20Exhibits.pdf ("December 2010 Supplemental Expert Opinion") appended hereto in Appendix B.

It is submitted in the April 2010 Expert Opinion that universal jurisdiction is concurrent with other bases for jurisdiction, such as territoriality and nationality, and is not subsidiary to these forms of jurisdiction. *Id at* 13-17. *See also, e.g.*, Report of the United Nations Fact Finding Mission on the Gaza Conflict, A/HRC/12/48, 15 September 2009, para. 1849, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf.

[9] *See* Joint Expert Opinion: Liability of the Six Defendants, 4 January 2011, available in English and Spanish at: http://www.ccrjustice.org/files/FINAL%20English%20Lawyers%20Responsibility%20Submission.pdf and http://www.ccrjustice.org/files/FINAL%20Spanish%20Lawyers%20Responsibility%20Submission.pdf, appended hereto in Appendix C.

The Central Court No. 6 and the majority of Section Three of the Criminal Division purport to base their decisions on the content of the U.S. Submission which, they find, demonstrate that the U.S. is adequately responding to the allegations in the complaint submitted by the Association. The U.S. Submission is utterly insufficient to support a conclusion that the criminal case against the so-called "Bush Six" is not properly before the Spanish court. On the contrary, the U.S. Submission demonstrates that no competent jurisdiction is investigating or prosecuting the allegations in the complaint. The listed initiatives undertaken by the US government in various fora, while indicating some small measure of concern with the "mistreatment" or "abuse" of detainees and the legal advice provided in relation to the treatment of detainees, are ultimately unresponsive and inapplicable to the allegations raised in the complaint pending in Spain. This brief provides detailed rebuttals to arguments advanced by the United States in its Submission that Spain should defer jurisdiction over this case, and explanations of the procedures cited by the U.S.

The U.S. Submission makes it clear that the named defendants in this case will not be prosecuted in the United States: *"**the Department of Justice has concluded that it is not appropriate to bring criminal cases with respect to any other executive branch officials, including those named in the complaint, who acted in reliance on [Office of Legal Counsel] memoranda during the course of their involvement with the policies and procedures for detention and interrogation**."*

While there is no doubt that U.S. has the legal framework to provide for jurisdiction over allegations of torture and other serious international law violations for which the named individual defendants bear individual criminal responsibility, ***it is apparent from the 10-year failure to investigate or prosecute any mid- or high-level officials, notwithstanding a considerable body of evidence that would merit a full investigation, that the U.S. will not exercise its jurisdiction over this complaint.*** Indeed, the seven page-submission, which cobbles together disparate governmental responses related to the torture or mistreatment of detainees at U.S. run detention facilities ultimately betrays the very point the U.S. is attempting to make through the submission: the U.S. Submission demonstrates that the United States has not and will not take any steps to investigate or prosecute the torture and other serious abuses of these detainees by these defendants or other high-level U.S. officials.

In the year and a half since the U.S. Submission was issued, numerous developments in the United States demonstrate that President Obama's admonishment to "look forward, not backwards" when it comes to accountability for torture – a position that embraces impunity – has been accepted as policy by the United States Department of Justice. Even the preliminary investigations into torture against persons by the CIA – *investigations which, as explained below, were never intended to encompass any of the actions of any of the named defendants in the complaint filed by the Association* – have been closed. There simply has been, and will be, no proper investigation and prosecution of torture by U.S. officials in U.S. courts.

As the former United Nations Special Rapporteur on Torture Manfred Nowak wrote "[t]orture... is according to its definition in Article 1 primarily committed by State officials, and the

respective governments usually have no interest in bringing their own officials to justice."[10] All statements and decisions taken to date by U.S. officials indicate that *the United States falls squarely within the list of countries which have no interest in bringing its own officials to justice*.[11] As a State party to the Convention Against Torture, Spain has an obligation to ensure that a proper investigation and prosecution for torture is conducted, and has an obligation to support petitioners' efforts for accountability rather than the United States' efforts to secure impunity for its former officials. Indeed, the International Court of Justice recently affirmed the obligations on States parties under the Convention Against Torture to investigate or prosecute torture allegations, in the case *Belgium v. Senegal*.[12]

Herein, we respond to the various points made in the U.S. Submission below and provide this Court with an update of the decisions taken since that filing in March 2011 which confirm that the U.S. will not provide an adequate forum for the investigation and prosecution of the violations set forth in this case. In so doing, we demonstrate that there are no investigations or prosecutions in the United States that would interfere with Spain exercising its jurisdiction over the "Bush Six."

[10] Manfred Nowak and Elizabeth McArthur, The United Nations Convention Against Torture - A Commentary (Oxford University Press 2008) ("Nowak and McArthur Commentary"), at 316.

[11] The United States failure to act in relation to torture when its own former officials are alleged to bear responsibility stands in stark contrast to the strong support it voiced for the principle of universal jurisdiction during the drafting of the Convention Against Torture. According to the Nowak and McArthur Commentary, "the US Government expressed the opinion that torture is an offence of special international concern which means that it should have a broad jurisdictional basis in the same way as the international community had agreed upon in earlier conventions against hijacking, sabotage and the protection of diplomats." *Ibid.* at 314. The Commentary continues: "It was, above all, the delegation from the United States which had convincingly argued that universal jurisdiction was intended primarily to deal with situations where torture is a State policy and where the respective government, therefore, was not interested in extradition and prosecution of its own officials accused of torture." *Ibid* at 315.

Notably, Italy has prosecuted U.S. officials for their role in the "extraordinary rendition" of Osama Mustafa Hassan Nasr (Abu Omar). *See* Francesco Messineo, '*Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture in Light of the Abu Omar Case in Italy*, 7 Journal of International Criminal Justice 1023-44 (2009). *See also* Ian Sahapira, *Italy's high court upholds conviction of 23 Americans in Abu Omar rendition*, Washington Post, September 19, 2012, available at: http://www.washingtonpost.com/local/italys-high-court-upholds-convictions-of-23-americans-in-abu-omar-rendition/2012/09/19/af06022c-0286-11e2-91e7-2962c74e7738_story.html Likewise, a German court issued thirteen arrest warrants against CIA-officials for their role in kidnapping and torturing German citizen Khaled El Masri. See Mark Landler, *German Court Seeks Arrest of 13 C.I.A. Agents*, N.Y Times, 31 Jan. 2007, *available at*: http://www.nytimes.com/2007/01/31/world/europe/31cnd-germany.html

[12] *See generally, Questions Relating to the Obligation to Prosecute or Extradite* (Belg. v. Sen.) Judgment of 20 July 2012, available at: http://www.icj-cij.org/docket/files/144/17064.pdf.

III. Applicable Legal Framework:

The April 2010 Expert Opinion attached hereto in Appendix A sets out in detail the jurisdictional basis in Spain for this case, and the relationship between Spanish jurisdiction and U.S. jurisdiction in this matter, particularly in light of the inaction in the U.S. It also elaborates on international and European jurisprudence on effective investigations. We highlight here some of the main points from that Opinion, as they are directly relevant to the question of whether the Court should retain or defer jurisdiction in this case.

Under Article 23(4) of the *LOPJ*, Spanish courts have jurisdiction over certain international crimes if "there is no other competent country … where proceedings have been initiated that constitute an effective investigation and prosecution, in relation to the punishable facts." This point is crucially significant: ***the jurisdiction of the Spanish courts to hear the current complaint can only be offset if the U.S authorities can demonstrate that they have initiated an effective investigation and prosecution of their own in relation to these facts***. While the U.S. is certainly competent to initiate an effective investigation (given the nationality of the defendants and domestic laws, including the War Crimes Statute (18 U.S.C. § 2441) and the Torture Statute (18 U.S.C. § 2340A), it is evident following an analysis of the U.S Submission, and subsequent actions by the Department of Justice, that no such effective investigation in relation to the allegations raised has been opened or concluded in the U.S. Furthermore, for the reasons outlined below, it is clear that no such investigation *will* take place in the U.S. under the current administration. Accordingly, the proceedings must continue before the Spanish Court rather than be provisionally stayed pursuant to Article 23(4) of the LOPJ.

As previously submitted in our April 2010 Expert Opinion, jurisprudence of the European Court of Human Rights (ECtHR) - which is necessarily binding on Spanish courts – needs to be taken into account when construing the scope of the "effectiveness" provisions contained within Article 23(4) - (5) of the LOPJ.[13] Considered cumulatively, in order to be "effective," an investigation must be independent; it must enable the determination of the claim and provide a right of redress; it must be thorough; and it must be prompt. We have previously outlined the applicable European case law on "effectiveness" and so do not repeat it here.[14] There are, however, two key points from the existing ECtHR jurisprudence that we highlight to provide context for our current response.

[13] Indeed, in the *Al Daraj* matter, the Spanish courts explicitly relied on ECtHR jurisprudence in construing the scope of the "effectiveness" provisions contained in Article 23(4) – (5) of the LOPJ. See, for example, Dissenting Opinion, Judgment No. 1/09, National High Court (Criminal Division), Appeal No. 31/09 (concerning preliminary proceedings No. 157/08), 17 July 2009, pp. 8-10, available at: http://www.ccrjustice.org/files/National%20High%20Court%20-%20Appeals%20Dissent%20Opinion%20of%2007.17.2009_ENG.pdf. *See also* Dissenting opinion prepared by Judges Clara Bayarri García, Ramon Saez Valcarcel and Jose Ricardo de Prada Solaesa, Section Three, National Court Criminal Division Plenary, 23 March 2012, Section 6.

