

**IN THE CENTRAL COURT FOR
PRELIMINARY CRIMINAL PROCEEDINGS NO.6**

MADRID

PRELIMINARY PROCEEDINGS
SUMMARY PROCEDURE 134/2009

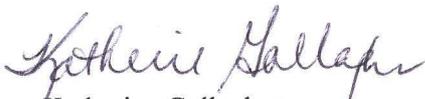
JOINT EXPERT OPINION by:



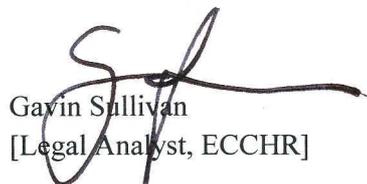
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26 April 2010

1. Introduction

The Center for Constitutional Rights (CCR) is an U.S.-based non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by lawyers that represented the civil rights movements in the south of the U.S. and currently based in New York, CCR has a long history of pursuing strategic public-interest litigation to ensure accountability for abuses in the exercise of executive power and to strengthen the rule of law.

The European Center for Constitutional and Human Rights (ECCHR) is an independent, non-profit legal and educational organization similarly dedicated to protecting civil and human rights throughout, and beyond, Europe. Founded by a small group of human rights lawyers in 2007 and based in Berlin, ECCHR aims to facilitate, support and directly engage in innovative litigation - using international, European and national laws - to enforce human rights standards and hold state and non-state actors accountable for egregious abuses.

CCR and ECCHR have accrued considerable legal expertise on issues arising from the treatment of detainees at Guantánamo Bay and other U.S overseas prisons in the post 9-11 context, in undertaking complex litigation against senior U.S officials responsible for facilitating ill-treatment and torture, including of civilians and of ‘high value detainees’, worldwide and in advising on matters involving the application of extraterritorial jurisdiction and the principles of universal jurisdiction under international law.¹ We accordingly welcome this opportunity to provide our joint expert opinion in this important case.

The focus of this submission is twofold.

¹ Since 2002, CCR has represented individuals who have been subjected to every facet of the United States’ torture program, from Guantánamo detainees to Abu Ghraib torture survivors, and victims of extraordinary rendition and CIA ghost detention. CCR has represented clients in U.S. federal courts in habeas corpus proceedings and civil actions, seeking habeas relief, injunctions or damages. See, e.g., the consolidated US Supreme Court cases of *Al Odah v. United States and Boumediene v. Bush*, 553 U.S. 723 (2008) (establishing the rights of non-citizens to challenge the legality of their detention in an offshore U.S. military base), *al Qahtani v. Bush* (habeas corpus petition filed on behalf of Guantánamo detainee) and *Al-Zahrani v. Rumsfeld et al* (case against the former US Secretary of Defense and others on behalf of the families of two men who died at Guantánamo Bay in June 2006) - Case information available at: <http://www.ccrjustice.org/current-cases>. CCR is also internationally active in a wide variety of universal jurisdiction matters. See <http://www.ccrjustice.org/case-against-rumsfeld>. For more information about CCR, see <http://ccrjustice.org> The attorneys at CCR responsible for the submissions made in this report are Michael Ratner, President, and Katherine Gallagher, Staff Attorney. Their cv’s are appended to this report.

ECCHR has considerable expertise in counterterrorism and human rights matters and has similarly undertaken high-profile Guantánamo litigation against US officials in a number of different European jurisdictions. ECCHR General Secretary Wolfgang Kaleck, for example, has previously initiated two criminal complaints in Germany (in 2004 and 2006) and supported a similar complaint filed in France in 2007 against former US Secretary of Defense Donald Rumsfeld and other high ranking US military personnel involved *inter alia* in the detention and torture of detainees in Iraq and Guantánamo. Additionally, ECCHR also has particular expertise in the application of universal jurisdiction principles in the pursuance of public-interest litigation worldwide – including the institution of criminal proceedings against former members of the Argentine military dictatorship (pursued in Argentina) and the Chechen President Ramzan Kadyrov on charges of torture and attempted duress (pursued in Austria). For further information about ECCHR and the cases they are involved in, see <http://www.ecchr.org>. The attorneys at ECCHR responsible for the submissions made in this report are Wolfgang Kaleck, General-Secretary, and Gavin Sullivan, Legal Analyst. Their cvs are appended to this report.

For comprehensive analyses of the cases outlined above and an overview of some of the universal jurisdiction cases brought by CCR and ECCHR, see Kaleck, W. (2009) From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1988-2008, *Mich. J. Int’l L.* 30[3]: 927 and Gallagher, K. (2009) Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture, *J. of Int’l Crim. Justice* 7: 1087-1116; Kaleck, W, Ratner, M, Singelstein, T and Weiss, P. (eds) *International Prosecution of Human Rights Crimes* (Springer: Berlin, 2007).

First, we write in support of the Claimant's submissions (to which this opinion is annexed) filed pursuant to the Order issued by this Court (dated 7 April 2010) as to how the requirements of Article 23(4)-(5) of the *Ley Orgánica del Poder Judicial* (hereafter, LOPJ) are clearly met in this case and, as a consequence, why this specific investigatory procedure ought to lawfully continue in Spain rather than be stayed for procedural reasons (or otherwise). In so doing, our purpose is to assist the Court by both:

- a) clarifying how the Spanish interest and relevant connection to this case is established, thus addressing the first limb of Article 23(4)-(5) of the LOPJ; and
- b) providing a concise overview of the limited consideration that has taken place within the United States in relation to the issues raised in this case to demonstrate that no investigative or effective prosecutorial proceedings have hitherto been initiated for these offences in another competent jurisdiction. In this sense, we aim to address the second limb of Article 23(4)-(5) of the LOPJ.

Second, notwithstanding that the requirements of Article 23(4)-(5) of the LOPJ (as amended) are clearly met in this case, we outline Spain's persistent obligations under *international* law to investigate the offences alleged in this case. After outlining the legal framework for the international prohibition against torture (in section 4), we then examine (in section 5) the different bases available under international law for establishing criminal jurisdiction to demonstrate, *inter alia*, that:

- a) international law envisages a system of *non-hierarchical* and *concurrent* jurisdictions;
- b) universal jurisdiction is legally distinct from other forms of jurisdiction based on national interests. States that exercise universal jurisdiction over international crimes (such as torture) are under no legal obligation to give priority to states that are territorially linked to the alleged acts;
- c) The subsidiarity principle - which seeks to prevent states from exercising jurisdiction if a state with closer territorial links to the crime exercises its jurisdiction – is at best a matter of policy and is conditional upon territorial states undertaking 'effective investigations' in compliance with accepted human rights standards as well as international and European jurisprudence

In conclusion, we argue that the U.S. investigations that have occurred in this matter to date fall far short of the required standard for 'effective investigations' and that this Court is well within its powers under international law to hear this complaint.

2. Background

The factual background of this case has already been put before the Court in considerable detail – most notably, in Sections IV (‘Relation Circunstanciada de la Hechos’ at pp. 5-48) and XI (‘Documentos’, indexed at pp.82-97) of the querrela filed with the Audiencia Nacional by Procurador Javier Fernandez Estrada on 17 March 2009 – and so we do not repeat this in the course of the current submission. We recall, however, that the complaint in this case is directed against six specific individuals: David Addington, former Counsel to, and Chief of Staff for, the former Vice President of the United States, Dick 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 the former President of the United States, 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. Furthermore, as outlined in more detail at s.3(i) below, at least four of the named plaintiffs in this case have a close link to Spain – either by virtue of their nationality, residency or some other relevant connection.

In terms of the procedural background, we understand that on 28 March 2009 the case was initially admitted by the competent investigating judge of the Fifth Court, Judge Baltasar Garzón Real. On 16 April 2009 Spain’s Attorney-General raised public objections about the continuance of the case. Subsequently, on 17 April 2009, the Public Office Prosecutor of the National Court filed a report requesting that the current complaint be discontinued² and that on 23 April 2009 the responsibility for investigating this matter was duly referred to your honour, Judge Velasco.

