# Legal Opinion Concerning the Application of Universal Jurisdiction for Prosecutions in Spain with Particular Reference to the Commission of Acts of Torture, Waging Aggressive War, Illegal Detention, and *jus cogens* War Crimes and Crimes Against Humanity by Officials and Agents of the Government of the United States of America


Abstract

This Opinion provided at the request of Spanish counsel considers the application of Universal Jurisdiction, under international and Spanish Law in cases currently pending before the Juzcado Central de Instrucion.

The cases involve alleged crimes of Torture, War Crimes and Crimes Against Humanity, Illegal or Arbitrary Detention, and the supreme international crime of Waging Aggressive War, which have culminated in the detention of Spanish and other nationals in the Guantanamo Bay, Cuba facility under the control of the United States government.

The potential defendants are former officials and agents of the government of the United States and the victims were/are detainees under U.S. control and/or previously exposed to U.S. military action in Iraq.

The Opinion examines the evidence and the basis for the application of Universal Jurisdiction by the Spanish Court as well as considering the defenses of Superior Orders and Sovereign Immunity – both *ratione materiae* and *ratione personae* – available to the Defendants.

Also examined in the context of Spanish Law is the issue of *in absentia* investigations in circumstances where prosecution by the defendants' State is refused and extradition is also denied, thus violating the honored precept *aut dedere aut judicare*. Before ruling on this issue, the Court is urged to Order that an International Rogatory be sent to the U.S. Attorney General requesting a certification as to whether or not there are any open criminal cases existing against the named defendants.

It concludes that in light of the *prima facie* evidence and the apparent violations of Treaty obligations and international humanitarian and customary Law and the Spanish Code of Procedure that the Spanish investigations, and prosecutions, where in the Magistrate's opinion they are supported by the evidence, should proceed, *in absentia* if necessary. In such instance, however, the Court is urged to ensure that defense counsel is available to vigorously represent each of the defendants at every stage of the proceedings through trial.

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44-1-233-350-239

6 May 2009

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Re: **Legal Opinion Concerning the Application of Universal Jurisdiction for Prosecutions in Spain with Particular Reference to the Commission of Acts of Torture, Waging Aggressive War, Illegal Detention, and jus cogens War Crimes and Crimes Against Humanity by Officials and Agents of the Government of the United States of America**

Dear Sr. Boye;

## Introduction

In light of the apparent reluctance, if not unwillingness, of the President of the United States and the U.S. Attorney General to seek the prosecution of officials of the previous administration for the policy and practice of using interrogation techniques, constituting criminal acts of torture under international law as well as other war crimes and crimes against humanity, you have requested that I provide an opinion as to the legal effect of such a refusal on the potential investigation and prosecution of the perpetrators by the courts of Spain under Universal Jurisdiction. The Opinion consists of nine sections. For your convenience, the following Table of Contents contains a brief summary of each section.

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Guantanamo Bay prison in the U.S. with no charges or trials being contemplated. The section concludes that the investigation should focus on 3 principals and 6 accessories.

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This section examines the concept of Universal Jurisdiction and how it has evolved. It is seen as basically embodying the obligation as well as the right of a State party to a treaty – such as the Torture Convention – to investigate acts of officials of another Treaty state, in particular where the offending State refuses to act. It concludes, with respect to the crimes here being alleged, that Spain has not only the right but an obligation to intervene and accept jurisdiction.

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*This section focuses on the precedents for the Spanish courts assuming jurisdiction over the Torture Treaty violations and the resulting crimes by U.S. officials and agents. The Pinochet case looms large in the discussion as does the Fujimori investigation which was deferred by his prosecution in Peru. The presence of Spanish nationals as victims clearly establishes the jurisdictional criterion of passive personality, leading to the conclusion that, absent prosecutorial actions in the U.S., the Spanish court has jurisdiction and a treaty obligation to investigate and, if merited by the evidence, to seek extradition and prosecute.*

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*This section focuses in considerable detail on the two primary defenses that the potential defendants may assert. The Defense of Superior Orders (which U.S. President Obama has already accepted on behalf of CIA interrogators) is examined in historical detail. The "Nuremberg Defense" is seen as not being valid in the instant cases, considering the nature of the crimes, with both superiors and subordinates, whether civilian or military or mixed, having criminal liability. The defense of immunity, historically attaching to serving Heads of State and senior government officials based upon the office they occupy effectively "standing in the shoes" of the state even extending to them when they are out of office for their "public" acts (ratione materiae) and personal immunity which is afforded such officials while carrying out their official duties (ratione personae) is examined in evolutionary detail. As evidenced by the Pinochet and Fujimori cases and the special Tribunals prosecuting Milosovic, Taylor, and the remaining Khmer Rouge leaders it has become clear that jus cogens crimes, embodied in treaties such as the Torture Convention can no longer be considered Acts of State conveying State or personal immunity. Such criminal conduct offends the conscience of mankind and the conclusion is that once a serving Head of State and senior governmental officials leave office they may be subject to investigation and prosecution and unable to assert sovereign immunity as a defense.*

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*This final section reviews the crimes under consideration and considers the paper trail of official communications even prior to the Torture Memos, setting them out in chronological order, which advocate the existence of virtually unlimited executive power. It also considers the possibility of any prosecutions taking place in the U.S. in light of very recent comments by the President, the Attorney General, and senior members of the Administration, which leave little hope. It concludes, from the U.S. government's own documents and the public*

*statements of it's leaders, that there is prima facie evidence of the following crimes:*

- *Torture and the Conspiracy to Commit Torture*
- *Waging Aggressive War*
- *War Crimes and Crimes Against Humanity*
- *Illegal (Arbitrary) Detention*

*It places varying degrees of responsibility on particular government officials including George W. Bush and Richard Cheney and dismisses as inapplicable to serious international crimes the relevant defenses available to them and their subordinates including the government lawyers who it is argued have a special professional responsibility.*

*Finally, it concludes that history teaches us that investigations of such crimes, by themselves, will not do, and that legally justified prosecutions must occur. Stating that the ultimate complaint at the Bar of the Spanish Court is civilization itself, the conclusion is that at this time only Spain can, and must, undertake this task. It is fully able and obligated to do so under international law and Universal Jurisdiction.*

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## 1. The Pending Investigations

I understand that there are two pending investigations/prosecutions being considered by the Juzcado Central de Instrucion. One is a general case which is addressed by the full scope of this opinion. The other is against six former officials of the Administration of former American President George W. Bush. The six are: former Counsel to the President and U.S. Attorney General Alberto R. Gonzales; former legal counsel and then Chief of Staff to Vice President Dick Cheney, David S. Addington; former Deputy Secretary of Defense, Douglas J. Feith; former counsel to the Secretary of Defense, William J. Haynes II; former counsel in the Office of Legal Counsel of the Department of Justice , John Yoo; and former counsel in the Office of Legal Counsel to the Department of Justice, Jay S. Bybee.

The six defendants are charged with facilitating a program of what is euphemistically called enhanced interrogation of prisoners and detainees which includes techniques clearly amounting to torture, contravening the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the U.S. implementing legislation, the Torture Victims Protection Act, through the intentional infliction of severe physical or mental pain and suffering.

It is alleged based on a range of evidence, including explicit statements by Lawrence Wilkerson, former Secretary of State Colin Powell's Chief of Staff, that the six met regularly for the purpose of developing a legal rationale for the use of enhanced interrogation or torture techniques and acts of cruel, inhuman, and degrading treatment on prisoners held at Guantanamo Bay and elsewhere.

Critical documentation has become available setting out the process and the various roles of the defendants. It appears that a memorandum issued by President Bush on 7 February 2002 began this process, according to a report issued in part by the Senate Armed Services Committee on 11 December 2008 with the full report recently released. The report was the result of an 18-month investigation which generated 38,000 pages of documents and reflected the testimony of 70 people.

The Bush memorandum concluded that the standards set by the Third Geneva Convention for the treatment of prisoners in armed conflicts did not apply to detainees picked up in the conflict against al Qaeda and the Taliban. Thus the application of the protections of Common Article 3 of the Geneva Conventions which would have afforded minimum standards of humane treatment for these detainees was barred.

The process then moved forward to consider which interrogation techniques could be used.

In the spring of 2002 these discussions involved the National Security Council, the C.I.A., the Department of Justice, and the Department of Defense. Evidence reveals that in July 2002 Defendant William Haynes (Department of Defense Counsel) played a major role in developing the types of harsh methods which the interrogators could use against detainees who were being held at the U.S. naval base at Guantanamo Bay, Cuba. Defendant Haynes urged Secretary of Defense Rumsfeld to approve 15 such harsh techniques. Rumsfeld did approve them.

Eventually, these discussions led to a request that the Office of Legal Counsel of the Department of Justice prepare a legal memorandum to serve as a rationale for the use of the

enhanced or harsh interrogation techniques. The development of this memorandum, effectively legitimizing the use of torture techniques and acts of cruel, inhuman, and degrading treatment was produced by Defendants John Yoo and Jay Bybee in a Memorandum dated 1 August 2002. (See Exhibit A)

The available reports and documentation indicate that the President's counsel, Alberto Gonzales, and the Vice President's counsel and ultimately Chief of Staff, David Addington, contributed materially to the process of legitimizing the torture techniques and acts of cruel, inhuman, and degrading treatment and causing them to be implemented. Addington traveled to Guantanamo on 26 September 2002 accompanied by, among others, Gonzales, Haynes, and C.I.A. Deputy Counsel John Rizzo. In the course of that visit and, on the return, two other stops to view the treatment of detainees Jose Padilla and Yaser Hamdi, Addington, with Gonzales' support, endorsed harsh treatment.

The Yoo/Bybee torture memorandum and the Guantanamo visit were followed by an "action memorandum" from Haynes in November 2002 which encouraged the Defense Secretary to order the implementation of the harsh interrogation techniques. On 2 December 2002 Secretary Rumsfeld did, in fact, authorize the aggressive interrogation techniques, leading to interrogation policies and plans that the Armed Services Committee report said conveyed the message that physical pressures and degradation were appropriate treatment for detainees in U.S. military custody.

After the U.S. led invasion of Iraq in 2003 and the resulting Iraqi insurgency against the American occupation in 2004, the harsh interrogation techniques which had been used at Guantanamo spread to Abu Ghraib prison in Iraq and eventually to other sites in Iraq,

Afghanistan, and elsewhere.

It has also become clear that Undersecretary of Defense Douglas Feith was, as a result of his position, in regular contact with the Secretary of Defense and that he knew of and supported the use of the torture techniques, because he participated in the planning and developmental meetings during 2002 subsequent to the Bush memorandum of 7 February 2002.

With respect to the events set out following an 18-month investigation by the Senate Armed Services Committee, its full report, released 22 April 2009, issued the following conclusions:

> **Conclusion 1:** On February 7, 2002, President George W. Bush made a written determination that Common Article 3 of the Geneva Conventions, which would have afforded minimum standards for humane treatment, did not apply to al Qaeda or Taliban detainees. Following the President's determination, techniques such as waterboarding, nudity, and stress positions, used in SERE (Survival Evasion Resistance Escape) training to simulate tactics used by enemies that refuse to follow the Geneva Conventions, were authorized for use in interrogations of detainees in U.S. custody.
>
> **Conclusion 2:** Members of the President's Cabinet and other senior officials participated in meetings inside the White House in 2002 and 2003 where specific interrogation techniques were discussed. National Security Council Principals reviewed the CIA's interrogation program during that period.
>
> Conclusions on SERE Training Techniques and Interrogations
>
> **Conclusion 3:** The use of techniques similar to those used in SERE resistance training – such as stripping students of their clothing, placing them in stress positions, putting hoods over their heads, and treating them like animals - was at odds with the commitment to humane treatment of detainees in U.S. custody. Using those techniques for interrogating detainees was also inconsistent with the goal of collecting accurate intelligence information, as the purpose of SERE resistance training is to increase the ability of U. S. personnel to resist abusive interrogations and the techniques used were based, in part, on Chinese Communist techniques used during the Korean War to elicit false confessions.
>
> **Conclusion 4:** The use of techniques in interrogations derived from SERE resistance training created a serious risk of physical and psychological harm to detainees. The SERE schools employ strict controls to reduce the risk of physical and psychological harm to students during training. Those controls include medical and psychological screening for students, interventions by trained psychologists during training, and code words to ensure that students can stop the application of a technique at any time should

the need arise. Those same controls are not present in real world interrogations.

Conclusions on Senior Official Consideration of SERE Techniques for Interrogations

Conclusion 5: In July 2002, the Office of the Secretary of Defense General Counsel solicited information from the Joint Personnel Recovery Agency (JPRA) on SERE techniques for use during interrogations. That solicitation, prompted by requests from Department of Defense General Counsel William J. Haynes II, reflected the view that abusive tactics similar to those used by our enemies should be considered for use against detainees in U.S. custody.'

Conclusion 6: The Central Intelligence Agency's (CIA) interrogation program included at least one SERE training technique, waterboarding. Senior Administration lawyers, including Alberto Gonzales, Counsel to the President, and David Addington, Counsel to the Vice President, were consulted on the development of legal analysis of CIA interrogation techniques. Legal opinions subsequently issued by the Department of Justice's Office of Legal Counsel (OLC) interpreted legal obligations under u.s. anti-torture laws and determined the legality of CIA interrogation techniques. Those OLC opinions 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.

Conclusions on JPRA Offensive Activities

Conclusion 7: Joint Personnel Recovery Agency (JPRA) efforts in support of "offensive" interrogation operations went beyond the agency's knowledge and expertise. JPRA's support to U.S. government interrogation efforts contributed to detainee abuse. JPRA's offensive support also influenced the development of policies that authorized abusive interrogation techniques for use against detainees in U.S. custody.

Conclusion 8: Detainee abuse occurred during JPRA's support to Special Mission Unit (SMU) Task Force (TF) interrogation operations in Iraq in September 2003. JPRA Commander Colonel Randy Moulton's authorization of SERE instructors, who had no experience in detainee interrogations, to actively participate in Task Force interrogations using SERE resistance training techniques was a serious failure in judgment. The Special Mission Unit Task Force Commander's failure to order that SERE resistance training techniques not be used in detainee interrogations was a serious failure in leadership that led to the abuse of detainees in Task Force custody. Iraq is a Geneva Convention theater and techniques used in SERE school are inconsistent with the obligations of U.S. personnel under the Geneva Conventions.

Conclusion 9: Combatant Command requests for JPRA "offensive" interrogation support and U.S. Joint Forces Command (JFCOM) authorization of that support led to JPRA operating outside the agency's charter and beyond its expertise. Only when JFCOM's Staff Judge Advocate became aware of and raised concerns about JPRA's support to offensive interrogation operations in late September 2003 did JFCOM leadership begin to take steps to curtail JPRA's "offensive" activities. It was not until September 2004, however, that JFCOM issued a formal policy stating that support to offensive

interrogation operations was outside JPRA's charter.

## Conclusions on GTMO's Request for Aggressive Techniques

**Conclusion 10:** Interrogation techniques in Guantanamo Bay's (GTMO) October 11, 2002 request for authority submitted by Major General Michael Dunlavey, were influenced by JPRA training for GTMO interrogation personnel and included techniques similar to those used in SERE training to teach U.S. personnel to resist abusive enemy interrogations. GTMO Staff Judge Advocate Lieutenant Colonel Diane Beaver's legal review justifying the October 11, 2002 GTMO request was profoundly in error and legally insufficient. Leaders at GTMO, including Major General Dunlavey's successor, Major General Geoffrey Miller, ignored warnings from DoD's Criminal Investigative Task Force and the Federal Bureau of Investigation that the techniques were potentially unlawful and that their use would strengthen detainee resistance.

**Conclusion 11:** Chairman of the Joint Chiefs of Staff General Richard Myers's decision to cut short the legal and policy review of the October 11, 2002 GTMO request initiated by his Legal Counsel, then-Captain Jane Dalton, undermined the military's review process. Subsequent conclusions reached by Chairman Myers and Captain Dalton regarding the legality of interrogation techniques in the request followed a grossly deficient review and were at odds with conclusions previously reached by the Army, Air Force, Marine Corps, and Criminal Investigative Task Force.

**Conclusion 12:** Department of Defense General Counsel William J. Haynes II's effort to cut short the legal and policy review of the October 11, 2002 GTMO request initiated by then Captain Jane Dalton, Legal Counsel to the Chairman of the Joint Chiefs of Staff, was inappropriate and undermined the military's review process. The General Counsel's subsequent review was grossly deficient. Mr. Haynes's one page recommendation to Secretary of Defense Donald Rumsfeld failed to address the serious legal concerns that had been previously raised by the military services about techniques in the GTMO request. Further, Mr. Haynes's reliance on a legal memo produced by GTMO's Staff Judge Advocate that senior military lawyers called "legally insufficient" and "woefully inadequate" is deeply troubling.

**Conclusion 13:** Secretary of Defense Donald Rumsfeld's authorization of aggressive interrogation techniques for use at Guantanamo Bay was a direct cause of detainee abuse there. Secretary Rumsfeld's December 2, 2002 approval of Mr. Haynes's recommendation that most of the techniques contained in GTMO's October 11, 2002 request be authorized, influenced and contributed to the use of abusive techniques, including military working dogs, forced nudity, and stress positions, in Afghanistan and Iraq.

**Conclusion 14:** Department of Defense General Counsel William J. Haynes II's direction to the Department of Defense's Detainee Working Group in early 2003 to consider a legal memo from John Yoo of the Department of Justice's OLC as authoritative, blocked the Working Group from conducting a fair and complete legal analysis and resulted in a report that, in the words of then Department of the Navy General Counsel Alberto Mora contained "profound mistakes in its legal analysis." Reliance on the OLC memo resulted in a final Working Group report that recommended approval of several aggressive

techniques, including removal of clothing, sleep deprivation, and slapping, similar to those used in SERE training to teach U. S. personnel to resist abusive interrogations.

Conclusions on Interrogations in Iraq and Afghanistan

**Conclusion 15:** Special Mission Unit (SMU) Task Force (TF) interrogation policies were influenced by the Secretary of Defense's December 2, 2002 approval of aggressive interrogation techniques for use at GTMO. SMU TF interrogation policies in Iraq included the use of aggressive interrogation techniques such as military working dogs and stress positions. SMU TF policies were a direct cause of detainee abuse and influenced interrogation policies at Abu Ghraib and elsewhere in Iraq.

**Conclusion 16:** During his assessment visit to Iraq in August and September 2003, GTMO Commander Major General Geoffrey Miller encouraged a view that interrogators should be more aggressive during detainee interrogations.

**Conclusion 17:** Interrogation policies approved by Lieutenant General Ricardo Sanchez, which included the use of military working dogs and stress positions, were a direct cause of detainee abuse in Iraq. Lieutenant General Sanchez's decision to issue his September 14, 2003 policy with the knowledge that there were ongoing discussions as to the legality of some techniques in it was a serious error in judgment The September policy was superseded on October 12, 2003 as a result of legal concerns raised by U.S. Central Command. That superseding policy, however, contained ambiguities and contributed to confusion about whether aggressive techniques, such as military working dogs, were authorized for use during interrogations.

**Conclusion 18:** U.S. Central Command (CENTCOM) failed to conduct proper oversight of Special Mission Unit Task Force interrogation policies. Though aggressive interrogation techniques were removed from Combined Joint Task Force 7 interrogation policies after CENTCOM raised legal concerns about their inclusion in the September 14, 2003 policy issued by Lieutenant General Sanchez, SMU TF interrogation policies authorized some of those same techniques, including stress positions and military working dogs.