[14] *See* April 2010 Expert Opinion, Appendix A, at pp. 17 – 20.

First, in order to enable the determination of the claim (and thus, be effective), an investigation must be "capable of leading to the identification and punishment of those responsible."[15] Crucially, given that torture is a crime under international law, this obligation to identify and bring alleged perpetrators to justice necessarily entails a *criminal* investigation and/or prosecution.[16] Thus, an administrative review that is incapable of leading to criminal prosecution is necessarily an ineffective, and therefore patently inadequate, response to alleged crimes of torture as it goes no way toward providing effective redress or bringing the perpetrators to justice.

Second, it is well established that an investigation must "be independent hierarchically and institutionally of anyone implicated in the events" in order to be considered effective.[17] This means, most basically, that defendants need to be kept separate and institutionally disconnected from the review procedures and findings pertaining to their alleged activity. Thus, as discussed below in more detail, if the defendants in this matter were invited to review and make substantive changes to investigations into their activities, then the independence and effectiveness criteria will not have been met. We note that these criteria are mirrored in international human rights jurisprudence, in particular by the UN Human Rights Committee tasked with reviewing and monitoring implementation of the International Covenant on Civil and Political Rights (ICCPR), and by the UN Committee Against Torture, entrusted with the oversight of the Convention Against Torture.[18]

IV. Factual and Legal Framework: Liability of the Defendants

In the majority's opinion, some concern was expressed regarding the specificity and the nature of the case against the named U.S. officials. *See* Majority Decision, Legal Foundations, One. While

[15] *Aksoy v Turkey* (1997) 23 EHRR 553 (at para.98).

[16] Rodley, N. and Pollard, M. (2009). The Treatment of Prisoners under International Law (3rd ed.) OUP at p.151; *see also* April 2010 Expert Opinion, Appendix A, n. 63.

[17] *Davydov and others v Ukraine* [Application nos. 17674/02 and 39081/02, 1 July 2010 (at para. 277)] [ECtHR]. *See also* April 2010 Expert Opinion, Appendix A, p. 18, and cases cited therein.

[18] On effective investigation into torture through the institution of criminal proceedings, see UN General Assembly *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* Part II(3)(b); UN Human Rights Committee General Comment No. 7: Torture or cruel, inhuman or degrading treatment or punishment (1982), para.1; General Comment No. 20: Torture or cruel, inhuman or degrading treatment or punishment (1992), para. 14; UN Convention Against Torture, Article 12; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereafter, the 'Istanbul Principles'), annexed to UN General Assembly Resolution 55/89 (4 December 2000). On independence see, *inter alia*, UN Human Rights Committee General Comment No. 31 ´The Nature of the general legal obligation imposed on State parties´ (2004), para. 15; *Nikoli and Nikoli v Serbia and* Montenegro (2005) UN Doc CAT/C/35/D/174/2000; *Jordan v United Kingdom* (2001) 37 EHRR 52 (at 106). See also ICC Statute, Article 17(2)(c). On promptness and undue delay, see, *inter alia*, UN Human Rights Committee *Rajapakse v Sri Lanka* (2006) UN DoCCPR/C/87/D/1250/2004, at paras. 9.4-9.5, and *Blanco Abad v Spain*, (1998) UN Doc CAT/C/20/D/59/1996. See also ICC Statute, Article 17(2)(b).

we do not intend to enter into the details of the merits of this case, we set forth herein a concise statement of the factual and legal basis for liability of the defendants. Such an understanding of the roles and alleged liability of the Bush Administration lawyers named in this case is essential in order to properly analyze the claim that these individual cases are being investigated in the United States, as advanced by the U.S. administration and accepted by the majority in the Appeals Decision of the *Audiencia Nacional*. The result of such an analysis can only be that the claim that these cases are being investigated in the United States is erroneous.

The six Americans named in the original complaint –David Addington, Jay S. Bybee, Douglas Feith, Alberto R. Gonzales, William J. Haynes and John Yoo – were all former senior members of the Bush administration, charged by the plaintiffs with having materially contributed to a systematic plan of torture and cruel, inhuman, and degrading treatment of persons detained by the United States in the context of the "War on Terror".[19] The crimes that the lawyers are accused of having aided and abetted include torture, cruel, inhuman or degrading treatment (violations of the Convention Against Torture) and grave breaches of the Geneva Conventions.

The widespread abuses that were perpetrated against detainees held by the United States in the so-called "War on Terror" have been documented by a large number of reliable sources including the United States Congress, U.S. military, Central Intelligence Agency, the United Nations Special Rapporteurs, the International Committee of the Red Cross, international non-government organizations, or the victims themselves.[20] Notably, new information continues to

[19] See Criminal complaint submitted to the *Audiencia Nacional* by Asociación Pro Dignidad de los Presos y Presas de España, 17 mars 2009.

[20] *See, e.g.*, A. Taguba, Art. 15-6: Investigation of the 800th Military Police Brigade (2004), available at: http://www.dod.mil/pubs/foi/detainees/taguba/ ("Taguba Report") (citing instances of 'sadistic, blatant, and wanton criminal abuse' at Abu Ghraib); J. Schlesinger, Final Report of the Independent Panel to Review Department of Defense Detention Operations, August 2004, available at: http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf (abuses were 'widespread' and serious in numbers and effect); G. Fay & A. Jones, US Army, AR 15-6 Investigation of Intelligence Activities At Abu Ghraib Prison and 205th Military Intelligence Brigade (2004), available at: http://www.washingtonpost.com/wp-srv/nationi/documents/fay_report_8-25-04.pdf ("Fay/Jones Report"); Report of the ICRC on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest Internment and Interrogation, February 2004, available at: http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf; Central Intelligence Agency, Office of the Inspector General. Special Review: Counterterrorism Detention and Interrogation Activities, 7 May 2004, available at: http://luxmedia.com.edgesuite.net/aclu/IG_Report.pdf ("CIA IG Report"); Senate Armed Services Committee (SASC), Inquiry into the Treatment of Detainees in U.S. Custody, 20 November 2008, available at: http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf ("SASC Report"); *US Department of Justice, Office of Professional Responsibility, Investigation Into The Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" On Suspected Terrorists* (2009), available at: http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf ("OPR Report"); House of Commons Foreign Affairs Committee, Human Rights Annual Report 2005, Session 2005-6, H.C. 574, available at: http://www.publications.parliament.uk/pa/cm200506/cmselect/cmfaff/574/574.pdf; *See also* Physicians for Human Rights, Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact (June 2008), available at: http://brokenlives.info/?page_id=69; Report on Torture and Cruel, Inhuman and Degrading Treatment

be revealed which indicates that the full factual record and full scope of legal liability of the defendants is yet unknown.[21]

The complaint draws upon a significant number of documents produced by various agencies and departments of the U.S. government, including the legal opinions written or otherwise prepared by the Bush administration lawyers named in this case, and leads to the conclusion that without these legal opinions, the widespread abuse and other crimes against U.S.-held detainees post 9/11 could not have occurred.

In this present document, we only highlight a few relevant factual and legal elements that give a solid basis to allege that the lawyers named in the complaint engaged in criminal acts, and warrant a criminal investigation. Our expert opinion, attached hereto as Appendix C, sets out a detailed factual and legal basis for the defendants liability.

On 9 January 2002, John Yoo, from the Office of Legal Counsel (OLC) within the US Department of Justice, issued a memorandum arguing that the 1949 Third Geneva Convention relative to the Treatment of Prisoners of War did not apply to the conflict with Al Qaeda or the Taliban, and that neither did Common Article 3 to the Conventions, which provides for the minimum safeguards to be observed at all times, in particular the humane treatment of both civilians and combatants.[22] On 22 January 2002, Jay Bybee, also with the OLC, seconded this advice.[23] Gonzales, then White House Counsel to George W. Bush, in a 25 January 2002 memo ghost-written by Addington,[24] further asserted that the "new paradigm" of the "war on terror"

---

of Prisoners at Guantánamo Bay, Cuba, July 2006, available at: http://www.ccrjustice.org/files/Report_ReportOnTorture.pdf; and HRW Getting Away with Torture, *supra* n. 7.

[21] For example, recently disclosed information indicates that the collection of crimes to which the Bush Six played a direct role in is larger than what has been advanced by the United States. Bush administration officials have claimed that only three men in US custody had been waterboarded, when a September 2012 Human Rights Watch report presents evidence to the contrary, revealing that other men were subjected to this form of torture by the CIA. That report, based on recently discovered CIA Secret Service documents found in Tripoli after the fall of Muammar Gaddafi, and interviews with former detainees, exposes the torture, including the waterboarding, by the Bush administration of former Gaddafi opponents before the US rendered detainees back to the Gaddafi regime. *See* HRW U.S./Libya Report, *supra* n. 7. This only serves to highlight the fact that any investigation from the US that failed to address the broader use of waterboarding and other forms of torture missed key elements and cannot be considered effective. It further adds to the argument that the fruits of the Bush Six lawyers' decisions expand farther than has been acknowledged by the United States.