On 27 April 2009 a separate, though somewhat interrelated, preliminary investigation was opened by Judge Garzón on behalf of four of the victims who are also party to the current application – namely, Hamed Abderrahman Ahmed, Ikassrien Lahcen, Jamiel Abdul Latiff Al Banna and Omar Deghayes – against “members of the American air forces or military intelligence and all those who executed and/or designed a systematic torture plan and inhuman and degrading treatment against prisoners under their custody”.³ We understand that despite attempts to consolidate these two overlapping complaints (Diligencias Previas Nos. 150/09 and 134/2009) they continue, to date, as separate investigations.⁴

On 4 May 2009, this Court sent an International Rogatory Letter to U.S. asking them to confirm “whether the facts to which the complaint makes reference are or not now being investigated or prosecuted”.⁵ Notably, to date the U.S. government has failed to provide any formal response to this Court’s request. Indeed, it is both this failure and the failure of the U.S. generally to address the serious allegations and evidence of torture which we seek to specifically address below in Section 3(ii) of this submission.

Moreover, we note that the national legislative background within which this current complaint is to be considered has been subject to change with the amendments to Article 23(4)-(5) of the *LOPJ* - as approved by the Spanish Senate on 15 October 2009 and entered

² Prosecutor’s Report, Preliminary Investigation 150/09, 17 July 2009.

³ Sumario 19/97-L Auto, Juzgado Central de Instruccion num. 5, Diligencias Previas 150/09 – N, Torturas y Otros (27 April 2009)

⁴ As discussed further at s.3(i) of this submission, on 27 January 2010 Judge Garzón found that Spanish courts were competent to investigate the interrelated complaint 150/09. On attempts to consolidate both investigations generally, see de la Rasilla del Moral, I. (2009) Swan Song of Universal Jurisdiction in Spain, *Int’l Crim. L. R* 9: 777-808 (at 789). On the effects of the reforms on universal litigation generally, see Ambos, K. (2009) Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the ‘Torture Memos’ be held criminally responsible on the basis of Universal Jurisdiction, *Case W. Res. J. Int’l L.* 42: 405-448.

⁵ Sumario 19/97-L Auto, Juzgado Central de Instruccion num. 6, Diligencias Previas 134/2009 (4 May 2009).

into force on the 4 November 2009⁶ - which establish certain conditions for the exercise of Spanish jurisdiction over extraterritorial acts. Pursuant to those amendments, Article 23(4)-(5) of the LOPJ now states:

Article 23(4)

Spanish Courts will equally have jurisdiction over acts committed by nationals or foreigners outside the national territory that can be classified, according to Spanish Criminal Law, as one of the following crimes (a) Genocide, crimes against humanity and crimes of war [...] (h) any other crimes that, under international treaties or agreements, must be prosecuted in Spain.

Notwithstanding whatever may be provided in other treaties and international conventions ratified by Spain, the Spanish Courts shall only have jurisdiction over the above crimes when it has been duly shown that the alleged responsible are *present* in Spanish territory, or that the victims are of *Spanish nationality* or that there *is some demonstrated relevant link* with Spain and that, in any event, 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.

The criminal process initiated before the Spanish jurisdiction shall be provisionally stayed when there is proof that another process regarding the incident in question has been opened in the country or by the court to which the preceding paragraph makes reference.

Article 23(5)

If a criminal cause was opened in Spain in cases regulated in the previous sections 3 and 4, it will be in all cases of application what is disposed in letter (c) section 2 of the present article [emphasis added].⁷

Thus, on 7 April 2010 - pursuant to Article 23(4)-(5) of the LOPJ (as amended and outlined above) - this Court issued an Order requesting that the parties file submissions on the issue of jurisdiction and the continuance or discontinuance of the current proceedings. Accordingly, it is to the specific elements contained within the 2009 amendments that our submission now turns.

⁶ B.O.E. No. 266, 4 Nov. 2009, sect. I

⁷ Ley Orgánica 1/2009, de 3 de noviembre, complementaria de la Ley de reforma de la legislación procesal para la implantación de la nueva Oficina judicial, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial.

3. Article 23(4)-(5) of the LOPJ: how the specific requirements are met in this case

Prior to discussing the amendments and requirements of Article 23(4)-(5) of the LOPJ, it must be recalled what the purpose and scope of this provision is, and indeed, the purposes of universal jurisdiction. Article 23(4)(a) provides jurisdiction over crimes against humanity and (h) provides jurisdiction over “any other crimes that, under international treaties or agreements, must be prosecuted in Spain.” As discussed below, the acts alleged in this case - including but not limited to torture, cruel and inhumane treatment, and prolonged arbitrary detention - constitute violations of international treaties to which Spain is a party. Among these treaties, the UN Convention Against Torture (discussed in detail below) and the grave breaches provisions of the Third and Fourth Geneva Conventions provide for universal jurisdiction over acts alleged in this case.⁸ For example, Article 146 of the Fourth Geneva Conventions provides, in part:

The High Contracting Parties undertake to enact any legislation necessary to provide penal sanctions for persons committing or ordering to be committed, and of the grave breaches of the present Convention...Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.”⁹

The International Committee of the Red Cross (ICRC) has described this article as “the cornerstone of the system used for the repression of breaches of the [Fourth Geneva] Convention,” which sets forth the “essential obligations” on each Contracting Party.¹⁰ The drafters of the “grave breaches” provisions included them because of the recognized “need to punish infractions of the Geneva Conventions” in order to prevent such infractions: “The universality of jurisdiction for grave breaches is some basis for the hope that they will not remain unpunished.”¹¹ As to the intent of the drafters in including a list of specific violations that would be subject to universal jurisdiction, the ICRC Commentary states that “[i]t was also thought advisable to draw up as a warning to possible offenders a clear list of crimes whose authors would be sought for in all countries.”¹²

In discussing the following factors relevant to an assessment of whether this Court has jurisdiction over this case, it must be recalled that such an assessment is undertaken “*notwithstanding whatever may be provided in other treaties and international conventions ratified by Spain*” pursuant to Article 23(4) of the LOPJ. Accordingly, even if this Court were to find that none of the factors discussed below were satisfied, it *must* retain jurisdiction over those crimes which are contained in international treaties and conventions to which Spain is a party and for which Spain has an obligation, under international law, to commence an investigation and prosecution, based on the *prima facie* case for *inter alia* torture set forth in the complaint. Indeed, we understand that this approach is consistent with the reasoning in two recent Spanish Court decisions - No. 211/2009 (dated 26 November 2009) and No.

⁸ Geneva Convention III (75 UNTS 85) and Geneva Convention IV (75 UNTS 287), adopted 12 August 1949, entered into force 21 October 1950. Spain is also a signatory to the International Convention for the Protection of All Persons from Enforced Disappearances (A-RES-47-133 General Assembly Resolution 47/133).

⁹ Article 147 of the Fourth Geneva Convention includes among the grave breaches willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the Convention.

¹⁰ ICRC Commentary of the Fourth Geneva Convention, p. 590.

¹¹ ICRC Commentary of the Fourth Geneva Convention, p. 587.

¹² ICRC Commentary of the Fourth Geneva Convention, p. 597.

150/09 (dated 27 January 2010).¹³ Given the nature of the crimes alleged in this case, we urge this Court to similarly establish competence to hear this matter pursuant to the principle of universal jurisdiction.¹⁴

(i) Spanish interest and relevant connection to the case

We do not wish to repeat in detail the submissions already made by the plaintiffs as to how the particular elements of Article 23(4)-(5) of the LOPJ are satisfied in this complaint. To assist the Court in this matter, however, we make two points of observation:

First, we note one of the victims responsible for initiating the current claim – Hamed Abderrahman Ahmed, identified as the first applicant of the *querrela* filed with the Audiencia Nacional on 17 March 2009 – is indeed a Spanish citizen. As Judge Garzón held in his decision of 27 January 2010 in the interrelated case of 150/09: “hence by that fact alone, Spanish jurisdiction is competent to investigate these facts, before and after Organic Law 1/09 (November 3, 2009) came into effect, if, as is the case, the requirement of non-concurrent jurisdiction applies”.¹⁵ The elements of Article 23(4) of the LOPJ (as amended) are not cumulative – that is, a complaint need satisfy only one of the prescribed conditions (perpetrator present on Spanish territory, victim of Spanish nationality *or* some demonstrable link of relevance with Spain) for the first limb of the legislation to be met. Accordingly, on the basis of the passive personality principle codified by Article 23(4) of the LOPJ (as amended) alone, Spanish courts have *prima facie* jurisdiction to hear this matter.

