

# Universal Jurisdiction in Practice

## Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture

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### Abstract

*This article examines the efforts to hold high-level US officials accountable for their alleged role in the torture and other serious abuse of detainees under US control through the principle of universal jurisdiction. First, it sets out what is known about United States detention and interrogation practices during the so-called 'war on terror', and what efforts, if any, have been undertaken in the United States to hold individuals accountable for their role in the torture and serious abuse of detainees. After a preliminary comment on the definition of torture, it examines the factual and legal underpinnings, and adjudicative results of the cases filed in this regard in Germany and France, and the recent efforts undertaken in Spain. It concludes by enquiring about the role and future of universal jurisdiction, particularly in cases of powerful defendants, in closing the impunity gap for serious violations of international law.*

*After years of disclosures by government investigations, media accounts, and reports from human rights organizations, there is no longer any doubt as to whether the [Bush] administration has committed war crimes. The only question is whether those who ordered the use of torture will be held to account.*

— Maj. General Antonio M. Taguba (US-Ret.), *led the US Army's official investigation into the Abu Ghraib prisoner abuse scandal.*<sup>1</sup>

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1 Physicians for Human Rights, *Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact*, June 2008, Preface, at viii.

*In releasing these [torture] memos, it is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution . . . This is a time for reflection, not retribution.*

— President Barack Obama, on release of legal memos that govern interrogations using ‘enhanced interrogation techniques’, including acts recognized to be torture.<sup>2</sup>

## 1. Introduction

In the spring of 2004, the world was shocked by photos of hooded, naked Iraqi detainees stacked in human pyramids with smiling Americans in military uniforms behind them. Domestic and international outrage at the torture of detainees in US-run detention facilities in Iraq, however, was met not with a wide-scale investigation into the extent and origins of prisoner abuse, but rather with carefully circumscribed investigations into the individuals and units directly implicated in the photos.<sup>3</sup> Former Secretary of Defense Donald Rumsfeld dismissed the abuse documented in the photos as the work of a ‘few bad apples’. Only about a dozen lower-level military guards would be prosecuted for the torture and abuse of Iraqi civilian detainees at Abu Ghraib.

No investigations or prosecutions of high-level officials were conducted in relation to Abu Ghraib. Nor were any investigations or prosecutions initiated following wide-spread reports of torture and other forms of serious abuse at other US-run detention centres in Iraq, in Afghanistan, in ‘black sites’ or at the infamous Guantánamo Bay prison complex. Indeed, despite the release of governmental memoranda and reports that detail and in some cases defend cruel, inhumane and degrading treatment as well as what many would define as ‘torture’ under both United States and international law, no such investigation has been undertaken under the Obama Administration.

In the years that have passed since the Abu Ghraib torture scandal, there have been numerous efforts to hold high-level officials accountable for the torture and other serious abuse of detainees — and to provide torture survivors with some form of redress and acknowledgment — through civil suits filed in US federal courts. For example, four British men detained without charge at

2 Statement of President Barack Obama on Release of OLC [Office of Legal Counsel] Memos, 16 April 2009, available online at <http://www.whitehouse.gov/the.press.office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/> (visited 11 September 2009).

3 See e.g. A. Taguba, Art. 15–6: Investigation of the 800th Military Police Brigade (2004), available online at <http://www.dod.mil/pubs/foi/detainees/taguba/> (visited 11 September 2009) (hereafter ‘Taguba Report’) (citing instances of ‘sadistic, blatant, and wanton criminal abuse’ at Abu Ghraib); J. Schlesinger, Final Report of the Independent Panel to Review Department of Defense Detention Operations, August 2004, available online at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> (visited 11 September 2009) (hereafter ‘Schlesinger Report’) (abuses were ‘widespread’ and serious in numbers and effect); G. Fay and A. Jones, US Army, AR 15–6 Investigation of Intelligence Activities At Abu Ghraib Prison and 205th Military Intelligence Brigade (2004), available online at <http://www.washingtonpost.com/wp-srv/nation/documents/fay.report.8-25-04.pdf> (visited 11 September 2009) (hereafter ‘Fay/Jones Report’).

Guantánamo for more than two years and subjected to sleep deprivation, forced nakedness, interrogations at gun point, and religious and racial harassment, among other acts, filed a lawsuit against then-Secretary of Defense and other senior military officials upon their release.<sup>4</sup> The claims, including arbitrary detention, torture and cruel, inhuman and degrading treatment, have been brought under the US Constitution, statutory law and international law.<sup>5</sup> Similar efforts have also been undertaken to hold corporations accountable for their role in what is described as a torture conspiracy.<sup>6</sup> While some such cases are on-going, others have been dismissed primarily on immunity grounds.<sup>7</sup>

Due to the failure to investigate and prosecute those accountable for torture, a coalition of international lawyers pursued justice and accountability for Iraqi detainees under universal jurisdiction laws in Germany in 2004 and 2006, and in France in 2007. Similar efforts on behalf of alleged torture survivors are now underway in Spain. In the absence of unfettered investigations or prosecutions within the United States, such efforts are to be welcomed and encouraged. As noted in the International Criminal Tribunal for the former Yugoslavia (ICTY)'s 1998 judgment in *Furundžija*, the prohibition against torture is so well recognized and binding that states are not only obliged to prohibit and punish its commission, but also to prevent its occurrence;<sup>8</sup> holding

- 4 See e.g. J.A. Menon, 'Guantánamo Torture Litigation', 6 *Journal of International Criminal Justice (JICJ)* (2008) 323–345 (detailing allegations brought by the plaintiffs and the abuses to which they were subjected).
- 5 *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009). A petition for certiorari was filed with the Supreme Court on 24 August 2009. Filings in this case are available online at <http://www.ccrjustice.org/ourcases/current-cases/rasul-v-rumsfeld> (visited 11 September 2009). An earlier decision had been vacated by the Supreme Court. In that decision, the Court of Appeals for the District of Columbia found that 'it was foreseeable that conduct that would ordinarily be indisputably 'seriously criminal' would be implemented by military officials responsible for detaining and interrogating suspected enemy combatants and thus fall within the scope of their employment such that the Secretary of Defense and other high-ranking US officials were immune from suit.' *Rasul v. Myers*, 512 F.3d 644, 661 (D.C. Cir. 2008). For detailed and critical discussions on this case see e.g. E. Wilson, 'Is Torture All in a Day's Work? Scope of Employment, The Absolute Immunity Doctrine, and Human Rights Litigation Against US Federal Officials', 6 *Rutgers Journal of Law & Public Policy* (2008) 175; B. Fassbender, 'Can Victims Sue State Officials for Torture? Reflections on *Rasul v. Myers* from the Perspective of International Law', 6 *JICJ* (2008) 347–369.
- 6 See e.g. *Saleh v. Titan*, 556 F. Supp. 2d 1 (D.C. Cir. 2007) and 580 F.3d 1 (D.C. Cir. Sept 11, 2009) (bringing claims for war crimes, crimes against humanity and torture on behalf of 256 Iraqis); *Al Shimari v. ACI Premier Technology*, 2009 U.S. Dist. LEXIS 29995 (E.D.V.A. Mar. 18, 2009) (bringing claims for war crimes and torture on behalf of four Abu Ghraib 'hard site' detainees) (filings for both cases available online at <http://www.ccrjustice.org/current-cases>; visited 11 September 2009).
- 7 See e.g. *In Re: Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85 (D.D.C. 2007) (filed on behalf of nine plaintiffs alleging torture and abuse by the US Military while they were being detained at various locations in Iraq and Afghanistan) (for filings in this case, see <http://www.aclu.org/safefree/torture/rumsfeld.html>; visited 11 September 2009).
- 8 Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, §§ 147–157 (hereafter '*Furundžija* Trial Judgment'). The prohibition on torture constitutes a *jus cogens* or peremptory norm.

those who bear the greatest responsibility for the torture of detainees during the so-called ‘war on terror’ is a critical step towards preventing its reoccurrence. Accordingly, the prosecution of torture under the principle of universal jurisdiction in the absence of domestic prosecutions should be an expected result rather than the controversial, and arguably unwanted, development that some consider it to be.

This article examines the efforts to hold high-level US officials accountable for their alleged role in the torture and other serious abuse of detainees under US control through the principle of universal jurisdiction. First, it sets out what is known about US detention and interrogation practices during the so-called ‘war on terror’, focusing primarily on what is contained in the ‘torture memos’ and the Senate Armed Services Committee ‘Inquiry into the Treatment of Detainees in U.S. Custody’. After a preliminary comment on the definition of torture, it examines the factual and legal underpinnings, and adjudicative results of the cases filed in Germany and France, and the recent efforts undertaken in Spain. It concludes by enquiring about the future of universal jurisdiction, particularly in cases of powerful defendants, and the role that the complementarity principle might play in this regard.

## 2. The Facts: A Selection of What is Known About the US Detention and Interrogation Programme

The reality of the US detention and interrogation programme — or the ‘authorized and systematic plan of torture and ill-treatment on persons deprived of their freedom’<sup>9</sup> — is quite different from what the few, low-level court-martials would suggest. By the time the Abu Ghraib torture scandal broke in mid-2004, a policy that condoned, if not encouraged, torture had begun to be known to both the American public and international community. In addition to the revelations contained in the US military investigative reports, the leaked International Committee of the Red Cross (ICRC) report<sup>10</sup> and the accounts of released detainees<sup>11</sup> detailed numerous incidents of detainees

9 Juzgado Central de Instrucción N° 5, Audiencia Nacional, Madrid (Spanish High Court), decision (*auto*) of 27 April 2009, Preliminary Investigations (*diligencias previas*) 150/09—N, at 9, unofficial English translation available online at <http://www.ccrjustice.org/files/Unofficial%20Translation%20of%20the%20Spanish%20Decision%20004-27-2009.pdf> (visited 11 September 2009) (hereafter ‘Garzón Decision’).