[22] John Yoo & Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, *Application of Treaties and Laws to al Qaeda and Taliban Detainees* (9 January 2002), at 1,11, available at: http://upload.wikimedia.org/wikipedia/en/9/91/20020109_Yoo_Delahunty_Geneva_Convention_memo.pdf.

[23] Memo from Assistant Attorney General Jay Bybee to Alberto Gonzales and William Haynes II, *Application of Treaties and Laws to al Qaeda and the Taliban Detainees* (22 January 2002), available at: http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf.

[24] Jane Mayer, *The Dark Side* 124 (2009). *See also* Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, Washington Post, 25 June 2007.

makes certain provisions of the Geneva Conventions "quaint" and "renders obsolete Geneva's strict limitations on questioning of enemy prisoners."[25]

Directly on the basis of this legal advice, President Bush signed a 7 February 2002 memorandum stating that the Third Geneva Convention did not apply to the conflict with al Qaeda and that Taliban detainees would not be entitled to prisoner of war status, or any of the legal protections afforded by the Convention, not even under Common Article 3.[26]

As had been anticipated by those who voiced opposition from within the administration at the time, this decision to remove those rights was a decisive step towards the erosion of detainees' rights, and the future violations of the most basic rules of warfare. The bipartisan U.S. Senate Armed Services Committee (SASC) 2008 investigative report on detainee abuse found that "[f]ollowing the President's determination [of 7 February 2002], techniques such as waterboarding, nudity, and stress positions … were authorized for use in interrogations of detainees in U.S. custody."[27]

Many of these techniques, including waterboarding, have been widely recognized as a form of torture.[28] Notably, the current U.S. Attorney General, Eric Holder, has unequivocally defined waterboarding as an act of torture[29] – but has failed to take steps to investigate or prosecute this crime.

---

[25] Memo from White House Counsel Alberto Gonzales to President George W. Bush, *Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* (25 January 2002).

[26] Memo from George W. Bush to the Vice President, Secretary of State, Secretary of Defense, Attorney General et. al., *Decision Re: Humane Treatment of Taliban and al-Qaeda* (7 February 2002), available at: http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf. See SASC Report, *supra* n. 19, at 1.

[27] SASC Report, *supra* n. 20, at xxvi.

[28] *See e.g.*, United Nations Committee Against Torture, Consideration of Reports submitted by States Parties under Article 19 of the Convention - Conclusions and recommendations of the Committee against Torture - United States of America, CAT/C/USA/CO/2, 25 July 2006, at para. 24, available at: http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf (recommending that the U.S. "rescind any interrogation technique, including methods involving sexual humiliation, 'water boarding,' 'short shackling' and using dogs to induce fear, that constitute torture or cruel, inhuman or degrading treatment or punishment"); United Nations Commission on Human Rights, *Situation of Detainees at Guantánamo Bay - Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt*, E/CN.4/2006/120, Feb. 27, 2006, at para. 87, *available at* http://www.un.org/Docs/journal/asp/ws.asp?m=E/CN.4/2006/120. *See also* M. CHERIF BASSIOUNI, THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION – IS ANYONE RESPONSIBLE? (2010).

[29] *See* Transcript of Confirmation Hearing for Eric Holder as Attorney General of the United States, 16 January 2009, available at: http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?_r¼1&pagewanted¼all. The Obama administration made "defines waterboarding as torture as a matter of law under the convention against

As further acknowledged by the SASC, the Bush government lawyers, in particular John Yoo and Jay Bybee of the OLC, also "redefined the [anti-torture] law to create the appearance of [the techniques'] legality, and authorized their use against detainees," in an attempt to "rationaliz[e] the abuse of detainees in U.S. custody."[30]

The first of the two 1 August 2002 so-called "Torture Memos" authored by Yoo and Bybee, argued that only acts inflicting pain equivalent to major organ failure, impairment of bodily function, or death were prohibited under the Convention against Torture, as well as only the worst forms of cruel, inhuman, or degrading treatment or punishment, but also that the President's Commander-in-Chief powers implied that he had the authority to allow torture.[31] According to the 2009 disciplinary investigation carried out by *Office of Professional Responsibility (OPR) of the US Department of Justice into the OLC lawyer's memoranda*, "[t]he Bybee Memo had the effect of authorizing a program of CIA interrogation that many would argue violated the torture statute, the War Crimes Act, the Geneva Convention, and the Convention Against Torture, and Yoo's legal analyses justified acts of outright torture under certain circumstances."[32]

The second Yoo and Bybee "torture memo" attempted to justify the legality of ten interrogation techniques that the CIA had requested for approval for use on detainee Abu Zubaydah.[33] As revealed in the OPR report, "[t]he CIA did not expect just an objective, candid discussion of the meaning of the torture statute. Rather … the agency was seeking maximum legal protection for its officers".[34] Amongst the techniques approved were the "waterboard," "stress positions," "sleep deprivation," and "insects placed in a confinement box."[35] The CIA Inspector General later recognized that this memo "provided the foundation for the policy and administrative decisions that guided the CTC [Counterterrorist Center] Program."[36] On its basis, Zubaydah, but

---

torture and as part of our legal obligation... it's not a policy choice." H. Koh, Legal Adviser at the U.S. State Department, at a UN press conference, cited in "US still investigating waterboarding torture: official", AFP, 5 November 2010, available at: http://www.google.com/hostednews/afp/article/ALeqM5g6sJ3Xr7kF602AVyixG782bcQ3fQ?docId=CNG.89c96e59c479e63644d023208c721a83.861.

[30] SASC Report, *supra* n. 19, at xii, xxvi-xxvii.

[31] Memorandum from J. S. Bybee, the Dep't of Justice Office of Legal Counsel, to A. R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, at 13, 14, and 31.

[32] See OPR Report, *supra* n. 20, at 251-252.

[33] J. S. Bybee, Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel, Memorandum for J. Rizzo, Acting General Counsel of the Central Intelligence Agency, *Interrogation of al Qaeda Operative*, 1 August 2002, available at: http://luxmedia.com.edgesuite.net/aclu/olc_08012002_bybee.pdf.

[34] OPR Report, *supra* n. 20, at 226.

[35] *Ibid* at 2.

[36] CIA IG Report, *supra* n. 20, at 4.

also a number of other detainees – was subjected to a series of torturous acts, including 83 waterboarding sessions.[37]

Based on a "preponderance of the evidence", the OPR Report found that Yoo "knowingly provided incomplete and one-sided advice", "knowingly failed to present a sufficiently thorough, objective, and candid analysis", and "knowingly misrepresented the authority."[38]

The OPR Report confirms the lawyers' knowledge of the substantial effect their opinions would have. With the OLC empowered with "the function of providing authoritative legal advice to the President and all the Executive Branch agencies. … OLC opinions are binding on the Executive Branch,"[39] the opinions that it issues are bound to have a substantial effect on a given course of conduct. Harold Koh, current U.S. Department of State's Legal Adviser, confirmed that "the definition of torture that permitted certain activities was drawn from a 2002 opinion [the First Bybee Memo] of the Office of Legal Counsel at the Justice Department." [40]

The OPR report further commented on Yoo and Bybee's readiness to assist what in fact amounted to criminal purposes: "We also found evidence that the OLC attorneys were aware of the result desired by the client and drafted memoranda to support that result. … According to Rizzo [former CIA General Counsel], there was never any doubt that waterboarding would be approved by Yoo, and the client clearly regarded OLC as willing to find a way to achieve the desired result."[41]

Similarly, William Haynes, then Pentagon General Counsel, advised Secretary of Defense Donald Rumsfeld to authorize the "Special Interrogation Plan" for Guantánamo detainee Mohammed al Qahtani, later acknowledged as torture, including by the Convening Authority for the Guantánamo Military Commissions.[42]

---

[37] *Ibid.* at 36-37.

[38] OPR Report, *supra* n. 19, at 251-254. H. Koh, then Dean of Yale Law School, wrote of the First Bybee Memo: "In sum, the August 1, 2002 Bybee Opinion is a stain upon our law and our national reputation. A legal opinion that is so lacking in historical context, that offers a definition of torture so narrow that it would have exculpated Saddam Hussein, that reads the Commander-in-Chief power so as to remove Congress as a check against torture, that turns Nuremberg on its head, and that gives government officials a license for cruelty." In H. Koh, 'World Without Torture', 43 Colum. J. Transnat'l L. 641, 654.

[39] OPR Report, *supra* n. 20, at 15.

[40] See Press Conference by the U.S. Delegation to the UPR (Transcript)", 5 November 2010, available at: http://geneva.usmission.gov/2010/11/05/upr-press-conf/.
http://ccrjustice.org/files/FINAL%20English%20Lawyers%20Responsibility%20Submission.pdf.

[41] OPR Report, *supra* n. 20, at 226, 227.

[42] *Ibid.* at 95. The Convening Authority for the Guantánamo Military Commissions in 2009 dropped all charges against Qahtani on the ground that he was tortured: "we tortured al-Qahtani. … His treatment met the legal definition of torture. And that's why I did not refer the case for prosecution." Cited in B. Woodward, *Detainee Tortured, Says U.S. Official; Trial Overseer Cites "Abusive" Methods Against 9/11 Suspect*, Washington Post, 14

While it may be unusual for lawyers to be charged with complicity in crimes, it is not unprecedented. Lawyers have been prosecuted for crimes arising from legal advice. The Nuremberg *Justice*[43] and *Ministries*[44] cases found Nazi government lawyers complicit for international crimes for having knowingly provided legal advice, issued decisions and legal covers for government actions that violated international law.