Second, in line with the points raised below in section 4, and notwithstanding whatever may be provided in other treaties and international conventions ratified by Spain, we invite the Court to give a purposive interpretation to the ‘relevant connection’ requirements contained within Article 23(4) of the LOPJ (as amended) so as to not unduly restrict the principle of universal jurisdiction the legislation ultimately seeks to recognize.

Within this context, we note the ruling of the Tribunal Constitucional de Espana in its Judgment 237/2005 of 26 September 2005 (hereafter, the *Guatemala Generals* case) insofar as it the Supreme Court’s findings that the scope of universal jurisdiction under Article 23(4) was limited and dependent upon, *inter alia*, a connection being established between the crimes committed and other relevant Spanish interests. In that decision – which, as we understand, is still binding on lower courts pursuant to Article 5 (1) of the LOPJ notwithstanding the amendments to Article 23(4) of the LOPJ – the Court held (at para. 8) that:

the determining question is that making the jurisdiction to hear cases of international crimes [...] subject to the concurrence of national interests in the terms set forth in the judgment is in no way compatible with the principle of universal jurisdiction.

While this decision was delivered prior to the 2009 amendments to Article 23(4)-(5) of the LOPJ coming into effect, it has also recently been reaffirmed by the Constitutional Court in its STC 227/2207 of 22 October 2007.¹⁶ Moreover, given the primacy it affords to universal jurisdiction (as against restrictions based on territoriality or relevancy), we submit that it

¹³ See pp. 13-14, which read in part: “the International Conventions signed and ratified by Spain impose prosecution of crimes against humanity and torture, and hence the limitations set forth in Article 23(4), next to last paragraph, would always be subordinated to what is established in the treaties”.

¹⁴ For a framework for universal jurisdiction based on the nature of the crime, see, e.g., ‘The Princeton Principles on Universal Jurisdiction’ in Macedo, S. (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (U. of Pennsylvania: Philadelphia, 2004) at pp. 18-25.

¹⁵ Decision of 27 January 2010, Juzgado Central de Instrucción num. 5, Diligencias Previas 150/09.

¹⁶ For a succinct overview of subsequent Spanish litigation around the ‘Guatemala doctrine’ see de la Rasilla del Moral, I. (*supra* note 4).

provides guidance and serves as a well-reasoned precedent for this Court in considering the current complaint.

Furthermore, we note that on 27 January 2010 in the Guantánamo torture case (150/09) discussed above, Judge Garzón has taken a similarly interpreted ‘relevant connection’ requirements contained within Article 23(4)-(5) (as amended) to include the relationships between other plaintiffs and Spain. In addition to establishing jurisdiction on the basis of the Spanish nationality of one of the victims (Hamed Abderrahman Ahmed), the Court also found sufficient connection for the three remaining victims named in the case (Ikassrien Lahcen, Jamiel Abdul Latiff Al Banna and Omar Deghayes) taking into account a broad range of factors including the fact that:

- a) these victims had previously been subject to both criminal and extradition procedures through the Spanish Courts
- b) one of the victims (Ikassrien Lahcen) was a victim currently present in Spanish territory
- c) the torture of two of the other victims at Guantánamo (Al Banna and Deghayes) had earlier caused the Spanish court to refrain from effecting a European Order of detention and delivery against them.

In that decision the Court adopted a construction of the ‘connection’ requirements imposed by Article 23(4) of the LOPJ (as amended) in order to afford primacy and give effect to Spain’s obligations under international law to investigate such matters.¹⁷ To avoid judicial inconsistency and arbitrariness,¹⁸ and for the reasons outlined in more detail below, we invite the Court to adopt a similarly broad and purposive interpretation of the amendments in this specific complaint.

(ii) Current State of investigations and/or prosecutions in the United States

The United States has apparently not answered the Letters Rogatory transmitted in May 2009. In the absence of such a response, we set forth the following to demonstrate that the U.S. has utterly failed in its obligations to initiate an effective investigation or prosecution against the specific defendants in this case or on behalf of the named plaintiffs or other victims of the U.S. interrogation, detention and torture policies. This unfortunately remains the case under the Obama Administration. Furthermore, both the Obama and Bush Administrations have actively sought to block all efforts on behalf of victims’ of the detention, interrogation and torture policies from having their day in court, when in the context of habeas proceedings or civil actions. Spain, therefore, can and indeed, must, exercise its jurisdiction over the named defendants for the violations alleged in this case.

Should the United States respond to the Letters Rogatory following the issuance of the 7 April 2010, or information be placed into the record in an effort to demonstrate that the U.S. has, in fact, commenced an effective investigation and prosecution into the violations alleged in this case, we will respectfully seek leave of this Court to submit an addendum to this expert report, addressing such a submission.

¹⁷ Specifically, Judge Garzón cites, *inter alia*, the Geneva Convention on Treatment of Prisoners of War and Protection of Civilians (12 August 1949, Art.3), United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984, Art. 5(1)(c) (CAT).

¹⁸ On the risk of arbitrariness and inconsistency in the application of the Article 23(4) of the LOPJ (as amended) to universal jurisdiction matters, see Perez Gonzales, C. (2009) Jurisdicción universal y enjuiciamiento de crímenes de guerra: qué obligaciones impone el Derecho Internacional Público? en Aranzadi (Ed) *La Responsabilidad Penal por la Comisión de Crímenes de Guerra: El Caso Palestina*. Universidad Carlos III de Madrid.

a) *No Independent, Thorough Criminal Investigation Has Been Commenced with regards to the Allegations in this Case, and no Prosecutions Have Occured.*

No independent, thorough criminal investigation has been opened examining serious violations of law, including torture, that occurred in the context of U.S. interrogation and detention policies during the so-called ‘war on terror.’ No investigation sanctioned by the judicial branch has been undertaken. There is no indication that any of the six named defendants have been the subject of an independent, thorough criminal investigation. Certainly, this was not the case during the eight years of the Bush Administration when many of the named defendants continued to hold high-level positions in the very institutions that would have, and should have, commenced such investigations, including the Department of Justice. It continues to be the case today.

A number of non-criminal investigations of a limited scope and nature (i.e., investigations with no subpoena powers, limited mandates directed at specific incidents, specific, isolated units) have occurred.¹⁹ Even though a number of these investigations entailed members of a particular branch of the government or military investigating itself, the cumulative effect of these reports and investigations is that serious violations of international law occurred.²⁰ Unfortunately, the effect has also been impunity: other than a small number of low-level soldiers present in Abu Ghraib and implicated in the torture scandal there, no U.S. officials (military or civilian) and certainly no high-level officials or the named defendants²¹ have been held accountable for their conduct in any forum.²²

b) *The Executive Branch has Embraced a Policy that Favors Impunity rather than Accountability.*

As President of the United States, Barack Obama has embraced a policy that favors impunity for the most serious crimes, including torture, war crimes and crimes against humanity.

¹⁹ See, for example, A. Taguba, Art. 15-6: Investigation of the 800th Military Police Brigade (2004), available at <http://www.dod.mil/pubs/foi/detainees/taguba/> (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 online at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> (abuses were ‘widespread’ and serious in numbers and effect); G. Fay and 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/nation/documents/fay_report_8-25-04.pdf; CIA Inspector General’s Report, available at: http://luxmedia.vo.llnwd.net/o10/clients/aclu/IG_Report.pdf. See also, Physicians for Human Rights, Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact, June 2008; 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 online at: http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf.