10 See *Report of the ICRC on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest Internment and Interrogation*, February 2004, available online at <http://www.globalsecurity.org/military/library/report/2004/icrcreportiraqfeb2004.pdf> (visited 11 September 2009) (hereafter ‘ICRC Iraq Report’).

11 See e.g. T. Branigan and V. Dodd, ‘Afghanistan to Guantánamo Bay - the story of three British detainees’, *The Guardian*, 4 August 2004, available online at <http://www.guardian.co.uk/world/2004/aug/04/afghanistan.usa> (visited 11 September 2009); *Broken Laws, Broken Lives*, *supra* note 1; Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba*, July 2006, available online at <http://www.ccrjustice.org/learn-more/reports/report%3A-torture-and-cruel%2C-inhuman%2C-and-degrading-treatment-prisoners-guantanamo> (visited 11 September 2009);

being repeatedly beaten with various objects; kept naked and shackled in dark cells; subjected to sensory deprivation; subjected to food, water and sleep deprivation; being exposed to loud music for prolonged periods of time or extreme temperatures; and various acts of humiliation including forcing male, naked detainees to stand against a wall with women's underwear on their heads.<sup>12</sup> Indeed, the ICRC established that 'persons deprived of their liberty [in US-run detention facilities in Iraq] face the risk of being subjected to a process of physical and psychological coercion in some cases tantamount to torture'.<sup>13</sup>

These acts were the outgrowth, if not the direct and intended result, of US policies, which were reflected in (or, some would argue, resulted from) a series of legal memoranda related to detention, interrogation and torture. It is the legal memos drafted in the weeks and months after 11 September 2001 that established the framework and policies that would govern detentions and interrogations.<sup>14</sup> Sections A and B provide a brief overview of certain legal memoranda issued by the Office of Legal Counsel (OLC) of the US Department of Justice (DOJ) for the President, Department of Defense and the CIA, among others. Section C provides an overview of the main findings of a Congressional investigation of detention and interrogation policies and practices. Section D concludes with a summary of what has been done — or not done — in the United States to determine who bears individual criminal responsibility for the alleged or potential violations of domestic and international law identified.

### A. The Initial 'Torture Memos'

US practices and policies for detentions and interrogations became known, in part, through the release of so-called 'torture memos' in June 2004. These memos set out the standards for detention and interrogation in the so-called 'war on terror' purportedly under domestic and international law. These memos, however, dramatically departed from the long-established standard under both. Notably, one of the first acts of Barack Obama upon taking office

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L.E. Fletcher and E. Stover, *Guantánamo and Its Aftermath: U.S. Detention and Interrogation Practices and Their Impact on Former Detainees*, November 2008, available online at [www.ccrjustice.org/files/ReportGTMO.And.Its.Aftermath.0.pdf](http://www.ccrjustice.org/files/ReportGTMO.And.Its.Aftermath.0.pdf) (visited 11 September 2009).

12 See also Second Amended Complain, *Saleh v. Titan*, 04cv1143, 30 July 2004, available online at <http://www.ccrjustice.org/files/Saleh.SecondAmendedComplaint.pdf> (visited 11 September 2009).

13 ICRC Iraq Report, *supra* note 10, at § 59.

14 See e.g. R. Bilder and D. Vagts, 'Speaking Law to Power: Lawyers and Torture', in K.J. Greenberg (ed.), *The Torture Debate in America* (New York: Cambridge University Press, 2006) 151–161; P. Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008); J. Paust, 'Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees', 43 *Columbia Journal of Transnational Law* (2005) 811. See also *Padilla v. Yoo*, 2009 U.S. Dist. LEXIS 50154 (N.D. Cal. June 12, 2009) (alleging inter alia that Yoo formulated unlawful practices and policies related to designation, detention and interrogation of suspected enemy combatants).

was to issue an Executive Order rescinding those orders issued between 11 September 2001 and 20 January 2009 that conflicted with US law and international obligations still in effect.<sup>15</sup>

In a 22 January 2002 memo, then-Assistant Attorney General in the OLC Jay Bybee (now a federal appellate judge) argued that the Geneva Conventions did not apply to Al Qaeda prisoners, and that President Bush had constitutional authority to ‘suspend our treaty obligations toward Afghanistan’ because it was a ‘failed state’.<sup>16</sup> In doing so, Bybee argued in effect that the President could unilaterally suspend the United States’ obligations under international law. Bybee argued that such ‘deviations’ could be justified by the right to self-defence. He based his conclusions in part upon a finding that the minimum protections of Common Article 3 are optional rather than obligatory — ‘a matter of policy’ rather than law — in the context of US detentions. In 2006, the US Supreme Court disagreed with Bybee’s conclusion, finding that Common Article 3 of the Geneva Conventions provides minimum protections to detainees, including those detainees not associated with a signatory to the Conventions or a party to the conflict.<sup>17</sup> It is on the basis of this advice that on 7 February 2002, George Bush issued a memorandum to senior-members of the Administration including Dick Cheney, Donald Rumsfeld and Director of the Central Intelligence Agency (CIA) George Tenet, which concluded that the Geneva Conventions did not apply to the conflict with Al Qaeda; that the President could suspend obligations under the Geneva Conventions with regard to Afghanistan; and that Taliban and Al Qaeda detainees were neither protected as prisoners of war nor under Common Article 3.<sup>18</sup>

The most notorious of Bybee’s memos is dated 1 August 2002. This memorandum, signed by Jay Bybee, with a cover-letter by then-OLC Deputy Assistant Attorney General John Yoo adopting that memo, examines the legality under international law of interrogation methods to be used on ‘captured Al Qaeda operatives’.<sup>19</sup> In this memo, Bybee and Yoo sought to essentially

15 Executive Order – Ensuring Lawful Interrogations, 22 January 2009, available online at <http://www.whitehouse.gov/the.press.office/EnsuringLawfulInterrogations/> (visited 11 September 2009).

16 Application of Treaties and Laws to al Qaeda and Taliban detainees, available online at <http://fll.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf> (visited 11 September 2009).

17 *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–632 (2006).

18 See Humane Treatment of Taliban and Al Qaeda Detainees, available online at <http://www.pegc.us/archive/WhiteHouse/bush.memo.20020207.ed.pdf>. (visited 11 September 2009). See also Bybee Torture Memo, *infra* note 19, Section V (The President’s Commander-in-Chief Power) (arguing that the Torture Statute might be unconstitutional if it were read to limit the President’s powers related to the interrogation of ‘enemy combatants’).

19 Memorandum from Jay S. Bybee, the Dep’t of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A*, available online at <http://www.washingtonpost.com/wp-rv/nation/documents/dojinterrogationmemo20020801.pdf> (hereafter ‘Bybee Torture Memo’); Letter from John Yoo, Deputy Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, available online at <http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html> (visited 11 September 2009). See also Memorandum from John Yoo to William J. Haynes, II, General Counsel of the

redefine torture and the United States' obligations under international law.<sup>20</sup> As then-dean of Yale Law School and current Legal Advisor to the State Department, Harold Koh stated in testimony before the US Senate: 'The August 1, 2002 OLC memorandum is a stain upon our law and our national reputation. A legal opinion that is so lacking in historical context, that offers a definition of torture so narrow that it would have exculpated Saddam Hussein, that reads the Commander-in-Chief power so as to remove Congress as a check against torture, that turns Nuremberg on its head, and that gives government officials a license for cruelty can only be described as a "disaster".'<sup>21</sup>

Specifically, under the Bybee Torture Memo, both the physical and mental thresholds for torture were heightened: physical pain 'must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death', while mental pain 'must result in significant psychological harm of significant duration, e.g. lasting for months or even years'. To the extent that 'international decisions' were reviewed, Bybee limited his analysis to two decisions, the European Court of Human Rights decision in *Ireland v. the United Kingdom*,<sup>22</sup> and the Israeli Supreme Court decision in *Public Committee Against Torture in Israel v. State of Israel*,<sup>23</sup> no subsequent decisions from the European Court were referenced to place the 1978 *Ireland v. United Kingdom* in the proper context or reflect the developments in the definition of and universal prohibition against torture.<sup>24</sup> Nor was mention made of the jurisprudence of the international war crimes tribunals.

The Bybee Torture Memo also includes a section on defences, in which it is stated that 'under current circumstances certain justification defenses might be available that would potentially eliminate criminal liability [for one charged under the Torture Statute]'.<sup>25</sup> No mention is made of the rejection of

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Department of Defense, *Memo Regarding the Torture and Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, 14 March 2003 (released 1 April 2008) available online at <http://www.aclu.org/safefree/torture/34745res20030314.html> (visited 11 September 2009).

20 For a critique of the Bybee Torture Memo, see the description by David A. Wallace, a colonel in the United States Army and an Academy Professor at the United States Military Academy: 'In addition to the Bybee Memorandum's narrow, overly-legalistic interpretation of the Convention Against Torture and the implementing torture statute, the legal opinion provides a breathtakingly expansive view of presidential powers. Read in its totality, the Bybee Memorandum provided the president and the administration virtually unfettered discretion to authorize the use of egregiously illegal and inappropriate interrogation practices inconsistent with US treaty commitments and *jus cogens* norms.' D.A. Wallace, 'Torture v. The Basic Principles of the US Military', 6 *JICJ* (2008) 309, at 313. See also M. Markovic, 'Can Lawyers Be War Criminals?' 20 *Georgetown Journal of Legal Ethics* (2007) 347.