**Conclusion 19:** The abuse of detainees at Abu Ghraib in late 2003 was not simply the result of a few soldiers acting on their own. Interrogation techniques such as stripping detainees of their clothes, placing them in stress positions, and using military working dogs to intimidate them appeared in Iraq only after they had been approved for use in Afghanistan and at GTMO. Secretary of Defense Donald Rumsfeld's December 2, 2002 authorization of aggressive interrogation techniques and subsequent interrogation policies and plans approved by senior military and civilian officials conveyed the message that physical pressures and degradation were appropriate treatment for detainees in U.S. military custody. What followed was an erosion in standards dictating that detainees be treated humanely.

In my opinion, there is a *prima facie* case to be investigated against the six defendants and a

number of other officials up the line, to the President himself, based upon the extensive evidence of their individual and collective roles in developing, promoting, and causing to be implemented the torture techniques and acts of cruel, inhuman, and degrading treatment that were used not only on Spanish nationals but a wide range of prisoners and detainees held by U.S. military and civilian officials.

The inevitable issue which comes to mind is that any investigation of these mid-level officials who were clearly carrying out the policies approved by their superiors, must ultimately include those senior officials who developed the policies and authorized their implementation.

## 2. Other Potential Defendants

It is my opinion that the prosecution of the six named individuals should be extended to include the senior officials under whom they served as well as others who participated in the process of developing and allowing torture techniques and acts of cruel, inhuman, and degrading treatment to be used on detainees and prisoners. Therefore, the opening-up of a second investigation by the Court is clearly warranted.

As principles in this process with the same culpability as the original six defendants it appears clear, in my view, that the following officials should be considered by the examining magistrate:

2.1. George W. Bush, who as Commander in Chief of U.S. military forces and also as the senior executive officer of the federal government had authority, supervision, and control over all U.S. national security and intelligence agencies and departments. During the period of 2 January 2002 through December 2008, and more specifically with the formal memorandum of

7 February 2002, he developed and caused to be developed, ordered and caused to be implemented, a systematic policy and practice of torture and other cruel, inhuman or degrading treatment or punishment, which policy and practice was carried out by U.S. officials under his command and supervision, against detainees and prisoners at the U.S. run Guantanamo Bay facility and elsewhere. Such illegal acts were carried out by him directly and though subordinates such as his counsel, and eventually Attorney General, Alberto Gonzales.

2.2. Richard Cheney, Vice President of the United States, similarly supported, advocated, and justified the use of torture by himself and through the actions of his agent, counsel and eventual Chief of Staff David Addington. On a major television interview on 15 December 2008, he confirmed his role by stating, "We had the Justice Department issue the requisite opinions (e.g. the Yoo/Bybee Memorandum) in order to know where the bright lines were that you could not cross." He went on to say that waterboarding was “appropriate” and he was aware and helped to get “the process cleared”.

2.3. George Tenet, Director of the Central Intelligence Agency, attended the regular torture implementation planning sessions, and in the spring of 2002 requested policy approval from the National Security Council to use torture techniques and acts of cruel, inhuman, and degrading treatment on detainees picked up and held by the CIA’s extraordinary rendition program. He continues to oversee the illegal detention and interrogation of detainees under CIA control. In addition, he was briefed by CIA Deputy Counsel when not personally present at critical meetings.

2.4. Michael Hayden, Director of the CIA who succeeded Tenet and continued to support and oversee the use of torture techniques and acts of cruel, inhuman, and degrading treatment on

detainees.

2.5. Donald Rumsfeld, as Secretary of Defense, explicitly ordered military interrogators to use torture techniques and acts of cruel, inhuman, and degrading treatment on prisoners they controlled. He specifically approved 15 enhanced interrogation methods requested by Defense Department Counsel William Haynes II and ordered the use of “aggressive interrogation techniques” on 2 December 2002.

2.6. John Ashcroft was the U.S. Attorney General who preceded Gonzales and who personally reviewed and confirmed the legal advice provided by the Office of Legal Counsel (the torture memoranda).

2.7. Condoleeza Rice, first as National Security Adviser and then as Secretary of State, presided over planning sessions and meetings from 2002 through 2008 during which the torture techniques and acts of cruel, inhuman, and degrading treatment were developed as policy and approved or supported for implementation.

2.8. Colin Powell was a member of the National Security Council’s “Principals Committee” and regularly participated in discussions of specific interrogation techniques to be used by the CIA against detainees.

2.9. Michael Mukasey, as the U.S. Attorney General following Gonzales, continued to support the previous legal opinions legitimizing the use of torture techniques and acts of cruel, inhuman, and degrading treatment and who explicitly refused to designate the use of waterboarding as an act of torture.

2.10. Paul Wolfowitz, as Deputy Secretary of Defense, participated in the development and planning sessions leading to the implementation of torture techniques and acts of cruel, inhuman, and degrading treatment to be used by military interrogators on prisoners at Guantanamo Bay and Abu Ghraib prison.

2.11. John Brennan, Deputy Executive Director of the CIA, was in charge of running the CIA's extraordinary rendition program and approving and supervising the torture techniques and acts of cruel, inhuman, and degrading treatment used on detainees.

2.12. John Rizzo was the CIA Deputy Counsel who received the legal opinions from the Justice Department and provided legal advice to the Director and Executive Director approving the use of torture on detainees in the rendition program.

2.13. General Richard Myers, Chairman of the Joint Chiefs of Staff during the relevant period (2001-2005), knew and approved of the torture techniques and acts of cruel, inhuman, and degrading treatment being implemented on prisoners at Guantanamo Bay and Abu Ghraib prison.

2.14. Stephen Cambone, Undersecretary of Defense for Intelligence from 2003-2007, was fully aware and supportive of the use of torture techniques and acts of cruel, inhuman, and degrading treatment on military prisoners during this period.

2.15. General Richard Sanchez, the top military commander in Iraq, following the Bush memorandum of 7 February 2002, instituted 12 interrogation methods that went beyond the

usual standard military practice and constituted techniques of torture.

2.16. Major General Michael Dunlavy, Base Commander at Guantanamo Bay until 8 November 2002, during the relevant period and following the Bush memorandum, oversaw the use of torture techniques and acts of cruel, inhuman, and degrading treatment on prisoners and regularly briefed Secretary Rumsfeld.

2.17. Major General Geoffrey Miller, who succeeded Dunlavy as Base Commander at Guantanamo Bay and particularly after the Rumsfeld memo of 2 December 2002, implemented a harsher regime of interrogation which clearly involved the use of torture techniques and acts of cruel, inhuman, and degrading treatment.

2.18. Lieutenant Colonel Diane Beaver, the Judge Advocate Group's chief lawyer at Guantanamo Bay during the critical 2002 period, advocated the use of torture techniques and acts of cruel, inhuman, and degrading treatment including waterboarding and prepared such an advocacy memo that went up the Defense Department's chain of command eventually reaching Haynes, who accepted her position and so advised Secretary Rumsfeld.

2.19. Steven Bradbury, head of the Office of Legal Counsel in the Department of Justice, on 23 June 2002 oversaw the preparation of the torture memorandum provided by Yoo and Bybee.

It is my opinion that there is a *prima facie* case for the criminal investigation of the above individuals for their various roles in facilitating the use of torture techniques and other acts of cruel, inhuman, and degrading treatment by the U.S. military and the civilian CIA interrogators. It goes without saying that there are varying degrees of criminal liability that would be

determined as a result of the investigation.

I respectfully suggest, however, that in addition to George W. Bush who had ultimate responsibility, special attention should be paid to the members of the National Security Council's Principals' Committee who ultimately steered the interrogation ship into the waters of torture and cruel and inhuman treatment and punishment.

The former members of the Principals' Committee who merit this close investigation are Vice President Richard Cheney, Secretary of State Colin Powell, Secretary of Defense Donald Rumsfeld, CIA Director George Tenet, National Security Advisor Condoleeza Rice, and Attorney General John Ashcroft.

Even though the defense of superior orders which may be asserted on behalf of the original six defendants cannot stand and must fail (see below), it would be unjust not to pursue those who were in the ultimate positions of authority. It would be tantamount to prosecuting Eichmann and ignoring Hitler.

I believe that the Attorney General of Spain has previously stated as much, and therefore has opened the door.

## 3. Additional Crimes and Perpetrators

### 3.1 Additional Crimes

#### 3.1.1 Waging Aggressive War – A Crime Against the Peace

The waging of aggressive war is universally acknowledged to be the supreme international crime. In a very real sense, every crime which the Court is considering to found as a basis for

criminal prosecution has emanated from or been indelibly associated with the waging of aggressive war against Iraq.

Associate United States Supreme Court Justice Robert Jackson was the chief prosecutor at the Nuremberg Tribunal. In his report to the U.S. State Department he wrote:

> "No political or economic situation can justify the crime of aggression."
> The International Military Tribunal at Nuremberg called the waging of aggressive war "… as not only an international crime but the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."

The Bush administration's war against Iraq is clearly a war of aggression. After the Vietnam War the U.N. General Assembly adopted Resolution 3314 which states:

> "Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state or in any other manner inconsistent with the charters of the United Nations."

The only situations in which the Charter permits a state to use armed force against another state is in self defense or in such instance where the action is authorized by the Security Council pursuant to Article 51 of the Charter. Since at the time of the U.S. invasion Iraq neither invaded the United States nor any other country, nor constituted an imminent threat to any country, and the Security Council never sanctioned the U.S. action, the order by former President Bush constituted commission of the crime of waging aggressive war. For committing this crime, the Nuremberg Tribunal sentenced a number of individuals it held responsible for starting World War II. The focus of the crime is on the action of states, not domestic or transnational insurgent groups or international organizations not under the control of a particular state or states. These exceptions are clearly not present in the instance of the war on Iraq since the invading forces were under the control of the United States and Commander-in-Chief George W. Bush (with the United Kingdom in a secondary position).

Additionally, substantial evidence has arisen that the then Commander-in-Chief George W. Bush and principal officials around him, as well as former British Prime Minister Tony Blair, knew full well that they were about to engage in aggressive war.

A memorandum of a two-hour White House meeting between Bush and Blair (and attended by Condoleeza Rice) on 31 January 2003 prepared by Blair's foreign policy advisor David Manning revealed the following:

> "Bush told Blair that the U.S. was so worried about the failure to find hard evidence linking Saddam Hussein to al Qaeda that he was considering flying aircraft painted with U.N. colors over Iraq in an effort to draw ground fire in breach of U.N. resolutions.
>
> Bush and Blair acknowledged that no weapons of mass destruction ("WMD") had been found but Bush expressed hope that a defector could be extracted from Iraq who would publicly testify about the presence and imminent threat of WMD. Bush also mentioned the possibility of Saddam Hussein being assassinated.
>
> Finally, Bush made it clear that the U.S. intended to invade even if it could not obtain a U.N. Security Council resolution. Blair agreed to support this inevitable military action. They agreed that any continuing diplomatic strategy has to be arranged around the military planning which was well advanced."
>
> - Don Van Natta, Jr., *New York Times*, 27 March 2006

Also, it has emerged that detainee abuse and the use of torture techniques by interrogators at Guantanamo Bay, Abu Ghraib, Bagram, and other facilities as discussed above was ordered by Bush administration officials, in part, to find evidence of cooperation between the Iraqi regime and al Qaeda, thereby justifying the invasion.

> "All of the foregoing took place in the context of an official campaign alleging that Iraq possessed weapons of mass destruction and was thus an imminent threat to the United States and other nations. This was a complete fabrication knowingly made in the drum beat lead up to the commencement of war."
>
> - Jonathan S. Landay, McClatchy Newspapers, 21 April 2009

The inescapable conclusion of the above facts is that is that the United States commenced an aggressive war against Iraq on 19 March 2003.

### 3.1.2 The Perpetrator

George W. Bush, as President of the united States and Commander in Chief of its military forces bears sole responsibility, with malice aforethought, for ordering the commencement of this war of aggression and should be charged accordingly for the crime of violation of the U.N. Charter and contravention of the Treaty establishing the United Nations.

Though George W. Bush must stand alone as the principal perpetrator, it is likely that the Court's criminal investigation will reveal that a number of individuals in senior positions of the Bush government aided and abetted this crime by being accessories before, during, and after the fact.

The list of those who were potential accessories at various stages of this criminal war includes the following:

1. Richard Cheney was Vice President of the United States from 2001-2009.
2. Colin Powell was Secretary of State of the United States from 2001-2005.
3. George Tenet was the Director of Central Intelligence for the United States Central Intelligence Agency from July 1997 to July 2004.
4. Condoleeza Rice served as United States National Security Advisor from January 20, 2001 to January 26, 2005 and as United States Secretary of State from January 26, 2005 to January 20, 2009.
5. John Ashcroft was the United States Attorney General from 2001 until 2005.

6. Alberto Gonzales was the United States Attorney General from February 3, 2005 to September 17, 2007.
7. Paul Wolfowitz was the United States Deputy Secretary of Defense from 2001 to 2005.
8. David Addington was Legal Counsel from 2001-2005 and Chief of Staff from October 28, 2005 to January 19, 2009 for Defendant Richard Cheney.
9. I. Lewis Libby served as Assistant to Defendant George W. Bush, Chief of Staff to Defendant Dick Cheney, and Assistant to the Vice for National Security Affairs from 2001 to 2005.
10. Douglas Feith served as the Under Secretary of Defense for Policy from July 2001 to August 8, 2005.
11. Stephen Cambone served as United States Under-Secretary of Defense for Intelligence from 2003 to 2007.
12. General Richard Myers was Chairman of the Joint Chiefs of Staff from October 1, 2001 to September 30, 2005.
13. General Peter Pace was Vice Chairman of the Joint Chiefs of Staff from October 1, 2001 to August 12, 2005, and Chairman of the Joint Chiefs of Staff from September 30, 2005 to October 1, 2007.
14. John Rizzo served as Deputy General Counsel of the United States Central Intelligence Agency from 2002 to 2007.
15. Scott W. Muller served as General Counsel of the United States Central Intelligence Agency from 2002 to 2007.
16. J. Cofer Black was Director of the CIA's Counterterrorist Center from 1999 to 2002 and United States Department of State Coordinator for Counter-terrorism with the rank of Ambassador at Large from December 2002 to November 2004.

17. Tim Flanigan served as deputy White House Counsel under Defendant Alberto Gonzales from January 2001 until December 2002.
18. L. Paul Bremer was head of the Coalition Provisional Authority in Iraq from May 11, 2003 to June 28, 2004.
19. General Tommy Franks was the Commander of the United States Central Command, from July 6, 2000 to July 7, 2003. He also led the 2003 invasion of Iraq.
20. Donald Rumsfeld served as Secretary of Defense from 2001 to 2006.
21. James Pavitt was Deputy Director for Operations (DDO) for the United States Central Intelligence Agency from 1999 until June 4, 2004.
22. Gordon R. England served as Deputy Secretary of Defense from January 4, 2006 to January 20, 2009.
23. Lt. Gen. Jay Garner was head of the Coalition Provisional Authority in Iraq from March to May 11, 2003.
24. Lt. Gen. Ricardo Sanchez was Commander of coalition ground forces in the U.S.-led occupation of Iraq from June 14, 2003 to November 1, 2006.
25. Lt. Gen. Raymond J. Odierno served as Assistant to the Chairman of the Joint Chiefs of Staff from November 3, 2004 to May 1, 2006, the Commanding General, Multi-National Force—Iraq (MNF-I) from September 16, 2008 to the present, and the Commanding General, III Corps, from May 2006 to May 2008.
26. Lt. Gen. David Petraeus has served as Commander, U.S. Central Command. from September 17, 2008 to the present. He previously served as Commanding General, Multi-National Force - Iraq (MNF-I) from January 26, 2007 to September 16, 2008.
27. Major Gen. Richard Natonski served as the United States Marine Corps Deputy Commandant for Plans, Policies and Operations from November 7, 2006 until August 2008.

It is my opinion that George W. Bush should be charged with the crime of waging aggressive war and that the above-named former U.S. Government officials be investigated for being criminal accessories at times material to the crime.

## 4. War Crimes and Crimes Against Humanity

4.1 I suggest that it is not reasonable to consider the use of torture in isolation. Particular criminal acts must be examined in the context of a criminal enterprise – the waging of aggressive war against Iraq – and the presence of massive war crimes and crimes against humanity. Hence, it is appropriate for the Court to open an investigation of those crimes against humanity which have been the result of the actions of the U.S. in the conduct of its war in Iraq. These are crimes against civilians and soldiers which are prohibited under treaties such as the Hague Convention of 1907 and the Geneva Convention of 1949 ratified by both the U.S. (8 February 1955) and Spain.

The crimes against humanity relate to the conduct of military activity and include the following prohibitions: the killing of civilians; indiscriminate bombing; the use of certain types of weapons – engines of war; the killing of defenseless soldiers; the abuse and mistreatment of prisoners of war and attacks on civilian targets. In the last category must be included the killing of Spanish photographer Jose Couso and the al Jazeera journalist Taraq Ayoub.

Attacks must be limited to military objectives which substantially contribute to military action and military advantage. Even so, a military force can only legally use that degree of force (the proportional amount of force) against military targets necessary to obtain the objective in order to minimize the spillover of violence into the civilian population.

Attacks must also avoid destroying facilities essential to the lives of the civilian population. So medical facilities, water and sewer systems, agricultural food supplies, power and electricity and public transportation systems must never be attacked.

In the context of these prohibitions, the U.S. military was involved in the following activities in Iraq:

4.1.1 Beginning in March 2003, the U.S. forces ordered the indiscriminate aerial and land based attacks on cities, towns, and villages in Iraq, against the civilian population of those areas. No distinction was made between civilian objects and military targets resulting in the excessive loss of life and massive injury to huge numbers of the Iraqi population. Actual human, non-combatant civilian deaths caused by these criminal actions, as of 2009, number in excess of 600,000 with a high percentage being women and children.

4.1.2 The degree of bombardment caused the forced flight for survival of more than 1 million Iraqis who either became refugees in Syria or Jordan or displaced persons within Iraq.

4.1.3 The weapons employed by premeditation included Depleted Uranium (DU) which contains a carcinogenic poison known to be responsible for birth defects, lung disease, kidney disease, leukemia, breast cancer, lymphoma, bone cancer and neurological disabilities. When DU munitions explode, the air is bathed with a fine radioactive dust which is carried by the wind and is easily inhaled. It eventually enters the soil, pollutes ground water, and enters the food chain.

4.1.4 Cluster bombs also used in premeditated fashion were used throughout the war zones. The nature of these weapons caused an untold number of civilian deaths, and that number continues to rise since unexploded cluster bombs dropped by U.S. personnel in

populated areas continue to kill and maim, exploding upon a simple touch by an unsuspecting child or other civilian. When a cluster bomb explodes, it sprays hundreds of smaller bomblets over an area the size of three football fields. The bomblets are bright yellow and look like beer cans. Each exploding bomblet sprays flying shards of metal that can tear through one quarter inch of steel. Since 15-20 percent of these bombs fail to explode on impact, these land mines will continue to take civilian lives for years to come. The injuries caused by these weapons overwhelmed the hospitals which themselves were often under aerial bombardment.