²⁰ See, Senate Armed Services Committee, Inquiry into the Treatment of Detainees in U.S. Custody, available online at http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf

²¹ The Office of Professional Responsibility (OPR) of the Department of Justice conducted a non-criminal, administrative ethics review related to the work of John Yoo and Jay Bybee. See 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, available at: http://judiciary.house.gov/hearings/pdf/OPRFinalReport_090729.pdf.

While the OPR concluded that both Yoo and Bybee committed professional misconduct, the penalty for which is the very limited step of notifying bar counsel in the states where each is licensed, this finding was overturned by a Department of Justice official in January 2010, resulting in the limited step of referral to the bar disciplinary authorities not being taken. Also see Memorandum of David Margolis, Associate Deputy Attorney General for the Attorney General and the Deputy Attorney General, January 5, 2010.

²² See, for example, ‘Prosecuting Abuses of Detainees in U.S. Counter-terrorism Operations’, International Center for Transitional Justice, November 2009, p. 35 ff, available at:

http://www.ictj.org/static/Publications/ICTJ_USA_CriminalJustCriminalPolicy_pb2009.pdf (detailing the possible reasons for the lack of prosecutions despite clear and convincing evidence that U.S. officials were involved in serious violations of international law, including torture).

President Obama has rejected calls for prosecutions and has even rejected calls for the creation of an independent *non-criminal* “Commission of Inquiry.” President Obama prefers to “look forward not behind.”²³ This position ignores the U.S. obligations to suppress and punish grave breaches of the Geneva Conventions and its obligation under UNCAT to prosecute those against whom a prima facie case exists for torture.

The following statement by President Obama demonstrates that accountability for serious violations is neither a priority nor even a preference of the current Administration. This statement was made on 16 April 2009, upon release of four legal memos directed to the CIA that govern interrogations using ‘enhanced interrogation techniques’, including acts recognized to be torture. Particularly relevant – and disturbing – to the nature of the investigation at issue before this Court is the assumption that the very torture memos that the named defendants were involved in drafting – which have been roundly criticized – can provide legal cover from prosecution:

“In releasing these [torture] memos, it is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution . . . ***This is a time for reflection, not retribution.*** We have been through a dark and painful chapter in our history. But at a time of great challenges and disturbing disunity, ***nothing will be gained by spending our time and energy laying blame for the past.***”²⁴

Attorney General Holder of the U.S. Department of Justice has also not opened an investigation into the drafting of the legal memoranda or into the torture program. AG Holder has not opened an investigation into the detention and interrogation policies employed by the Bush Administration that resulted in the torture of detainees. 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.*

There are those who will use my decision to open a preliminary review as a means of broadly criticizing the work of our nation’s intelligence community. I could not disagree more with that view. The men and women in our intelligence community perform an incredibly important service to our nation, and they often do so under difficult and dangerous circumstances. They 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*

²³ Transcript, “This Week,” 11 January 2009, available at <http://abcnews.go.com/ThisWeek/Economy/story?id=6618199&page=3>.

²⁴ 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/.

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.*

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." [...]²⁵

No information about the status or outcome of the preliminary review has been publically released.

c) The Executive Branch Has Consistently Blocked Detainees Access to Justice and Access to a Remedy.

Despite pledges to close Guantánamo within a year of taking office, the detention center at Guantánamo continues to operate and hold nearly 200 male prisoners without charge. Challenges to their detention in the form of habeas petitions are opposed by the Obama Administration. Given the ongoing harm of detention without charge, any investigation into this policy by the Obama Administration - should it ever decide to open one - would have to be deemed ineffective due to bias.

The Obama Administration, through the Department of Justice, has continued the policies of the Bush Administration in blocking attempts of victims of post-9/11 policies to seek accountability and redress in U.S. 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. Rather, the Obama Administration's Justice Department has opposed specific detainees' claims, including those of four British former detainees who sought damages for their arbitrary detention and torture while detained at Guantánamo.²⁶ The Obama Administration's Justice Department has invoked the "states secrets privilege" in an attempt to block a lawsuit brought by five men who allege they were subjected to "extraordinary rendition".²⁷ Finally, in a case seeking damages on behalf of the families of two former detainees who were abused, arbitrarily detained and died at Guantánamo Bay, the Obama Administration's Department of Justice has embraced the arguments put forth under the Bush Administration that torture can be within the scope of employment of U.S. government officials and members of the military – despite the universal recognition that torture can never be an official act.²⁸ 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 can occur again.

²⁵ 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>

²⁶ See *Rasul v. Rumsfeld* case page at: <http://www.ccrjustice.org/ourcases/current-cases/rasul-v.-rumsfeld>.

²⁷ See *Mohamed v. Jeppesen Dataplan, Inc.* case page at: <http://www.aclu.org/nationalsecurity/mohamed-et-al-v-jeppesen-dataplan-inc>.

²⁸ See *Al Zahrani v. Rumsfeld* case page at: <http://www.ccrjustice.org/ourcases/current-cases/al-zahrani-v.-rumsfeld>.

4. Prohibition against Torture under International Law

Further to the submissions originally filed on 17 March 2009 in support of this claim, we now briefly emphasize the key legal bases for the international prohibition against torture that are either directly engaged in, or otherwise relevant to, this matter. While our analysis focuses on torture, we note that it is not the only violation of international law engaged by the acts alleged in this case which extend to include, *inter alia*, prolonged arbitrary detention as well as cruel, inhuman or degrading treatment.

a) UN Convention Against Torture

The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (hereafter, CAT), the key international treaty establishing the prohibition against torture as an international crime,²⁹ was ratified by Spain on 21 October 1987. Article 2 of CAT obliges each state party to “take effective legislative, administrative, judicial and other measures to prevent acts of torture”. It is this obligation which Article 23(4)(h) of the LOPJ clearly seeks to give effect to. Furthermore, Article 2 confirms that neither “war or threat of war, internal political instability or any other public emergency [nor] an order from a superior officer or public authority” can ever justify the use of torture. Significantly, the UN Committee Against Torture have expressly held that the lack of public emergency justification contained in Article 2 prevents states from breaching the prohibition against torture on grounds of counter-terrorism.³⁰ Under Article 4 of CAT, all acts of torture, *including complicity*, are to be punishable as crimes of a grave nature and (under Article 9) “states shall afford one another the greatest measure of assistance in connection with criminal proceedings” that are initiated.³¹ This prohibition against torture as a crime against humanity is clearly reflected in Article 607 *bis* 8 of the Spanish Criminal Code.

b) Torture under international humanitarian law

As is well known, the Geneva Conventions of 12 August 1949³² on the protection of victims of war, as ratified by Spain on 4 August 1952 and supplemented by the two Additional Protocols of 1977, were primarily designed to apply to situations of international armed conflict. However, common Article 3, which is found in each of the four conventions and supplemented by Protocol II, applies to “armed conflict not of an international character”. Common Article 3 clearly states that “violence to life and person, in particular Mutilation, cruel treatment and torture” shall remain “prohibited at any time and in any place whatsoever”. While “armed conflicts not of an international character” is not clearly defined in the Conventions or other supplementary treaties, we note that the absolute prohibition against torture contained in common article 3 has been confirmed as applying to detainees held in Guantánamo (such as the victims identified in the present claim), following the 2006 decision of the U.S. Supreme Court in *Hamdan v Rumsfeld* which held, *inter alia*, that the protection afforded by common Article 3 extended to any armed conflict that was not “a

²⁹ 1465 UNTS 85 (CAT), *supra* note 17.

³⁰ UN Committee Against Torture, *Paez v Sweden* (1997) UN Doc CAT/C/18/D/39/1996.

³¹ *Supra* note 17. While the jurisdictional requirements contained within Articles 5-7 and the investigative obligations established under Article 13 of CAT overlap to some extent with some of our subsequent analysis, a thorough examination of this complex interrelation – in addition to the key provisions of the Optional Protocol to the Convention Against Torture (OPCAT) – is beyond the scope of the current submission.