In conclusion, the Bush administration lawyers named in this case knowingly distorted the law in a conscious attempt to provide a legal cover for torture by government officials. Arguments can be made that the lawyers' actions satisfy the *actus reus* and *mens rea* under aiding and abetting according to international law. Torture and grave breaches of the Geneva Conventions were a foreseeable consequence of the legal opinions, and they did in fact follow. The lawyers knew their opinions would lead to acts of torture and grave breaches because they were aware of the great authoritative power any opinion emanating from their offices carried, while they were also put on notice that a legal "green light" was needed. This further establishes their intent to facilitate crimes. In light of the knowledge and experience of the lawyers, as well as the findings of the OPR report, it can be alleged that the lawyers knowingly distorted the law for an end result they knew would be criminal. The acknowledged desire and attempts to prevent potential prosecutions of US citizens only adds to such criminal intent.

January 2009, available at: www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html. Mr. Qahtani remains in detention at Guantánamo.

For more information on the interrogation of Mohammed al Qahtani, see the Declaration of Gitanjali Gutierrez, submitted before the Central Court for Preliminary Investigation No. 5 in case 150/09-p (Spanish version available at: http://ccrjustice.org/files/SIGNED%20Span%20Gutierrez%20Declaration%202011.pdf and English version available at: http://ccrjustice.org/files/SIGNED%20Gutierrez%20Declaration%202011%20Eng.pdf).

The military judge overseeing the proceedings against another Guantánamo detainee, Mohammed Jawad, found that Jawad had been subjected to cruel and inhuman treatment in violation of the Geneva Conventions and the U.S. War Crimes Act. Despite recommending that "those responsible should face appropriate disciplinary action," no investigations or prosecutions have been conducted. *See* David J.R. Frakt, *Mohammed Jawad and the Military Commissions of Guantánamo*, 60 Duke Law Review, 1367, 1399 (2011).

[43] *United States v. Altstoetter*, *in* 3 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1951), available at: http://www.mazal.org/NMT-Home.htm. Defendants were involved in the provision of "legal cover" for the transfer of detainees to concentration camps and the creation of a legal system of persecution amounted to a crime against humanity.

[44] *United States* v. *Weizsaecker*, *in* 12-14 Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1951). The Tribunal stressed that the Foreign Office's diplomats were international law experts responsible for advising higher officials on the legal consequences of foreign policy decisions.

V. Response to the U.S. Submission: The U.S. Governments Continued Failure to Investigate and Prosecute the Allegations contained in the Complaint

The U.S. Submission identifies government administrative initiatives, Congressional investigations, prosecution of civilian personnel for crimes committed in Afghanistan, a limited preliminary investigation, and investigations within the Department of Defense that resulted in the prosecution of a small number of low-level soldiers. Herein, we respond to each in turn. This brief sets forth developments in the United States to the present. While *amici* consider that the events as presented at the time of the U.S. Submission, in March/April 2011, already made it clear that there would be no independent or proper investigations or prosecutions into the torture allegations against the six defendants that underlie this case, the developments in the period since June 2011 demonstrate, without any qualification or room for doubt, that the United States has not and will not conduct any investigations or prosecutions so as to divest Spain of its jurisdiction over these proceedings.

A. The Office of Professional Responsibility (OPR) Process

As the U.S. Submission indicates, the Office of Professional Responsibility opened an investigation into the professional conduct of two of the six named defendants: Jay Bybee and John Yoo. The U.S. Submission on the OPR Report is, however, both misleading and incomplete. The U.S. Submission wholly fails to set forth an accurate or complete description of the mandate and jurisdiction of Office of Professional Responsibility, the nearly five year investigation it undertook into the professional conduct – or misconduct – of John Yoo and Jay Bybee, the role that Yoo and Bybee played in that process, and the decision taken by David Margolis to overturn the findings of the OPR investigation. In failing to set out the very narrow scope of the OPR review process, the U.S. conceals its ultimate irrelevance to the complementarity and subsidiarity analysis.

The U.S. Submission discusses the conclusions of Associate Deputy Attorney General David Margolis, but fails to properly acknowledge or set forth the findings of the nearly five year investigation conducted by the OPR, culminating in the 261 page report issued on 29 July 2009.[45] The OPR Report concluded that John Yoo intentionally committed professional misconduct and that Jay Bybee committed professional misconduct.

The US submission is misleading – and disingenuous – in its depiction of the significance of the OPR process: the U.S. Submission claims that there "exists no basis for criminal prosecution of John] Yoo or [Jay] Bybee" based on the revised findings of an Assistant Deputy Attorney General, David Margolis, who, after a review that lasted a matter of months and drew heavily on the responses to the July 2009 OPR report submitted by Bybee and Yoo, determined that neither man had committed professional misconduct. *The findings of the OPR process* – whether of misconduct or not – *have* ***no*** *bearing on whether a basis exists for criminal prosecution*. The

[45] OPR Report, *supra* n. 20s.

OPR is a purely disciplinary process and is not in any way connected to criminal investigations or prosecutions.

As discussed in more detail below, the US submission also acknowledges that the Department of Justice has made a *policy* decision not to prosecute anyone who relied on the torture memos – including, apparently, the authors of those memos. The U.S. Submission acknowledges and confirms that "***the Department of Justice has concluded that it is not appropriate to bring criminal cases with respect to any other executive branch officials, including those named in the complaint, who acts in reliance on these [the Yoo and Bybee] and related OLC memoranda during the course of their involvement with the policies and procedures for detention and interrogation***."[46] Such a ***policy* decision** demonstrates that ***the U.S. is unwilling, not unable,*** to investigate these crimes for which there is a sufficient factual basis and indeed, an obligation to investigate under, *inter alia*, the Convention Against Torture. Spain must not, and cannot, defer to a *policy* decision not to prosecute, and must not transfer a case to the United States that it has been told unequivocally will not be prosecuted.

The scope of the OPR review was limited

- The Office of Professional Responsibility has a limited mandate: the ***OPR investigates professional misconduct*** *by Department of Justice attorneys, and* ***is not mandated to conduct criminal investigations or examine criminal responsibility.***

The OPR "is responsible for investigating allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when they are related to allegations of attorney misconduct within the jurisdiction of OPR."[47] There is simply no connection between the work of the OPR and criminal proceedings, as put forward in the U.S. Submission.

[46] U.S. Submission, *supra* n. 3, p. 2.

[47] *See* http://www.justice.gov/opr/about-opr.html . *See* 28 C.F.R. Section .39a(a)(1) (OPR "Functions"): (a) The Counsel shall: (1) Receive, review, investigate and refer for appropriate action allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when such allegations are related to allegations of attorney misconduct within the jurisdiction of DOJ–OPR […](3) Report to the responsible Department official the results of inquiries and investigations arising authorities of the states, territories, and the District of Columbia with respect to professional misconduct matters […]under paragraphs (a)(1) and (2) of this section, and, when appropriate, **make recommendations for disciplinary and other corrective action**; […](6) Engage in liaison with the bar disciplinary. *See also* OPR Report, p. 14, defining the OPR mandate as "[a]ssessing compliance of Department attorneys with Departmental and professional standards, whether in conduction litigation or providing legal advice, is the core function of OPR."; The "**OPR's jurisdiction is limited to reviewing allegations of misconduct made against Department of Justice attorneys** and law enforcement personnel that relate to the attorneys' exercise of authority to investigate, litigate, or provide legal advice." available at: http://www.justice.gov/opr/process.htm.

The OPR review was thus not only limited in scope to review of professional misconduct, but it was limited to DOJ lawyers – and it only covered only two of the six named defendants.[48] The other four defendants worked at other agencies, beyond the reach of the DOJ OPR, during the time of events under review: David Addington served as Counsel to, and Chief of Staff for, former Vice President Cheney; Douglas Feith served as Under Secretary of Defense for Policy in the Department of Defense; Alberto R. Gonzales served as Counsel to President George W. Bush; and William J. Haynes served as General Counsel in the Department of Defense. None of them has had any form of investigation pursued into their actions.

There is a clear distinction between the OPR process and criminal proceedings

- The OPR process is distinct from a criminal investigation and OPR investigators have more limited powers that prosecutors or law enforcement personnel.
    - Anyone other than a *current* DOJ employee can decline to be interviewed during an OPR investigation; ***the OPR cannot subpoena witnesses***.[49] This was the case with several witnesses that were sought during the Yoo/Bybee investigation, including former Attorney General John Ashcroft, CIA Counterterrorism Center staff and attorneys, and others, declined to be interviewed.[50] *Notably, defendant David Addington, former counsel to Vice President Cheney, did not respond to the OPR investigators requests for interview*.[51]
    - The ***OPR does not have the power to subpoena documents***.[52] As the OPR Report clarifies: "*OPR's administrative review of allegations of professional misconduct is unlike civil litigation, where parties may request documents or notice depositions, or a criminal investigation, where access to witnesses and documents may be obtained through the use of a grand jury subpoena*."[53]
    - Even in cases where professional misconduct is established, the ***"punishment" is disciplinary in nature only***, including referral to the bar counsel in the jurisdictions where the lawyers are licensed to practice law – far from the sanctions pursuant to a criminal prosecution.[54] When the OPR found that John Yoo "committed intentional professional misconduct when he violated his duty to

[48] The OPR investigation into the professional conduct of John Yoo and Jay Bybee was formally initiated in October 2004.