4.1.5 Bombs containing Napalm and White Phosphorous (WP) have also been used with premeditation in Iraq. These become devastating chemical weapons when used against people. WP is fat-soluble and burns instantly upon contact with the air. The burns are multiple, deep, and variable in size, and often go straight through flesh to the bone. Napalm, whose deadly anti-personnel effects have been well known since the Vietnam War, is made from petrol and polystyrene and emits a burning, jellied substance which instantly causes permanent burn damage to any parts of the body to which it attaches itself.

Some exemplary crimes against civilians include the following:

4.1.6 On November 8, 2004 U.S. forces launched an air and ground assault on the city of Fallujah. The ground assault was preceded by air and artillery attacks including the dropping of eight 2000 pound bombs. Some artillery shelling used White Phosphorous.

4.1.7 The bombing campaign was designed to drive out all of the civilian population except the adult male population between the ages of 15 and 45 who were turned back by U.S. personnel ringing the city.

4.1.8 The victims of the aerial attacks included whole families, including pregnant women and babies.

4.1.9 During this siege, water, food, and electricity were cut off to the 300,000 inhabitants.

4.1.10 After several weeks of bombing, the U.S. forces began their ground attack. They took over the Fallujah General Hospital, making patients lie on the floor and tying their hands behind their backs.

4.1.11 The aerial bombardment also hit the Central Health Centre, killing 35 patients and 24 staff according to Dr. Sami al-Jumarli who was on duty.

4.1.12 Dr. Eiman al-Ari of the Fallujah General Hospital said that after the attack, the entire health center had collapsed on the patients.

4.1.13 The Iraqi Red Crescent was denied access to the devastated city which contained corpses inside charred buildings, entire neighborhoods leveled, and lakes of sewage in the streets.

4.1.14 Hunger and deprivation of water to the civilian population were used as weapons of war.

4.1.15 On March 3, 2005, Dr. Khalid Ash Shay Khli, an Iraqi Health Ministry official stated thet the U.S. military had used chemical weapons in their November 2004 attack on Fallujah. These weapons included mustard gas, nerve gas, napalm, and white phosphorous.

4.1.16 An American soldier, Jeff Engelhardt, stated that he saw burned bodies of women and children.

4.1.17 Available photographs from the Studies Centre of Human Rights in Fallujah show bodies of Fallujah residents, some still in their beds, whose skin has been dissolved or caramelized or turned into leather by the shells.

4.1.18 There is no way to know for certain the number of innocent Iraqi civilians who suffered this horrible death.

4.1.19 In November 2005, a group of U.S. Marines on duty in Anbar Province, in the village of Haditha, carried out an unprovoked killing of innocent civilians including women and children.

4.1.20 In early April 2004, heavy civilian casualties resulted from a night of aerial bombardment. The chief surgeon at the local hospital stated that 120 dead and wounded civilians were brought in.

4.1.21 The Campaign for Innocent Civilians (CIVIC) deployed 150 surveyors and carried out detailed interviews documenting more than 1,000 civilian deaths in Nasariya.

4.1.22 On April 26, 2006, in Al Hamdania village, U.S. Marines murdered an entire family including a 14-year-old girl who was also raped before she was murdered.

4.1.23 The soldiers invaded the family's home where the crimes were committed.

4.1.24 On April 5, 2003, a U.S. tank fired a shell at the Palestine Hotel, which housed dozens of international journalists, killing Spanish cameraman Jose Couso of Telecineo. Earlier that morning, U.S. air strikes hit the Baghdad bureau of Al Jazeera, killing correspondent Tareq Ayoub.

4.1.25 There was additional massive loss of civilian lives as a result of the continued firing upon targeted areas of Haditha, Al Qaim, Ramadi, Samarra, Saniya, and Baghdad.

In my opinion the foregoing – however incomplete – constitute crimes against humanity and call for a comprehensive investigation with the possibility that the following U.S. officials may be charged as principals at times material for some or all of these crimes:

4.2.1 George W. Bush was Commander in Chief of the U.S. military forces in Iraq.

4.2.2 Donald Rumsfeld served as Secretary of Defense from 2001 to 2006.

4.2.3. General Tommy Franks was the Commander of the United States Central Command,

from July 6, 2000 to July 7, 2003. He also led the 2003 invasion of Iraq.

4.2.4. Lt. Gen. Jay Garner was head of the Coalition Provisional Authority in Iraq from March to May 11, 2003.

4.2.5. Lt. Gen. Ricardo Sanchez was Commander of coalition ground forces in the U.S.-led occupation of Iraq from June 14, 2003 to November 1, 2006.

4.2.6. Lt. Gen. Raymond J. Odierno served as Assistant to the Chairman of the Joint Chiefs of Staff from November 3, 2004 to May 1, 2006, the Commanding General, Multi-National Force—Iraq (MNF-I) from September 16, 2008 to the present, and the Commanding General, III Corps, from May 2006 to May 2008.

4.2.7. Lt. Gen. David Petraeus has served as Commander, U.S. Central Command. from September 17, 2008 to the present. He previously served as Commanding General, Multi-National Force - Iraq (MNF-I) from January 26, 2007 to September 16, 2008.

4.2.8. Major Gen. Richard Natonski served as the United States Marine Corps Deputy Commandant for Plans, Policies and Operations from November 7, 2006 until August 2008.

4.2.9. L. Paul Bremer was head of the Coalition Provisional Authority in Iraq from May 11, 2003 to June 28, 2004.

4.3. I am further of the opinion that a comprehensive investigation by this Honorable Court may result in the following individuals amongst others being charged with aiding and abetting the foresaid crimes as being accessories at various stages either before, during, after, or in some cases all times to specific war crimes and crimes against humanity:

4.3.1 Richard Cheney was Vice President of the United States from 2001-2009.

4.3.2 Colin Powell was Secretary of State of the United States from 2001-2005.

4.3.3 Condoleeza Rice served as United States National Security Advisor from January 20, 2001 to January 26, 2005 and as United States Secretary of State from January 26, 2005 to January 20, 2009.

4.3.4 Paul Wolfowitz was the United States Deputy Secretary of Defense from 2001 to 2005.

4.3.5 David Addington was Legal Counsel from 2001-2005 and Chief of Staff from October 28, 2005 to January 19, 2009 for Defendant Richard Cheney.

4.3.6 I. Lewis Libby served as Assistant to Defendant George W. Bush, Chief of Staff to Defendant Dick Cheney, and Assistant to the Vice for National Security Affairs from 2001 to 2005.

4.3.7 Douglas Feith served as the Undersecretary of Defense for Policy from July 2001 to August 8, 2005.

4.3.8 Stephen Cambone served as United States Undersecretary of Defense for Intelligence from 2003 to 2007.

4.3.9 General Richard Myers was Chairman of the Joint Chiefs of Staff from October 1, 2001 to September 30, 2005.

4.3.10 General Peter Pace was Vice Chairman of the Joint Chiefs of Staff from October 1, 2001 to August 12, 2005, and Chairman of the Joint Chiefs of Staff from September 30, 2005 to October 1, 2007.

4.3.11 Gordon R. England served as Deputy Secretary of Defense from January 4, 2006 to January 20, 2009.

In my opinion, war crimes, and particularly crimes against humanity, have been committed as a part of the U.S. invasion of Iraq, and it is proper for the investigation of this honorable Court to extend to consider these crimes.

Here, as elsewhere, an investigation should be undertaken to fix the degree of liability to attach to the particular officials. The criminal responsibility under the relevant treaties and customary international law of the principal actors, on the basis of existing evidence, appears clear.

The secondary criminal liability should be determined by the Court upon the receipt of detailed investigative reports and documentation.

## 5. Illegal, or Arbitrary Detention

The practice of illegally, or arbitrarily, detaining individuals constituted an essential aspect of the extraordinary rendition program of the U.S. Central Intelligence Agency. Since these detentions inevitably involved enhanced interrogation where torture techniques and acts of cruel, inhuman, and degrading treatment were employed on the detainee, these cases must be linked and considered with the torture cases discussed above.

In the instance of the illegal detentions, however, it is apparent that two crimes have been committed. Invariably, individuals, often in the absence of any hard *prima facie* evidence of terrorist activity or criminal wrongdoing, have been abducted, held for varying periods of time, transported to pre-arranged interrogation sites inEgypt, Syria, Jordan, Morocco, Yemen, Guantanamo Bay, Bagram Air Base, Belarus, Uzbekistan, and other locations where torture techniques and acts of cruel, inhuman, and degrading treatment were carried out in the course of interrogation.

According to a leaked Justice Department memorandum, in December 2001 Guantanamo Bay – and presumably the other illegal detention/torture sites, were specifically chosen because the

Bush administration believed they would be beyond the reach of the U.S. courts.[1]

By the time the Obama administration took office on 20 January 2009, many of the detainees had spent nearly seven years in detention at Guantanamo and elsewhere without a trial or even having been charged or given a real hearing. In addition, many had been subjected to torture as a part of the enhanced interrogation program, which was based on erroneous legal memoranda issued by former White House Counsel Alberto Gonzales and Deputy Assistant Attorney General John Yoo that the detainees (here specifically Guantanamo detainees) were not protected by the Geneva Conventions.

As noted above, it has become so well known that this honorable Court may take judicial notice of the fact that the CIA developed an extensive network of "black sites" around the world in order to carry out its illegal detention and enhanced interrogation aspects of the extraordinary rendition program.

In every instance Agency personnel, which also included private contractors under their control, contravened the terms of the International Convention for the Protection of All Persons from Enforced Disappearance. (Art. 2, 6 February 2007) Article 1 of the Convention explicitly provides that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification for enforced disappearance."

When it opened for signature in Paris on 20 December 2006, 57 nations signed. At this writing, 80 nations have signed. Spain signed the Convention on 3 July 2007. The United States, for obvious reasons which have gradually become known and discussed herein, has

yet to sign the Convention.

Enforced disappearance and illegal detention, however, also involve several other treaties that are binding on the U.S. and Spain. They include the Geneva Convention of 1949, the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Such action also violates customary international humanitarian law. The U.S. ratification of the ICCPR in 1992, however, was subject to 5 reservations, 5 understandings, and 4 declarations. In particular, a non self execution clause has basically emasculated the treaty so that it has little domestic effect with no private right of action.

On 5 October 1993, Spain registered its formal objections to the U.S. reservations, stating that such derogations from basic provisions are "… incompatible with the object and purpose of the covenant…." The objection further notes that this position does not constitute an obstacle to the entry into force of the covenant between Spain and the U.S.

The Torture Convention, which is binding upon Spain and the U.S., clearly prohibits the kind of criminal conspiracy to commit torture that is embedded in the CIA's extraordinary rendition program. Article 3 explicitly prohibits states parties from sending a person to another state where there are substantial grounds for believing that he would be in danger of being tortured. Article 15 requires states parties to bar from evidence any statement made as a result of torture. Article 4 obligates state parties to criminalize not only acts of torture, but attempts to commit torture or participate, or be complicit in activity leading to or carrying out torture. Most importantly in terms of U.S. culpability, Article 2 prohibits state parties from invoking any exceptional circumstances to justify torture. The U.S. reservations and declarations,

particularly with respect to the scope of Article 16 which requires states to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman treatment or punishment which do not amount to torture," seems to have been addressed by the U.S. Torture Statute, codified at 18 USC Sec 2340 and 2340 A, which clearly extends criminal jurisdiction in accordance with Article 5 of the Torture Convention. In other words, it is geographically all encompassing.

In most instances, it is generally agreed that under the Convention and the Torture Statute, extraordinary rendition also constitutes a criminal conspiracy to commit or facilitate the commission of torture.[2] The collaboration of the U.S. Justice Department Office of Legal Counsel with the CIA (see the discussion below) attempts to establish a specious and, on its face, erroneous legal basis for the use of torture techniques in enhanced interrogation. Thus, the violation of treaty obligations, customary international law and international humanitarian law is evidenced with the program of extraordinary rendition under the Bush administration.

Previously such criminal activity was conducted in the shadows and scenarios allowing for plausible deniability were put in place so that the illegal acts could be denied – swept under the rug by the officials and a compliant mass media. The Bush administration has committed its crimes in the light of day and flaunted its impunity to abduct, illegally detain and torture at will, with all hands on deck in support.

This process involved the politicalization of the Department of Justice as a result of which the principal lawyers of the Office of Legal Counsel (OLC) issued memoranda These memoranda promulgated to an unprecedented degree the attempt to re-define what constitutes torture. This effort had to mitigate against all of the provisions and principles of law contained in,

among others, the U.S. Constitution's Eighth Amendment ("cruel and unusual punishment"), the Torture Convention, and the Common Articles of the Geneva Convention, not to mention international customary law. These memoranda promulgated an unprecedented degree of executive power to the Bush White House for its "War on Terror".

The first memorandum was issued on 9 January 2002 and concluded that the Geneva Conventions, including Common Article 3, did not apply to "War on Terror" and prisoners. The second memo, "Standards of Conduct for Interrogation Under 18 U.S.C. Secs. 2340-2340A," was issued on 1 August 2002, soon to be known as the "torture memo". In the memo signed by Jay S. Bybee, John Yoo adopted a narrow and illegal definition of "torture" that attempted to justify the use of conduct heretofore considered to be illegal. His definition of torture, which conflicts with the definition of torture accepted under international law and previously adopted by the United States, concluded that: 1) physical pain constituting torture "… must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death"; 2) that severe mental suffering "must penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality"; 3) psychological harm must last "months or even years" to constitute torture; and 4) anything below these thresholds merely constitutes "cruel, inhuman, or degrading kinds of treatment" which, he reasoned, though prohibited under the Third Convention, does not constitute a punishable offense under the War Crimes Act. The memo went on to make the extraordinary claim that the President had the power to order torture, and that any attempt to limit this authority would be an unconstitutional infringement of the President's powers as Commander in Chief.

I attach hereto as Exhibit A true and exact copies of the OLC memoranda including the one by

John Yoo and Jay S. Bybee sent to the CIA Deputy Counsel John Rizzo. They were clearly meant to be applicable to the use of enhanced or "aggressive" interrogation techniques on detainees, with respect to said interrogations being conducted by CIA or CIA controlled interrogators or intelligence operatives of the receiving rendition states.

I also refer this Honorable Court to the recently released Report of the Committee on Armed Services of the United States Senate on the "Inquiry Into the Treatment of Detainees in Custody" finalized on 20 November 2008. It sets out in excruciating detail the treatment of these unfortunate detainees, and I have set out its conclusions on pp. 9-13 above. I request that in its entirety it be incorporated by reference herein.

I set out below, in my opinion to this honorable Court, the perpetrators: those individuals who I believe the evidence indicates committed or facilitated the commission of the crimes of facilitating illegal or arbitrary detention and torture and conspiring to commit these crimes.
As Principals:

1. George Tenet, Director of Central Intelligence for the United States Central Intelligence Agency from July 1997 to July 2004 approved the program of "extraordinary rendition".
2. Michael Hayden, Director of the Central Intelligence Agency from April 21, 2005 to May 26, 2006, also approved the program of "extraordinary rendition" during his tenure.
3. John Brennan was Chief of Staff to Director of Central Intelligence, CIA. He was primarily responsible for the conduct of the "extraordinary rendition" program which resulted in the multiple criminal acts of illegal detention.

Some policy statements have recently emerged from the Obama administration which further complicate, compound and threaten to perpetuate the crime of illegal or arbitrary detention.

Of particular note is the announcement on 30 April 2009 by Secretary of Defense Robert M. Gates that up to 100 detainees at the Guantanamo Bay prison may continue to be held without trial inside facilities in the United States.[3]

The administration has previously indicated that similar situations exist with certain prisoners at the Bagram Air Base in Afghanistan.

Some of these individuals from a variety of countries have been held for 7 or more years by the military and cannot be brought to trial because of the brutal interrogation techniques used against them in secret prisons run by the CIA [Ibid.] Hence, they effectively will continue to be detained because of the treatment they received from their captors.

As Accessories if not co-conspirators as revealed by the evidence:

1. Richard Cheney was Vice President of the United States from 2001-2009.
2. Donald Rumsfeld served as Secretary of Defense from 2001 to 2006.
3. John Rizzo served as Deputy General Counsel of the United States Central Intelligence Agency from 2002 to 2007.
4. Scott W. Muller served as General Counsel of the United States Central Intelligence Agency from 2002 to 2007.
5. J. Cofer Black was Director of the CIA's Counterterrorist Center from 1999 to 2002 and United States Department of State Coordinator for Counter-terrorism with the rank of Ambassador at Large from December 2002 to November 2004.
6. James Pavitt was Deputy Director for Operations (DDO) for the United States Central Intelligence Agency from 1999 until June 4, 2004.

In my opinion, the crimes and their perpetrators are clear. The only question is, as with the previously discussed crimes, is whether this honorable Court will fully investigate and prosecute these cases, seek justice for the victims, and again, define and assert what it means to be a human being living in a society governed by the rule of law and not the tyranny of other human beings.

This brings us to consider the issue related to the jurisdiction and venue of any prosecutions and the primary defenses that may be asserted.

## 6. Universal Jurisdiction – In General

Widespread revulsion and anger has developed in the United States as the details describing the crimes committed by officials of the Bush administration have come out. The release of the memoranda provided to the CIA effectively approving the use of torture techniques and acts of cruel, inhuman, and degrading treatment on detainees held under the extraordinary rendition program (see above and Exhibit A) and the Report of the Senate Armed Services Committee covering the treatment of prisoners has fueled the demand for a full investigation and the appointment of a special prosecutor.

At this writing, it appears that the current administration is opposed to an investigation and basically coming down against prosecution of the torturers on the grounds that they acted in good faith. (See below for the discussion of the inapplicability of the superior orders defense.)

The indications are that the Attorney General (who serves at the pleasure of the President) is disinclined to prosecute as evidenced by his statement of 5 May 2009. The Senate

Intelligence Committee Report is expected to be released around the end of the year, but it is unlikely to change the situation. There is considerable political opposition to any prosecutorial action from both major parties, not the least because leaders of the Democratic Party, when they were out of power, appear to have been briefed on the rendition and interrogation activities and did not object.

Any prosecution inside the U.S. would likely be faced with defenses involving a manipulation of the state secrets privilege which resulted in the dismissal of the Alien Tort Claims case of Khaled Masri.[4] Federal judges are almost always reluctant to challenge the executive branch on national security and almost never refuse the government's claim to confidentiality.[5]

The issue of the United States military prosecution pursuant to treaty obligations should be clearly understood. The U.S. does not follow the monist system of interpretation where most treaties once ratified automatically become national law. Under the U.S. system, which has some features of the duallist approach, a ratified treaty establishes some affirmative obligations to other state treaty partners but the treaty may not necessarily be used to assert private claims in domestic courts without some form of subsequent enabling legislation. If, however, a treaty's language is sufficiently clear so that it could be enforced by a domestic court, a petitioner may petition a court directly for enforcement.

In the ancient case of *Foster vs. Neilson* (1829) the Supreme Court stated:

> "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in the courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political , not the judicial department; and the legislature must execute the contract before it can become a role for the Court."[6]

Consequently, when the Senate gives advice and consent it examines the existing law in order to determine whether or not it is self executing; that is, it makes a determination as to whether or not additional federal legislation is necessary to give legal effect to the treaty provisions. For example, with respect to the Torture Convention, in giving its advice and consent the Senate expressly found the treaty not to be self executing, requiring the passage of the Torture Victims Protection Act (TVPA).