21 Statement of Harold Hongju Koh before the Senate Judiciary Committee regarding The Nomination of the Honorable Alberto R. Gonzalez as Attorney General of the United States, 7 January 2005, available online at <http://www.law.yale.edu/documents/pdf/KohTestimony.pdf> (visited 11 September 2009).

22 ECtHR (1978) Series A, No. 25, 90.

23 HCJ 5100/94 (1999).

24 Bybee Torture Memo, Section IV (International Decisions).

25 *Ibid.*, Section VI (Defenses).

‘superior orders’ defence under international law. That Article 2(2) of the Convention Against Torture provides that there can be no exception to the prohibition against torture is dealt with only in a footnote; it is ultimately found to be no bar to asserting a defence of necessity for torture because the domestic Torture Statute fails to include a similar provision.

Based on the legal advice contained in these memos, a list of interrogation techniques was developed for use on detainees captured in the so-called ‘war on terror’. On 2 December 2002, then-Secretary of Defense Donald Rumsfeld approved interrogation techniques that included hooding, exploitation of phobias, stress positions, deprivation of light and auditory stimuli, removal of clothing and the use of dogs.<sup>26</sup>

### ***B. CIA ‘Enhanced Interrogation Techniques’ or CIA Torture Memos***

In April 2009, four memos describing so-called ‘enhanced interrogation techniques’ used by the CIA were released, albeit in redacted form. The legal opinions, written in 2002 and 2005 by the OLC, were released as part of a Freedom of Information Act lawsuit. The opinions set out the methods approved by the Bush administration for extracting information from alleged senior operatives of Al Qaeda, while attempting to shoe-horn these techniques — which are widely acknowledged as amounting to torture — within US and international law.<sup>27</sup>

The 1 August 2002 memo was authored by Jay Bybee. It attempted to give the CIA its first written legal approval for 10 interrogation tactics, including waterboarding. The opinion described in great detail how the techniques should be used, including placing the detainee ‘in a cramped confinement box with an insect’ as ‘he appears to have a fear of insects’ as well as the use of water-boarding, which Bybee concluded did not constitute torture because it did not result in ‘prolonged mental harm’.<sup>28</sup>

Three May 2005 memos, all signed by then-Acting Assistant Attorney General Steven Bradbury, sought to assure the CIA that its interrogation methods were legal, under domestic and international law, even when used in combination and despite the prohibition against cruel, inhuman or

26 Action Memo: Counter-Resistance Techniques, from William J. Hayes, II, General Counsel of the Dept of Defense to Secretary of Defense, dated 27 November 2002 and approved 2 December 2002, available online at <http://fll.findlaw.com/news.findlaw.com/hdocs/docs/dod/gcrums1127120202men.pdf> (visited 16 November 2009). Donald Rumsfeld added a hand-written line to the typed memo: ‘I stand for 8-10 hours a day. Why is standing limited to 4 hours?’

27 See Transcript of Confirmation Hearing for Eric Holder as Attorney General of the United States, 16 January 2009, available online at <http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?r=1&pagewanted=all> (visited 11 September 2009).

28 Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, *Interrogation of al Qaeda Operative*, 1 August 2002, at 2, 13–14, and 15, available online at <http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc.08012002.bybee.pdf> (visited 11 September 2009).

degrading treatment.<sup>29</sup> The issuance of these memoranda followed a decision by Jack Goldsmith, during his time as Deputy Attorney General in OLC, to rescind certain legal memoranda, including the 1 August 2002 Bybee Torture Memo.<sup>30</sup> Through these memos, Bradbury largely reinstated much of the legal framework regarding presidential powers and policies regarding detention and interrogation that the Bybee/Yoo memos had put in place. The 40-page 30 May 2005 memo cites the CIA Inspector General's report, indicating that waterboarding had been used 'at least 83 times during August 2002' in the interrogation of Abu Zubaydah, 'and 183 times during March 2003 in the interrogation of [Khalid Sheikh Mohammed]'.<sup>31</sup> In light of these facts, it is notable that elsewhere in this memo, Bradbury concludes that 'the CIA uses enhanced techniques only to the extent reasonably believed necessary to obtain the information and takes great care to avoid inflicting severe pain or suffering or any lasting or unnecessary harm'.<sup>32</sup>

The CIA Inspector General's report referenced in the 30 May 2005 Bradbury Memo was released in heavily-redacted form in August 2009.<sup>33</sup> The report, dated 7 May 2004, examines the CIA's counterterrorism detention and interrogation activities between September 2001 and October 2003. The Inspector General detailed and evaluated the interrogation techniques used, the legal advice given, the effectiveness of the program, and policy considerations.<sup>34</sup> The list of 'specific unauthorized or undocumented techniques' that the report examines are: handguns and power drill; threats; smoke; stress positions; stiff brush and shackles; waterboard technique; pressure points, mock executions; use of cold; water dousing; hard takedown. While whole pages are redacted when discussing certain of these techniques, it is notable, and jarring, to read the level of detail with which each technique was discussed and prescribed by individuals in Washington, DC and in the field. For example, the use of 'water dousing' 'involves laying a detainee down on a plastic sheet and pouring water over him for 10 to 15 minutes . . . the room was maintained at 70 degrees or more; the guards used water that was at room temperature

29 All memoranda available online at <http://www.aclu.org/accountability/olc.html>. Additional memoranda were released in late August 2009, which include details of the CIA's detention, interrogation and rendition programmes. These memoranda are available online at <http://www.aclu.org/safefree/torture/40838prs20090824.html?s.src=RSS> (visited 11 September 2009).

30 The Bybee Torture Memo was superseded by 'Legal Standards Applicable under 18 U.S.C. §§ 2340–2340A', Daniel Levin, Acting Assistant Attorney General, 30 December 2004, available online at <http://www.usdoj.gov/olc/18usc23402340a2.htm> (visited 11 September 2009).

31 Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees*, at 37 available online at <http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc.05302005.bradbury.pdf> (visited 11 September 2009).

32 *Ibid.*

33 The CIA IG Report is available online at <http://luxmedia.vo.llnwd.net/o10/clients/aclu/IGReport.pdf> (visited 11 September 2009).

34 The CIA IG Report also details the involvement of health professionals, including psychologists hired by the CIA as independent contractors, in interrogations.

while the interrogator questioned the detainee.’<sup>35</sup> Discussions on this technique with headquarters resulted in the direction only that ‘the detainee must be placed on a towel or sheet, may not be placed naked on the bare cement floor, and that the air temperature must exceed 65 degrees if the detainee will not be dried immediately’.<sup>36</sup> There is no indication that the correspondence from headquarters questioned the legality of this ‘interrogation technique’ or, indeed, raised any concerns about officials of the US government treating detainees in such a manner.

In relation to the policy considerations, the Inspector General arrived at the unqualified finding that ‘[t]he EITs [enhanced interrogation techniques] used by the Agency under the CTC [counterterrorism center program] are inconsistent with the public policy positions that the United States has taken regarding human rights.’<sup>37</sup> The Inspector General concluded, *inter alia*, that:

Although the current detention and interrogation Program has been subjected to DOJ legal review and Administration political approval, it diverges sharply from previous Agency policy and practice, rules that govern interrogations by U.S. military and law enforcement officers, statements of U.S. policy by the Department of State, and public statements by very senior U.S. officials, including the President, as well as the policies expressed by Members of Congress, other Western governments, international organizations, and human rights groups.<sup>38</sup>

As all 10 paragraphs of the Inspector General’s ‘Recommendations’ are redacted, it is not known how he advised that these deficiencies be remedied.

### C. *The Senate Armed Services Committee Report*

As the question of whether there should be prosecutions of high-level US officials for torture is asked, it is worth recalling not only how much ‘raw’ information is known through released memos but also what findings have been made about the detention and interrogation programmes through Congressional investigations. Of particular relevance, the bi-partisan United States Senate Armed Services Committee (SASC) publicly released the executive summary of a report documenting the findings of its 18-month inquiry entitled, ‘Inquiry into the Treatment of Detainees in U.S. Custody’ on 20 November 2008. The full report was declassified and released to the public in April 2009, albeit in redacted form.<sup>39</sup> It details the involvement of officials at the highest levels of the US government in formulating and implementing the US detention and interrogation programme. In essence, the SASC Report

<sup>35</sup> CIA IG Report, *supra* note 33, at 76.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, at 91, § 226.

<sup>38</sup> *Ibid.*, at 101–102, § 255.

<sup>39</sup> Inquiry into the Treatment of Detainees in U.S. Custody, available online at [armed-services.senate.gov/Publications/Detainee%20Report%20FinalApril%2022%202009.pdf](http://armed-services.senate.gov/Publications/Detainee%20Report%20FinalApril%2022%202009.pdf) (visited 11 September 2009) (hereafter ‘SASC Report’).

provides a comprehensive overview of United States policies and the programme of torture and serious abuse of detainees during the Bush Administration in Afghanistan, Guantánamo and Iraq. Drawing on legal memoranda, internal investigations within the military, the FBI and the CIA, as well as testimony of more than 70 witnesses, the Report conclusively establishes that the interrogation policies that originated in the White House, the Department of Defense, the Department of Justice and the CIA in 2001–2002 led to the torture and abuse of detainees in Afghanistan, Guantánamo, Iraq and elsewhere.

The Committee found:

The abuse of detainees in US custody cannot simply be attributed to the actions of ‘a few bad apples’ acting on their own. *The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.* Those efforts damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemies, and compromised our moral authority. (SASC Report, at xii, emphasis added).