[49] OPR Report, *supra* n. 20, p. 12.

[50] *Ibid*, p. 7.

[51] *Ibid*, p. 7.

[52] *See Ibid*. 12-13.

[53] *Ibid*., p.13, note 12.

[54] *See Ibid*. p. 13.

> exercise independent legal judgment and render thorough, objective, and candid legal advice," and that Jay Bybee "committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice," the sanction for both was to "notify bar counsel in the states in which Yoo and Bybee are licensed."[55]

There are applicable *criminal* legal provisions in the United States for criminal investigations – which are wholly distinct from the *ethics* review conducted by the Office for Professional Responsibility. The relevant provisions include the Torture Statute (18 U.S.C. § 2340A) and the War Crimes Statute, 18 U.S.C. § 2441, both found in the Crimes and Criminal Procedure Statute, Chapter 18 of the US Code. These provisions have *never been invoked or applied to a case of detainee mistreatment, let alone to the specific defendants or victims named in this case*.

Criminal prosecution for violations of these federal laws would ordinarily be conducted under the supervision of a United States Attorney from the Department of Justice Criminal Division, who has the authority to request the appropriate federal investigative agency to investigate alleged violations of federal law.[56] A grand jury may be used by the United States Attorney to investigate alleged or suspected violations of federal law.[57] The United States Attorney initiates prosecution by "requesting an indictment from the grand jury, and when permitted by law, filing an "information" in any case in which, in his or her judgment, warrants such action."[58] When the United States Attorney opens any torture, war crimes, or genocide matter, they are required to promptly notify the Human Rights and Special Prosecution Section (HSRP) of the Criminal Division.[59] The United States Attorney also has discretion to forego prosecution in the interests of justice. "Whenever a case is closed without prosecution, the United States Attorney's files should reflect the action taken and the reason for it."[60] Such is the process in the context of criminal investigations, which is wholly separate and distinct from the OPR process.

Given the disciplinary and non-criminal nature of the OPR process, it cannot be considered an "effective" investigation for the purposes of Article 23(4) of the LOPJ interpreted in light of applicable jurisprudence.

It is also important to note that unlike criminal investigations, the OPR investigation process in the Yoo/Bybee investigation included a review of the draft report by John Yoo and Jay Bybee. This review by Yoo and Bybee appears to have resulted from a review of the December 2008 draft of the report by the Attorney General and Deputy Attorney General in the closing weeks of

[55] *Ibid*., p. 11, note 10.

[56] Dep't of Just. Manual U.S. Atty's Manual 9-2.010.

[57] *Ibid*.

[58] § 9-2.030 AUTHORIZING PROSECUTION, Dep't of Just. Manual U.S. Atty's Manual 9-2.030.

[59] § 9-2.400 PRIOR APPROVALS CHART, Dep't of Just. Manual U.S. Atty's Manual 9-2.400, 9-2.139(C).

[60] Dep't of Just. Manual U.S. Atty's Manual 9-2.020

the Bush Administration. Both men "were highly critical of the draft report's findings," and submitted a letter to the OPR setting out their concerns and criticisms.[61] Although the OPR had intended to release the report in January 2009 without review by John Yoo and Jay Bybee, the Bush-Administration Attorney General Mukasey and his deputy objected to the report not being shared with the subjects of the investigation before being publically released.[62]

The draft report was then given to the subjects of the investigation – Bybee and Yoo – to review and comment upon within 60 days. Both men submitted comments in May 2009. The release of the report was thus delayed by six months.[63]

Yoo and Bybee's responses were "harshly critical" of the draft report, and there are significant differences between the original draft and final report, although in both versions the OPR concluded that both men had committed professional misconduct.[64]

While maintaining our opposition to framing the OPR as a proper "investigation" for the purposes of assessing whether the U.S. is a conducting an "effective investigation" into the facts raised in the complaint, as noted above, under applicable European jurisprudence an "effective" investigation is one that is "independent hierarchically and institutionally of anyone implicated in the events."[65] The fact that Yoo and Bybee directly participated in the OPR review process and had a direct bearing on its outcome raises serious questions – and concerns – about the independence of this investigation process.

Shortcomings and Factual Gaps in the OPR Report

- The OPR investigation suffered from factual gaps, due in large part to the OPR investigators limited access to witnesses and documents – particularly in relation to the Central Intelligence Agency, as well as the mysterious disappearance of emails from defendant John Yoo.
    - As acknowledged in the OPR Report: *"Although we have attempted to provide as complete an account as possible of the facts and circumstances surrounding the Department's role in the implementation of certain interrogation practices by the CIA, it is important to note that* ***our access to information and witnesses outside***

[61] OPR Report, *supra* n. 20, p. 9.

[62] *See* Memo from US Deputy Attorney General David Margolis to the US Attorney General Eric Holder, *Decision Re: the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists*, 5 Jan 2010 ("Margolis Memorandum"), available at: http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf, pp. 4-6.

[63] *Ibid.*, p. 6.

[64] *Ibid.*, pp. 7-8. *See also* OPR Report, *supra* n. 20 ,p. 10: "OPR carefully reviewed these responses and made changes to the draft report where appropriate."

[65] *See* Margolis Memorandum, *supra* n. 62, p. 4, note 10.

of the Department of Justice was limited to those persons and agencies that were willing to cooperate with our investigation."[66]

- The OPR **investigation "*was hampered by the loss of Yoo's and Philbin's email records, our need to seek the voluntary cooperation of non-DOJ witnesses, and out limited access to CIA records and witnesses (including almost all of the CIA attorneys and all witnesses from the White House** other than former White House Counsel Alberto Gonzales**).***"[67]

- The OPR investigators also acknowledged the uncertainty and lack of finality in their findings.

  - "During the course of our investigation significant pieces of information were brought to light by the news media and, more recently, by congressional investigations. *Although we believe our findings regarding the legal advice contained in the Bybee Memo and related, subsequent memoranda are complete, given the difficulty OPR experienced in obtaining information over the past five years, it remains possible that additional information eventually will surface regarding the CIA program and military's interrogation programs that might bear upon our conclusions."*[68]

The Margolis Review

Following the determination by the OPR that John Yoo and Jay Bybee should be referred to their bar associations based on a finding of professional misconduct, the case was transmitted to Associate Deputy Attorney General David Margolis for review. Yoo and Bybee submitted comments on the 29 July 2009 Report to Margolis.[69] In employing a lower standard to assess the men's conduct, Margolis concludes that while Bybee's work reflected "errors" it did not merit disciplinary measures.[70] In relation to Yoo, while calling it "a close question," Margolis ultimately was "not prepared to conclude" that Yoo knowingly provided inaccurate legal advice or acted with conscious indifference to the consequences of his action.[71]

Margolis is absolutely clear that the result of his rejecting the OPR's finding of professional misconduct, and replacing it with a finding that Yoo and Bybee exercised "poor judgment" is

[66] OPR Report, *supra* n. 20, p. 10.

[67] *Ibid*., p. 14.

[68] *Ibid*, p. 10.

[69] Margolis Memorandum, *supra* n. 62, p. 2.

[70] *Ibid*, pp. 64-65.

[71] *Ibid*, p. 67.

only that their cases will not be referred by the DOJ to the state bar disciplinary authorities;[72] there is no suggestion, let alone possibility, that the result of Margolis's analysis could be what the US submission suggests, namely that there is no basis for criminal prosecution. *The U.S. Submission is simply incorrect in stating that Margolis concluded that no "legal norms" were violated by Yoo or Bybee;* ***Margolis did not examine criminal law precedents for holding lawyers criminally liable. The issue of criminal prosecution was wholly outside the mandate of the Margolis review, just as it was outside the OPR investigation***.

Thus, as with the OPR process, the Margolis review is insufficient for enabling a determination of the claims in the complaint as it was too narrow to enable a determination of the substance of the complaint in line with applicable international standards on the investigation of torture and other ill-treatment, and therefore cannot provide a proper basis for the Court to defer jurisdiction under the Article 23(4) of the LOPJ, interpreted in light of applicable jurisprudence.

Government Lawyers can be held Criminally Liable for their Unlawful Conduct

As noted above and set forth in detail in the "Expert Submission on Liability of Lawyers for International Law Violations," attached hereto as Appendix C, the defendants can be held liable under international law for their actions. The OPR Report contains findings that fit within the Nuremberg framework for liability for lawyers. For example, the OPR Report states:

> "we conclude that the memoranda did not represent thorough, objective, and candid legal advice, but were drafted to provide the client with a legal justification for an interrogation program that included the use of certain EITs [enhanced interrogation techniques]… we found ample evidence that the CIA did not expect just an objective, candid discussion of the meanings of the torture statute. Rather, as John Rizzo candidly admitted, the agency was seeking maximum legal protection for its officers, and at one point Rizzo even asked the Department [of Justice] for an advance declination of criminal prosecution. …*We also found evidence that the OLC attorneys were aware of the result desired by the client and drafted memoranda to support that result, at the expense of their duty to thoroughness, objectivity and candor*. … Goldsmith viewed the Bybee Memo itself as a 'blank check' that could be used to justify EITs without further DOJ review…According to Rizzo, there was never any doubt that waterboarding would be approved by Yoo, and the client clearly regarded the OLC as willing to find a way to achieve the desired result."[73] (emphasis added)

It is notable that the former Vice President, Dick Cheney – a "client" of the defendants, including David Addington who served as his counsel – recently spoke out in favor of the techniques employed during the "War on Terror," including waterboarding. In those remarks, Cheney specifically acknowledged that the named lawyers in this case were serving the interests of their client, rather than the interest of the law:

[72] *Ibid*, p. 68.