Similarly, the ICCPR was also held to be non-self executing.[7] It is important, however, not to confuse a treaty based private right of action, which may be barred without new statutory provisions, with the obligations that a treaty – here in particular the Torture Convention and the Geneva Convention of 1949 – impose on states parties to each other. In accordance with the provisions of Torture and Geneva Conventions, for example, the United States has an obligation to initiate criminal prosecutions of those officials responsible for the torture and the extraordinary rendition and torture of detainees as well as for other war crimes and crimes against humanity. Specifically, the Torture Convention obliges States Parties to prosecute or extradite offenders. Under Article 5 (2) each State Party must take such measures as may be necessary to establish its jurisdiction over the offenses of torture and complicity in torture.[8] Where the offender is present in any territory under its jurisdiction, and it elects not to extradite him/her, in accordance with Article 8, to the jurisdiction where the offense was committed or to the jurisdiction where the alleged perpetrator is a national [9]Article 7 then directs a State Party with territorial jurisdiction over an individual alleged to have committed torture, attempted torture or having been complicit in torture, either to prosecute or extradite the person to the country where that person ***or the victim*** is a national or to the country where the alleged acts occurred.[10]

Once a State Party has determined that an alleged offender is located within its jurisdiction the Torture Convention requires the State Party first to take the alleged offender into custody and then immediately conduct a preliminary inquiry into the facts.[11]

I suggest, for reasons set out above and also discussed below that although it may Congressionally investigate the crimes *ad nauseum*, the U.S. government will not prosecute any of its officials or agents for committing acts of torture or acts of complicity or conspiracy to commit torture, or for war crimes or illegal detention resulting from the CIA program of extraordinary rendition.

## 6.1 History

The history of Universal Jurisdiction "stems [from] the customary international practices prompted by pirates even before international law as we know it was in existence. Sixteenth and seventeenth analysts, such as Francisco de Vitoria, and Hugo Grotius, recognized Universal Jurisdicition as a principle of law applicable to crimes under international law. Grotius argued that violations of the rules of natural law constituted offense against *societas genuis humani*, or the universal society of humanity. Accordingly, he contended that all states had an interest, and indeed an obligation, to punish violations of the *Jus cogens* – serious international crimes.

This conception has come to meant that since all states, whether they acknowledge it or not, are interested parties which should be concerned with international criminal activity and consequently, it should not be no necessary for there to be a link between the victim, the offender, and a prosecuting state in order for Universal Jurisdiction – prosecution in any state –

to be exercised. Grotius wrote:

> "Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations. For the Liberty of consulting the Benefit of human Society, by Punishments, does now, since Civil Societies, and Courts of Justice, have been instituted, reside in those who are possessed of the supreme Power, and that properly, not as they have Authority over others, but as they are in Subjection to none. For . . . it is so much more honorable, to revenge other Peoples Injuries rather than their own . . . Kings, beside the Charge of their particular Dominions, have upon them the care of human Society in general."[12]

Sêe also Professor Sunga for an earlier dating of the consideration of Universal Jurisdiction .[13]

In a different context, the crime of piracy, actualizing the necessity of protecting international trade, emphasized the importance of Universal Jurisdiction. This is obviously different from the application of Universal Jurisdiciton to war crimes, crimes against humanity, and genocide. More broadly, Universal Jurisdiction, as noted by Randall, indeed, has gradually come to extend to every state with respect to particular crimes. He wrote:

> [T]his principle provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offense and the nationalities of the offender and the offended. While the other jurisdictional bases demand direct connections between the prosecuting state and the offense, the universality principle assumes that every state has an interest in exercising jurisdiction to combat egregious offenses that states universally have condemned. [Kenneth C. Randall, Universal Jurisdiction under International Law, 66 Tex. L. Rev. 785, 788 (1988).

It is also useful to look at the prosecution of Adolf Eichman ( 36 I.L.R. 26, 1968) where the Israeli court stated that the crimes involved were not only crimes under Israeli Law but of such a nature as to shock the conscience of mankind and constitute grave offences against the law of nations itself (*delicta juris gentium*). Jurisdiction over such crimes, said the Eichman Court, required each and every nation to give effect to its own criminal law and bring the criminals to trial. Thus, the Court confirmed that

the jurisdiction to try crimes under the existing Treaty provisions and customary international law is universal.

After the judgment of the IMT at Nuremberg it became clear that international crimes were subject to the jurisdiction of every state. The Tribunal's statement did not elaborate on the principle or set forth any restrictions on its application.

> "[T]he Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right to set up special courts to administer law. With regard to the Constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law."[14]

In the post World War II period the principle was also recognized and embodied in the four Geneva Conventions of 1949. The 1949 Geneva Conventions codified the use of Universal Jurisdiction over war crimes "treating the [doctrine] as an accepted feature of customary international law.

Signatory States of the four Geneva Conventions are required to prosecute or extradite offenders who have violated any of the "grave breaches" provisions set out in the Conventions. This duty is put upon the States in Articles 40, 50,129 and 146. In addition, the State signatories are required to enact any necessary empowering legislation. Absent any prosecution in the offender's home State, extradition must take place, subject to a case to answer being developed.

An understanding of Paragraph 2, common to the four Geneva Conventions, results in the presence of a critical mandate whereby each State is under a duty to apprehend and try those who commit any of the "grave breaches" set out in the conventions, regardless of any link

between the perpetrator and the State asserting jurisdiction. A State, unwilling to do so, with the offender in its midst, must extradite him to a signatory State willing to undertake the prosecution

## The Principle of Effectiveness

Some States may take the position that they are under a duty to arrest perpetrators of grave breaches only when found on their territory, but, this strict interpretation can no longer reflect the course of international law and the compelling nêed to aďdress the great number of gross crimes perpetrated over the last half century. This organic position may be gleaned in an advisory Opinion of the ICJ regarding Namibia. The court stated that "[i]interpretation cannot remain unaffected by the subsequent development of law, ... ."[15]

The European Court of Human Rights (ECHR) reaches a similar result by applying the "principle of effectiveness" which enables maximum effectiveness of the provisions to be reached. In the *Airey*, *Mamatkulov, Ocalan*, and *Loizidou* cases, the ECHR explicitly implemented the principle of effectiveness by affirming that "…the Convention must be interpreted in the light of present day conditions...."[16]

The, applicătion of these principles to the text of the Geneva Conventions ensures that Universal Jurisdiction is essential to the fundamental purpose and scope of those Conventions.Though the four common provisions of the Geneva Conventions, envision *aut dedere aut judicare*, ordinarily, the presence of the offender on the territory of the State asserting jurisdiction, is preferred, but, in no way should this be interpreted so as to exclude the voluntary exercise of Universal Jurisdiction. The joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal, in the Congo case, stated, "… if the underlying purpose of

designating certain acts as an international crime is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the *aut dedere* principle) which makes illegal cooperative overt acts designed to secure their presence within a State wishing to exercise jurisdiction."[17] Consequently, Universal Jurisdiction *in absentia* is not only not forbidden but clearly essential to the cause of justice, and, in m,y view, preferable to illegal abduction such as what took ;place in the *Eichman* case, or what has taken place, and continues to occur as a result of the American policy and practice of extraordinary rendition.

The State Parties agreed to enact any legislation necessary to provide penal sanctions for persons committing or ordering to be committed any of the grave breaches of the Convention (which include willful killing, torture or inhuman treatment, unjustified destruction and unlawful detention) crimes which are before this Honorable Court. Such alleged offenders were required to be brought before the national courts, where they were located. (Common Articles 49, 50, 129, 146 and the additional protocol 85.) Subsequent Conventions have invoked *aut dedere aut judicare*).[18] The same solution will be used in the future in several conventions of the United Nations and of its specialized agencies as well as by regional organizations.[19]

Since World War II, 15 countries have exercised Universal Jurisdiction in investigations or trials. A number of the Post World War II trials in U.S. and British military courts inclined more to restrict the application of Universal Jurisdiction to the presence of the accused in the prosecuting state's custody; which is the more traditional or conditioned interpretation. However, unlike in prior cases, this requirement was not set out by the U.S. Military Commission in China, which tried the German national Lothar Eisentraeger where the Commission stated:

> [A] war crime, however, is not a crime against the law of or criminal code of any individual nation, but a crime against the *jus gentium*. The laws and usages of [1]war are of universal application, and do not depend for their existence upon national laws or frontiers. Arguments to the effect that only a sovereign state of the locus criminis has jurisdiction and that only the lex loci can be applied, are therefore without any foundation.[20]

The facts of *Eiesentrager* clearly show that the U.S. Commission exercised extraterritorial jurisdiction over non US citizens or residents who committed crimes against aliens which was tantamount to the exercise of Universal Jurisdiction (*in absentia).* Jurisdiction was extended over German nationals acting in Shanghai, committing crimes against people who were residents of China during the relevant period of time. No links existed between the United States and the accused.

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[2] See Weissbrodt & Berquist, Extraordinary Rendition in the Torture Convention, Virginia, Journal of international Law, vol. 46:4, p. 618 and 619.

[3] *New York Times,* 1 May 2009, p. A16

[4] See El Masri, 437 F. Supp. at 535-39, and also see eg Abu Ali, 387 F. Supp. 2d at 17.

[5] *Bush Wielding Secrecy Privilege to End Suits*, Andrew Zajac, *Chicago Tribune*, 3 March 2005, and United States v. Reynolds, 345 US 1 (1953); also see Memorandum in Support of the United States of State Secret Privilege, Araky v. Ashcroft, CA No. 04-CV-249-DGT-VVP C 2nd Cir 18 June 2005

[11] Ibid, 6 (1) – (2)

[12] H. Grotius, *De Jure Belli Ac Pacis Libri Tres, Polegomena*, Carnegie ed. (Oxford: Clarendon Press, 1925)., Book II, Chap. XX.

[13] Lyal S. Sung, Individual Responsibility in International Law for Serious Human Rights Violations, 102-103 (Martinus IV, hoff Dub. 1992

[14] The International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, reprinted in 41 Am. J. Int'l L. 172, 216-17 (1947); see also Nicolaos Strapatsas, *Universal Jurisdiction and the International Criminal Court*, 29 Manitoba L.J. 1, 19 (2001).

[15] See 1971, ICJ, 34

[16] Series A. No. 32, ¶ 26; *Mamatkulov and Abdurasulovic* v. Turkey, (Merits) App. No., 00046827/99, Judgment Feb. 6, 2003, ¶ 94 ; *Ocalan v. Turkey*, (Merits), App. No. 00046221/99, Judgment Mar. 12, 2003, ¶ 193; *Loizidou v. Turkey (Preliminary Objections),* App. No., 0001531/89, Mar. 23, 1995, ¶¶ 71-72 *Tyrer* Case, Series A. No. 26, ¶ 31. *Minelli* Case, Series A. No. 62; *Artico* Case, Series A. No. 37; *Klass* Case, Series A. N. 28.

[17] See *Congo v. Belgium* Case, 2000 ICJ, 2 Feb. 2002 at 58

[18] Convention for the suppression of unlawful seizure of aircraft of 1970, art. 4; International convention against the taking of hostages of 1979, art. 5.

[19] 1973 International convention on the suppression and punishment of the crime of apartheid, art. 4; 1984 Convention against torture, art. 5; Convention on the safety of United Nations and associated personnel, art. 10; International convention for the protection of all persons from enforced disappearance, art. 9; Inter-American convention on forced disappearance of persons, art.4;

[20] ibid at 15

Given this history it is not surprising that a number of the relevant treaties require states to prosecute alleged offenders present in their own country if they do not extradite them to a requesting state. As noted above, this is the principle of *aut dedere aut judicare*.

## Criteria for Jurisdiction

The four main criteria for the establishment of jurisdiction are:

- Territorial Jurisdiction: crimes committed in the prosecuting state's territory
- Active Personality Jurisdiction: crimes committed by a national of the prosecuting state
- Passive Personality Jurisdiction: crimes committed against a national of the prosecuting state
- National Security: crime is a threat to the national security of the prosecuting state[21]

Jurisdiction, however, may not be extended to an existing office holder but must await his/her leaving office. Such immunity does not necessarily extend to prosecutions by the offender's own State.

Articles 49, 50, 129 and 146 of Geneva Conventions I, II, III, and IV, and Article 85 (1) of Additional Protocols 1to the Geneva Conventions however contain a similar but more ambiguous provision. They lay down that:

> "Each High Contracting Party shall be under the obligation to search for person alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provision of its own legislation, hand such person over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case." 23

[21] Article 7 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984, 1465 *UNTS* 85), Article 5 of the International Convention on the Suppression of the Crime of Apartheid (30 November 1973, 1015 *UNTS* 244), Article 4 of the Convention for the Suppression of Unlawful Seizure of Aircraft (16 December 1970, 860 *UNTS* 105), Article 5 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (23 September 1971, 974 *UNTS* 178), Article 3 of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (14 December 1973, 1035 *UNTS* 167), and Article 5 of the International Convention against the Taking of Hostages (18 December 1979, 1316 *UNTS* 205).

Ambiguity may arise with respect to the strength of the evidence being relied upon and this concern requires that charges only be brought by a prosecutor or Judge authorized to do so and formally able to commence proceedings through the filing of formal charges and the issuance of an international arrest warrant.

## Torture and Universal Jurisdiction

As noted above, there is no doubt that torture as a war crime is subject to Universal Jurisdiction, whether committed in an international or non-international armed conflict. What is frequently overlooked, however, is that torture is also subject to Universal Jurisdiction as a crime against humanity when it is committed as part of a pattern of crimes against humanity. I believe that a case can be made that the incidents of torture planned and committed by U.S. officials and agents was part of a pattern involving both the U.S. military and intelligence agencies and spanning four or more continents and thousands of victims. In addition to the obligation of states parties under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) to exercise jurisdiction over persons found in their territory suspected of torture abroad, to extradite them to other states able and willing to do so or to surrender them to an international criminal court, other states may exercise Universal Jurisdiction over them as a matter of customary international law.

I suggest that the United States, a party to the Convention against Torture, may not shield a person suspected of torture from international justice, but must either exercise jurisdiction over persons found in its territory suspected of torture or extradite that person to a state able and willing to do so or surrender the suspect to an international criminal court with jurisdiction over torture and the suspect.

So that there is no doubt, Article 1 of the Convention defines the crime of torture as follows:

"For the purposes of this Convention, the term 'torture' means any act by which severe

> pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidation of any kind, when such pain or suffering is inflicted by or at the instigation of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

The definition of torture in the Convention against Torture reflects customary international law.

The Convention against Torture requires all parties to enact legislation prohibiting torture and providing appropriate punishment. Both treaties lay out detailed obligations for states parties to prevent and punish torture and to exercise jurisdiction over suspects in their territory regardless of the nationality of the suspect or the victim, no matter where the torture is alleged to have taken place or to extradite suspects to states requesting extradition. The obligations related to jurisdiction are described below.

All states parties to the Convention against Torture are obliged whenever a person suspected of torture is found in their territory to submit the case to their prosecuting authorities for the purposes of prosecution, or to extradite that person. In addition, it is now widely recognized that states, even those which are not states parties to these treaties, may exercise Universal Jurisdiction over torture under customary international law.  As noted above, the U.S. has enacted the Torture Victims Protection Act.

### A. The duty of states parties to the Convention against Torture and the Inter-American Convention on Torture to prosecute or extradite suspects

The jurisdictional provisions of the Convention against Torture are modeled on those of the Hague and Montreal Conventions.

Article 5 (1) of the Convention against Torture requires each state party to provide for territorial and active personality jurisdiction over torture and permits any state party to exercise passive personality jurisdiction "if that State considers it appropriate". In addition, Article 5 (2) of the Convention against Torture requires each state party to take measures to establish Universal Jurisdiction over persons suspected of torture, unless it does not extradite the suspect. It provides:

"Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to a lawful request.

### Duty to extradite or submit case for prosecution

Article 7 (1) of the Convention against Torture provides that any state party which does not extradite a person found in territory under its jurisdiction alleged to have committed torture must submit the case for the purpose of prosecution. It reads in full:

"The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

Failure to fulfil this obligation is a violation of international law. It is clear from the *travaux préparatoires* that the try or extradite obligation in Article 7 (1) does not depend on a request for extradition followed by a refusal. The drafters of the Convention expressly rejected a proposal to impose such a requirement, which is found in some treaties and national

legislation. Instead, they decided to follow the model of the Hague Convention and similar treaties which do not impose such a requirement.

As in the Hague Convention model, the Convention against Torture did not establish a system of priority among states with jurisdiction. Instead, it left the decision with the state in whose territory or territory under its jurisdiction a suspect was located whether to extradite the suspect to another state or to submit the case to its authorities for the purpose of prosecution. Article 5 (2) is an independent basis for jurisdiction which may be invoked regardless whether another basis of jurisdiction exists.

The obligation in Article 7 (1) to "submit the case to its competent authorities for the purpose of prosecution", as in similar provisions in treaties following the Hague Convention model, is designed to safeguard the rights of the accused. Article 7 (2) makes this point clear by requiring, first, that "[t]hese authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State". This requirement should not, however, be read to permit a state party to excuse itself from its obligations to bring persons to justice for crimes under international law because of outdated restrictions on the scope of Universal Jurisdiction over ordinary crimes. Read together with absolute obligation in Article 5 (2) to "take such measures as may be necessary to establish its jurisdiction", it is clear that states parties must eliminate such outdated restrictions with respect to torture. A second provision of Article 7 (2) safeguards the rights of suspects in cases of Universal Jurisdiction by providing that "the standards of evidence required for prosecution shall in no way be less stringent than those which apply in the cases [based on other forms of jurisdiction]". Similarly, Article 7 (3) guarantees a person accused of torture "fair treatment at all stages of the proceedings".

The obligation in Article 7 (1) to extradite or to submit the case for the purpose of prosecution is absolute and one that must be fulfilled in good faith. Therefore, restrictions in national legislation on the scope of that obligation with respect to torture and ancillary crimes are contrary to the Convention against Torture.

### Permissive Universal Jurisdiction

Individual acts of torture are crimes under international law.[22] Evidence in the form of international and national jurisprudence and scholarly writings indicates that, independently of the Convention against Torture, customary international law permits states to exercise Universal Jurisdiction over the crime of torture. The prohibition of torture, whether it is committed on a widespread and systematic basis and, therefore, a crime against humanity, or committed against a single victim, is part of *jus cogens*. That the prohibition of torture is part of *jus cogens* is recognized both by scholarly authority and national courts.[23]

The prohibition of torture is also an obligation *erga omnes* owed to the entire international community which all states have a right to enforce through the exercise of Universal Jurisdiction over suspects found in their territory.

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[22] R. V. Bow Street Metropolitan Stipendiary Magistrate and others, *ex parte* Pinochet Ugarte (Amnesty International and others intervening) (Pinochet No. 3) , [1999] 2 All ER 97, Hutton ("acts of torture were clearly crimes against international law" as of 1988) 164; Browne-Wilkinson, 114 ("international crime of torture"); Millet ("The 1984 Torture Convention did not create a new international crime. But it redefined it.").

[23] See, for example, Restatement (Third) of the Foreign Relations Law of the United States § 702, comment n (prohibition of torture is *jus cogens*) (1986); Pinochet (No. 3), Browne-Wilkinson, 108 (noting that Chile had accepted that "the international law prohibiting torture has the character of *jus cogens* or a peremptory norm"); Hutton, XXX ("the prohibition of torture had [ac]quired the status of *jus cogens* by that date [1988]"); Hope, XXX ("there was already widespread agreement that the prohibition against official torture had achieved the status of a *jus cogens* norm" by 1988); In re Estate of Ferdinand Marcos, Human Rights Litigation(Hilao v. Estate of Marcos), 25 F.3d 1467, 1473, 1475 (2d Cir. 1994); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992), cert. denied, 507 U.S. 1017 ("[T]he right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of jus cogens.").