³² Geneva Conventions (adopted 12 August 1949, entered into force 21 October 1950) including 75 UNTS 31 (Geneva Convention I), 75 UNTS 85 (Geneva Convention II), 75 UNTS 135 (Geneva Convention III) and 75 UNTS 287 (Geneva Convention IV). Supplemented by Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II).

conflict between nations”.³³ Moreover, international humanitarian law imposes clear obligations on all states to prosecute war crimes, such as torture. Article 146 of the Fourth Geneva Convention, for example, imposes a clear obligation on all states to: “search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and ... bring such persons, regardless of their nationality, before its own courts”. This prohibition against torture as a war crime is reflected in Articles 608-614 (esp. 609) of the Spanish Criminal Code.

c) Torture under international human rights law

The principle prohibition against torture, notwithstanding its widespread inclusion in a range of other international and regional human rights treaties,³⁴ is contained within Article 7 of the International Covenant on Civil and Political Rights (ICCPR) which provides: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Again, we stress that this prohibition is absolute – the UN Human Rights Committee, for example, have expressly held that “the text of article 7 allows no limitation” and similarly refused to allow states to use the threat of terrorism to undermine this freedom in any way.³⁵

d) Torture under customary international law

The prohibition against torture is also a peremptory (or *jus cogens*) norm of customary international law.³⁶ As such, the prohibition - which, as outlined above, is both absolute and non-derogable - is binding on all states irrespective of whether they are a party to the specific treaties outlined in the preceding sections.

In summary, torture (including both individual acts and complicity) is subject to absolute prohibition under international law – irrespective of where or against whom it is perpetrated. The victims identified in this case were subject to the protections afforded, *inter alia*, under CAT and the Geneva Conventions at all material times while they were under the effective control of the U.S. authorities. Their right to be free from torture was not - contrary to the view of the alleged perpetrators identified in this complaint – in any way derogable (either on grounds of public emergency, counter-terrorism or otherwise).

³³ 126 S.Ct. 2479 (2006). This decision was later reaffirmed by the Executive Order of President Barack Obama (22 January 2009) *Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities*: “No individual currently detained at Guantánamo shall be held in custody or under the effective control of any officer ... except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Convention”. Furthermore, for a clear statement of the prohibition against torture as a war crime, see Article 8(2) of the ICC Statute.

³⁴ For example, the European Convention on Human Rights (1950); the American Convention on Human Rights (1969); the African Charter on Human and Peoples’ Rights (1981) and the Revised Arab Charter on Human Rights (2004) – all of which prohibit torture in a manner consistent with Article 7 of the ICCPR.

³⁵ See, for example, UN Doc CCPR/C/CAN/CO/5 (at para. 15)

³⁶ Third Restatement of US Foreign Relations Law Vol. II (1987) para. 702; de Wet, E. (2004) *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law* *European Journal of International Law* 15(1): 97; *Prosecutor v. Furundžija*, International Criminal Tribunal for the Former Yugoslavia (2002) 121 *International Law Reports* 213.

5. Jurisdiction under international law

(i) Jurisdiction, concurrency and the subsidiarity principle

As is well known, a number of different forms and bases of criminal jurisdiction are recognized under customary international law. For clarity in this submission, we have divided these bases into two overarching categories:³⁷

a) *National grounds of jurisdiction* –including where:

- the acts are committed by persons of any nationality within the state's territory (the territoriality principle)
- the acts are committed by a state's nationals (the active personality principle)
- the acts victimize a state's nationals (the passive personality principle)³⁸
- the acts are directed against a state's security and/or its ability to carry out official state functions (the protective principle)

b) *International grounds of jurisdiction*, namely where:

- a state asserts jurisdiction solely based on universality of the crime, “irrespective of the place of commission of the crime and regardless of any link of active or passive nationality or other grounds of jurisdiction recognized by international law” (the universality principle).³⁹

First, we wish to stress that while these two broad categories of jurisdiction – national and international – may overlap in practice, they are both conceptually and legally distinct. Significantly, universal jurisdiction (unlike the other grounds which derive, in some way, from a state's independent national interests) arises from the international and universal nature of the crimes themselves, as defined under international law.⁴⁰ As such, universal jurisdiction is distinct from the national jurisdiction of specific states but rather is a base of international jurisdiction available to states to “enforce a shared international entitlement to suppress universal crimes as prescribed in international law”⁴¹ and a means by which a state may act “as a trustee of the fundamental values of the international community”.⁴² Thus, from an international law perspective, we concur with the position of the Spanish Constitutional Court in the *Guatemala Generals* case who held (at para.8) that:

³⁷ See, in particular, Colangelo, A. (2009) Universal Jurisdiction as an International ‘False Conflict’ of Laws, *Mich. J. Int'l L.* 30[3]: 885-925. These bases, and their distinction from the universality principle discussed above, have also been succinctly discussed and endorsed in the recent *AU-EU Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction Report* (2009) 8672/1/09 Ev 1 Annex, at pp. 7 – 11.

³⁸ As mirrored in the new requirements of Article 23(4)(a) of the LOPJ (as amended) which, as discussed above, seek to introduce territoriality and passive personality principles as a necessary ‘legitimizing link’ in universal jurisdiction matters.

³⁹ See Resolution on Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes *Institut de Droit international* (IDI) 2005, para. 1. Available at http://www.idi-ijil.org/idiE/resolutionsE/2005_kra_03_en.pdf. While the definition of universal jurisdiction is far from settled - see, for example, the comments of Judge ad hoc van den Wyngaert in International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v Belgium), 14 February 2020 (at para. 44) [hereafter the ‘Arrest Warrant’ case] and Scheffer, D.J. (2002) The Future of Atrocity Law, *Suffolk Transnational Law Review* 25: 422 – and largely negative in scope, the above framework provides a useful, albeit limited, working definition for the purposes of our current analysis.

⁴⁰ See Principle 1(1) of the Princeton Principles on Universal Jurisdiction, *supra* note 14. at p.21: “criminal jurisdiction is based solely on the nature of the crime without regard to where the crime was committed, the nationality of the alleged or the convicted perpetrator, the nationality of the victim or any other connection to the state exercising jurisdiction”.

⁴¹ Colangelo, *supra* note 37, at 889.

⁴² Kress, C. (2006) Universal Jurisdiction over International Crimes and the Institut de Droit international *J. of Int'l Crim. Justice* 4: 561 – 585 (at 567).

The international and cross-border repression sought through the principle of universal justice is based exclusively on the particular characteristics of the crimes covered thereby, whose harms ... transcend the specific victims and affects the international community as a whole. Consequently, their repression and punishment constitute not only a commitment, but also a shared interest among all states ... whose legitimacy in consequence does not depend on the ulterior individual interests of a state, as demonstrated in ... the resolution adopted by the Institute of International Law in Cracow on August 25, 2005 in which ... it defines criminal universal jurisdiction as “the jurisdiction of a state to prosecute and, when found guilty, punish alleged criminals, independently of the place in which the crime was committed and without considering any connection with regard to the nationality of perpetrator or victim, or other criteria for determining jurisdiction recognized in international law”.⁴³

The crucial point here is that any national law of a particular state used to prosecute international crimes under universal jurisdiction effectively operates as a legal vehicle for the state to give effect to its international law obligations. To illustrate the practical effect of this point, Colangelo offers the following example:

Suppose a U.S. national is alleged to have committed torture in Egypt. Clearly Egypt may exercise prescriptive jurisdiction, and may apply Egyptian law proscribing torture to activity committed in its territory. Under international law, the United States also may exercise prescriptive jurisdiction, and may apply U.S. law proscribing torture to activity committed by its national. Thus we have two States that potentially may claim jurisdiction, under international law, based on state interests. But ... Spain, among other States, has a universal jurisdiction law that allows Spanish courts to prosecute for torture ... so it too conceivably could exercise jurisdiction on these facts.