[73] OPR Report, *supra* n. 20, p. 226-27.

> The reason I've been so outspoken is because there were some things being said, especially after we left office, about prosecuting CIA personnel that had carried out our counterterrorism policy or disbarring lawyers in the Justice Department who had – had helped us put those policies together, and I was deeply offended by that, and I thought it was important that some senior person in the administration stand up and defend *those people who'd done what we asked them to do*.[74]

B. U.S. Responses to "allegations of mistreatment" of Detainees

The U.S. Submission cites a number of steps that various U.S. agencies and departments have taken into what it terms "mistreatment" or "abuse" of detainees. (Notably, the U.S. submission makes no reference to torture, war crimes, or violations of international treaties to which the U.S. is a party, including the Geneva Conventions or the Convention Against Torture; these violations are the subject-matter of the complaint before Judge Velasco.) Acknowledging that the cases cited "***do not relate to the aforementioned advice given on interrogation matters [by named defendants, Yoo and Bybee]***,"[75] the United States proceeds to demonstrate that it can exercise jurisdiction over violations committed against persons held in U.S. custody that occur outside the United States – a question neither at issue, nor relevant. What is at issue, and what the U.S. submission does not address, is whether the Criminal Division of the United States Department of Justice, is *willing* to exercise such jurisdiction over mid and high-level former U.S. officials. Taking its lead from President Barack Obama who famously stated that we have to "look forward not behind"[76] and that "*[t]his is a time for reflection, not retribution… nothing will be gained by spending our time and energy laying blame for the past*,"[77] the answer to this question is clearly no.

Closed Investigation/Review: Durham investigation

The U.S. Submission cites, with little commentary, the then-ongoing investigation of Assistant United States Attorney John Durham. Notably, in the context of its discussion of the OPR investigation, the U.S. acknowledged that the Durham investigation is not focused on the defendants in this case, as the "torture memos" are deemed outside the scope of the investigation: "***the Department of Justice has concluded that it is not appropriate to bring criminal cases***

[74] Interview by Jonathan Karl with Dick Cheney, former Vice President under the Bush administration, *This Week*, February 14, 2010, available at: http://abcnews.go.com/ThisWeek/week-transcript-vice-president-dick-cheney/story?id=9818034/.

[75] U.S. Submission, *supra* n. 2, p. 3.

[76] Transcript, "This Week," 11 January 2009, available at: http://abcnews.go.com/ThisWeek/Economy/story?id=6618199&page=3.

[77] Statement of President Barack Obama on Release of OLC [Office of Legal Counsel] Memos, 16 April 2009, available at: http://www.whitehouse.gov/the_press_office/Statement-of- President-Barack-Obama-on-Release-of-OLC-Memos/.

with respect to any other executive branch officials, <u>including those named in the complaint</u>, who acts in reliance on these [the Yoo and Bybee] and related OLC memoranda during the course of their involvement with the policies and procedures for detention and interrogation."[78]

As of this date, the Durham investigations have been closed without any prosecutions forthcoming.[79] In order to adequately respond to the U.S. Submission we first address the limitations of the Durham investigation, and then provide a summary of the two-stage closure of that preliminary investigation.

CCR and ECCHR have previously addressed at length the shortcomings of the Durham investigation, its narrow scope, and that it explicitly does not include the defendants in so far as it excludes from its scope anyone who relied on the memos. In the April 2010 Expert Opinion, CCR and ECCHR stated:

> AG Holder has taken one small step to appoint a prosecutor to open a narrow and *preliminary* investigation into a limited (reportedly less than 10 and possibly even less than five) number of incidents involving the Central Intelligence Agency. Notably, and once again disturbingly, however, AG Holder demonstrates an acceptance of the torture memos, in that he relies on those memos to shield any direct perpetrators who relied on them from any liability.
>
> The following statement was made on 24 August 2009 after his review of the OPR report, which examined certain parts of the OLC memos, and the CIA Inspector General's report that analyzed interrogation techniques used by the CIA on certain detainees. The following excerpts of his statement are emblematic of AG Holder's approach to accountability for war crimes, crimes against humanity and torture:
>
> > "I have concluded that the information known to me warrants opening a *preliminary review* into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations… *I want to emphasize that neither the opening of a preliminary review nor, if evidence warrants it, the commencement of a full investigation, means that charges will necessarily follow*.
> >
> > [The men and women in our intelligence community] deserve our respect and gratitude for the work they do. Further, *they need to be protected from legal jeopardy when they act in good faith and within the scope of legal guidance*. ***That is why I have made it clear in the past that the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees.*** I want to reiterate that point today, and to underscore the fact that ***this preliminary review will not focus on those individuals.***

[78] U.S. Submission, *supra* n. 3, p. 2.

[79] *See* Holder August 2012 Statement, *supra* n. 5.

> I share the President's conviction that as a nation, we must, to the extent possible, look forward and not backward when it comes to issues such as these. While this Department will follow its obligation to take this preliminary step to examine possible violations of law, we will not allow our important work of keeping the American people safe to be sidetracked." […][80]

By maintaining a narrow focus on rogue agents that acted in excess of the institutional mandates authorizing torture, Holder effectively immunized three categories of individuals from investigation and subsequent prosecution: (1) Bush officials who ordered the torture; (2) Bush lawyers who sought to legally approve it; and (3) those in the CIA and the military who tortured within the confines of the permission given by the lawyers. As stated above, this particularized mandate explicitly excluded the named individual defendants in this case from even "preliminary review." Indeed, Attorney General Holder confirmed that the scope of the Durham investigation does not include the "torture memos" or their authors when he stated: "It's a question of whether people went beyond those pretty far-out [Office of Legal Counsel] opinions, people who went beyond that. That's what we're looking at."[81]

In relation to the "preliminary" nature of the investigation, as explained by John Durham in a 2 March 2012 statement explaining the scope of his investigation, a "preliminary review" simply authorized him to recommend further investigations:

> On August 24, 2009, Attorney General Eric H. Holder expanded my mandate to include a preliminary review into whether federal laws were violated in connection with the interrogation of certain detainees at overseas locations. In that capacity, I was directed to recommend to the Attorney General whether there existed sufficient predication for a full investigation into whether the law was violated in connection with those interrogations.[82]

Unlike in traditional criminal investigations into violation of federal laws (discussed above), where the United States Attorney has the authority to employ the appropriate federal investigative agency[83] and the assistance of a grand jury,[84] Holder only authorized Durham to

---

[80] April 2010 Expert Opinion, Appendix A, pp. 9-10, citing Holder August 2009 Statement, *supra* n. 4.

[81] December 2010 Supplemental Expert Opinion, Appendix B, p. 8, citing R. Reilly, "Holder: Review of CIA's Treatment of Detainees Nearly Complete," 18 June 2010, available at: http://www.mainjustice.com/2010/06/18/review-of-cias-treatment-of-detainees-nearly-complete/. Attorney General Holder reaffirmed the limited nature of the investigation in a 30 June 2011 statement: "I made clear at that time that the Department would not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees." *See* Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees, 30 June 2011, available at: http://www.justice.gov/opa/pr/2011/June/11-ag-861.html ("Holder June 2011 Statement").

[82] Declaration of John Durham, Document 21-2, March 2, 2012 in *ACLU v. CIA* Case 1:11-cv-00933-ABJ.

[83] Dep't of Just. Manual U.S. Atty's Manual 9-2.010.

[84] *Ibid*.

conduct a "preliminary review" with the objective of deciding whether to proceed further with investigations.

As is now known, there will be neither further investigations nor prosecutions.

Over the course of the preliminary review, according to the Attorney General, "Mr. Durham examined any possible CIA involvement with the interrogation of 101 detainees who were in United States custody subsequent to the terrorist attacks of September 11, 2001."[85] Ninety-nine of those cases were closed on 30 June 2011: "The Department has determined that an expanded criminal investigation of the remaining matters is not warranted."[86] Notably, the only two cases that remained under preliminary review were cases involving the death of detainees, Mandel Al-Jamadi and Gul Rahman, in custody.

On 30 August 2012, these remaining two deaths/murder cases were closed. In stating that the Department has "declined prosecution" over the two cases, the Attorney General repeated that "[o]ur inquiry was limited to a determination of whether prosecutable offenses were committed and *was not intended to, and does not resolve, broader questions regarding the propriety of the examined conduct*."[87] In effect, this statement by the Attorney General confirms that the underlying question of torture, as defined and applied by the named defendants and as carried out by the United States in the context of "the War on Terror" has not been examined by the U.S. For this reason alone, deferring jurisdiction to the U.S. Department of Justice, as was done by Central Court for Preliminary Investigation No. 6, is a grant of impunity for these actions, because there is not and will not be an investigation into these acts.

