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RESPONSE TO THE SUBMISSION FROM THE UNITED STATES

IN RELATION TO THE 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

April 2011

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I. Background

On 17 March 2009, a complaint was filed by the Association for the Dignity of Male and Female Prisoners of Spain 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 Sates in the context of the so-called "War on Terror." The complaint contains charges that include torture and violations of the 1949 Geneva Conventions.

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.

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,

[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."

was made available to the parties on 21 March 2011. The submission provides no explanation of why the United States waited nearly two years to respond to Judge Velasco's query.

II. Summary

The Center for Constitutional Rights (CCR) and the European Center for Constitutional and Human Rights (ECCHR) respond herein to the letter filed by the Office of International Affairs of the United States Department of Justice.[3] CCR and ECCHR, as 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, have 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,[4] 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.[5] Based on the findings in these expert opinions, CCR and ECCHR determined that it is proper for Judge Velasco and the *Audiencia Nacional* to exercise jurisdiction over this case.

The U.S. Submission does nothing to alter the conclusion that the criminal case against the so-called "Bush Six" is properly before the Spanish court: it 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.

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 or implementation of a detention and interrogation policy under which the plaintiffs and other individuals detained at Guantánamo, in Iraq, Afghanistan and in

[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 Numer: 002342/2009-CAP," dated 1 March 2011 and stamped 4 March 2011 ("U.S. Submission").

[4] *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"); 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").

[5] *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%20English%20Lawyers%20Responsibility%20Submission.pdf.

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

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 9-year failure to investigate or prosecute any mid- or high-level officials, 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.

CCR and ECCHR respond to the various points made in the U.S. Submission below, and in so doing, demonstrate that there are no investigations or prosecutions in the United States that would interfere with Spain exercising its jurisdiction over the "Bush Six."

III. Applicable Legal Framework:

The April 2010 Expert Opinion 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 that no such

effective investigation in relation to the punishable facts 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.[6] 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.[7] There are, however, two key points from the existing ECtHR jurisprudence that we highlight to provide context for our current response.

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."[8] 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.[9] 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.[10] 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.

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[6] 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.

[7] *See* April 2010 Expert Opinion, at pp. 17 - 20

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

[9] 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, n. 63.

[10] *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, p. 18, and cases cited therein.

IV. Response to the U.S. Submission

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. CCR and ECCHR will respond to each in turn.

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.[11] The OPR Report concluded that John Yoo intentionally committed intentional 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 OPR is a purely disciplinary process and is not in any way connected to criminal investigations or prosecutions.

[11] United States 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, 29 July 2009 ("OPR Report"), available at http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf

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***." [12] 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."[13] There is simply no connection between the work of the OPR and criminal proceedings, as put forward in the U.S. Submission.

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.[14] The

[12] U.S. Submission, p. 2.

[13] *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.

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

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***.[15] 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[16] *Notably, defendant David Addington, former counsel to Vice President Cheney, did not respond to the OPR investigators requests for interview*.[17]
    - The ***OPR does not have the power to subpoena documents***.[18] 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*."[19]
    - 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.[20] When the OPR found that John Yoo "committed intentional professional misconduct when he violated his duty to 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."[21]

[15] OPR Report, p. 12.
[16] OPR Report, p. 7.
[17] OPR Report, p. 7.
[18] *See* OPR Report 12-13.
[19] OPR Report, p.13, note 12.
[20] *See* OPR p. 13.
[21] OPR, p. 11, note 10.

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 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.[22] 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.[23]

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.[24]

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.[25]

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."[26] 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.

[22] OPR Report, p. 9.
[23] *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.
[24] *See* Margolis Memorandum, p. 6.
[25] Margolis Memorandum, pp. 7-8. *See also* OPR Report, p. 10: "OPR carefully reviewed these responses and made changes to the draft report where appropriate."
[26] *See supra* p. 4, note 10

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 the 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 of the Department of Justice was limited to those persons and agencies that were willing to cooperate with our investigation***."[27]
    - 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).*"*[28]

- 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."*[29]

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.[30] In employing a lower standard to assess the

[27] OPR Report, p. 10.
[28] OPR Report, p. 14.
[29] OPR Report, p. 10.
[30] Margolis Memorandum, p. 2.