The Report provides a paper trail leading to top civilian leaders and connecting the dots between their authorizations of certain interrogation techniques and torture or other forms of serious abuse in Guantánamo, Afghanistan and Iraq. Policies migrated from Guantánamo to Iraq as high-level US officials travelled from Guantánamo to Iraq to assess interrogation and military detention operations there.<sup>40</sup> Indeed, the Committee found that the interrogation policies which developed because of Donald Rumsfeld’s approval of ‘aggressive techniques’ at Guantánamo ‘were a direct cause of detainee abuse and influenced interrogation policies at Abu Ghraib and elsewhere in Iraq’.<sup>41</sup>

The Report also makes it clear that the White House was being informed and had approved the use of techniques that constitute torture, including waterboarding, applied to one detainee in May 2002, before they were reviewed by the Office of Legal Counsel. The report also states that ‘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’.<sup>42</sup> In relation to the 1 August 2002 memos, ‘[b]efore drafting the opinions, Mr. Yoo, the Deputy Assistant Attorney General for the OLC, had met with Alberto Gonzales, Counsel to the President, and David Addington, Counsel to the Vice President, to discuss the subjects he intended to address in the opinions’.<sup>43</sup>

40 SASC Report, at xxiv and 193–200. The Committee found that Donald Rumsfeld and Stephen Cambone, the Under-Secretary of Defense, ‘encouraged’ Major General Geoffrey Miller to travel to Iraq. *Ibid.*, at 190.

41 *Ibid.*, at xxviii–xxix and 169–170.

42 *Ibid.*, at xxvi.

43 *Ibid.*, at xvi. See also *ibid.*, at xv.

#### D. Investigations and Prosecutions in the United States

As noted above, the investigations and subsequent court-martials following the Abu Ghraib torture scandal were limited in nature and did not look up the chain of command.<sup>44</sup> It is recalled that in the United States a victim cannot initiate a criminal investigation as a *partie civile*. With the changing of administrations in the United States in 2009, there have been renewed calls for full investigations of allegations of torture and other forms of serious abuse committed against persons detained by the United States.<sup>45</sup> Calls for full investigations and the appointment of an independent prosecutor intensified following the release of the CIA legal memos and the full SASC Report in April 2009.

The release of the CIA IG Report in August 2009 brought with it the first indications of an investigation and possible prosecutions. The results, however, are disappointing to those who had hoped for a comprehensive investigation into the torture programme and a mandate for an independent prosecutor to go as far up the chain of command as the evidence led. On 24 August 2009, Attorney General Eric Holder announced that the information contained in the IG Report, as well as the still-unreleased report of the Office of Professional Responsibility, which examined the legal memoranda produced by the OLC related to 'so-called enhanced interrogation techniques', warranted 'opening a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations'.<sup>46</sup> He explained that a preliminary review was used 'to gather information to determine whether there is sufficient predication to warrant a full

44 No marked increase in the number of court-martials followed the Abu Ghraib scandal, despite the many accounts of detainee abuse or torture. In April 2006, Human Rights Watch, Human Rights First, and the NYU Center for Human Rights and Global Justice jointly issued a report regarding detainee abuse in Iraq, Afghanistan and at Guantánamo Bay, and accountability. Despite finding that detainee abuse was 'widespread,' only a 'fraction' of the military implicated in abuse were convicted through court-martial proceedings, and 'many' cases were not investigated properly, if at all. 'No US military officer has been held accountable for criminal acts committed by subordinates under the doctrine of command responsibility.' See *By The Numbers, Findings of the Detainee Abuse and Accountability Project*, at 2–3, available online at <http://www.humanrightsfirst.info/pdf/06425-etn-by-the-numbers.pdf> (visited 11 September 2009). See also Human Rights Watch, *Getting Away with Torture? Command Responsibility for the US Abuse of Detainees* April 2005, available online at <http://www.hrw.org/reports/2005/us0405/us0405.pdf> (visited 11 September 2009).

45 Numerous non-governmental organizations have launched 'accountability campaigns' in the last six months. See e.g. Center for Constitutional Rights (<http://ccrjustice.org/prosecutebushofficials/>) and the specialized campaign to hold health care professionals accountable for torture, (<http://whenhealersharm.org/>); American Civil Liberties Union (<http://www.aclu.org/torturedlogic/>); Human Rights Watch (<http://www.hrw.org/en/news/2009/05/13/accountability-torture>); Amnesty International (<http://www.amnesty.org/en/appeals-for-action/accountability-for-US-counter-terrorism-human-rights-violations>).

46 Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees, 24 August 2009, available online at <http://www.usdoj.gov/ag/speeches/2009/ag-speech-0908241.html> (visited 11 September 2009).

investigation of a matter'.<sup>47</sup> He emphasized, however, that taking such steps does not mean 'that charges will necessarily follow'.<sup>48</sup> Twice in his five-paragraph statement, Attorney General Holder stated that he will not place in 'legal jeopardy' or indeed, 'prosecute' those individuals who acted 'in good faith and within the scope of legal guidance'.<sup>49</sup> Such a statement indicates that the investigation will not only be narrow in scope but will apparently also recognize the defence of 'superior orders', contrary to the teachings of Nuremberg and the Convention Against Torture.<sup>50</sup> This statement ultimately means that the need remains to have the accountability — and impunity — gap closed seemingly by prosecutors and investigating judges outside the United States.

### 3. A Comment on the Definition of Torture

The brief overview of the 'torture memos' above requires that a word be said about the definition of 'torture' and what standard should be applied to the facts alleged in the cases brought in Germany, France and Spain, to be discussed below. The debates and discussions that took place — and to some extent continue to take place — particularly in the United States, on what constitutes torture and whether 'torture' can even be defined are perplexing.<sup>51</sup> In addition to the definition of 'torture' in various international instruments, and its application in international criminal tribunals and regional human rights courts, torture is defined in the United States Criminal Code.<sup>52</sup> Indeed, it was the language of the Torture Statute that Jay Bybee reinterpreted in the Bybee Torture Memo. The Army Field Manual 34–52 in effect at the time of the Abu Ghraib scandal prohibited torture and defined it as: 'the infliction of intense pain to body or mind to extract a confession or information, or for sadistic pleasure. Examples of physical torture include electric shock, forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time, food deprivation, and any form of beating. Examples of mental torture include mock executions, abnormal sleep deprivation, and chemically induced psychosis'.<sup>53</sup>

Since the cases described below are brought under the principle of universal jurisdiction (albeit applying national laws), it is useful to recall the definition of torture, as elaborated upon in Article 1 of the Convention Against Torture, under customary international law. As defined in the jurisprudence of the ad hoc tribunals, torture is 'the infliction by act or omission, of severe pain or

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> Convention Against Torture, Art. 2(3) provides: 'An order from a superior officer or a public authority may not be invoked as a justification for torture.'

<sup>51</sup> See Greenberg, *supra* note 14.

<sup>52</sup> 18 U.S.C., §§ 2340–2340A (Torture Statute).

<sup>53</sup> Army Field Manual 34–52, Intelligence Interrogations (1992), at 1–8.

suffering, whether physical or mental.’<sup>54</sup> The mental element is intent, which has been elaborated upon as ‘a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.’<sup>55</sup> Under customary international law, torture does not require specific intent, but rather requires that the act or omission be carried out for a particular purpose. The ‘purposes’ of torture include ‘obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.’<sup>56</sup>

Notably, in *Brđanin*, the Appeals Chamber of the ICTY had occasion to consider the definition of torture, and concomitant ‘severity’ test, put forward in the Bybee Torture Memo. The Appeals Chamber rejected the definition advanced by Bybee,<sup>57</sup> reaffirming that the standard under customary international law, as reflected in the Convention Against Torture, is ‘severe pain or suffering, whether physical or mental — and not...some greater amount of pain or suffering.’<sup>58</sup> The Appeals Chamber held that the United States could not unilaterally redefine customary international law, stating ‘[n]o matter how powerful or influential a country is, its practice does not automatically become customary international law.’<sup>59</sup>

The acts to which some detainees held in Iraq, Guantánamo and Afghanistan have been subjected, including beatings, rape, sexual violence and forced nudity, prolonged denial of sleep, food, proper hygiene and medical assistance, as well as threats of torture, rape or the death of third persons, have been found to constitute torture under customary international law.<sup>60</sup>

## 4. The German Proceedings

Two criminal complaints have been filed in Germany on behalf of former detainees held in Iraq and Guantánamo against US officials, including

54 Judgment, *Brđanin* (IT-99-36-A), Appeals Chamber, 3 April 2007, § 242 (hereafter ‘*Brđanin* Appeal Judgment’).

55 Judgment, *Kunarac* (IT-96-23&23/1-A), Appeals Chamber, 20 June 2002, § 153.

56 Judgment, *Furundžija* (IT-95-17/1-A), Appeals Chamber, 21 July 2000, § 111. See also Convention Against Torture, Art. 2.

57 Under the Bybee Torture Memo, ‘for an act to constitute torture . . . it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.’

58 *Brđanin* Appeal Judgment, at § 246. See *ibid.*, at §§ 244–252. The tribunals have found that certain acts, including rape, constitute torture per se. See C. Burchard, ‘Torture in the Jurisprudence of the Ad Hoc Tribunals: A Critical Assessment’, 6 JICJ (2008) 159, at 164, citing Judgment, *Kunarac* (IT-96-23&23/1), Appeals Chamber, 20 June 2002, § 150.

59 *Ibid.*, at § 247.