Nigel Rodley, concluded more than a decade ago that "permissive universality of jurisdiction [over torture] is probably already achieved under general international law".[24] He repeated this conclusion in 1999, stating that "it is now hard to imagine a convincing objection to any state's unilateral choice to exercise jurisdiction [over torture] on a universal basis".[25] More recently, he urged: "In countries where legislative provisions do not exist which give authorities jurisdiction to prosecute and punish torture, wherever the crime has been committed and whatever the nationality of the perpetrator is (Universal Jurisdiction), the enactment of such legislation should be made a priority."[26]

### Obligation to prosecute or extradite – Treaty Monitoring Reports

There is also some authority, as reflected in the interpretation of international treaty monitoring bodies and international experts for the view that all states - whether parties to the Convention against Torture or not - may not harbor persons suspected of torture, but must either exercise Universal Jurisdiction over suspects found in their territory or extradite them to a state able and willing to do so.

The Committee against Torture, an expert body established under that treaty to monitor its implementation, has declared that all states are under an independent duty to investigate and prosecute the crime of torture even if they are not parties to the Convention against Torture, as there exists "a general rule of international law which should oblige all States to take effective measures to prevent torture and to punish acts of torture", recalling the principles of the Nuremberg judgment and the Universal Declaration of Human Rights. The Committee against Torture did not limit the obligation to investigate and prosecute to cases where states had territorial jurisdiction. Similarly, as noted above, the UN Special Rapporteur on torture has urged that in all states lacking Universal Jurisdiction legislation, "the enactment of such

legislation should be made a priority", in effect suggesting a moral, if not legal, obligation.

## Universal Jurisdiction in Europe

As Redress, the U.K. NGO focusing on torture has reported:

Universal Jurisdiction has been the basis of a number of criminal investigations and trials around Europe, most of them arising out of the conflicts in former Yugoslavia and Rwanda or from military dictatorships in Latin America.

Since 1993, there have been six completed trials in Europe, resulting in four convictions and two acquittals. In Germany, two Bosnian Serbs were convicted for crimes committed in former Yugoslavia against Muslims. Novislav Djajic was convicted in May 1997 and sentenced to five years' imprisonment for war crimes, and Nikola Jorgic was convicted in September 1997 and sentenced to life imprisonment for genocide and murder. In November 1994, a Danish court convicted a Bosnian Muslim, Refik Saric, of brutally torturing prisoners of war in a Croat-run prison camp in Bosnia, and sentenced him to eight years' imprisonment. And in April 1999 a Swiss military court convicted N, a Rwandan national, of having committed war crimes in Rwanda. Two Bosnian Serbs have been tried and acquitted of crimes, Dusko Cvjetkovic in Austria and G.G. in Switzerland.

There are ongoing criminal proceedings in at least four other cases in Belgium, France, Germany and the Netherlands. All of these cases relate to the conflicts in former Yugoslavia and Rwanda. In May 1999, charges were dropped in a process taking place in the United Kingdom. A Sudanese national had been charged in September 1997 with torture allegedly committed in Sudan following the coup which brought the National Islamic Front to power there

in 1989. He was awaiting trial in Scotland in connection with alleged torture of detainees at a secret detention centre in Sudan until the Scottish prosecution authorities decided to discontinue the prosecution for unknown reasons. At least ten further suspects are known to be currently under investigation in several European states. In addition, investigations have been opened against persons not physically present in the country where the process is taking place, the most notable example being the ongoing cases against Pinochet in several European states.

This does not cover cases relating to war crimes committed during the Second World War, although even in the 1990s there have been a number of criminal processes initiated in European states. For example, the trial of Anthony Sawoniuk took place in February and March 1999 in London.

Almost all of the ongoing cases where suspects are in custody relate to the conflicts in former Yugoslavia and Rwanda. The entry of waves of refugees from all sides of these conflicts into Europe has inevitably resulted in victim and perpetrator encountering each other. European legal systems have been challenged to respond to this situation by implementing principles they have committed themselves to in the international arena. Most have managed to live up to the challenge even where this has meant breaking new ground in terms of national law.

The cases show a dynamic interplay between the existing international criminal tribunals (for former Yugoslavia and Rwanda) and national courts. Most European states enacted legislation in order to be able to co-operate with the international tribunals. Several have handed over suspects to the international tribunals. For example, Germany transferred the suspect Tadic to the International Criminal Tribunal for former Yugoslavia (ICTY) in 1994.

The cases show national courts grappling with the most difficult points of international law and displaying confidence in doing so. In Djajic, the Bavarian High Court in Germany considered whether or not the conflict in former Yugoslavia constituted a conflict of an international nature or not, and determined that it did. On this point it reached a different conclusion than the ICTY had in the case of Tadic. The Swiss Military Tribunal in the case of G.G. also determined that the conflict was of an international nature at the relevant time.

Some countries, notably Switzerland and the Netherlands, view their military tribunals as the appropriate courts for adjudicating cases involving war crimes. In the leading case which determined that the Dutch courts can exercise Universal Jurisdiction over war crimes, the Supreme Court said that only a military ordinary judge would be equipped to deal with the technical military issues involved in such cases. It said that such questions form the basis not only of the question of guilt but also inform sentencing.

The problems that can be caused by the absence of adequate implementing legislation were illustrated in France. The French courts were deterred from investigating allegations of war crimes against Bosnian Serbs by the absence of specific French legislation to give effect to the Geneva Conventions. In March 1996, the French Supreme Court, the Cour de Cassation, confirmed this ruling.

Nevertheless some of the cases show domestic courts addressing and overcoming some of the shortcomings of international law or of implementing legislation identified in this briefing. One example is the willingness of courts in Austria, Germany and Spain to exercise jurisdiction over genocide despite the absence of explicit provision for the exercise of Universal

Jurisdiction by national courts of another state in the Genocide Convention itself. Article 6 of the Convention provides only for jurisdiction to be exercised by the territorial state or by a relevant international tribunal. The Austrian Supreme Court in 1994 expressed its satisfaction that the Austrian courts were entitled to exercise jurisdiction because there was no functioning criminal justice system in the state where the crime was committed, and nor was there a competent international criminal tribunal at the time. The German court in the case of *Jorgic* in 1997 found that Article 6 of the Genocide Convention was generally regarded as not excluding the possibility of national courts exercising jurisdiction. It also found jurisdiction on the basis of the German Law on Co-operation with the ICTY. The Spanish national criminal court, the Audiencia Nacional, hearing an appeal in the *Pinochet* case, also found that the lack of explicit provision in the Convention did not exclude the possibility of a state party exercising jurisdiction, and said that it would be contrary to the spirit of the Genocide Convention to consider Article 6 as limiting the freedom of national courts to prosecute for genocide committed abroad.

Courts will not normally rely on customary international law alone to found jurisdiction. For instance the Swiss courts, in the case of N, were not willing to base charges of genocide and crimes against humanity on customary international law alone. In rare cases, national courts have found a basis for exercising Universal Jurisdiction drawing directly on international law principles. For instance, a Belgian judge investigating Augusto Pinochet decided in November 1998 that international law gave his court jurisdiction over crimes against humanity committed abroad.

A number of the other ongoing cases relate to human rights violations such as disappearances and torture, committed during military dictatorships in several Latin American states,

particularly Chile and Argentina. While these regimes were replaced by democracy, most of those responsible for the violations have not been punished. In both Chile and Argentina, amnesty laws were passed that purported to remove the possibility of criminal proceedings against the military leaders. While some leaders were tried in Argentina, they were later pardoned. Some of the European cases have arisen out of the strong links between the states in question. For instance, a number of Italian and Spanish nationals were victims of the harsh regimes in Argentina and Chile during the 1970s and 1980s. Other cases arose out of the refugee communities which formed in most European countries during the years of these repressive regimes.

Most of these investigations have been initiated, at the instigation of victims or their families, without the physical presence of the suspect. For example, examining magistrates in Spain, France, Switzerland and elsewhere have initiated criminal investigations into violations allegedly committed by General Pinochet even though he was not physically within their territory, and then subsequently sought his extradition from the UK. In some cases it has been possible to obtain custody of the accused at a later stage in the investigation. For instance in Spain, Argentinean Navy Officer Adolfo Scilingo was arrested in October 1997 after admitting to involvement in throwing opponents of the military regime out of an airplane.

Courts have not always proved willing to initiate investigations on the basis of Universal Jurisdiction in the absence of an accused person. For instance, the French Cour de Cassation ruled in March 1996 that the French courts could only exercise Universal Jurisdiction over war crimes and other crimes which France was obliged to prosecute under international treaties, where the accused was actually present in France. It was only where exercising jurisdiction on the basis of the passive personality principle - for violations against French nationals - that

French courts have initiated proceedings in the absence of the accused. On this basis an investigation was opened into Chile's Augusto Pinochet in October 1998 which led to a request for his extradition from the UK, and in 1990, Argentine Captain Alfredo Astiz was convicted and sentenced to life imprisonment for his role in the torture and disappearance in Argentina of two French nuns. Since France allows trials *in absentia*, Alfredo Astiz was tried, convicted and sentenced in his absence. In the instant proceedings, Spain is proceeding on the basis of the passive personality principle.

In a number of cases, investigators and the court itself have made visits to the crime site to collect witness testimony and other evidence. For instance, the Swiss Court visited Rwanda in March 1999 during the trial of a Rwandan national.

An important lesson to be learned from the cases is that it is not only the presence or absence of adequate implementing legislation that is important in determining whether a state will be able to effectively exercise jurisdiction on the basis of Universal Jurisdiction. Other aspects of a country's legal system will also be important, including the capacity and willingness of those authorities charged with investigating and prosecuting criminal offences to prosecute cases involving violations of human rights and humanitarian law committed abroad. Like Spain, most European states use an investigating judge system, whereby crimes are investigated under the direct supervision of a judge including collection of evidence. Such systems tend to be more open to victims of crime, who are able to exercise greater influence in the initiation of an investigation and the pursuit of a prosecution, than in a system such as that of the UK or the U.S. where non-judicial organs are responsible for criminal investigations. In the case of the Sudanese doctor charged in Scotland with having committed torture in Sudan, the decision of the Scottish Crown Office in May 1999 not to continue the prosecution was taken without

consultation with the victims, and without any possibility of judicial review.

Despite the difficulties encountered, many of these cases serve to strengthen arguments for Universal Jurisdiction because they demonstrate that fair and speedy conviction of war criminals in national courts is possible.

### The Role of the Victim

Victims and their legal representatives have played a key role in encouraging national authorities in Europe to exercise Universal Jurisdiction for international crimes. In many instances, they have taken steps to initiate criminal proceedings and to press states to comply with their obligations under international law. Yet in some cases they have faced obstacles in playing a full role in the proceedings.

In most European states the criminal justice system enables victims to play an active and central role in the criminal proceedings, in addition to their role as witnesses. They can often not only trigger a criminal investigation but also join the criminal process as a full party and seek reparation. Such provisions reflect a consensus among European states. In 1985, in Recommendation R (85) 11, the Council of Ministers of the Council of Europe recommended that the needs of the victim should be taken into account to a greater degree throughout all stages of the criminal justice process.[27] According to this document, measures should be taken by the police, the prosecution authorities and the court to keep victims informed at all stages, and give them a meaningful role in the decision to prosecute as well as prosecution process itself, and victims should be able to obtain compensation within the criminal justice process. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985 also calls on judicial and administrative processes to be responsive to the

needs of victims by, *inter alia*, keeping them informed and allowing their views and concerns to be presented and considered at appropriate stages of the proceedings.[28]

The prosecuting authorities have an obligation to inform the victim of his/her rights in the criminal justice system in a number of countries.[29] Where a victim may be joined as a party to the proceedings, he/she must be informed of this right. The victim often has the right to be informed in cases where the prosecuting authority takes the decision not to prosecute. This is important for a number of reasons. It may be important for the victim to know that the defendant is at large. Or the victim may wish to take alternative action such as claiming compensation in a civil suit. More generally, it is a way of showing respect for and sensitivity to the victims.

In some states the victim has the right to appeal the prosecutor's decision to a superior authority or to a court, which may order the prosecutor to take over the case if it finds for the victim. In some countries there is also a right to initiate private prosecution, although this right is rarely exercised In cases where it is decided that an offence is so minor that there is insufficient public interest in a prosecution by the state, many countries provide for the possibility of victims initiating their own private prosecution.

Once a criminal prosecution has been initiated by the state, several states allow victims to have an advocate or "support person", especially in cases of sexual assault/rape. In others, victims may make suggestions regarding the investigation process, propose or submit

[29] See the Codes of Criminal Procedure of Hungary and Poland. In Germany, such duties are provided for in guidelines published by the Ministry of Justice. The French Ministry of Justice published a book called Guide des droits des victimes in 1982 which informs victims about court procedures as well as provisions for compensation by the state. In the Netherlands, similar guidelines for dealing with victims of serious crimes were published by the Ministry of Justice in 1986. The UK also provides for victims to be informed of their rights.

evidence, provide input regarding the examination of witnesses, subpoena witnesses and be heard in court regarding the charges and the emotional, social and economic costs of the crime. Such a possibility exists in Austria, France, Germany, Sweden and Norway. In Italy the victim may make representations at the end of the trial.

In several European states victims are permitted an even greater level of participation. A *partie civile* system operates in France, Belgium, Italy and Germany, by which a victim is permitted to join criminal proceedings as a full party in the case. In France, parties other than the victim may be joined as *parties civiles* as well; some examples are organizations dedicated to combating racism, sexual violence and child abuse. After being joined to the proceedings in France, the *partie civile* has the same right to be informed about the progress of the case as has the defendant, as well as the right to be informed about evidence collected. He or she has the right to be represented by a lawyer and legal aid is available. Other rights include the right to address the court and tell his/her version of events, and to make representations regarding the appropriate sentence.

In other states, too, victims joined as *parties civiles* are permitted access to official documentation. In the Netherlands, once a summons has been issued, the victim may examine the police files.

Many states place a formal obligation on the police or other agencies to give victims certain information at various points during an investigation and trial, as called for in the Council of Europe's Recommendation R. It appears, however, that despite the considerable importance attached to notification of victims, actual implementation may often be lacking.[30] The attitude of the authorities towards their informatory duties is most important, and in countries where

victims have an official status as party to the proceedings, their chances of being informed are greater.

A key aspect of the *partie civile* system is that it enables victims to seek reparation through the proceedings. In France, a victim may initiate criminal proceedings to this end through an intervention by sending a registered letter to the court. This ability to be joined to a criminal prosecution allows for a cheaper and quicker way to obtain compensation than recourse to the civil courts. Most European jurisdictions offer victims the possibility of claiming compensation within the framework of the criminal process. Compensation awarded in cases relating to violations of human rights or humanitarian law is usually regarded as symbolic. In the trial in absentia of Argentinean Captain Astiz in France, for instance, victims joined as *parties civiles* were awarded one franc each by way of moral damages (*á titre du préjudice moral*), and were also awarded the costs of the civil action.

Despite these sometimes far-reaching rights afforded to victims in European criminal justice systems in theory, in reality victims have experienced difficulties in exercising the rights given to them by law. In Italy, for instance, groups representing relatives of the disappeared in Argentina were denied their applications to join proceedings. In Switzerland, the spouse of a victim who had died in the Rwandan genocide withdrew as *partie civile* from the case against N. when forced to choose between becoming an ordinary witness and gaining the right to witness protection measures, or remaining as *partie civile* and not being eligible for such protection. There are also disincentives for victims to apply to be *partie civile*. For instance, in Belgium if victims initiate an investigation from which no prosecution results, the victims are obliged to pay the costs of the investigation. Any compensation orders made in such cases are also difficult to enforce.

## 6.1 Universal Jurisdiction and the Issue of Prosecution In Absentia In General

This issue will be discussed further in the section concerned with Spanish Law, but as noted above, under international law, there are different forms of jurisdiction. They are territoriality active personality, passive personality, and protective principles.

Though strengthened by the presence of any form, the universality principle does not by itself require any link between the state demanding to assert jurisdiction and the offence. It appears that Universal Jurisdiction can be exercised without the voluntary physical presence, or even without any presence of the person in question — leading to Universal Jurisdiction *in absentia*.

Universal Jurisdiction *in absentia* connotes at least three different meanings. It could refer to the possibility of initiating proceedings in the absence of the offender. Hence, international arrest warrants may be issued to secure the offender's presence to stand trial. It may, however, go further by using enforcement means, such as abductions. Finally, it could refer to trials *in absentia*.

Third, international law divides jurisdiction into two major categories: prescriptive or legislative jurisdiction on the one hand, and enforcement jurisdiction on the other.

Prescriptive jurisdiction is the power or capacity of a state to make law, decisions, or other rules within its own territory. An example of this category is the right of a State to criminalize acts by enacting criminal codes. On the other hand, the competence to ensure compliance with that law through an "executive action" is known as jurisdiction to enforce. Enforcement jurisdiction is not problematic if it is limited to the territory of the State who exercises it.

However, as in the instant potential prosecution, enforcement jurisdiction can also take the form of a State acting within the borders of another state in order to enforce its laws, and it is frequently in this narrow sense that the term "enforcement jurisdiction" is used. The general rule in international law is that any such action requires consent by the other State, in view of that State's territorial sovereignty. Thus, States have full competence to prescribe and enforce their laws only within their own territory. This poses an important question: under which category falls Universal Jurisdiction *in absentia*?

In my view the first and third aforementioned meanings of universality *in absentia* — i.e., initiating proceedings against an absent offender, and trials *in absentia*, are covered by either prescriptive jurisdiction including enforcement on the State's own territory. In other words, a State can "investigate and prosecute crimes" committed on a foreign soil.

Universal Jurisdiction *in absentia* includes the conduct of a criminal investigation or the issuing of international arrest warrants, and does not seem to lie under the prohibited category of enforcement jurisdiction. Technically, an international arrest warrant is normally enforced by the authorities, or by the consent, of the receiving state. This finding is in line with Professors Van Den's argument in the *Congo v. Belgium* judgment, where she rightly observed that "[for the purpose of enforcing an international arrest warrant in a third state]: there is always a need for a validation by the authorities of the State where the person, mentioned in the warrant, is found...[and thus the warrant is not] automatically enforceable."[31]

Thus, a State that issues an international arrest warrant is still acting within the frame of the wider form of prescriptive jurisdiction (including enforcement within the State's own territory) as opposed to enforcement jurisdiction within the territory of a foreign State.

There is a growing tendency to shrink the sovereign rights of States in cases involving human rights violations on a large scale. Authority for this view can be taken from the *Tadic* decision,[32] which is also supported by a considerable part of the legal literature on the subject. Professor Brownlie goes so far as to state that, in cases of prosecuting crimes against international law, both customary law and the principles related to jurisdiction, intervention in the internal judicial affairs of other states have no standing.[33]

Thus there is a presumption that a state may exercise Universal Jurisdiction and prosecute without the presence of the accused.

This may often be regarded as the exception and not the rule, since it is settled that prosecutions of *jus cogens* are entitled to Universal Jurisdiction without the application of the traditional rules of jurisdiction which do not apply in such cases.