But unlike the United States and Egypt, Spain’s interest is not linked to any distinctly national jurisdictional entitlement...Rather, for Spain to prosecute, it must rely uniquely upon its international jurisdiction over the universal crime of torture. The *Spanish national law used to prosecute is therefore really just a shell, with no self-supporting national jurisdictional basis, through which Spain applies and enforces international law*. Yet Spain surely has an “interest” in exercising jurisdiction. It may not be an interest related distinctly to national entitlements like national territory and persons, but it is an interest nonetheless (and one that Spain shares with all other States): the application and enforcement of international law against universal crimes [our emphasis added].

Whilst this example was prepared prior to the 2009 amendments to Article 23(4)-(5) of the LOPJ coming into effect, it nonetheless provides a useful means of analyzing some of the jurisdictional issues that may arise in both current and future cases before the Spanish courts. We have previously demonstrated (in s.3(i) of this submission), for example, why the specific requirements of Article 23(4)(a) of the LOPJ are clearly met in the current case – first, by virtue of the Spanish nationality of Hamed Abderrahman Ahmed and the ‘relevant connections’ being established in the parallel case of 150/09 with respect to Ikassrien Lahcen, Jamiel Abdul Latiff Al Banna and Omar Deghayes. Notwithstanding the 2009 amendments to Article 23(4) of the LOPJ, however, there is a distinct basis still available in international law (the universality principle) that would provide this court with an alternative means for exercising jurisdiction in this matter in a way that extends to include the broader group of victims identified in the original complaint. Following the Spanish Supreme Court’s recent decision in *Al Daraj* case discussed above, we understand that there will be a legal challenge introduced in the near future seeking to challenge the legality of the 2009 amendments to Article 23(4)-(5) of the LOPJ.⁴⁴ In the interim, and for the reasons outlined above, we would

⁴³ Judgment No. 237/2005, Constitutional Court, 26 September 2005

⁴⁴ See, for example, the press statement (16 April 2009) by the PCHR available at: http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=6437:pchr-take-al-daraj-

urge this Court to adopt an interpretation of the provisions that gives effect to the *purpose* of the universality principle to facilitate (rather than restrict) Spanish jurisdiction over extraterritorial acts of torture and other international crimes.

Second, we note that international law also envisages a system of *concurrent* jurisdictions *without hierarchy* as to various bases of jurisdiction that it permits. There is, therefore, no positive rule prohibiting states from asserting domestic criminal jurisdiction over an extraterritorial situation that is within the ambit of other states (such as the territorial state where the acts occurred).⁴⁵ Thus in the famous *Lotus* case - arising from the death of eight Turkish nationals in a collision with French steamship and concerning the respective jurisdiction of states involved to try the matter - the Permanent Court of International Justice held:

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law (allowing exercising jurisdiction outside its own territory) ... The territoriality of criminal law ... is not an absolute principle of international law and by no means coincides with territorial sovereignty.⁴⁶

Similarly, the Spanish Constitutional Court – in previously considering the nature of universal, as opposed to territorial, jurisdiction - has held that:

The ultimate basis for this provision attributing jurisdiction resides in the universalization of the jurisdiction of the states and their courts to hear cases involving certain acts whose prosecution and adjudication are in the interests of all those states, *the logical consequence being concurrent jurisdiction, or in other words, a concurrence of states having jurisdiction.*⁴⁷[emphasis added].

Concurrency is, therefore, a direct consequence of the shared obligation amongst states to prosecute international crimes such as torture.⁴⁸ A state that exercises jurisdiction to investigate and prosecute international crimes on the basis of one of the jurisdictional grounds identified above acts within the permissible scope of international law, even if the crime is already being investigated by the authorities of the state where the acts were committed. Within this context we note the recent conclusions of the *AU-EU Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction*. This report - which was prepared at the request of Ministers of African and European Union states in response to diplomatic tensions that ensued from the issuing of arrest warrants by European judges against African officials on the basis of universal jurisdiction - unequivocally declares:

1.3 No Mandatory hierarchy of internationally permissible jurisdictions

14. Positive international law recognizes no hierarchy among the various bases of jurisdiction that it permits. In other words, a state which enjoys universal jurisdiction over, for example, crimes against humanity is under no positive legal obligation to accord priority in respect of

[case-to-constitutional-court-challenge-restrictions-on-universal-jurisdiction-law-in-spain-&catid=36:pchrpressreleases&Itemid=194](#)

⁴⁵ See, for example, Kress, *supra* note 42 (at 566), Princeton Principles, *supra* note 14, Colangelo, *supra* note 37 (at 887).

⁴⁶ S.S. “*Lotus*” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10

⁴⁷ Judgment No. 87/2000, Constitutional Court, March 27, Conclusion of Law para. 4. This principle was later reaffirmed by the Constitutional Court in full in the *Guatemala Generals* case (Conclusions of law, para.3), *supra* note 43.

⁴⁸ See, for example, Princeton Principles, *supra* note 14 and Kress, *supra* note 42 (at 566). For a clear judicial restatement in the Spanish context, see the Dissenting opinion in Judgment No. 1/09, National High Court (Criminal Division), Appeal No. 31/09 (concerning preliminary proceedings No. 157/08), 9 July 2009 (hereafter, the *Al Daraj* matter).

prosecution to the state within which the territory of which the criminal acts occurred or to the state of nationality of the offender or victims.⁴⁹

Third, therefore, the fact that concurrent and non-hierarchical jurisdictional bases are envisaged as operating under international law in this way has a profound impact on the relative status of the *subsidiarity principle* underpinning, *inter alia*, the 2009 amendments to Article 23(4)-(5) of the LOPJ. Most importantly, it is clear that this principle - which variously seeks to prevent the exercise of third state jurisdiction if a state with a closer connection to the crime genuinely exercises its jurisdiction - does not have any firm legal foundation in international law.⁵⁰ Neither - as Ryngaert⁵¹ points out after reviewing state practice in this area and acknowledging its implementation by some states through legislation and case law - is the subsidiarity principle a norm of customary international law. As the *AU-EU Technical Ad Hoc Expert Group* makes patently clear, in a view that we fully endorse, there is *no mandatory hierarchy* of internationally permissible jurisdictions or any rules under international law restricting the exercise of universal jurisdiction.

At best, therefore, the subsidiarity principle has been accorded priority by certain states only as a matter of *policy* and/or political expediency, rather than law. It is within this context, for example, that the *AU-EU Technical Ad Hoc Expert Group* recommend that states consider prioritizing territoriality as a basis for jurisdiction when prosecuting international crimes as “a matter of policy”⁵² for practical reasons, that other academic commentators recommend tempering the state application of universal jurisdiction in the prosecution of international crimes through subsidiarity on the grounds of “reasonableness”⁵³ or “good sense”⁵⁴ and that Spanish Courts have variously suggested prioritizing subsidiarity on the grounds of “procedural and political-criminal reasonableness”.⁵⁵ Indeed, we acknowledge that one of the express aims of the 2009 amendments to Article 23(4) of the LOPJ was to “allow the adaption and clarification of that article in accordance with the principle of subsidiarity”.⁵⁶ However, we submit that where subsidiarity is applied, it should always be done so subject to certain conditions relating to the exercise of jurisdiction by the territorial state and it these threshold conditions which we now examine.