men's conduct, Margolis concludes that while Bybee's work reflected "errors" it did not merit disciplinary measures.[31] In relation to Yoo, while calling it "a close question," Margolis ultimately was "not prepared to conclude" that the Yoo knowingly provided inaccurate legal advice or acted with conscious indifference to the consequences of his action.[32]

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 only that their cases will not be referred by the DOJ to the state bar disciplinary authorities;[33] 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, 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 set forth in detail in the "Expert Submission on Liability of Lawyers for International Law Violations,"[34] 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'

[31] Margolis Memorandum, pp. 64-65.
[32] Margolis Memorandum, p. 67.
[33] .Margolis Memorandum, p. 68.
[34] See particularly pp. 2-8 for legal liability arguments, available here (English): http://www.ccrjustice.org/files/FINAL%20English%20Lawyers%20Responsibility%20Submission.pdf and here (Spanish): http://www.ccrjustice.org/files/FINAL%20Spanish%20Lawyers%20Responsibility%20Submission.pdf.

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."[35]

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]***,"[36] 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"[37] 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*,"[38] the answer to this question is clearly no.

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 nine 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

[35] OPR Report p. 226-27.
[36] U.S. Submission, p. 3.
[37] Transcript, "This Week," 11 January 2009, available at http://abcnews.go.com/ThisWeek/Economy/story?id=6618199&page=3.
[38] Statement of President Barack Obama on Release of OLC [Office of Legal Counsel] Memos, 16 April 2009, available online at http://www.whitehouse.gov/the_press_office/Statement-of- President-Barack-Obama-on-Release-of-OLC-Memos/.

government employees, will be prosecuted for torture and other serious violations of international law.[39]

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.[40] This statement cannot be read as indicating that a broad criminal investigation in underway that could cover the actions 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. It is notable, however, 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,[41] and the Legal Advisor of the State Department also only referenced the Durham investigation, when addressing the issue of accountability for US torture in the context of the United States Universal Periodic Review before the UN Human Rights Council.[42] 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*.[43]

[39] 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.

[40] U.S. Submission, pp. 3-4.

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

[42] *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/

[43] *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:

Ongoing Investigation/Review: Durham investigation

The U.S. Submission cites, with little commentary, the 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 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***."[44]

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***

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http://judiciary.house.gov/hearings/June2007/Razook070619.pdf and http://www.amnestyusa.org/military-contractors/page.do?id=1101665

[44] U.S. Submission, p. 2.

> ***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.***
>
> 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." […][45]

As the December 2010 Supplemental Expert Opinion details, Attorney General Holder recently 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."[46]

CCR and ECCHR 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.[47]

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 "Authority" that is empowered to open a criminal investigation and prosecute the named defendants is only 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

[45] April 2010 Expert Opinion, pp. 9-10, citing Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees, 24 August 2009, available online at http://www.usdoj.gov/ag/speeches/2009/ag-speech-0908241.html.

[46] December 2010 Supplemental Expert Opinion, 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/

[47] December 2010 Supplemental Expert Opinion, 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.

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.

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.[48] 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, [49] 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" ("SASC Report")[50] 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,

[48] *See generally* April 2010 Expert Opinion, p. 8.
[49] *See e.g.*, Taguba Report (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 and A. Jones, US Army, AR 15-6 Investigation of Intelligence Activities At Abu Ghraib Prison and 205th Military Intelligence Brigade (2004) (focusing on the 205th Military Intelligence Brigade), available at http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf.
[50] November 20, 2008, available at: Senate Armed Services Committee, Inquiry into the Treatment of Detainees in U.S. Custody.

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 conduction 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.'"[51] The Report, however, contains no recommendations, and the Committee carries no powers to initiate criminal investigations.

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 recent 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.[52] 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 nine 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. 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.[53] *The immunity that the Obama 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 occur again.*

[51] SASC Report, pp. xxvii and xxviii.
[52] December 2010 Supplemental Expert Opinion.
[53] *See* April 2010 Expert Opinion, p. 10.

V. 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, 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 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. To refer this investigation from Spain to the United States would be to knowingly transfer this case to be closed.