60 See e.g. *Furundžija* Trial Judgment, at §§ 264–269; Judgment, *Čelebići* (IT-96-21-T), Trial Chamber, 16 November 1998, §§ 936–943, 955–965, 970–977 and 993–998; and Judgment, *Kvočka* (IT-98-30/1-T), Trial Chamber, 2 November 2001, §§ 144–151, and 155–158.

former Secretary of Defense Donald Rumsfeld. Each proceeding is addressed below.<sup>61</sup>

## A. The 2004 Case

### 1. The Complaint: Plaintiffs, Defendants and Allegations

On 30 November 2004, a 181-page criminal complaint was filed with the Federal Prosecutor in Karlsruhe on behalf of four Iraqi civilians (Ahmed Hassan Mahawis Derweesh, Faisal Abdulla Abdullatif, Ahmed Salih Nouh and Ahmed Shehab) who had been tortured in US-run detention facilities in Iraq.<sup>62</sup> The complaint details the crimes to which the plaintiffs were subjected while detained. For example, Mr Ahmed was arrested at his home in the middle of the night; his handicapped father was shot and killed at the time of his arrest. Mr Ahmed was beaten and stripped; deprived of sleep and food; threatened with rape; forbidden to pray; doused with cold water; had unidentified substances injected into his penis; had sexual acts attempted with him by an interrogator and interpreter during an interrogation with a female interpreter, while naked and hooded; and was threatened with the rape of his family and children. Due to the treatment in detention, he became impotent. Like the other plaintiffs, he was released without charge.

A fifth plaintiff was the New York-based Center for Constitutional Rights ('CCR'), a legal non-profit organization which represents current and former detainees held at various locations, including Abu Ghraib and Guantánamo, in civil and habeas corpus proceedings in US federal court.

The complaint alleges that certain US military and government officials directly and indirectly committed, aided and abetted, and bear command responsibility for the commission of numerous crimes through the creation of a policy governing the treatment of detainees that mandated or allowed that abuses occur. Specifically, the complaint brings charges of torture, including rape, war crimes, cruel and inhuman treatment, and degrading and humiliating treatment. The named US officials included Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, Undersecretary of Defense for Intelligence Steven Cambone, Attorney General Alberto Gonzales, Lieutenant General Ricardo Sanchez, Major General Walter Wojdakowski, Major General Geoffrey Miller, Brigadier General Janis L. Karpinski, Lieutenant Colonel Jerry L. Phillabaum, Colonel Thomas Pappas and Lieutenant Colonel Stephen L. Jordan. Three of the defendants were present in Germany: Lt. General

61 German attorney Wolfgang Kaleck served as attorney-of-record and lead counsel for both complaints.

62 For discussion on this case, see e.g. A. Fischer-Lescano, 'Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law', 6 *German Law Journal* (2005) 689; W. Kaleck, 'German International Criminal Law in Practice: From Leipzig to Karlsruhe', in W. Kaleck et al. (eds), *International Prosecution of Human Rights Crimes* (Berlin: Springer, 2007) 102–112. Certain filings in this case can be found at <http://www.ccrjustice.org/current-cases> (visited 11 September 2009).

Sanchez and Major General Wojdakowski were stationed in Heidelberg, and Colonel Pappas was in Wiesbaden. Others, such as Secretary of Defense Donald Rumsfeld, often travelled to Germany. In addition, the military units that engaged in the illegal conduct at Abu Ghraib were stationed in Germany.

The complaint sets out the factual background for the allegations by first detailing the contents of the torture memos described above. It sets out the conditions for detainees in Guantánamo, drawing on accounts of released detainees and human rights reports, and describes how the interrogation methods migrated from Guantánamo to Iraq. The names and circumstances of numerous Iraqi detainees who were killed while in US-held detention are given, including Manadel al-Janabi, whose ice-packed corpse was captured in one of the most infamous Abu Ghraib photos, as a smiling US army reservist Sabrina Harman giving a ‘thumbs up’ leans over him. The complaint also includes excerpts from the Fay/Jones Report.

In setting out the responsibility of the defendants — and the lack of investigation or prosecution — the complaint draws heavily on the findings of the Taguba, Fay/Jones and Schlesinger Reports.

## 2. *The Legal Basis for the Complaint*

The legal basis for the complaint is the German Code of Crimes against International Law (CCAIL), which entered into force on 30 June 2002.<sup>63</sup> The CCAIL was intended to clarify Germany’s legal framework vis-à-vis international law, and incorporate provisions of international criminal law in accordance with Germany’s obligations under the complementarity provisions of the International Criminal Court (ICC) Statute. The CCAIL was adopted to promote the fundamental principles of international criminal and humanitarian law, which include ending impunity. The Explanatory Memorandum to the CCAIL states unequivocally that ‘the primary objective’ of the CCAIL is to fight impunity for international crimes ‘by solidarity in prosecution. . . . [t]he investigation and prosecution duty is not limited to crimes which have a German connection: even if there is no connection, the results of investigations initiated in Germany could be valuable for proceedings before a foreign or international criminal court.’<sup>64</sup> Accordingly, the CCAIL provides for the prosecution of crimes committed anywhere in the world, regardless of the nationality of the perpetrator or the victim.<sup>65</sup> The principle of mandatory prosecution, which does not allow for prosecutorial discretion if there is sufficient evidence

63 The CCAIL is available online in English at <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf> (visited 11 September 2009).

64 Government Explanatory Memorandum, at 82, quoted in S. Zappalà, ‘The German Federal Prosecutor’s Decision not to Prosecute a Former Uzbek Minister: Missed Opportunity or Prosecutorial Wisdom?’ 4 JICJ (2006) 602, at 608–609.

65 Section 1 of the CCAIL provides: ‘This Act shall apply to all criminal offenses against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.’

to warrant a prosecution, is found in German law.<sup>66</sup> After the adoption of the CCAIL, the Code of Criminal Procedure (CCP) was amended to allow for discretion in certain circumstances, namely when the accused is 'not present in Germany and such presence is not to be anticipated'<sup>67</sup> or, in cases where neither the accused nor the victim is German, where criminal proceedings have been instituted outside of Germany and the accused can be extradited or surrendered to that country.<sup>68</sup>

The crimes contained in the CCAIL largely reflect the crimes contained in the ICC Statute. These include genocide, crimes against humanity and war crimes. The charges against the defendants include violations of the CCAIL under Section 8 'War Crimes against Persons'. The Code makes criminally responsible those who carry out the above acts as well as those who induce, condone or order the acts. It also makes commanders, whether civilian or military, liable if they fail to prevent their subordinates from committing such acts.<sup>69</sup>

Following the filing of a report of allegations with the prosecutor, an investigation is generally commenced. The prosecutor must provide a reasoned decision if he or she declines to file charges. Under certain conditions, an application for review of the decision not to charge can be made first to the prosecutor and next to the Higher Regional Court.<sup>70</sup> Applications for review include an overview of the allegations and the evidence that supports those allegations. The Court may order further investigations to determine

66 Section 152(2) of the CCP provides: 'Except as otherwise provided by law, the public prosecution office shall be obliged to take action in the case of all criminal offenses which may be prosecuted, provided there are sufficient factual indications.' See S. Wirth, 'Germany's New International Crimes Code: Bringing a Case to Court', 1 *JICJ* (2003) 151, at 158–160.

67 One Commentator has posited that the presence of an accused can be 'anticipated' if a request for extradition could be successfully made. See Wirth, *supra* note 66, at 160. Extradition entails involvement not only of the prosecutor, but also the Ministry of Justice and the Ministry of Foreign Affairs.

68 Section 153f of the CCP provides, in part:

(1) ... the public prosecution office *may* dispense with prosecuting an offence punishable pursuant to Sections 6 to 14 of the [CCAIL] if the accused is not present in Germany and such presence is not to be anticipated. If ... the accused is a German, this *shall* however apply *only* where the offence is being prosecuted before an international court by a State on whose territory the offence was committed or whose national was harmed by the offence.

(2) ... the public prosecution office *may* dispense with prosecuting an offence punishable pursuant to Sections 6 to 14 of the [CCAIL], *in particular* if: 1. There is no suspicion of a German having committed such offence, 2. Such offence was not committed against a German, 3. No suspect in respect of such offence is residing in Germany and such residence is not to be anticipated and 4. The offence is being prosecuted before an international court or by a State on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence. The same shall apply if a foreigner accused of an offence committed abroad is residing in Germany but the requirements pursuant to the first sentence, number 2 and 4, have been fulfilled and transfer to an international court or extradition to the prosecuting state is permissible and is intended. (emphasis added).

Reprinted in Fischer-Lescano, *supra* note 62, at 711.

69 See CCAIL, §§ 4, 13, 14.

70 See Wirth, *supra* note 66, at 162–163.

whether charges should be brought. The decision of the Higher Regional Court is final.

### 3. *The Decision*

The plaintiffs submitted that there were compelling reasons for the federal prosecutor to exercise what they argued was a duty to prosecute in this case, namely the grave nature of the crimes and the extensive evidentiary basis establishing the role of the officials in setting out the torture policy. In addition, they argued that jurisdiction was proper in Germany because three of the defendants were currently stationed there at the time.