On a related matter, we note that they have also addressed the fact that Durham closed the investigation into the destruction of torture tapes without prosecuting anyone in their December 2010 Supplemental Expert Opinion.[88] Recent statements made by the former head of the CIA's Clandestine Services, Jose Rodriquez, revealing details of the tapes as well as the CIA's "enhanced interrogation tactics" confirm the concern expressed into the closing of that investigation without any prosecutions.[89]

---

[85] Holder June 2011 Statement, *supra* n. 81.

[86] *Ibid.*

[87] Holder August 2012 Statement, *supra* n. 5.

[88] December 2010 Supplemental Expert Opinion, Appendix B, p. 7. The tapes included evidence of the use of so-called "enhanced interrogation techniques" – or torture – of detainees. See, e.g., "Court Orders Government Not to Destroy Torture Evidence: Federal Court's Order Comes Amid CIA Tape Destruction Scandal," CCR, Press Release, 12 December 2007, available at: http://www.ccrjustice.org/newsroom/press-releases/court-orders-government-not-destroy-torture-evidence.The detainees on the tapes in question remain in custody in Guantánamo Bay.

[89] *See* Interview by Lesley Stahl with Jose Rodriguez, former head of CIA Clandestine Services, on 60 Minutes, 29 April 2012, available at: http://www.cbsnews.com/8301-18560_162-57423533/hard-measures-ex-cia-head-defends-post-9-11-tactics/. In this interview, Rodriguez stated that in its search for methods to extract information from

Completed Federal Prosecutions: David Passaro and Don Ayala

The U.S. Submission cites the prosecution of two civilian contractors as evidence that the U.S. Department of Justice can and will address the myriad accounts of torture and other serious violations committed against hundreds, if not thousands of individuals, held in U.S. detention centers across the globe. ***The fact that the only prosecutions that the Department of Justice can point to are of non-government employees is revealing of the fact that the Department of Justice has, over the last ten years, decided to look the other way by not opening criminal investigations into the actions of US officials.*** Additionally, the investigation and prosecution of two *civilian contractors* for crimes committed in Afghanistan – both cases involving the death of a detainee – has essentially no bearing on whether the named defendants – 6 former high-level government employees, will be prosecuted for torture and other serious violations of international law.[90]

The U.S. submission appears to be under the mistaken impression that all it must do to satisfy the Spanish court that it should defer jurisdiction over this case is to demonstrate that the legal system in the U.S. could – theoretically – allow for prosecutions of the defendants. No doubt the U.S. legal system provides the jurisdiction for the prosecution of these individuals, whether under *inter alia* the Torture Statute (18 USC § 2340A) or the War Crimes Statute (18 USC § 2441).

Pending Investigations in Eastern District of Virginia

The U.S. Submission makes vague comments that the US Attorney's Office for the Eastern District of Virginia is "investigating various allegations of abuse of detainee" which it is constrained by U.S. law from discussing further.[91] This statement cannot be read as indicating that a broad criminal investigation is underway that could cover the conduct of the defendants or the torture and other violations suffered by the named victims. The U.S. Submission tries to hide behind the secrecy aspects of the grand jury proceedings to suggest that this investigation is a robust investigation into detainee abuse. Available information indicates that the opposite is the case. It is notable that the United States government has not spoken of any investigation in Virginia when discussing US investigations into US torture: Eric Holder has made reference only to the investigation by John Durham,[92] and the Legal Advisor of the State Department also only referenced the Durham investigation, when addressing the issue of accountability for US torture

---

detainees, "there was no lack of imagination" from the CIA, and further detailed how the Justice Department was not only aware of how detainees were being interrogated, but gave permission to do so.

[90] It should also be noted that in the case of David Passaro, Passaro caused the death of a detainee, Abdul Wali, in Afghanistan. Passaro was charged and convicted of *assault*; there were no charges of murder or manslaughter brought against Passaro for causing the death of Wali, who was beaten by Passaro on 19 and 20 June 2003, and died in his cell on 21 June 2003.

[91] U.S. Submission, *supra* n. 3, pp. 3-4.

[92] Holder August 2009 Statement, *supra* n. 4.

in the context of the United States Universal Periodic Review before the UN Human Rights Council.[93] Moreover, Amnesty International has indicated that the investigations in Eastern District of Virginia have focused on the actions of *private contractors, not US government officials*.[94]

Most notably, and of greatest relevance to the question of whether there are adequate proceedings underway in the United States so as to warrant Spain deferring its jurisdiction over this case, in the year and a half since the U.S. submission was filed and in the more 10 years since the first allegations of torture by U.S. officials surfaced, there have been no prosecutions carried out by the U.S. Attorney's Office for the Eastern District of Virginia related to torture and other serious violations of international law.

C. Other U.S. Government Components Responses

Judge Velasco asked the United States "whether the acts pertinent to this complaint are or are not now being investigated or prosecuted by any Authority." The only "Authority" that is empowered to open a criminal investigation and prosecute the named defendants is the Department of Justice. The U.S. Submission's discussion of actions taken by other U.S. government components – namely the Department of Defense, the Central Intelligence Agency and the Congress – is misplaced, albeit highly revealing. But for the discussion of investigations carried out by other government departments and the actions taken by the Department of Defense against a small number of direct perpetrator soldiers, the United States would only be able to cite the prosecution of two non-governmental employees and an ongoing, preliminary investigation that is limited in scope to exclude the named defendants as its response to the well-documented accounts of torture, cruel, inhuman and degrading treatment and other serious violations committed against persons held in U.S. custody across the globe that have been identified as such by the numerous sources, including the International Committee of the Red Cross and various components of the United Nations, including the Special Rapporteur on Torture.

---

[93] *See* Q& A with Harold Koh, Legal Advisor for the State Department (and others) at 'Press Conference by the U.S. Delegation to the UPR (Transcript),' 5 November 2010:

> "Press: A very brief follow-up. Does that mean that the United States would consider, are you still considering the possibility of legal investigations and federal prosecution of those who might have ordered such a practice in the past?
>
> Mr. Koh: As I think is well known, the Attorney General has referred this very issue to a Special Prosecutor, John Durham of Connecticut. Those investigations are ongoing. The question is not whether they would consider it, those discussions are going on right now." available at: http://geneva.usmission.gov/2010/11/05/upr-press-conf/.

[94] *See* "Lack of Accountability for Crimes Committed Overseas," Testimony before the Before the House Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, 19 July 2007, available at: http://judiciary.house.gov/hearings/June2007/Razook070619.pdf and at: http://www.amnestyusa.org/military-contractors/page.do?id=1101665

The reality remains, however, that the fact-finding investigations by U.S. government agencies and Congress are no substitute for full criminal investigations and prosecutions.[95] As previously discussed in relation to the OPR, these investigations also suffer from limited powers around calling witnesses or subpoenaing documents.

The information contained in the U.S. Submission related to other agency or government component actions does, however, require some comment or clarification:

- The Department of Defense prosecutions have been *limited to low-level soldiers*; *the DOD has not looked up the chain of command and prosecuted officers, and certainly not the high-level DOD civilian officials*. Even in the notorious case of Abu Ghraib, prosecutions were limited to the so-called "bad apples".

- While the DOD has conducted a number of investigations, which have concluded that detainees in U.S. custody have been subjected to conduct that violates domestic and international law, the manner in which the investigations proceeded was problematic. The investigations were limited to particular units or locations, [96] and did not examine the Department of Defense as a whole, up to and including the Secretary of Defense, Donald Rumsfeld.

- The 232-page "Senate Armed Services Committee, Inquiry into the Treatment of Detainees in U.S. Custody" provides a detailed and comprehensive analysis of the origins of the interrogation techniques used and resulting treatment of detainees held by the United States in Guantánamo, Iraq and Afghanistan. As a result of a far-reaching investigation, this Report makes a number of highly relevant conclusions, including that "OLC opinions [examining the legality of CIA interrogation techniques] distorted the meaning and intent of anti-torture laws, rationalized the abuse of detainees in U.S. custody and influenced Department of Defense determinations as to what interrogation techniques were legal for use during interrogations conducted by U.S. military personnel" as well as a number of conclusions specific to the named defendants, including "Department of Defense General Counsel William J. Haynes II's direction to the Department of Defense Working Group in early 2003 to consider a legal memo from John Yoo of the Department of Justice's OLC as authoritative, blocked the Working Group from conducting a fair and complete legal analysis and resulted in a report that, in the words of then-Department of Navy General Counsel Alberto Mora contained 'profound mistakes in its legal analysis.'"[97] The Report, however, contains no recommendations, and the Committee carries no powers to initiate criminal investigations.

---

[95] *See generally* April 2010 Expert Opinion, Appendix A, p. 8.

[96] *See e.g.*, Taguba Report, *supra* n.20 (focusing on the conduct of operations within the 800th Military Police Brigade detention and internment operations by the Brigade from 1 November 2003 to April 2004); Fay/Jones Report, *supra* n. 20.

[97] SASC Report, *supra* n. 20, pp. xxvii and xxviii.

D. What the U.S. Submission Is Missing

The U.S. Submission discusses various actions that the U.S. government has taken in response to the torture and cruel treatment to which detainees held in U.S. custody were subjected. The U.S. Submission fails, however, to give a full accounting of the U.S. government position towards detainee "mistreatment" and accountability. The following points must be considered when assessing the U.S. Submission and whether Spain should defer its jurisdiction over this case.