Hence, the conclusion that in such cases prosecution *in absentia* is permitted.

Universal Jurisdiction *in absentia* is excluded under some legal systems but permissible under others. (See below for a discussion of the law in Spain.)

The trials held post-World War II by the U.S. and British Military courts showed recognition of the principle of Universal Jurisdiction. The courts inclines tended to embrace the conditional form of universality, which required the presence of the offender on the territory of the state which exercises jurisdiction.

The adoption of the 1949 Geneva Conventions demonstrated a material development of the

concept of Universal Jurisdiction. The language of those treaty provisions in no way bars *in absentia* prosecutions.

Although a number of treaties do not permit the application of universality *in absentia*, this does not mean that such practice is prohibited under international law but only that the practice had not been developed at the time the treaty was ratified.

While contemporary legislation and jurisprudence in some countries exclude this practice, it is allowed in others. For example, the practice is still allowed in the Spanish (see below), Italian, New Zealand, and Israeli legislation. Given the gravity of genocide, crimes against humanity, torture and war crimes, both courts and legislature in Germany are now leaning towards this a type of jurisdiction.[34] Although state is divided regarding this type of jurisdiction, there is no explicit prohibition. An example of the special significance of *jus cogens* crimes to the application of *in absentia* prosecutions prior to extraordinary political pressure from the U.S. causing amendment to the Belgian Penal Code regulating *in absentia* jurisdiction, was the ruling of the Belgian Court de Cassation (12 February 2003) which held that although article 12 of the code of Penal Procedure required the presence of the accused in Belgian territory, the article was limited to crimes which did not include those grave breaches of the 1949 Geneva Conventions, genocide or crimes against humanity.[35]

In the Belgian instance, it is clear that such change was based on political and economic pressure rather than any legal justification. The United States apparently threatened to move the NATO headquarters out of Belgium if the law was not changed. The action undertaken by the Belgian legislature, which contradicted the Belgian High Court's finding, demonstrates how law suffers when politics interferes.

## 7. Universal Jurisdiction in Spain

Article 23-4 of the Organic Law 6/1985[36] confers on Spanish courts Universal Jurisdiction over Genocide and any offense which Spain is obligated to prosecute under international treaties including the Convention Against Torture[37] and the Geneva Conventions and the first additional Protocol.[38] Spain ratified the four Geneva Conventions on August 4, 1952.[39]

Crimes against humanity have been criminalized under the Spanish Criminal Code since 1984.[40]

The efforts by investigative Judge Baltasar Garzon to extradite former Chilean dictator August Pinochet Ugarte from the United Kingdom in 1998 were a hallmark exercise of Universal Jurisdiction in Spain. Since that case, included among other completed and pending cases, are ones against Alberto Fujimori (deferred to Peruvian prosecution), Scilingo, Argentine Military Officer Ricardo Miguel Cavallo, Guatemalan Head of State Efrain Rios Montt, and former Chilean General Herman Brady.

In the *Rios Montt* case the Supreme Court's ruling in 2003[41] by an 8 to 7 majority, appeared to take the view that the principles of state sovereignty and non-intervention can, in fact, restrict jurisdiction and can only be justified where there is – as is present in the instant case – a direct connection with Spanish national interests, bi-lateral agreement, a decision of the United Nations, or the presence of passive or active personality principle. (In the instant proceeding, with Spanish victims of torture and murder – Jose Couso – the passive personality criterion is

[40] See Spanish Penal Code 1995 (Edigo Penal) art. 607 bls.] The High Court (Audencia Nacional), in the case of the Argentinian Adolfo Scilingo, ruled that crimes against humanity may be prosecuted even if they were committed before the amendment of the Criminal Code. [See the report by Giulia Pinazaute "An Instance of Reasonable Universality: The Scilingo Case", Journal of International Criminal Justice, 3 (2003) p. 1092

satisfied.)

In the subsequent *Fujimori* case the Supreme Court did not make any reference to the requirement of a direct connection, neither, contrary to *Rios Montt*, did it require the defendant's presence.

Prior to the *Rios Montt* case it had been possible not only to investigate such charges but also to declare judicial competence over such heinous crimes. This was evident in the *Pinochet* case where the Audencia Nacional declared that the Spanish Courts had jurisdiction even though *Pinochet* was in the United Kingdom at the time.

Thus, the ruling of the Supreme Court in the *Fujimori* case seems to follow the pre-*Rios Montt* reasoning.

In the worst case scenario there appears to be no barrier under Spanish law to the commencement of an investigation, the issuance of arrest warrants and the request for extradition.[42]

Immunities

(For a comprehensive discussion see the "Defenses" section below)

Spanish law recognizes immunity in accordance with the provisions of public international law.[43] Since to the extent public officials at various levels of authority, have immunity while in their official positions and they fail to retain it when they leave office *(rationae personae)* the focus must be on Heads of State and the immunity for their "official acts" which remains with them after they leave office. *(ratione materiae)* This is a critical issue since a result allowing for

retention of immunity could allow the Pinochets, Galtieris, Hitlers, Amins, (and here Bushes and Cheneys) of the world to enjoy a luxurious retirement following their responsibilities for the commission of unspeakable crimes. As evidenced by the *Fujimori, Pinochet, Galtieri* and *Rios Montt* cases Spain is among those states reducing the immunity of high state officials. It has become clear that acts such as torture, criminalized by treaties, can no longer be provided with the "official acts" continuing immunity.

Spanish courts have also held that amnesties issued in territorial states will not be binding on Spanish courts exercising Universal Jurisdiction.[44]

Statute of Limitations

Article 131-4 of the Spanish Criminal Code expressly excludes crimes against humanity, genocide, and war crimes from statutes of limitations.[45]

Subsidiarity

If the evidence in a case demonstrates that a territorial court (previously the Courts of Guatemala and Tibetan cases) -- here the courts of the United States of America – are unwilling or unable to effectively investigate and prosecute the crimes referred to in the complaint, See discussion below and the "Conclusion",) an investigative judge may open an investigation, rendering it unnecessary for a complainant or prosecutor to show a line between the prosecution of a Universal Jurisdiction crime and Spain's national intent.[46]

Notification

These proceedings have been raised by Spanish human rights lawyers on behalf of Spanish citizens. Other cases have been raised by NGOs or Spanish citizens as private prosecutions

for the *accin popular*.[47]

Mechanism of International Cooperation

The Spanish investigative officials use the EU network and Interpol for the exchange of information. Treaty States partners are expected to cooperate with respect to extradition requests and information. It is anticipated in the pending proceedings that cooperation from the relevant United States agencies will be limited.

Victims – Compensation and Representation

In such cases there is no limit on compensation, but punitive damages are not permitted. The convicted perpetrator is also responsible for compensation and where he or she is unable to pay, the State will intervene (although it has only previously done so in cases involving terrorism). NGOs or human rights lawyers generally act as the contact points and sources of support for victims. Legal aid is not available for *accines populares*.

Witnesses

Different methods of testifying, including testimonies via video-link, written statements and personal oral statements are permitted under Spanish law. In the trial of *Scilingo,* witnesses testified in person during trial as well as via video-link. In any case, the defendant's lawyer must be given an opportunity to cross examine witnesses and other evidence.

Fairness

The investigative judge is required to thoroughly investigate the charges and equally examine enculpatory and exculpatory evidence. Defense counsel must be given full access and opportunity to examine witnesses. If the defendant cannot afford counsel, or does not have

counsel, then counsel should be appointed by the Court.[48]

It appears that Spain is decisively moving in the direction of most European states by embracing the status of Universal Jurisdiction in its body of law. It also appears to be sincerely limiting the acceptance of immunity as a defense against the *jus cogens* crimes which horrify the civilized world. (See below.) In so doing however, it has established procedures to protect the rights of defendants as well as victims.

It is obviously not possible for the International Criminal Court or the special prosecutorial Tribunals established for particular instances of atrocities and crimes – e.g. Sierra Leone, Cambodia, Yugoslavia, and Rwanda – to address the multitude of human rights offenses including, as here, the *jus cogens* crimes of torture, illegal detention, crimes against humanity, and war crimes.

Through the exercise of Universal Jurisdiction, individual States, by treaties legally obligated to respond and adjudicate these crimes, must do so, and by stepping up, as Spain has done in previous cases, the vacuum of injustice created by inaction is filled and victims may have their day in court.

In every case defendants must have a full and fair opportunity to be heard and present a defense. Spanish law fully affords this opportunity. An issue arises however, if given that opportunity a defendant – unlike *Scilingo* -- refuses to attend voluntarily to answer the charges. An extradition request must follow, but if that also is ignored –- this time illegally by a Treaty Party that elects to breach its obligations -- a dilemma arises. In my view, not only must the prosecutorial investigation and any subsequent requests or warrants be issued, but also the

trail must go on *in absentia*. In such circumstances, I suggest not only is it permissible, but necessary, lest the course of justice be frustrated.

In the absence of any open criminal prosecutions against the defendants in their state, the procedure for an *in absentia* trial, should be accompanied by strict due process protections for the defendants in order to avoid any semblance of unfairness. They should include the following:

1. A certification from the relevant authority in the Defendant's home state that there are no open criminal proceedings against the Defendant.
2. Full and complete notice to each defendant of the specific charges to be answered.
3. Responses in writing by the Prosecution to all questions posed on behalf of the defendant.
4. Agreement in writing as to the conditions of pre-trial release, bail, and movement in and out of Spain by the Defendant.
5. The opportunity for the Defendant to be represented by any counsel of his choice or, if he so elects, by counsel appointed by the Court.
6. Complete access by the Defendant and his counsel to all enculpatory and exculpatory evidence against him/her and the opportunity to question witnesses under oath prior to the trial proceedings.
7. Full and complete access to information at each stage of the investigative process.

To the extent that any of these procedures seem irregular to the Spanish investigative process, in a case like this, I suggest that it is fully necessary to open up the proceedings to the maximum extent.

Should the investigative hearings proceed without the Defendant appearing, I urge the Court to appoint Counsel who would diligently represent the accused at every stage.

These procedures are not unfamiliar to U.S. Federal judicial procedure. As an aside, not very long ago I tried a case against Iran in the U.S. Federal District Court in Washington, D.C.[49] The Iranian government elected not to appear and not to send defense Counsel. In that instance, the trial judge effectively took on that role and scrupulously intervened and examined witnesses and the evidence. This is the role with which a Spanish investigating judge would be familiar.

In any event, it is clear that the refusal of a defendant and a political decision by the United States government to not extradite, thereby contravening the *aut dedere aut judaire* principle, must not be allowed to frustrate the legal process of Universal Jurisdiction in such a serious case. If the proceedings are not to proceed to trial and judgment it will make a nonsense of the very concept of Universal Jurisdiction and the entitlement of justice to Spanish citizens as well as other victims from a number of other countries.

As a result of the crimes against Spanish nationals and others – torture, murder and illegal detention – the course of justice in this Spanish Court in accordance with the principles of Universal Jurisdiction must, in my opinion, go forward.

## 8. Defenses

It is anticipated that the Defendants, or some of them, in the Universal Jurisdiction cases before the Court will attempt to assert either, or in some instances both, of the two most likely

defenses available to them under International Law, namely:

## 8.1. Superior Orders

### 8.1.1 History

The defense being asserted by the U.S. President in his public statements confirming that he will not sanction a prosecution of the interrogators of prisoners in U.S. custody is one that has been asserted for several centuries. "Superior Orders" may, in fact, be the oldest defense used in military trials, but it also has had a formidable presence in instances of civilian actors.

Going back to the 15th century, Peter von Hagenbach was convicted of mistreating and permitting those under his command to criminally mistreat civilians.[50] His defense was that he was carrying out the orders of his superior, the Duke of Burgundy. During this century, in 1439, Charles VII of France issued an order stating that "… each captain or lieutenant be held responsible for the abuses, ills and offenses committed by members of his company, and as soon as he receives any complaint of any such misdeed or abuse, he must bring the offender to justice… If he fails to do so… the captain shall be responsible for the offense as if he had committed it himself and shall be punished in the same way as the offender would have been."[51]

Some 200 years later, the Swedish King ordered that: "No colonel or capitaine shall command his soldiers to do any unlawful thing: which who so does, shall be punished according to the discretion of the judges."[52]

In a similar spirit, in 1775 the Massachusetts Provisional Congress provided that: "Every Officer commanding, in quarters, or on the march, shall keep good order, and to the utmost of

his power, redress all such abuses or disorder which may be committed by any Officer or a Soldier under his command; if upon complaint made to him of Officer or Soldiers beating or otherwise ill-treating any persons, or committing any kind of riots to the disquieting of the inhabitants of this Continent, he, the said commander, who shall refuse or admit to see Justice done this offender, or offenders, and reparations made to the party or parties injured, as soon as the offender's wages shall enable him or them, upon due proof thereof, be punished, as ordered by General Court-Martial, in such manner as if he himself had committed the crimes or disorders complained of."[53]

In a case dealing with the seizure of property owned by an American businessman by members of the United States military during the Mexican-American war, the Court clearly held: "It can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify."[54]
In the United States, Henry Wirz, a Confederate Army officer put forward a similar defense against allegations that he mistreated prisoners of war.[55] He was also convicted.

The International Military Tribunals in Nuremberg and the Far East, subsequent to World War II resulted in the greatest discussion of superior orders (which became known as "The Nuremberg Defense"). While most of the issues related to military command responsibility, the body of law that emerged established guidelines that focused on superior/subordinate relationships whether military or civilian. It is most important to understand that criminal liability can exist at both levels of the relationship. The Tribunal's judgment made specific reference to, and considered the various defenses of superior orders as tendered. The judgment contained:

The defendants invoke the defensive plea that the acts charged as crimes were carried out

pursuant to orders of superior officers whom they were obliged to obey. That brings into operation the rule just announced. The rule that superior order is not a defence to a criminal act is a rule of fundamental criminal justice that has been adopted by civilized nations extensively. It is not disputed that the municipal law of civilized nations generally sustained principle at the time the alleged criminal acts were committed. This being true, it properly may be declared as an applicable rule of international law.[56]

It cannot be questioned that acts done in time of war cannot involve any criminal liability on the part of officers or soldiers if the acts are prohibited by the conventional or customary rules of war. Implicit obedience to orders of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act pursuant to a superior's order be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of the crime exists, and the inferior will be protected. But the general rule is that members of the Armed Forces are bound to obey only the lawful orders of commanding officers and they cannot escape criminal liability by obeying a command, which violates international law and outrages international law...

International Law has never approved the defensive plea of superior order as a mandatory bar to the prosecution of war criminals. This defensive plea is not available to the defendants in the present case, although if the circumstances warrant, it might be considered in mitigation of punishment under the express provisions of Control Council Law No.10.[57]

A few significant cases illustrate this point:

**The Farben Case:** As part of the horrific 'final solution' prisoners in concentration camps such as Auschwitz were put to death systematically in gas chambers using a chemical, Cyclon-B gas that was manufactured and delivered by the Degesch company. The Tribunal found, as a matter of fact that Degesch was in large part controlled by the I.G. Farben Industrial complex. Compounding the matter was the fact that the Tribunal had found that the manager of the Degesch plant had clear knowlege of the fact that the Cyclon-B chemical was being used to kill concentration camp victims.[58]

**Bruno Tesch:** The British Military Tribunal convicted the suppliers other chemicals.[59] The (British) Tribunal was satisfied, in convicting this accused that he knew that the chemical

supplied by his firm was being used for killing people.[60] The attorney representing this defendant, in mitigation of sentence, argued that even if Tesch had known the purpose to which the chemical was being put, and even if he had consented to it, that this consent was obtained as a result of extreme pressure being applied by the SS. Further, the lawyer for Tesch also argued that if his firm had not supplied the chemical another firm would have. The Tribunal rejected these arguments in mitigation of sentence subsequent to conviction. A death sentence resulted.

**Roechling:** A French military Tribunal in the Roechling matter carried the doctrine of command responsibility further by imposing upon civilians with either formal authority or informal influence and power, a positive obligation to remain informed and to intervene. Hermann Roechling was, and all material times, the general director of the Stahlwerke Voelkingen steel plant. The Tribunal found that he played a key role in obtaining, involuntarily, foreign workers for not only his plant, but as well, in his role as chairman of the Reich Association, Iron, for other plants as well.

The Tribunal found that the workers in question, in various factories, were subject to 'discipline' by the Gestapo, and, further, that these workers were often beaten and starved. Further the Tribunal found that Roechling had, in his official capacity, inspected a number of the plants in question, and either saw, or must have seen the conditions then existent for the labourers under Gestapo control. While the Tribunal acceded to the argument that Roechling lacked any formal authority to intervene in Gestapo affairs, nevertheless, the Tribunal found that he had acquiesced to the criminal treatment of the individuals in question by doing nothing.[61]

A similar American Tribunal adapted the same principle in convicting civilians for, with

knowledge, approving the acquisition of prisoners of war for use in other factories.

**The Tokyo Tribunal**: In 1946, General Douglas MacArthur established the International Military Tribunal for the Far East. This tribunal was mandated to try senior Japanese officials (both military as well as civilian) accused of having committed war crimes in what was described as the Far Eastern Theatre of the War.

In addressing the defence of superior orders Article 6 of the statute of this tribunal bears a remarkable similarity to the Nuremberg Charter. In this statute Article 6 recited:

> Neither the official position, and any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused for responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation or punishment if the Tribunal determines the justice or requires.

The principles that the Tribunal applied in the case of General Tomoyuki Yamashita were further considered in the trial, in Tokyo, of twenty-two former Japanese officials who were charged with, inter alia, war crimes. Amongst those put on trial were former members of the Japanese Cabinet, former high-ranking military officers and, as well, senior officials who had responsibility for the custody care and control of prisoners of war. This Tribunal chose to define command responsibility as:

> If this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates... of the atrocities... or of the existence of routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander, and must be punished.