The plaintiffs also argued that the United States was unwilling to investigate, let alone prosecute, high-ranking officials for these crimes. Attached to the complaint was an expert opinion by Scott Horton, an international law expert who at the time was the Chair of the Committee on International Law of the Association of the Bar of the City of New York. Horton addressed the ‘willingness’ of the United States to investigate the crimes — and the defendants — named in the complaint. He made numerous arguments against the likelihood of prosecutions in the United States including: that lead-defendant Rumsfeld controlled the Department of Defense’s criminal investigatory functions; that on-going investigations were mandated to look down the chain of command only, thereby protecting high-level officials and officers from investigation and prosecution, evidence of what he described as a ‘continuing scheme in corruption of the military criminal justice system’; that the Department of Justice, which had the sole discretion to initiate prosecutions under the War Crimes Act, was under the control of an Attorney General implicated in the alleged crimes; that the atmosphere at the Department of Justice was hostile to any efforts to investigate war crimes allegations; and that the legislative branch had abdicated its oversight responsibility.<sup>71</sup> Horton’s conclusion was blunt: ‘no such criminal investigation would occur in the near future in the United States for the reason that the criminal investigative and prosecutorial functions are currently controlled by individuals who are involved in the conspiracy to commit war crimes.’<sup>72</sup>

The US government responded to the case by describing the complaint as a ‘frivolous lawsuit’ and stating that an investigation or prosecution would have an impact on US-German relations.<sup>73</sup> In January 2005, the US embassy in

71 Horton Expert Report, available online at <http://www.ccrjustice.org/files/Appendix%20N.%205%20-%20Scott%20Horton%27s%20Affidavit.pdf>. See also A. Morgan, ‘US Officials’ Vulnerability to “Global Justice”: Will Universal Jurisdiction over War Crimes Make Traveling for Pleasure Less Pleasurable?’, 57 *Hastings Law Journal* (2005) 423, at 451–453.

72 Horton Expert Report, *ibid.*, at 1.

73 See ‘Lawsuit against Rumsfeld Threatens US-German Relations,’ *Deutsche Welle*, 14 December 2004, available online at <http://www.dw-world.de/dw/article/0,,1427743,00.html> (visited 11 September 2009).

Germany announced that Rumsfeld would not attend the Munich Conference on Security Policy.

On 10 February 2005 — one day before the Munich Conference — the Chief Federal Prosecutor, Kay Nehm, announced that he would not open an investigation against Rumsfeld and others; Rumsfeld travelled to Munich. The prosecutor found it was for the US to pursue legal action in the first instance, as none of the victims are German and all of the accused are American and that such a finding was in keeping with 'the framework of non-interference in the affairs of foreign countries'.<sup>74</sup> Purportedly applying Article 17 of the ICC Statute to the domestic setting, under the principle of subsidiarity, he found: 'The jurisdiction of uninvolved third countries is . . . to be understood as an initial intercepting jurisdiction, which should avoid impunity, yet not inappropriately push aside the primarily competent jurisdictions'.<sup>75</sup> In refusing to open an investigation, he found that there were 'no indications' that the United States was 'refraining' from investigating the 'violations' in the complaint, and found it possible that there would be further suspects (if not the named defendants themselves) resulting from investigations.<sup>76</sup> This purported absence of non-action — or possibility of an investigation — was sufficient for the prosecutor to find that CCP 153f (4) (prosecution by the state whose national is suspected of commission of the offence) was triggered.

In terms of the persons stationed in Germany, the prosecutor found that there was no special obligation on Germany to investigate allegations against them due to their presence on German soil. Rather, the prosecutor found that the United States had 'unlimited access to these persons' that they are at 'the disposal of American jurisdiction just as if they were residing in the United States', and therefore 'there is no room for the initial jurisdiction of the German prosecutorial authorities'.<sup>77</sup> There was no discussion of what immunities, if any, might exist due to the status of any of the defendants.

Plaintiffs filed a request to review the decision with the prosecutor as well as with the court. The Higher Regional Court (*Oberlandesgericht*) in Stuttgart declared the application for review inadmissible on 13 September 2005. It rejected the plaintiffs' arguments that the conditions under CCP 153f were not present, particularly as some of the defendants were present in Germany. It further found the prosecutor's use of his discretion justified, with the alternative

74 Prosecutor's 2005 Decision, at 3 available online at [www.ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld%2C-et-al](http://www.ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld%2C-et-al) (visited 11 September 2009).

75 *Ibid.*, at 4. See also, F. Jessberger, 'Universality, Complementarity, and the Duty to Prosecute Crimes Under International Law in Germany,' in Kaleck et al. (eds), *supra* note 62, at 213–222.

76 Prosecutor's 2005 Decision, *supra* note 74, at 5. Compare with dismissal of case against former Uzbek Minister, see Zappalà, *supra* note 64, at 602–622 (noting that one reason for the dismissal of the complaint was a finding by the Prosecutor that it was unlikely that Uzbek authorities would cooperate in the investigation thereby making a successful prosecution highly unlikely).

77 Prosecutor's 2005 Decision, *supra* note 74, at 5.

being ‘an unbridled extension of domestic criminal prosecution, which is questionable under international law’.<sup>78</sup>

This decision must be regarded as a political, rather than a purely legal, decision. As such, it is contrary to the spirit of CCAIL and undercuts its very purpose. The wisdom of the newly-acquired discretion to prosecute in cases involving the most serious crimes is to be questioned. It is precisely in such cases when the fight against impunity must be won — and particularly when the defendants are from powerful countries, efforts for accountability, redress and justice are most vulnerable. The requirement of mandatory investigation and prosecution could assist in taking the politics — or the perception of politics — out of such cases. As one commentator has argued, ‘[t]he system of ‘mandatory prosecution’ is not intended so much to prosecute each and every offence . . . but to avoid making decisions as to whether or not to commence an investigation and prosecution (the decision to render justice or not) on a *policy basis*.’<sup>79</sup>

## **B. The 2006 Case**

### *1. The Complaint: Plaintiffs, Defendants and Allegations*

The European Center for Constitutional and Human Rights (ECCHR), the International Federation for Human Rights (FIDH), CCR and more than 40 human rights organizations and individuals, including two former Nobel Peace Prize winners and the former Special Rapporteur on Torture, filed a second complaint under the CCAIL against high-level US officials on 14 November 2006.<sup>80</sup> Supporting the complaint were numerous expert opinions from international law scholars, including Richard Falk. This case was filed on behalf of 11 Iraqi torture survivors and Mohammed al Qahtani. Mr al Qahtani, a citizen of Saudi Arabia, remains detained at Guantánamo where he has been subjected to ‘aggressive interrogation techniques’ that have been recognized as amounting to torture.<sup>81</sup> The complaint reflected development in

<sup>78</sup> Decision of the Higher Regional Court cited in Kaleck et al. (eds), *supra* note 62, at 105. Following the Higher Regional Court’s decision, the plaintiffs filed a petition with the Special Rapporteur on the Independence of Judges and Lawyers, claiming that the case was dismissed for political rather than legal reasons. The Special Rapporteur addressed the plaintiffs’ claims and the German government’s response in his report, noting with concern the continued lack of investigation and prosecution into plaintiffs’ allegations. See Report of the Special Rapporteur on the Independence of Judges and Lawyers, Addendum, Leandro Despouy, A/HRC/4/25/Add.1, 5 April 2007, §§ 154–160.

<sup>79</sup> Zappalà, *supra* note 64, at 607 (emphasis in original).

<sup>80</sup> For an overview of issues raised by the 2006 complaint, see S. Lyons, ‘German Criminal Complaint Against Donald Rumsfeld and Others,’ 10 *ASIL Insights*, no. 33, 14 December 2006, available online at <http://www.asil.org/insights/2006/12/insights061214.html> (visited 11 September 2009). Documents related to this case are available online at <http://www.ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld-%2C-et-al.%3FMyAdmin=563c49a5adf3t4ddbfb89b> (visited 11 September 2009).

<sup>81</sup> Indeed, even the convening authority for the military commissions, Susan J. Crawford, ruled that al Qahtani’s treatment met the legal definition of torture. See B. Woodward, ‘Detainee

the United States, including the passage of the Military Commissions Act in October 2006, which inter alia purports to provide immunity to officials for certain violations of international and US law, as well as the *lack* of developments in the United States regarding the investigation and prosecution of high-level officials. Additional information that had entered the public domain, including recently released government documents, detailing US detention policies and practices was also included in the complaint.

The 2006 complaint included five government attorneys as additional defendants: former chief White House Counsel Alberto R. Gonzales, former Assistant Attorney General Jay Bybee, former Deputy Assistant Attorney General John Yoo, General Counsel of the Department of Defense William James Haynes, II and Vice President Cheney's Chief Counsel, David S. Addington. Plaintiffs allege that these defendants were involved in formulating the detention and interrogation policies that resulted in the torture and other forms of serious abuse of the plaintiffs.<sup>82</sup> Former Brigadier General Janis Karpinski, who had been a defendant in the 2004 case, submitted 17 pages of testimony in support of the complaint and offered to appear before the German prosecutor as a witness.<sup>83</sup> The resignation of Donald Rumsfeld as Secretary of Defense was announced on 8 November 2006, days before the complaint was filed.

## 2. The Decision

On 27 April 2007, the Prosecutor General at the Federal Court of Justice announced that he would not proceed with an investigation.<sup>84</sup> Once again, CCP 153f was invoked as the basis for dismissal. This prosecutor, Christian Ritscher, focused less on the 'unwillingness' of the United States to investigate

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'Tortured, Says US official,' *Washington Post*, 14 January 2009, available online at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html> (visited 11 September 2009). A member of Mr. al Qahtani's legal team submitted a declaration with the complaint detailing the torture and abuse to which he was subjected. See Declaration of Gitanjali S. Gutierrez, Esq., Lawyer for Mohammed al Qahtani, available online at <http://ccrjustice.org/files/Gutierrez%20Declaration%20re%20Al%20Qahtani%20Oct%202006.pdf> (visited 11 September 2009).