(ii) Conditional subsidiarity

Our starting point, following from the analysis outlined above, is that the position enjoyed by territorial jurisdiction under international law does not lead to an absolute and unlimited subsidiarity of universal jurisdiction. Rather, the primacy currently afforded to the territoriality principle by certain states is a matter of policy grounded in a form of *conditional*

⁴⁹ *AU-EU Expert Group on the Principle of Universal Jurisdiction*, *supra* note 37, (at p.11). Cf: Kress *supra* note 42 (at 579)

⁵⁰ See, for example, Geneuss, J. (2009) Fostering a better understanding of universal jurisdiction: a comment on the AU-EU Expert report on the Principle of Universal Jurisdiction, *J. of Int'l Crim. Justice* 7: 945 – 962

⁵¹ Ryngaert, C. (2008) Applying the Rome Statute's complementarity principle: drawing lessons from the prosecution of core crimes by states acting under the universality principle, *Criminal Law Forum* 19: 153 (at 173)

⁵² AU-EU Technical Ad Hoc Expert Group, *supra* note 37 R.9. For further examples, see Colangelo, A. (2009) Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory *Wash. U. L. Rev.* 86: 769

⁵³ Ryngaert, *supra* note 51

⁵⁴ Colangelo. *supra* note 37, at 900

⁵⁵ *Supra* note 48

⁵⁶ 121/000028 Proyecto de Ley Orgánica complementaria de la Ley de Reforma de la Legislación Procesal para la Implantación de la Nueva Oficina Judicial, por la que se modifi ca la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial. Boletín Oficial de las Cortes Generales. Congreso de los Diputados, IX Legislatura. Serie A: Proyectos de Ley 6 de Julio de 2009. Núm- 28-3. Preambulo

subsidiarity, the nature and substantive content of which has yet to have been conclusively settled.⁵⁷

First, however, it seems agreed that if the principle of subsidiarity is to be applied by one state it should only be done so at the *conclusion* of another states investigation.⁵⁸ Investigations can clearly be initiated simultaneously in different countries with the evidentiary material collected shared in mutual legal assistance and transferred to the forum state which ultimately prosecutes the matter.⁵⁹

Second, there is widely agreed that the prioritization of subsidiarity by third states as a matter of policy is dependent upon the territorial state acting in “good faith” to exercising their own criminal jurisdiction to investigate and prosecute international crimes.⁶⁰ Some commentators have suggested that the normative content of this criterion is based on, and simply reflects, the complementarity principle enshrined in Article 17 of the Rome Statute of the International Criminal Court (hereafter, the ICC Statute).⁶¹ It is our view, however, that the application of the subsidiarity principle in the context of universal jurisdiction (as discussed above) does not (and should not) simply coincide with the minimum ‘unwilling or unable’ requirements specified in the complementarity principle enshrined in Article 17(1)(a) of the ICC Statute. First, while the complementarity principle is clearly applicable to state-ICC relations, it does not apply on a state-to-state level where concurrent jurisdiction with conditional subsidiarity prevails (as in this case). Second, the complementarity must clearly be read in the context of the preamble to the ICC Statute which notes, *inter alia*, that “it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes” and that “the most serious crimes of concern to the international community as a whole must not go unpunished and ... their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.” The fight against impunity, therefore, is paramount and envisaged as a joint effort between States and the ICC, where bystander states (rather than simply territorial states) have a crucial to play in the prosecution of international crimes. Third, moreover, if complementarity principles of the ICC statute are to be considered in the context of the current case, they ought to be read in conjunction with Articles 55, 67 and 21(3) which stipulate that proceedings must adhere to ‘internationally recognized human rights standards’.

In this case, therefore, we submit that any assessment undertaken by Spanish authorities pursuant to Article 23(4)-(5) of the LOPJ (as amended) as to the existence and/or extent of the prosecutorial efforts undertaken (by the U.S. authorities or otherwise) must go beyond the minimum requirements of the complementarity principle and take the accepted standards of investigative obligations established under international human rights law into account as relevant considerations.

(iii) Investigative obligations under international and European law

International law variously requires an ‘effective remedy’ to be made available to victims by states in the case of human rights violations,⁶² such as torture. When torture has been or

⁵⁷ Thus, Kress [*supra* note 42 (at 580)] argues that “It is ... impossible to identify - as a matter of customary international law - a certain standard of proof required in determining whether or not the holder of the primary right to adjudication is unwilling or unable to prosecute the case”.

⁵⁸ Kress, *supra* note 42 (at 580). See also *Arrest Warrant* case (*supra* note 39), Separate and Joint Opinion of Judges Higgins, Kooijmans, Buergenthal at para. 59.

⁵⁹ See *AU-EU Technical Ad Hoc Expert Group*, *supra* note 37, R10

⁶⁰ See Colangelo, *supra* note 37, at 835. For a similar approach, see the *Arrest Warrant* case, *supra* note 15, at pp. 64 – 91.

⁶¹ ICC Statute (available at: <http://www.icc-cpi.int>)

⁶² See, for example, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 2(3)(a)

appears to have been committed, the state involved firstly has an obligation under international law to undertake an effective investigation into the matter and to bring the perpetrators to justice, particularly through the institution of criminal proceedings.⁶³ Furthermore, ECHR jurisprudence on the nature of the investigative obligation arising from breaches to Article 2 (the Right to Life), Article 3 (prohibition against ill treatment and torture) and, by extension, Article 13 (right to an effective remedy) is relevant in this context. In a number arising from Turkey involving both Articles 2 and 3 of the European Convention, for example, the ECHR have held that where there is an ‘arguable’ allegation of torture, Article 13 requires “a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure”.⁶⁴ Indeed, as the Dissenting Opinion (of 9 July 2009) of the National High Court made clear in the *Al Daraj* matter (at para.4), this European jurisprudence can and should be referred to by Spanish courts when determining the applicable criteria in such cases under Article 23(4)-(5) of the LOPJ.⁶⁵

Considered together, international and European law establishes that for an investigation to be *effective* it must be:

a) *Independent*

That is, the persons responsible for carrying out the investigation must be independent from those implicated in the events.⁶⁶ The investigators’ independence must not simply be a formality but also a practical reality.⁶⁷ In *Khan v UK*⁶⁸, for example, the ECHR held that a form of internal investigation (in that case, a police complaints system) lacked the requisite degree of independence to provide an ‘effective remedy’ because the head of the police ordinarily appointed a member of their own force to carry out the investigation and cabinet ministers of the Central government were responsible for appointing, remunerating and dismissing members of the investigative authority in question. Similarly, in *Tanrikulu v Turkey*⁶⁹ the ECHR found that the Turkish authorities had failed to carry out an ‘effective investigation’ as required under Article 2 of the European Convention because investigations were carried out by ‘administrative councils’ (rather than the public prosecutor) composed of civil servants ultimately subordinate to the authority whose conduct was in question. Similarly, state security courts, in which military judges participate, have also been found to render investigations ineffective in cases where security forces are implicated in the crime.⁷⁰

b) *Enable the determination of the claim and provide a right of redress.*

⁶³ See, for example, 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).

⁶⁴ See, for example, *Aksoy v Turkey* (1997) 23 EHRR 553; *Kaya v Turkey* (19 February 1998); *Aydin v Turkey* (1998) 25 EHRR 251; *Kurt v Turkey* (1999) 27 EHRR 373

⁶⁵ *Supra* note 48

⁶⁶ 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)

⁶⁷ *Ergi v Turkey* (2001) 32 EHRR 18.

⁶⁸ *Khan v UK* (2001) No. 35394/97 5 EHRR 347. See also *Govell v UK* (1999) EHLR 121

⁶⁹ *Tanrikulu v Turkey* (2000) No. 26763/94 30 EHRR 950

⁷⁰ *Incal v Turkey* (2000) No. 22678/93 29 EHRR 449

Significantly, this means, *inter alia*, that an effective investigation must be “capable of leading to the *identification and punishment* of those responsible”.⁷¹ Given that torture is a crime under international law, therefore, the obligation to identify and bring the perpetrators to justice entails a *criminal* investigation and/or prosecution.⁷² Furthermore, administrative inquiries or civil claims that lack the capacity to render alleged perpetrators of international crimes criminally accountable go no way toward meeting this criterion as the remedy must be capable of affording effective redress. For this reason, remedies which are either discretionary or unenforceable generally fail to comply with this criterion.⁷³ Moreover, as the ECHR held in *Paul and Audrey Edwards v UK*,⁷⁴ an inquiry which lacks the powers to compel witnesses to attend and give evidence – in that case, a non-statutory inquiry set up to investigate the death of a prisoner in custody – is ineffective and in breach of the investigative obligations imposed by the European Convention, notwithstanding (in that case) the fact that it took evidence from a number of witnesses, produced a 388-page report and made official recommendations for reform.