This Tribunal ruled that, firstly both military personnel as well as civilian officials could be found culpable for war crimes. The Tribunal in refining the same noted that such culpability would

attach where either the individual was aware, or in the alternative, should have been aware and failed to take any action of crimes by subordinates. As a corollary, however, the Tribunal also found that if an individual did not have direct responsibility (for those upon whom the crimes were committed) that no such duty attached. In point of fact the Tribunal attached a positive obligation to both military as well as civilians who either had custody of individuals, or, in the alternative, were concerned with their well-being.[62]

**Hideki Tojo:** In refining or elaborating on the decision in the case of General Yamashita, the Tokyo Tribunal in its trial of former Minister of War as well as former Prime Minister Tojo held that once a superior (either military or civilian) has knowledge of war crimes he is under a positive obligation to deal with the same aggressively. The Tribunal considered Tojo's actions subsequent to his being told of the 'Bataan Death March'. The Tribunal found, as a matter of fact, that Tojo was aware of not only the march, but, of the substantial number of casualties and deaths that resulted from it. The Tribunal noted that while he may have made certain preliminary inquiries or observations concerning this matter that he (Tojo) did not demand a detailed investigation nor did he order criminal proceedings against those involved. The Tribunal found, further, that Tojo was aware of either situations or instances where prisoners of war had been mistreated, and again, the Tribunal found him culpable for not instituting any punitive action.[63]

**Koki Hirota:** The Tribunal, as well, set a standard by which a superior may be deemed to have knowledge of criminal acts committed by his subordinates, and the obligations that arise from the same. At all material times Hirota (1933-1938) was the Japanese Foreign Minister. The Tribunal found that he would have had notice of the war crimes committed by Japanese forces when they captured Nanking as a result receiving diplomatic memoranda or through the

international media. The Tribunal accepted that Hirota had made initial inquiries, and the Tribunal further found that he had received assurances from the Ministry of War that the ongoing acts would be halted. The Tribunal found, however, that subsequent to the receipt of advises to the effect that the criminal conduct would be terminated, the same continued for approximately another four weeks. The Tribunal held that Hirota had a positive obligation to take necessary steps to ensure that this conduct was terminated and that he failed by not so-doing. The Tribunal further found Hirota criminally culpable in not demanding from his Cabinet colleagues that immediate action be taken.[64]

**Iwane Matsui:** General Matsui was the commander of the Japanese China Expeditionary Forces (1937-1938). The Tribunal found that forces under his overall command responsible for the atrocities that took place in Nanking. The Tribunal while accepting evidence that General Matsui had issued orders to the effect that war crimes were not to be committed, noted that given the amount of time during which these atrocities took place that General Matsui had to have had knowledge that his orders were not being followed, and in point of fact, were being ignored. The Tribunal further found that General Matsui had both the responsibility as well as the authority to prevent the (ongoing) atrocities and added that in taking no action to control his subordinates he attracted criminal culpability.[65]

In the Yamashita case, he was charged, convicted, and sentenced to death for murders and rapes committed by his troops. Due to the widespread nature of the crimes, the Tribunal (IMTFE) concluded that he either knew and ordered the crimes or, minimally, condoned them.[66]

After World War 11, at the Tokyo War Crimes Tribunal the United States convicted several

Japanese soldiers for waterboarding American and allied prisoners of war. Some of the defendants were executed for committing what was clearly acknowledged to be an act of torture. In this context, it is interesting that President Obama has explicitly agreed that waterboarding is torture. He confirmed this belief again in a press conference on 29 April 2009.

Judge Evan Wallach, a former Judge Advocate and a foremost US expert of the Law of War, has stated that the US "... has not only condemned the use of water torture but has severely punished those who applied it."[67]

It is likely that those soldiers who were severely punished, even executed, were following orders and carrying out policies in good faith.

**Adolf Eichmann:** In the civilian case of Adolf Eichmann in 1961, a prosecution of a civilian superior, the principle of “manifest illegality” was advanced, which states that a subordinate should disobey all orders that are clearly illegal.[68]

A companion civilian case was:

**Klaus Barbie:** French prosecution of Klaus Barbie, the Court of Cassation explicitly stated that the defense of superior orders is not an excuse barring conviction, and may not even be used as a mitigating factor for punishment.[69]

**Viet Nam, My Lai:** Perhaps the most well known military trial involving the superior orders defense during the second half of the twentieth-century surrounds the incident that took place in the Vietnamese hamlet of My Lai on or about March 16, 1968. Amongst others, William

Calley was charged and appeared before military courts. While this incident focused in part on the issues of both command responsibility as well as superior orders, it, as well, also demonstrated that subordinates can legitimately refuse to undertake criminal actions notwithstanding direct orders from a superior.

In this fact situation, an infantry platoon led by Lieutenant Calley entered the village of My Lai anticipating substantial resistance. This resistance did not occur, but rather the soldiers met only civilians, mostly women and children. The facts demonstrated that Calley, himself opened fire on groups of unarmed civilians, and, as well, ordered one of his subordinate soldiers (Meadlo), to do the same. The material further indicated that Calley had also ordered two other subordinate soldiers to open fire on civilians but they refused to obey that order.

**William Calley:** Lieutenant Calley was convicted of murder of a number of innocents in the village of My Lai. The thrust of his defense was that the evening before this mission, while being briefed by his superior (Medina), he had given orders that "they were to kill every living thing -- and under no circumstances were made to leave any Vietnamese behind them". Medina denied giving that order, although, at trial evidence was tendered both supporting as well as refuting the position of Calley in this regard.

The Court then, in its majority decision, considered Calley's defense, and noted:

> A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts only in compliance with it. Soldiers are trained to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of the soldier is not the obedience of an automaton. A soldier is a reasoning agent, not a machine, but a person. The law takes these factors into account in assessing criminal responsibility for acts only in compliance with illegal orders.

> The acts of a subordinate done in compliance with a lawful order given him by his superior are excused and impose no criminal liability unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, known to be unlawful, or if order in question is actually known to the accused to be unlawful.[70]

The Court was clear in its judgment that even if the order, as alleged by Calley had been given to him, so long as he actually knew the same to be illegal that the defence of superior order would be of no avail and by extrapolation any subsequent continuing orders given by Calley would also be illegal.

The Court then canvassed the issue of what standard were to be applied if no actual knowledge of illegal order was found as a matter of fact, and the judgment notes:

> Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful, you must proceed to determine whether, under the circumstances, a man of ordinary sense and understanding would have known the order to be unlawful... (T)he standard is that of a man of ordinary sense and understanding under the circumstances.[71]

In a separate, although concurring judgment the case report notes:

> An act performed manifestly beyond the scope of authority, or pursuant to an order then a man of ordinary sense and understanding would know to be illegal, or are in a wanton manner in the discharge of lawful duty, is not excusable.[72]

**Ernest Medina:** Ernest Medina (the only other officer brought to trial as a result of the My Lai incident) was charged with the killing of over one hundred Vietnamese civilians. One of the fundamentals of the case against Captain Medina was the issue of command responsibility. It was the thrust of the case against him that as the officer in command of the infantry company, he was responsible, and therefore, accountable for the actions of his subordinates, particularly, if he knew that the killings were either taking place or were about to take place. The thrust of this is encompassed by the summation of the case made by the prosecution as noted by the

summary of Judge Howard:

> ...The prosecution also alleges that captain Medina was in radio contact through the operation with his platoons. It is contended that the accused was aware of almost from the beginning of the operation that units of his company were receiving or hostile fire and in fact early in the morning ordered his men to conserve ammunition. The prosecution also contends that sometime during the morning hours of 16 March 1968, the accused became aware that his men were probably killing noncombatants. It is contended that this awareness arose because of the accused's observations, both by sight and because of the conversation between.... and the accused. The contention is further made that the accused, as company commander, had a continuing duty to control the activities of his subordinates which activities were being carried out as part of assigned military mission, and this became particularly true when he became aware that the military duties were being carried out by his men in an unlawful manner. The prosecution contends that captain Medina, after becoming aware of the killing of noncombatants by his troops, declined to exercise his command responsibility by not taking necessary and reasonable steps because his troops to cease the killing of noncombatants. It is further contended by the prosecution that the accused became aware of these acts of his subordinates, and before he issued an order to cease fire, the number of unidentified Vietnamese civilians were killed by his troops.... It is the prosecution's contention that the accused was capable of controlling his troops .... but once learning he had lost control of his unit, he declined to regain control for a substantial period of time during which the deaths of unidentified Vietnamese civilians occurred. It is finally the prosecution's contention that as a commander the accused, had a duty to interfere (and) he may be held personally responsible because his unlawful inaction was the proximate cause of unlawful homicides by his men.[73]

The brief of law filed by the prosecution in the case against Medina contained the following:

> ...The military commander has complete and overall responsibility for all the activities within his unit. He alone is responsible for everything his unit does or does not do. This command responsibility does not, of course, extend to criminal responsibility unless the commander knowingly participated in the criminal acts of his men or knowingly fails to intervene and prevent the criminal acts of his men when he had the ability to do so.
>
> Military commanders may also be responsible for war crimes committed by their subordinates, 'When troops commit massacres and atrocities against the civilian population in occupied territory or against prisoners of war, but responsibility the rests not only with the actual perpetrators and also with the commander... The commander is also responsible if he had actual knowledge, or should have knowledge through reports received by him or other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law or to punish violators thereof'.[74]

Of particular note however are the instructions on the law given to the jury panel by Judge

Howard. In particular is the portion of the charge to the jury:

> In relation to the question pretending to the supervisory responsibility of a Company Commander, I can advise you that as a general principle of military law and custom a military superior in command is responsible for, and in the performance of his command duties, to make certain the proper performance by his subordinates on their duties as assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation.
>
> Furthermore, a commander is also responsible if he has actual knowledge that troops or other persons subject to his control or in the process of committing or about to commit or war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus or wrongful failure to act. Thus mere presence at the scene will not suffice. That is, the commander-subordinate relationship alone will not allow inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he knows that his subordinates are in the process of committing atrocities or are **about** to commit atrocities (emphasis added).[75]

### 1977 Protocol Additional to the Geneva Conventions

The issue of command responsibility was addressed, and to a degree clarified by the 1977 Protocols to the Geneva Conventions. Article 86(2) of the Protocol I notes:

> The fact the breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which would have enabled them to conclude in the circumstances at the time, that he was committing or was about to commit such a breach and if they did not take all feasible measures within their power to prevent or repressed such a breach.

While Article 86(2) deals with the 'Failure to Act' the same must be read in conjunction with the subsequent article that specifically addresses the issue of the responsibility or 'Duty of the Commanders'. Specifically Article 87(1) and (3) note:

> The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol. 3. The High Contracting Parties, and Parties to the conflict shall require any commander who was aware that his subordinates or other persons under it his control are going to commit or have

committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or of this Protocol, and where appropriate, to initiate disciplinary or penal action against violators thereof.

This Protocol attaches responsibility to superiors in those particular situations where they knew or should have known, and the knowledge would have given them reason to believe that a prohibited act had either occurred, or was about to occur. Liability would attach to the superior where information had been given and was then either disregarded or ignored by the superior. Further liability could also attach to the superior if the information given had been acted upon, but, the action(s) taken may have been totally inadequate in the circumstances.

Whilst Article 86 addresses the issue of 'Failure to Act' it specifically uses the term 'superior' suggesting that so long as the relationship between subordinate and superior exists the obligation attaches. Article 87, is more specific in attaching liability to military commanders for actions of their civilian and soldier subordinates, but also, for the actions of 'other persons under their control'. This phrase carries foreword the judgments of the World War II trials, but, in addition, also now clearly makes military commanders being responsible for the actions of 'non-military' (civilian) personnel under their control (as distinct from command).

It is further clear that this Article also requires that a proactive posture be maintained on an ongoing basis by the superior to keep control of the activities of their subordinates. However, the Article does not impose an absolute or totally inflexible standard of conduct on the superior, but, rather, obliges the superior to undertake steps or measures that are practical and, secondly, 'within their power'. This article then codifies, a modification of the liability standard that was imposed upon commanders by the Tribunal in Yamashita.
Further clarification of the evolution of the superior orders defense has been provided by

horrific crimes in South Lebanon, the rulings of the ITCY (which quite clearly extended the "command" relationship to civilian superior/subservient relationships finding liability where influence rather than control existed between the actors), the International Tribunal for Rwanda and the statute of the International Criminal Court where Section 286 also extends liability to non-military actors.

### Conclusion as to command responsibility defense issues

Thus, command responsibility has evolved to include both military and non-military personnel. The development of the law is not based on strict liability, but rather reflects the clear understanding that every case is to be decided on its own particular set of facts. The concept of command responsibility is now based on the clear inference that those who occupy the position of a superior, in a superior-subordinate relationship, are deemed to have; (a) the knowledge of the criminal actions of the subordinates, (b) the authority to deal with the criminal actions of the subordinates; and (c) the power to deal, by with punishment or prevention with the criminal acts of subordinates.

Particularly since the end of the World War II different bodies, have grappled with the concept. At one end of the spectrum was the strict liability attaching to a superior for the criminal acts of subordinates it regardless of any factors attaching to the ability to command and effectively control.

At the Nuremberg Trials, the standard was not one of strict liability, but rather a determination of what the superior actually knew. The trials of war criminals pursuant to Control Council Law No.10 further expanded the notion of command responsibility to include not only those in a chain of command, but also those in a specified territory who exercised a form of executive

control.

The Tokyo Tribunals added the concept of constructive knowledge and the concept of a superior's negligent disregard of information, thus further expanding the standard.

The Geneva Protocol of 1977 further attempted to clarify the standard by identifying criteria including; (a) actual knowledge that the superior had, (b) knowledge that the superior should have had and (c) standards of negligence for not knowing.

The ongoing conflict in the Middle East, in its own way added to development and refinement of the concept with the Kahan Commission's attachment of liability to high-ranking politicians who may have had only minimal notice of events and to military officers outside the chain of command.

The two functioning ad hoc tribunals (Yugoslavia and Rwanda), through their Statutes as well as decisions have continued this refinement. It remains yet to be seen as to whether or not to the community of nations will ascribe and follow the ambitious course as charted by the original signatories of the Statute of Rome establishing the International Criminal Court.

Consequently, the evolution of the superior orders defense, while ordinarily associated with the military command structure, in reality has now evolved into a superior/subservient relationship that exists in either a military or bureaucratic hierarchy of command or a mixture of the two.

It thus embraces the liability of civilian "foot soldiers" following the orders of their superior, which is precisely the case before this honorable Court.

## 8.2 Sovereign Immunity

The application of the concept of immunity which could attach to George W. Bush, Richard Cheney, and members of the Cabinet of the Bush administration has historically been considered as a dual concept. Immunity *ratione materiae* relates to individuals who perform certain functions or acts of state. This is subject matter jurisdiction and ordinarily serves to protect the acts of one state from being adjudicated before the courts of another. Therefore, it only incidentally confers immunity on the acting state official. Consequently, it follows that it is open to any person exercising official acts, from a former Head of State to the lowest public official. Immunity *ratione personae* is immunity granted to individuals based upon the position they hold rather than a consideration of the acts performed. This immunity relates to individuals who hold public office and whose acts are public acts. Its basis is the official status of the person concerned and is available to serving Heads of State, heads of diplomatic missions, their families and servants.

These immunity shields have been used throughout history to prevent the prosecution of state officials who have committed the most horrendous crimes. That protection is rapidly coming to an end. General Antonio Taguba (ret.) who conducted the joint investigation into prisoner abuse at Abu Ghraib prison in Iraq stated: “There is no longer any doubt as to whether the current [Bush] administration has committed war crimes. The only question that remains is… whether those who ordered the use of torture will be held to account.”[76]

Traditionally, accountability has been a difficult consequence. Functional immunity (*ratione materiae*) has often been used to shield governmental leaders from prosecution in the domestic courts of other countries for acts carried out as part of their official or “public” duties.

Personal immunity (*ratione personae*) has served to protect leaders for **all** acts while in office.

The concept of sovereign immunity has its roots in the divine right of kings. A 19th century American case articulated the notion:

> "One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing

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[24] Nigel Rodley, *The Treatment of Prisoners Under International Law* 107 (Oxford: Clarendon Press 1987).
[25] Nigel Rodley, *The Treatment of Prisoners Under International Law* 130; 133 (Oxford: Clarendon Press 2nd ed. 1999).
[26] Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43, U.N. Doc. E/CN.4/2001/66, 25 January 2001, para. 1316 (a).] Other authorities have also recognized this principle, which is independent of the Convention against Torture. [Daniel Bodansky, *Human Rights and Universal Jurisdiction,* in Mark Gibney, ed., *World Justice: U.S. Courts and International Human Rights* (Boulder/San Francisco/Oxford: Westview Press 1991) ("[U]niversal jurisdiction over torture is permitted as a matter of customary international law.");Geoff Gilbert, Crimes Sans Frontières: *Jurisdictional Problems in English Law*, 63 Brit. Y.B. Int'l L. 415,423-424 n. 61 (1992); Robert Jennings & Arthur Watts, 1 *Oppenheim's International Law* 470 (London: Longman 9th ed. 1996); Menno T. Kamminga, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Rights Law and Practice, International Law Association, London Conference 2000 (Final ILA Report) 8 ("States not parties to the Convention against Torture are entitled, but not obliged, to exercise Universal Jurisdiction in respect of torture on the basis of customary law. . . . Perpetrators of torture committed in states that are not parties to the Convention against Torture may therefore be brought to trial elsewhere on the basis of Universal Jurisdiction."); Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 Tex. L. Rev. 785, 791 (1988); Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* 111 (Oxford: Clarendon Press 1997); *Restatement (Third) of the Foreign Relations Law of the United States* (1987), § 404; *see also* André Huet & Renée Koering-Joulin, *Droit pénal international* 191 (Paris: Presses Universitaires de France 1994) (noting the emerging system of repression of torture).] A doctor from the Sudan, which is not a party to the Convention against Torture, was charged with torture in a Scottish court and a Mauritanian military officer was arrested in France on charges of torture, although Mauritania is not a party to the Convention against Torture.

[32] See *Prosecutor v. Tadic*, 35 ILM32, 58 (1995)
[33] See Ian Brownlie, Principles of Public International Law, 93 (5th ed. 2001) ivote 26 at 314).
[34] See Gerhard Werle & Florian Jessberger, *International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law*, 13 Crim. L.F. 91 (2002).
[35] See Court de Cassation, Section Francaise, 2e Chambre, 12 Feb. 2003 at 4-5.
[37] See U.N. A/35/51 (1984) entered into force, 26 June 1987, 21 October 1987
[38] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force October 21, 1950; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force October 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21, 1950; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force October 21, 1950.
[36] See Organic Law 6/1985 of Judicial Power, amended by Organic Law 11/1999 arts. 23,4 (a) and (g1)
[39] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force December 7, 1978, ratified by Spain on June 8, 1977, April 21, 1989.
[1] memo from Patrick Philbin and John Yoo, Office of Legal Counsel, U.S. Dept. of Justice, to William J. Haynes II, Gen. Counsel, U.S. Dept. of Defense, 6-8 Dec. 2001, "Restore, Protect, Expand the Constitution: Ending Arbitrary Detention, Torture and Extraordinary Rendition" Center for Constitutional Rights, New York, 2009, p. 3

himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign status, though not expressly stipulated, are reserved by implication, and will be extended to him."[77]

In addition, sovereign states are judicially equal under international law, and are bound by the maxim *par en purem non habet imperium*. (One sovereign cannot exercise authority over

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[6] Foster v. Neilson, 27 US (2 Pet.) 253, 314 (1829)
[7] 138 Cong. Rec. S4781-01 (2 April 1962)
[8] Convention Against Torture, Art. 5 (2)
[9] Ibid, Art. 8
[10] Ibid, Art. 7

[27] Committee of Ministers Recommendation No.R(85)11 of 28 June 1985
[28] UN Declaration 40/34, adopted by the UN General Assembly on 29 November 1985
[30] Information systems for victims of crime: results of comparative research, M.Brienen and E.Hoegen, International Review of Victimology, 1998, Vol.5, p163
[31] See *Congo v. Belgium* (2002) 41 Ibid, 536 at 49

[41] See *Rios Montt* case, Tribunal Supremo, 25 February 2003
[42] See Constitutional Court, 2nd Chamber, STC 237/2005, 26 September 2005
[43] See Organic Law 6/1985 of 1 July of the Judicial Power, art. 21 (2).
[44] See *Audencia Nacional*, 3rd Chamber, Sentencia Num, 16/2005, 19 April 2005, Part 41, Sec. 6
[45] See Criminal Code, Art. 131
[46] See National Court, 4th Section of the Criminal Chamber, Roll of Appeal No. 196/05, Preliminary Proceedings, 10 January 2006
[47] See Constitution of Spain, art. 125, Organic Law 6/1985, art. 20.3, Code of Criminal Procedure, sections 101 and 270
[48] See Spanish Constitution, art. 24-2, and the Legal Aid Law 1996 (Ley 1/1996 de 10 enero 1996, de assistancia Juridica Gratuit).
[49] See *Ghollam Nikbin v. Islamic Republic of Iran* 1:04 CV0008/JDB
[50] Levie, 1991, p.187
[51] Louis Guillame de Klevault & Louis de Brequigny (eds.) Ordonances des Rois de France de la Troisieme Roce (1782), cited in Leslie Grieve, Command Responsibility in International Humanitarian Law (1995) 5 Transnational Law & Contemporary Problems 319 int 321.
[52] William Winthrop, Military Law and Precedents, 2nd ed., 1920, at 910
[53] William H. Parks, Command Responsibility for War Crimes, 62 Mil. L. Rev. 1 at 5 quoting from Articles of War, Provisional Congress of Massachusetts Bay, April 5,1775
[54] Mitchell v Harmony (54, U.S.-13 How. 115 at 137)
[55] Levie, 1991, p.186
[56] United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Vol. VIII, 1949, case No. 47 USMT Nuremberg, Part I, Page 45
[57] United Nations War Crimes Commission. Law Reports of Trials Of War Criminals, Volume V11I, 1949, case No 47, Trial of Wilhelm List and Others, United States Military Tribunal, Nuremberg, Part I . P. 45 et sub
[58] Trials of War Criminals Before the Nuremberg Military Tribunal's Under Control Council Law No 10, VIII 1081
[59] United Kingdom v Tesch, Vol I L.R.T.W.C. (1947) 93
[60] Ibid. at 125
[61] France v Roechling et al, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10,XIV (1952)
[62] International Military Tribunal for the Far East, The Tokyo War Crimes Trial Nov. 1948
[63] Ibid.

another by means of its legal system.)