82 The German Criminal Code (Secs 21 et seq., 223 et seq., and 239 et seq) is invoked for those acts or omissions are alleged to have occurred before the adoption of the CCAIL on 30 June 2002. Section 5.2.3. ('The Legal Architecture of the Torture Program: The Criminal Liability of John Yoo and Jay Bybee as Authors of the Torture Memorandum') of the complaint is available online in English at [http://www.ccrjustice.org/files/YooBybee%20translation%20\(3\).pdf](http://www.ccrjustice.org/files/YooBybee%20translation%20(3).pdf) (visited 11 September 2009).

83 Testimony of Former Brigadier General Janis Karpinski, the Former Head of Abu Ghraib, for the German criminal procedure against DOD Donald Rumsfeld and others, 26 October 2005, available online at <http://www.ccrjustice.org/files/abu%20KarpinskiTestimony2006.pdf> (visited 11 September 2009).

84 The 9-page decision, dated 5 April 2007, is available online in English at <http://www.ccrjustice.org/files/ProsecutorsDecision.pdf> (visited 11 September 2009) (hereafter 'Second Prosecutor's Decision').

and prosecute the violations than the prior prosecutor, and did not cite the subsidiarity principle.<sup>85</sup> Contrary to both the letter and spirit of Section 1 of the CCAIL, the prosecutor instead focused on what links, if any, existed with Germany. The prosecutor rejected the stationing and training of US troops on German soil as a link, finding ‘insufficient preparation for care of prisoners of war is not a part of preparation for the criminal act’ alleged.<sup>86</sup> Relying on the Foreign Law Branch at the headquarters of the US Armed Forces in Europe — and rejecting arguments to the contrary put forward in the complaint — the prosecutor found that no defendants were currently present in Germany and could not be expected to be present in Germany.

The prosecutor also focused on whether such an investigation could be successful or whether the result would be a ‘purely symbolic prosecution’, which he did not view as having any merit.<sup>87</sup> He expressed concern about ‘forum shopping’ for a state that is favourable to international law claims, and lamented the resources that could go into ‘complicated but ultimately unsuccessful investigations’.<sup>88</sup>

After an unsuccessful request for review to the prosecutor, the plaintiffs filed a petition seeking review of the prosecutor’s decision with Frankfurt Higher Regional Court in November 2007. In light of the prosecutor’s earlier disregard of the fact that the last posting of three named military defendants was in Heidelberg, it is ironic that this was invoked by the court as the basis for moving the petition from Frankfurt to Stuttgart.<sup>89</sup> The petition was dismissed on 21 April 2009, five days after the release of the CIA torture memos discussed in Section 2(b) — and the statement by President Obama cited above, which effectively equates prosecution and individual accountability with retribution rather than justice.<sup>90</sup>

Recalling that a primary purpose of enacting the CCAIL was to end impunity, it is particularly regrettable that the Higher Regional Court found it

85 Citing CCP 153f(1), the prosecutor notes that he could decline to prosecute ‘purely foreign acts’ regardless of whether they were being investigated or prosecuted in another forum. *Ibid.*, at 7. The prosecutor did remark: ‘Dealing with possible violations of the prohibition on torture at Guantánamo Bay/Cuba or connected with the Iraq war through criminal law thus remains the task of the justice system of the United States of America, which has been assigned this task and is responsible for it.’ *Ibid.*, at 8.

86 *Ibid.*, at 5. The prosecutor also found, based solely on the complaint, that there was ‘no concrete evidence’ that orders were given in Germany to commit acts that constituted violations under the CCAIL.

87 *Ibid.*, at 7.

88 *Ibid.*, at 6. See also *ibid.*, at 7: ‘To resolve possible accusations, investigation on the scene and in the United States of America would be unavoidable. Because the German investigative authorities have no executive powers abroad, this could only occur through legal assistance. But such requests are obviously futile — especially if we consider the legal and security situation in Iraq.’

89 See Stuttgart Higher Regional Court decision, 21 April 2009, at 5–6, available online in English at <http://www.ccrjustice.org/files/Stuttgart%20Appeals%20Court%20Decision%20Rumsfeld%20Case%20-%20EN.pdf> (visited 11 September 2009) (hereafter ‘Stuttgart Higher Regional Court 2009 Decision’).

90 See *supra* note 2.

unnecessary to consider 153f(2); instead of questioning or condemning the glaring lack of accountability for the serious allegations of torture and war crimes, it simply stated that 'the question can remain open whether the acts charged were sufficiently prosecuted by other states.'<sup>91</sup>

## 5. The French Proceedings

On 25 October 2007, FIDH, ECCHR, CCR and the French League for Human Rights filed a complaint before the Paris district prosecutor against former US Secretary of Defense Rumsfeld for torture and other serious violations of international law.<sup>92</sup> Mr Rumsfeld had travelled to France in his personal capacity to attend a conference. Twenty-seven exhibits — a number of which are described above in Section 2 — were appended to the complaint, including government reports, IGO and NGO reports, and legal memoranda issued by various agencies or departments of the US government. Also included in the complaint were allegations regarding the torture and abuse of specific current and former US detainees, including Mr al Qahtani and Nizar Sassi, a French detainee.<sup>93</sup>

The complaint alleges that Rumsfeld had direct and command responsibility for torture in US run detention facilities in Iraq, Afghanistan and Guantánamo. Drawing in part on a statement from former Abu Ghraib commander Janis Karpinski, the complaint contains allegations later confirmed in the SASC Report regarding Rumsfeld's role in exporting interrogation techniques from Guantánamo to Iraq.

### A. The Legal Framework

The complaint was filed pursuant to Article 689 of the French Code of Criminal Procedure.<sup>94</sup> Article 689 provides jurisdiction over 'perpetrators and accomplices' for certain acts committed outside the territory of France under specific conditions, including 'when an international Convention gives jurisdiction to French courts to deal with the offence.' Article 689-1 grants jurisdiction to French courts over persons present in France, regardless of their nationality, who have committed offences provided for in a series of international conventions. Article 689-2 implements the Convention Against Torture and other

91 Stuttgart Higher Regional Court 2009 Decision, *supra* note 89, at 10.

92 Documents from this case, including the complaint, are available online at <http://www.fidh.org/DONALD-RUMSFELD-CHARGED-WITH#1> (visited 11 September 2009).

93 Mr Sassi was released from Guantánamo in July 2004. Upon return to France, he was detained and convicted of terrorism-related charges. In February 2009, his conviction was overturned because it was based on interrogations conducted at Guantánamo by French officials that violated French rules of evidence. See S. Erlanger, 'Terror Convictions Overturned in France', *The New York Times*, 24 February 2009, available online at <http://www.nytimes.com/2009/02/25/world/europe/25france.html> (visited 11 September 2009).

94 Available online in English at <http://195.83.177.9/upl/pdf/code.34.pdf> (visited 11 September 2009).

Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'). In relevant part, it provides 'any person guilty of torture in the sense of article 1 of the Convention may be prosecuted and tried in accordance with the provisions of article 689-1'.<sup>95</sup> It was pursuant to this provision that the claims of torture were brought against Donald Rumsfeld.

### 1. *The Decision and its Aftermath*

On 16 November 2007, Jean Claude Marin, the Paris district prosecutor, dismissed the complaint. He found that Rumsfeld enjoyed immunity from prosecution based on an argument attributed to the French Ministry of Foreign Affairs.<sup>96</sup> Specifically, and without elaboration, the prosecutor stated that under the jurisprudence of the International Court of Justice (ICJ), immunity from criminal jurisdiction for heads of state and ministers of foreign affairs continues to apply after termination of their functions for acts carried out during their time of office — and the same immunity should apply to Rumsfeld for the acts he carried out while in office.<sup>97</sup> In essence, the prosecutor found that the acts of torture and abuse alleged in the complaint were carried out 'in the exercise of his functions'.

A motion for reconsideration was also filed with the federal prosecutor, in which it was argued that the applicable law was treaty law and that Article 1 of Convention Against Torture forecloses immunity. It was further argued that even if the ICJ's *Yerodia* decision were applicable,<sup>98</sup> the prosecutor improperly applied it to a case in which a *former* secretary of defense (a category not enumerated as enjoying personal immunity in *Yerodia*) was on a private visit, and to extend immunity in this case would contradict the ICJ's

95 CCP Art. 689-1 provides in relevant part: 'a person guilty of committing any of the offences listed by these provisions outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts. The provisions of the present article apply to attempts to commit these offences, in every case where attempt is punishable.'

96 On 5 December 2007, the legal organizations which brought the complaint filed an open letter with the Minister of Foreign Affairs, Bernard Kouchner, arguing that the Ministry's intervention violated the separation of powers, and that the legal position attributed to it is wrong under French and international law. The letter is available online at <http://www.fidh.org/Complaint-filed-against-Donald> (visited 11 September 2009). No response was received.

97 See Press Release, FIDH, *France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complaint*, 27 November 2007, available online at <http://www.fidh.org/FRANCE-IN-VIOLATION-OF-LAW-GRANTS> (visited 11 September 2009).