c) *Thorough*

That is, investigations must obtain all information necessary to the inquiry. Authorities must make a serious attempt to find out what happened and must not rely on hasty or ill-founded conclusions as the basis for their decisions,⁷⁵ including taking all reasonable steps available to them to secure evidence (including witness testimony) that is material to the matter.⁷⁶ Ignoring obvious evidence or failing to properly search for corroborating evidence can render an investigation ineffective.⁷⁷ In *Cobzaru v Romania*,⁷⁸ for example, the ECHR held that a failure to question key witnesses, failure to question victims and the unquestioning reliance upon the statement of those allegedly involved in torture constituted a breach of investigative obligations imposed by Article 3 of the European Convention. Furthermore, a plethora of ECHR cases have confirmed the principle that inadequate questioning of state authorities or officials identified as alleged perpetrators is in itself sufficient to render an investigation ‘ineffective’ under the European convention.⁷⁹ Moreover, the degree of effectiveness must be strictly construed when fundamental rights – such as freedom from torture – are involved. Thus, in *Chahal v UK*⁸⁰, the ECHR overturned earlier case law⁸¹ in holding a remedy which is “as effective as can be” is entirely insufficient in matters that engage Article 3 of the European Convention.

d) *Prompt*

It is well established that an effective investigation must be undertaken with reasonable expedition and without undue delay.⁸² The rationale for this rule was simply expressed by the European Court in the case of *Finucane v United Kingdom*.⁸³

⁷¹ *Aksoy v Turkey*, *supra* note 64, (at para. 98, our emphasis added).

⁷² Rodley N. and Pollard M. (2009) *The Treatment of Prisoners under International Law* (3rd ed) OUP: 151.

⁷³ See Leach, P. (2005) *Taking a Case to the European Court of Human Rights* (2nd ed) OUP (at 342)

⁷⁴ *Paul and Audrey Edwards v UK* (2002) No. 46477/99 35 EHRR 19

⁷⁵ *Boicenco v Moldova* (No. 41088/05) ECHR 11 July 2006, at para. 123.

⁷⁶ *Jordan v United Kingdom*, *supra* note 66, at para 106 and the *Istanbul Principles* (*supra* note 63), esp. at paras. (1) – (3)

⁷⁷ *Aydin v Turkey*, *supra* note 64

⁷⁸ *Cobzaru v Romania* (2007) No. 48254/99 ECHR 26 July 2007

⁷⁹ See, for example, *Onen v Turkey* (No. 22876/93), *Angelova v Bulgaria* (No. 38361/97) (2004) 38 EHRR 31; *Demiray v Turkey* (No. 27308/95); *Atlas v Turkey* (No. 24351/94) (2004) 38 EHRR 18; *Nachova and ors v Turkey* (2004) Nos. 43577/98 and 43579/98 39 EHRR 37

⁸⁰ *Chahal v UK* (1997) 23 EHRR 413

⁸¹ *Leander v Sweden* (1987) 9 EHRR 433

⁸² On promptness see, *inter alia*, UN Human Rights Committee *Rajapakse v Sri Lanka* (2006) UN Doc CCPR/C/87/D/1250/2004, at paras. 9.4-9.5. See also ICC Statute, Article 17(2)(b).

The lapse of time, the effect on evidence and the availability of witnesses may inevitably render ... an investigation an unsatisfactory or inconclusive exercise which fails to establish important facts or put to rest doubts and suspicions.

In *Jordan v United Kingdom*, the ECHR (at para. 106) put this requirement following terms:

A requirement of promptness and reasonable expedition is implicit in this context. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities ... may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

The promptness requirement has been strictly interpreted under international law. In *Blanco Abad v Spain*,⁸⁴ for example, the UN Committee Against Torture found that a delay of 3 weeks in initiating an investigation against alleged perpetrators of torture constituted a breach of the investigative obligation established under Article 12 of CAT. Furthermore, in *Cicek v Turkey*⁸⁵ the ECHR held that a delay of one and a half years to make initial inquiries and three and a half years for the prosecutor to take witness statements in relation to the disappearance of suspected PKK members in Turkey was in clear breach of the investigative obligations imposed on States under the European Convention.

⁸³ *Finucane v UK* (2003) No. 29178/95 37 EHRR 221

⁸⁴ (1998) UN Doc CAT/C/20/D/59/1996

⁸⁵ *Cicek v Turkey* (2003) No. 25704/94 37 EHRR 20 (at para. 149)

6. Conclusion

Further to the key principles outlined above, and our analysis in s.3(ii) of this submission about the state of U.S investigations to date, we make the following summary observations:

First, it is clear that there has been no independent and thorough investigation into the criminal acts allegedly perpetrated by the defendants identified in this complaint. The non-criminal investigations which *have* taken place have been extremely limited in scope, generally directed towards lower-ranking soldiers (in the case of Abu Ghraib torture scandal) and without the capacity to either compel witnesses to attend or render the alleged perpetrators criminally accountable. As such, these limited ‘investigations’ are patently *ineffective* because they lack the capacity to both properly enable the determination of the international crimes identified in this claim and afford redress to the victims.

Second, we submit that this failure needs to read within the context of impunity that has been actively fostered by both the Bush and Obama Administrations. Both President Obama and U.S. Attorney General Holder have stated - in their desire to “look forward, not behind” - that they will in effect shield alleged perpetrators of international crimes from prosecution if they acted in “good faith” and circumscribe the scope of any investigations to ensure that such individuals are protected. By pre-emptively limiting the scope of inquiries in this way to exclude officials implicated and identified as alleged perpetrators, and failing to properly obtain evidence that might be material to their prosecution, such inquiries *lack the requisite degree of thoroughness* to meet the standard of an ‘effective investigation’ as defined above by international and European jurisprudence. Furthermore, it indicates a degree of ‘unwillingness’ to prosecute that, we submit, approximates the threshold established under Article 17(2)(a) of the ICC Statute.⁸⁶

Third, as there has been no effective investigation or prosecution into the crimes alleged in this matter to date, nor is there likely to be any such investigation in the near future, there is consequently an ongoing failure by the U.S authorities to meet their obligations for promptness as outlined in the preceding section of our submission. Again, we suggest that this failure would meet the threshold for ‘unwillingness’ as established by Article 17(2)(b) of the ICC Statute⁸⁷ and breach the accepted investigatory standards as established by the ECHR.

In sum, therefore, we submit that this Court is well within its powers – both under Article 23(4)-(5) of the LOPJ and the international law which it seeks to reflect – to hear the current complaint. As there is both sufficient Spanish interest and ‘relevant connection’ in this case, and no ‘effective investigation and prosecution’ that has been initiated in any other country, the requirements of the legislation are clearly met.

Moreover, we submit that Article 23(4)-(5) of the LOPJ – which contains the express proviso “notwithstanding whatever may be provided in other treaties and international conventions ratified by Spain” - ought to properly be situated and understood in the context of international law. As such, we have shown that Spain *must* still retain (universal) jurisdiction over international crimes (such as torture) and have therefore suggested that this Court give a

⁸⁶ Article 17(2)(a) of the ICC Statute provides: “In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5”. *Supra* note 61

⁸⁷ Article 17(2)(b) of the ICC established that ‘unwillingness’ to prosecute can be identified when “there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice”. *Supra* note 61

broad and *purposive* interpretation to the 2009 amendments consistent with Spain's obligations under international law.

International law recognizes a system of *concurrent* and *non-hierarchical* jurisdictions. Accordingly, the subsidiarity principle - which underpins the 2009 amendments to the LOPJ - does not have any legal basis in international law. While this principle has been prioritized by certain states as a matter of policy and/or political expediency, we have argued that its use is, and ought to be, always *conditional* upon territorial states meeting the accepted standards of "effective investigation" as established under international and European law. In this case, as we have demonstrated above, the limited inquiries into the crimes alleged in this complaint undertaken to date by the U.S authorities fall far short of these accepted standards.

We are grateful for being able to provide our joint expert opinion in this case. If it would assist the Court, we would welcome the opportunity to provide more detailed submissions on this matter in the future.

Enc.