- *President Barack Obama has embraced a policy of impunity*, when he says that we must "look forward, not back." One example demonstrates the culture of impunity that exists in the United States: former president George W. Bush confessed in his memoirs that he authorized the waterboarding – an act of torture – of individuals held in U.S. secret detention sites.[98] Bush made this admission because he felt immune from prosecution; the lack of response by the Department of Justice to this admission, despite having formally and publicly acknowledged on various occasions, including before the United Nations, that waterboarding is an act of torture as a matter of law, demonstrates that Bush – like the defendants in this case – is right to feel safe from prosecution in the United States. There have been ***no prosecutions of mid or high level officials in the ten years since the first allegations of torture and other serious abuses surfaced.***

- The U.S. Department of Justice has actively blocked all forms of redress for victims of the U.S. torture program in the United States courts. *To date, no victim of post-9/11 policies has been allowed to have his day in court.*[99] *Indeed, to date, no victim has even received an apology from the Executive Branch.* The Department of Justice has opposed every case brought by a former detainee or rendition-to-torture victim that has been brought against a former U.S. official in U.S. courts. In so doing, the U.S. has sought to ensure that there will be no accountability for torture.[100] *The immunity that the Obama*

[98] December 2010 Supplemental Expert Opinion, Appendix B.

[99] Recent cases for accountability and redress which the U.S. Department of Justice has opposed include *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012)(granting immunity to defendant John Yoo from suit filed by torture victim); *Doe v. Rumsfeld*, 683 F.3d 390, 391 (D.C. Cir. 2012) (finding lower court erred in *not* dismissing case brought by a U.S. citizen and former detainee in part on the basis of the "special factor" that, "litigation of Doe's case would require testimony from top military officials as well as forces on the ground, which would detract focus, resources, and personnel from the mission in Iraq.") *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (granting immunity to then Secretary of Defense Rumsfeld from suit brought by Afghan and Iraqi victims of torture); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (upholding lower court's finding that, "'allegations' of covert U.S. military or CIA operations in foreign countries against foreign nationals — [are]clearly a subject matter which is a state secret," and therefore dismissing the case). *See also* Lisa Magarrell and Lorna Peterson, *After Torture; U.S. Accountability and the Right to Redress*, International Center for Transitional Justice (August 2010) ("a number of cases have been dismissed without ever reaching a hearing on the merits because courts have repeatedly declined to hear cases in which the government asserts that state secrets, classified evidence, evaluations of foreign policy, or national security issues are involved."), available at: http://www.ictj.org/sites/default/files/ICTJ-USA-Right-Redress-2010-English.pdf.

[100] *See* April 2010 Expert Opinion, Appendix A, p. 10.

Administration seeks for U.S. officials – as the Bush Administration did before it – creates a culture of impunity that leaves open the possibility that such egregious conduct occurs again.

VI. Conclusion

In light of the standards that are binding as a matter of law upon Spanish courts, and in light of the above review of the U.S. Submission and the failure of U.S. authorities to investigate or prosecute torture, it is evident that the criteria for Spain to defer jurisdiction have not been satisfied. There are no ongoing investigations related to the six named defendants or the punishable facts set forth in the complaint. To the extent that there have been any investigations or prosecutions related – tangentially – to this case, it is irrefutable that *the investigations and prosecutions carried out do not constitute effective investigations or prosecutions in relation to the punishable facts set forth in the complaint filed in Spain.*

Through its actions and inactions, the U.S. clearly has demonstrated its *unwillingness* to exercise its jurisdiction to investigate and prosecute the named defendants for serious violations of international law. Referring investigation of this case from Spain to the United States in effect will close this case.

For this reason, we respectfully submit that the Central Court for the Preliminary Criminal Investigation No. 6 erred in transferring this case to the United States, and the majority of Section Three of the Criminal Division of the National Court erred in upholding that court's decision. We urge reversal of those decisions and reopening of this investigation in Spain.

Counsel for *Amici:*

Katherine Gallagher
Senior Staff Attorney
Center for Constitutional Rights

Wolfgang Kaleck
Secretary General
European Center for Constitutional and Human Rights

centerforconstitutionalrights

ECCHR

LIST OF AMICI:

INDIVIDUALS:

(institutional listings are for identification purposes only)

- **Manfred Nowak**, former United Nations Special Rapporteur on Torture (2004-2010), and Law Professor, Vienna University
- **Theo van Boven**, former United Nations Special Rapporteur on Torture (2001 - 2004) and professor emeritus of international law, Maastricht University
- **Morris D. Davis,** Colonel, U.S. Air Force (retired); Chief Prosecutor for the U.S. military commissions at Guantanamo Bay, Cuba, 2005-2007; and Assistant Professor of Legal Skills, Howard University School of Law,
- **Antonio M. Taguba**, Major General, U.S. Army (Retired)
- **Richard L. Abel**, Distinguished Research Professor, Connell Distinguished Professor of Law Emeritus, University of California, Los Angeles (UCLA)
- **Bill Bowring**, Barrister, Director of the LLM/MA in Human Rights, School of Law, Birkbeck, University of London
- **Lisa Hajjar**, Associate Professor of Sociology, University of California, Santa Barbara
- **Scott Horton**, Lecturer in Law at Columbia Law School, expert in national security and public international law
- **Deena Hurwitz**, Associate Professor of Law, Director, International Human Rights Law Clinic and Human Rights Program, University of Virginia School of Law
- **Florian Jessberger**, Law Professor, Faculty of Law of the University of Hamburg, Co-Editor of the Journal of International Criminal Justice
- **Jordan J. Paust**, Mike & Teresa Baker Law Center Professor at the University of Houston Law Center
- **Naomi Roht-Arriaza**, Professor of Law, University of California, Hastings College of Law
- **William A. Schabas OC MRIA**, Professor of International Law, Middlesex University, London
- **Martin Scheinin**, Professor of Public International Law, Department of Law, European University Institute, Italy
- **Kim Lane Scheppele**, Director, Program in Law and Public Affairs, Princeton University

ORGANIZATIONS:

- **Amnesty International**

  Amnesty International is a worldwide movement of people working to promote respect for and protection of internationally-recognized human rights principles. It monitors law and practices in countries throughout the world in the light of international human rights,

refugee and humanitarian law and standards. The movement has over 2.8 million members and supporters in more than 150 countries and territories and is independent of any government, political ideology, economic interest or religion. It has consultative status before the U.N. Economic and Social Council and the U.N. Educational, Scientific and Cultural Organization, has participatory status at the Council of Europe, has working relations with the Inter-Parliamentary Union and the African Union, and is registered as a civil society organization with the Organization of American States.

- **Human Rights Watch**

  Human Rights Watch is one of the world's leading independent organizations dedicated to defending and protecting human rights. Its 2011 report "Getting Away with Torture: The Bush Administration and Mistreatment of Detainees," presents substantial information warranting criminal investigations of former President George W. Bush and other senior officials, for ordering practices such as "waterboarding," the use of secret CIA prisons, and the transfer of detainees to countries where they were tortured.

- **The International Commission of Jurists**

  The International Commission Jurists, established in 1952 and headquartered in Geneva, comprises eminent jurists, who represent the different legal systems of the world, dedicated to promoting the understanding and observance of the rule of law and the legal protection of human rights.

- **International Federation for Human Rights (FIDH)**

  Established in 1922 and headquartered in Paris, FIDH is a federation of 164 non-profit human rights organisations in more than 100 countries. FIDH coordinates and supports member organisations' activities at the local, regional and international level, to obtain effective improvements in the prevention of human rights violations, the protection of victims, and the sanction of their perpetrators, in accordance with international standards on due process and the right to a fair trial. See www.fidh.org

- **Physicians for Human Rights (PHR)**

  PHR is an independent organization that uses medicine and science to stop mass atrocities and severe human rights violations against individuals. PHR was founded in 1986 on the idea that health professionals, with their specialized skills, ethical duties, and credible voices, are uniquely positioned to stop human rights violations. In 1997, PHR was a co-recipient of the Nobel Peace Prize for its work to ban landmines.

- **Public Interest Lawyers**

  International and domestic public law firm, based in the United Kingdom.

- **The Redress Trust ("REDRESS")**

  REDRESS is an international human rights non-governmental organisation based in London with a mandate to assist torture survivors to prevent their further torture and to seek justice and other forms of reparation. It has accumulated a wide expertise on the rights of victims of torture to gain both access to the courts and redress for their suffering

and has advocated on behalf of victims from all regions of the world, including by regularly taken up cases on behalf of individual torture survivors at the national and international level. REDRESS has extensive experience in interventions before national and international courts and tribunals, including the U.N. Committee against Torture and Human Rights Committee and the European Court of Human Rights, among others.

- **Reprieve**

Reprieve is a registered UK charity based in London that provides free legal assistance to indigent persons facing the death penalty worldwide, as well as those held beyond the rule of law in the 'War on Terror.' see www.reprieve.org.uk

- **TRIAL**

TRIAL offers legal support to victims of international crimes in their quest for truth, justice and reparations and fights against the impunity too often enjoyed by the perpetrators of such acts, by resorting to existing national or international legal mechanisms.

- **The World Organization Against Torture (OMCT)**

The OMCT is the leading global civil society coalition of 311 non-governmental organizations fighting against torture, summary executions, enforced disappearances and all other cruel, inhuman or degrading treatment.