Finally, the doctrine, historically, was designed to enhance inter-state relations and eventually emerge as a legal doctrine to limit the reach of sovereign states through their judicial and executive machinery.

These historical concepts of protection have been increasingly challenged over the last 100 years. Provision was made in the 1919 Versailles Treaty for the German Emperor to be tried for a "supreme offense against international morality".

In 1945, the Nuremberg Tribunals similarly, refused to extend immunity to Nazi leaders whose war crimes shocked the conscience of the world. Gradually also, a distinction began to emerge between governmental nature (*jure imperi*i) and those acts of private or commercial nature (*jure qestiosis*) which had nothing to do with public leadership of the state or which were private acts of the state amenable to justice in foreign courts. Thus, initially, the erosion of absolute immunity was based upon financial considerations. Gradually, sovereign immunity became premised only on the public nature of the act (*jure imperii*) excluding those acts serving private functions such as commercial activities.

This evolving orientation became the basis for Sovereign Immunity Acts such as the U.S.

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[64] Ibid.
[65] Ibid.
[66] Lippman, 2000 p.142
[67] Washington Post, 4 November, 2007
[68] Scaliotti, 2001, p.131
[69] Ibid, at p.132
[70] Stuart F. Hendlin, Command Responsibility and Superior Orders in the Twentieth Century, E-Law, Vol. 10 No. 1, March 2007, P. 26
[71] Ibid.
[72] Ibid.
[73] Ibid, p. 27
[74] Ibid, pp. 27-28
[75] Ibid, pp. 27-28
[76] *The Economist*, 10 July 2008

Foreign Sovereign Immunity Act (1978). Gradually, courts have come to refuse to accept the sovereign character of criminal acts. This has resulted in the erosion of the absolute state discretion previously associated with U.N. Charter Article 2 (7) in the sphere of human rights. *Ratione materiae* has also suffered significant restriction.

In *Pinochet 3* before the House of Lords, Lord Brown-Wilkinson wrote:

> Can it be said that the commission of a crime which is an international crime against humanity and *jus cogens* is an act done in an official capacity on behalf of the state? I believe here to be a strong ground to saying that the implementation of torture as defined by the Torture Convention cannot be a state function.

I suggest to this Honorable Court that is the emerging state of the law.

In the case of *Ghollam Nikbin v. Iran et.al.*[78], where I was lead counsel, the U.S. Federal District Court in Washington, D.C. found the Islamic Republic of Iran liable for torture. This was the first time that a sovereign state had been held accountable for torture (not terrorism). The *Nikbin* case made the trend clear. *Rationae Materiae* will not require immunity where the crimes reach the level of being *jus cogens* offenses and thus contravene the pre-emptory rules of international law. Such crimes as are before this honorable Court including torture, illegal detention, war crimes, and crimes against humanity no longer may be afforded immunity.

The Charters of the International Criminal Court and the various International Tribunals set up to try war crimes and crimes against humanity have all explicitly ruled out high office as being able to provide an absolute (immunity) defense for such crimes.

The logic of these Charters applies in the instant cases. How could high office ever provide immunity – an absolute defense – for *jus cogens* crimes – crimes so heinous that there is no way they could ever be considered a part of the official function of a Head of State?

The precedents are clear. Slobodan Milosevic was the first serving Head of State to be indicted for war crimes. Charles Taylor of Liberia followed. Several former Heads of State have found themselves similarly charged. They include Iraq's Saddam Hussein, Chad's Hissene Habre (in Senegal) and Cambodia's Khiev Samphan.

It appears that *ratione materiae* is dead in the water since the advent of the Torture Convention. There is no way that a state can convey its immunity to its officials for the commission of an act of torture, a violation of the *jus cogens* which by which by treaty it has condemned as a serious international crime which it must punish.

In fact, in the *Pinochet* case Lord Justices Brown-Wilkinson and Hope stated that the impact of the Torture Convention on the rule of immunity *ratione materiae* was such as to absolutely deny immunity. Lord Millet went so far as to opine that Universal Jurisdiction existed long before the Torture Convention over *jus cogens* crimes in respect of which no immunity could apply.[79]

Lord Phillips held that crimes of such gravity as to shock the consciousness of mankind cannot be tolerated by the international community and that state immunity *ratione materiae* cannot coexist with international crimes and the rights of states to exercise extraterritorial jurisdiction over them. Though questioning whether customary international law recognizes Universal Jurisdiction over international crimes, Lord Phillips held that, on occasion, when states agree by way of Treaty to exercise extraterritorial jurisdiction, acts done in an official capacity must not be excluded.

On 24 March 1999 The House of Lords held that Pinochet had no personal immunity. *Ratione Personae* no longer applied and he was not immune from prosecution for torture and

conspiracy as the acts committed after 8 December 1985 when the U.K. ratification of the Torture Convention and section 134 of the implementing Criminal Justice Act, 1988 took effect.[80]

There is little question that immunity may persist with respect to "official acts" but it surely has emerged as a nonsense to suggest that ordering torture and conspiring to allow torture to be committed could, at this stage be considered to be an official act  No act which violates the *jus cogens* should carry with the cloak of immunity.  Such acts dissolve immunity.

As to Personal Immunity (*Ratione personae*) the emerging law appears to limit the personal immunity of senior state officials to that period when they are performing their official duties. The immunity ceases, however, once the official leaves office, so that any prosecution could not interfere with his public duty.  Thus, the rationale for personal immunity is **not** to benefit individuals, but to ensure that their carrying out their official duties is not obstructed.[81]

Once out of office this primary purpose is no longer relevant and individual prosecutions may proceed.  Accordingly, acknowledging the Milosevic exception, George W. Bush, Richard Cheney, and the Bush administration cabinet while in office were immune from prosecution, not on the basis of *ratione materiae* or State Acts immunity which can no longer be afforded to torture and other *jus cogens* crimes, but on the basis of *ratione personae*, the immunity still afforded to serving officials.

At the time of the existing cases before this honorable Court the defense of personal immunity is no longer available, nor should it be, to these senior officials who have ordered, organized, and caused to happen some of the most horrific crimes of our time.

The cries for justice must penetrate the chambers of this honorable Court, for they come from victim citizens of Spain and their brothers and sisters from all over the world whose lives and families have been visited with pain and suffering, misery and death.

Wherever the investigative evidence leads it must be followed. But it must be clear, in my opinion, that neither *ratione materiae* or *ratione personae*, the historical immunities which have covered the atrocities and horrific crimes of the centuries in the interest of the King and his successors' divine right, now may be pleaded as a defense to their crimes as charged.

Thus, this honorable Spanish Court stands on the graves of the wretched of the earth, whose brothers and sisters for centuries have waited to see justice emerge from the long night of its denial. However passionately the successors to Kings – the Bush/Cheney administration argue for their immunity, in my opinion they have none. They stand naked before the bar of justice without this cloak of historical protection.

## 9. Conclusion

It is probably true that when Congress criminalized torture by passing the *Torture Victims Protection Act* as implementing legislation for the Torture Convention, it did not envision the possibility that the law would be used against officials and agents of the United States government.

But it has come to this stark reality. American officials, from the President down, established a policy authorizing the conduct of "enhanced interrogation", which clearly amounted to torture of prisoners under their control in various locations.

In addition, such horrific acts were also carried out in the conduct of the CIA-managed program of extraordinary rendition. Illegal (or Arbitrary) detention was another element of that program administered by Agency executive John Brennan under the leadership of, first, George Tenet, and then General Michael V. Hayden. During a 24 October 2007 television interview with Charlie Rose, Hayden confirmed that a number of prisoners had been picked up under the extraordinary rendition program and sent to various facilities in different parts of the world for enhanced interrogation.

By the time of this writing there is little doubt that the crimes of torture and illegal detention, and the initiation of aggressive war have been authorized and ordered at the highest levels of the Bush administration, overseen and administered by senior Cabinet and agency officials and carried out by agents of the government , whether under military or intelligence auspices. It has become abundantly clear that beginning with the Bush memorandum of 7 February 2002, continuing with the three OLC Memoranda commencing on 1 August 2002 (see Exhibit A), the issuance of the Rumsfeld aggressive interrogation authorization on 2 December 2002 and the three follow-up, new OLC legal opinions in May 2005.[82]

The conduct of criminal activity under international law has been the result of policies sanctioned at the highest levels of the Bush administration supervised and carried out by government agents.

The development of this policy becomes more transparently sinister when one reverts to the paper trail of memoranda in the run up to the August 2002 Torture Memos.[83] There is no room for doubt that legal advice generated by Executive Branch Department of Justice lawyers

attempted to vastly expand presidential authority and power, and override fundamental Constitutional protections, deny *Habeus Corpus* jurisdiction to Guantanamo prisoners, opt out of the Geneva Convention (in order to obstruct future prosecutions,) designate prisoners of war as enemy combatants, excluding them from Geneva Convention protections (so declared by George W. Bush on 7 February 2002) and authorize the President's "unfettered" right to transfer prisoners around the world even if they would likely be tortured.

Even giving the Bush administration every benefit of any doubt, I conclude without hesitation that the evidence is overwhelming that the following crimes have occurred:

1. Torture and conspiracy to Torture
2. Waging of Aggressive War
3. War Crimes and Crimes Against Humanity
4. Illegal or enforced arbitrary Detention

The issue of personal criminal culpability which is discussed in Sections 3-7 must initially be focused on the former President and members of his Cabinet who were also principal members of the National Security Council group which oversaw the commission of the crimes.

The conduct of the aggressive war and the commission of the multitude of war crimes and crimes against humanity, (such as the murder of Spanish national Jose Couso) must principally also involve the Secretary of Defense and his ranking Generals.

The CIA Extraordinary Rendition Program of illegal detention and torture mandates charges being brought against the Directors, George Tenet and Michael Hayden, and the executive who oversaw the program on a daily basis, John Brennan.

Then there is the corps of lawyers beginning with the Attorneys General Ashcroft, Gonzales, and Mukasey who presided over the OLC rationalizations. At their side facing criminal charges should be the OLC lawyers, and the counsels to the Department of Defense, the CIA, the President, and the Vice President whose fingerprints are all over the principal decisions with respect to the lawyers. It is often observed that attorneys who provide advice to a client about how to circumvent the law may be held to be complicit in the resulting criminal activity. Government lawyers who provide legal cover for illegal and immoral acts may well be responsible for fostering a disregard for conscience among those officials implementing government policy.

An editorial in the American Journal of International Law stated:

> Government attorneys also have responsibilities and obligations of loyalty that go beyond those of private attorneys. Thus, the government lawyer's "client" is not simply his or her administrative superior, but also the government agency…for which he or she works, the U.S. government as a whole, and indeed the American public and its collective interests and values. Moreover, government attorneys have a particular obligation to act responsibly in formulating advice or arguments regarding constitutional or international legal questions. For their opinions on such matters may often not be subject to definitive judicial or other impartial review; and even if government legal views are in theory subject to review, it is well known that national courts, other government agencies, and the Congress have traditionally been especially deferential to such opinions. Consequently, in practice there may be no "safety net" other than these attorney's own competence, care, integrity, and good faith; it is only these professional qualities that protect against legal advice or advocacy that might undermine the national interest in respect for law, or subvert or erode the international legal order.
>
> Finally, foreign policy decisions are often highly political, and policymakers and others who influence policy are often skeptical concerning the relevance of international law. Thus, there may be strong pressures on government lawyers to "bend" or ignore the law in order to support policy decisions—pressures that responsible government attorneys have an obligation to resist. For unless public officials are given competent, objective, and honest advice as to the legal consequences of proposed actions and decisions, they cannot make informed and intelligent policy judgments or properly balance the national interests involved.[84]

These and others discussed in the earlier sections clearly facilitated and conspired to cause the commission of the crimes.

There is enough principal and accessorial liability to go around, and as additional information is released and the evidence mounts, the prosecutions now before the Spanish courts should be well founded.

The action by the Spanish Court is based on the principle of Universal Jurisdiction,[85] and it is clear by this time in history that the possible defenses of Superior Orders and Sovereign Immunity (either *ratione materiae* or *ratione personae*) are not available for any of the potential defendants – including George W. Bush.

The only remaining issue is whether or not the United States, under the Obama administration, will prosecute any of these former officials. A serious, concerted effort to do so would give the Spanish courts one reason to pause their proceedings. This occurred with respect to the Spanish case against the former President of Peru, Alberto Fujimori. The Spanish prosecution deferred to the Peruvian proceedings which resulted in conviction and a 25 year prison sentence.

Having noted the possibility, it appears unlikely that the U.S. will initiate prosecutions against its former President and his officials. This should not be a surprise since it has been the consistent policy of previous administrations when such savagery does arise; the atrocities in Vietnam being the most notable example. At best, the policy has been to investigate, not prosecute. With respect to most of the crimes being considered by this honorable Court, even a U.S. investigation may not take place.

Both the President and his Attorney General have said more than once that the CIA interrogators who used the controversial techniques would not be charged. On 27 April 2009 the Attorney General said, "… Those who in good faith followed legal guidance they were given will not be prosecuted or investigated."[86]

In remarks made on 19 April 2009 on the ABC television program *This Week*, the President's Chief of Staff, Rahm Emanuel, repeated this commitment but then went a step further to say that also, "… those who devised the policy – of using the interrogation techniques – should not be prosecuted either." A few hours later, this position was confirmed by White House Press Secretary Robert Gibbs.[87]

Finally, on 5 May 2009, the Office of Professional Responsibility of the U.S. Department of Justice released its conclusion following a lengthy internal investigation. It concluded that Bush administration lawyers committed serious "… lapses of judgment in writing secret memorandums authorizing brutal interrogations…" but that **they should not be prosecuted**. Though the 220 page report is still subject to some revisions, no major alterations to its conclusions or recommendations are expected.[88]

The United Nations Special Rapporteur on Torture, Manfred Nowak, sharply condemmed reports that President Obama had decided against an investigation of the torture allegations, asserting that such inaction is a violation of international law, because the Convention Against Torture mandates a criminal inquiry be undertaken whenever there is credible evidence that torture has occurred.[89]

Consequently, the signs are that unless this pending prosecution goes forward, justice will be

denied the victims and the rule of law, so blatantly flaunted by the development and conduct of policy by the United States will be defiled.

Though the American President extols rule of law and publicly urges his Attorney General to follow the evidence, out of the other side of his mouth in a press conference marking the first 100 days of his administration on 29 April 2009, he termed the advice given by the OLC lawyers as “mistakes”, referred to the use of torture to gain information as a “shortcut”, and stressed the fact that necessary information could be obtained without using such “shortcuts”; in other words without resorting to torture. Though he acknowledged that waterboarding was torture, he refused to use the word “crime” in describing the conduct.

Perhaps the actions of this honorable Court will galvanize some meaningful U.S. prosecutorial action, but the signs have yet to emerge.

On the other hand, the Attorney General has very recently stated that his Department might very well cooperate with the Spanish prosecution. The initiative of this honorable Court might well provide a plausible escape hatch for the Obama administration from the political dilemma they face, though this is the broader context within which the Court must act.

In respect of the rule of law, however, there is no alternative. Heinous *jus cogens* crimes have been committed as clear offenses against international law. The lives of human beings and their families have been destroyed or lost. These offenses have violated not only the Treaty obligations to which most nations of the world have agreed to be bound, but they also contravene the basic tenets of customary law which has evolved over the centuries.

Mindful of the fact that a Treaty State might on occasion seek ways to excuse the contravening actions of its officials, the standard provisions routinely oblige other treaty states to be vigilant and impose upon them the duty to act and seek justice where the state hosting the crime does not do so. Hence, subject to some basic conditions (see above) Universal Jurisdiction becomes the judicial mechanism in the quest for justice
And so sits this honorable Court upon which rests humanity's hope for truth and justice.

It is obliged to follow this judicial process to the end, bitter or sweet, even if a portion of the earth erupts in seismic opposition, and it should never be forgotten that the conscience of mankind will not be assuaged if the law is used to punish only the pawns, scapegoats of the mighty. It must reach those powerful leaders who were the moving forces behind the crimes being investigated.

Though there will be scores of individual victims who bring their complaints to this honorable Court, the ultimate complainant before the Bar is civilization itself.

The wrongs that this Court is being asked to consider and punish are so devastatingly evil and malignant to the human condition that the conscience of mankind demands that they not now

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[77] See *The Schooner Exchange v. McFadden*, U.S. Sup. Ct. 1812
[78] See *Ghollam Nikbin v. Islamic Republic of Iran* 1:04 CV0008/JDB
[79] See *Ex Parte Pinochet* (HL2, 1999) in *Re Pinochet* 93 AJIL 690
[80] Ibid.
[81] See *Democratic Republic of Congo v. Belgium* Case, 2000 ICJ, 2 Feb. 2002
[82] See the Senate Select Committee on Intelligence preliminary narrative describing the OLC opinions on the CIA's Detention and Interrogation Program
[83] See the Chronological Memoranda, discussed above in Section 4 and Exhibit "B".
[84] See Richard B. Bilder & Detlev F. Voigts, *Speaking Law to Power: Lawyers and Torture*, 98 A.M.J. INTL. L. 689, 692, 694 (2004)
[85] See above Sections 6-7
[86] See CNN.com, 27 April 2009
[87] *The Daily Beast*, 22 April 2009, by Scott Horton
[88] *New York Times*, 6 May 2009, David Johnston and Scott Shane
[89] *Der Standard*, 19 April 2009

be ignored so that future generations will not suffer their being repeated.

Thus, in light of all of the above, and in the interests of affirming our common humanitarian and legal obligation to right the wrongs committed in our name, I submit this opinion for the unrestricted use of you and your colleagues and the courts of Spain.

Yours sincerely,

(Dr.) W.F. Pepper

mhn/wfp