98 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (hereafter '*Yerodia*'), judgment of 14 February 2002, available online at <http://www.icj-cij.org/docket/files/121/8126.pdf> (visited 11 September 2009). It is recalled that this decision has been widely criticized. As one commentator put it: 'Immunity is assumed by the Court, not established'. P. Sands, 'International Law Transformed? From Pinochet to Congo ...?' 16 *Leiden Journal of International Law* (2003) 37, at 48. See also, A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case', 13 *European Journal of International Law* (2002) 853, at 862.

instruction that immunity does not mean impunity.<sup>99</sup> The Paris Prosecutor to the Paris Court of Appeal issued a response on 27 February 2008.<sup>100</sup> The prosecutor affirmed the decision, finding that the acts of torture alleged 'cannot be dissociated from [Rumsfeld's] functions', and that since they were allegedly carried out while he was in office, he had immunity. The prosecutor did not attempt to reconcile his conclusions with the requirements for prosecution of all who commit torture, including state actors, found in CAT. Instead, he found that 'immunity cannot be set aside on the grounds that certain violations, because of their gravity, make it impossible to maintain it'.<sup>101</sup> The prosecutor distinguished the *Rumsfeld* case from the case of Pinochet, finding that the violations of assassinations and kidnappings which Pinochet was to have committed 'did not fall under the exercise of his functions as President but were marginal to them'. This reasoning is stunning, in so far as it squarely places acts of torture within the scope of official functions. Equally remarkable is the fact that the prosecutor made no effort to square his conclusion with the many precedents to the contrary,<sup>102</sup> including French precedents.<sup>103</sup>

Finally, on 21 May 2008, the legal organizations filed an open letter to the Minister of Justice, Rachida Dati.<sup>104</sup> In the letter, the organizations raised three arguments: (1) both prosecutors' opinions fail to articulate any valid legal justification for the personal immunity of Mr Rumsfeld, a *former* Secretary of Defense; (2) both prosecutors' opinions ignore the principle

99 Notably, the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal cites the importance of national proceedings in the fight against impunity. See *Yerodia*, *supra* note 98.

100 Available online in English at <http://ccrjustice.org/files/RumsfeldFrenchCase.%20Prosecutors%20Decision.02.08.pdf> (visited 11 September 2009).

101 *Ibid.*, at 2.

102 Cf., Nuremberg Charter, Art. 7 ('[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'); Art. 7(2) ICTYSt. (same); Decision on Preliminary Matters, *Milošević* (IT-02-54-PT), 8 November 2001, § 32 (quoting Nuremberg Judgment, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10: 'He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law'); *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), Opinion of Lord Browne-Wilkinson ('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 there to be strong grounds for saying that the implementation of torture . . . cannot be a state function'); Issue of *subpoena duces tecum*, *Blaškić* (IT-95-14-AR), Appeals Chamber, 29 October 1997, § 41 ('those responsible for [war crimes, crimes against humanity and genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity').

103 See e.g. case of Mauritanian Captain Ely Ould Dah, as discussed in European Court of Human Rights decision, *Ould Dah v. France* (Application No. 13113/03), 17 March 2009, available online in French at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=ould%20%7C%20dah&sessionid=23103930&skin=hudoc-en> (visited 11 September 2009).

104 The letter is available online in English at <http://ccrjustice.org/files/OpenLetterKouchnerDatiFinal.pdf> (visited 11 September 2009).

according to which there is no immunity for international core crimes such as torture; and (3) immunity of former officials for such crimes goes directly against the very purpose of the French legislation implementing the provisions of the Convention Against Torture, ratified by France. The organizations argued, in essence, that the dismissals illustrated an unacceptable double standard and improper selectivity in when and against whom the law would be applied. Minister Dati responded to the president of FIDH on 23 June 2008. In her letter, she adopted the prosecutors' flawed conclusion that Rumsfeld would have immunity because the acts were committed in his official capacity.

## 6. The Spanish Proceedings

As discussions about 'accountability' and the need for prosecutions began to intensify in the United States following the election of Barack Obama, a new international venue for accountability for US officials emerged: Spain.

In March 2009, a complaint was filed in Spain against six of the Bush administration lawyers for their role in formulating the alleged torture programme.<sup>105</sup> The case was assigned to Judge Baltasar Garzón. Jurisdiction over the defendants is provided for in the 1985 Organic Law of the Judicial Power.<sup>106</sup> The 98-page complaint bases the defendants' alleged criminal responsibility for violations of the Geneva Conventions and torture on the legal advice that each provided while serving in the administration. The Spanish Attorney General expressed his opposition to this case proceeding.<sup>107</sup> In response, Judge Garzón submitted the case to a senior judge for reassignment by lottery; it was reassigned to Eloy Velasco.<sup>108</sup>

105 J. Borger and D. Fuchs, 'Spanish judge to hear torture case against six Bush officials,' *The Guardian*, 29 March 2009, available online at <http://www.guardian.co.uk/world/2009/mar/29/guantanamo-bay-torture-inquiry> (visited 11 September 2009). The defendants are: Alberto Gonzales, David Addington, William Haynes, John Yoo, Jay Bybee, and Douglas Feith, who was Under-Secretary of Defence for Policy.

106 Art. 23(4) provides: 'Spanish jurisdiction will be valid for those crimes committed by Spanish or foreign nationals outside Spanish territory that may, according to Spanish penal law, be qualified as any of the following: (a) genocide; (b) terrorism; (c) piracy and unlawful seizure of aircraft; (d) forgery of foreign currency; (e) crimes related to prostitution and corruption of minors or the handicapped; (f) illegal trafficking of psychotropic, toxic and narcotic drugs; (g) crimes related to the female genital mutilation, as long as those responsible are in Spain; (h) any other crimes that, according to international treaties or agreements, must be prosecuted in Spain.' English translation of Art. 23(4) provided in T. McCormack, and A. McDonald (eds), *Yearbook of International Humanitarian Law*, Vol. 8 (The Hague: TMC Asser Press, 2005), at 507, n. 356. Relevant to Art. 23(4)(h), Spain ratified CAT on 21 October 1987.

107 M. Simons, 'Spain's Attorney General Opposes Prosecutions of 6 Bush Officials on Allowing Torture,' 17 April 2009, *The New York Times*, available online at <http://www.nytimes.com/2009/04/17/world/europe/17spain.html> (visited 11 September 2009).

108 A. Goodman, 'Spanish court sends Guantánamo case to new judge,' 23 April 2009, CNN, available online at <http://edition.cnn.com/2009/WORLD/europe/04/23/spain.court.guantanamo/index.html> (visited 11 September 2009).

One week after the reassignment of the so-called 'Bush Six' case, Judge Garzón issued a decision opening an investigation into another case regarding torture in US detention facilities.<sup>109</sup> This decision related to the alleged torture and abuse of four former Guantánamo detainees: Hamed Abderrahman Ahmed, Ikassrien Lahcen, Jamiel Abdul Latif Al Banna and Omar Deghayes. All four men had previously been the subject of a criminal case in Spain, but were later acquitted; Judge Garzón had previously issued extradition requests for Messrs Al Banna and Deghayes.<sup>110</sup> Mr Ahmed is a Spanish citizen and Mr Ikassrien had been a Spanish resident for more than 13 years.<sup>111</sup> The decision presents six pages of facts related to the torture and abuse the four men suffered including being held in cells made of chicken-wire in intense heat; being subjected to constant loud music, extreme temperatures and bright lights; constant interrogations without counsel; sexual assault; forced nakedness; threats of death; and severe beatings.

In the 'legal reasoning' section of the decision, Judge Garzón states that the facts relate to violations under the Spanish Penal Code, the Third and Fourth Geneva Conventions, the Convention Against Torture, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the Organic Law of the Judicial Power.<sup>112</sup> Making reference to the release of the SASC Report and the CIA Torture Memos,<sup>113</sup> as well as findings made in the 2006 sentencing of Mr Ahmed, Judge Garzón concluded that 'an authorized and systematic plan of torture and ill-treatment' of unlawfully detained persons has been revealed.<sup>114</sup> Accordingly, he ordered that a preliminary investigation be opened.

At this early stage, proceedings in both cases are on-going and the outcome is unclear. But with Spain's demonstrated commitment to the application of universal jurisdiction, most notably in *Pinochet* and *Scilingo*,<sup>115</sup> it is quite possible that the outcome of these proceedings may prove more successful than those in Germany and France.

The greatest impediment to a successful investigation and prosecution of US officials for torture in Spain might be from within Spain itself. In developments reminiscent of those in Belgium in 2003,<sup>116</sup> legislation has been introduced to limit the reach of universal jurisdiction — albeit prompted largely by outside pressure. On 26 September 2005, the Constitutional Court (*Tribunal Constitucional*) issued its judgment in the *Guatemalan Generals* case. The

109 See Garzón Decision, *supra* note 9.

110 See V. Dodd, G. Tremlett and J. Borger, 'Spain to seek extradition of Briton from Camp Delta', *The Guardian*, 13 February 2004, available online at <http://www.guardian.co.uk/uk/2004/feb/13/politics.spain> (visited 11 September 2009).

111 Garzón Decision, *supra* note 9, at 3–4.

112 *Ibid.*, at 8–9.

113 See *supra* Section 2B and C.

114 Garzón Decision, *supra* note 9, at 9.

115 See G. Pinzauti, 'The Instance of Reasonable Universality: The *Scilingo* Case', 3 *JICJ* (2005) 1092–1105.

116 See L. Reydam, 'Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law', 1 *JICJ* (2003) 679–689.

Constitutional Court reversed the 2003 judgment of the Spanish Supreme Court (*Tribunal Supremo*), which had dismissed that case due to the lack of a link with Spain.<sup>117</sup> The Constitutional Court held that the principle of universal jurisdiction does not require a territorial link between Spain and either the victims or the alleged offenders. Following this decision, a number of universal jurisdiction cases have moved forward.<sup>118</sup> The defendants in some of these cases include former government officials from politically powerful countries — China, Israel and, as discussed, the United States.

Following pressure from certain of these countries, legislation was recently introduced that would amend the current universal legislation provisions.<sup>119</sup> The proposed legislation requires the involvement of a Spanish national or the suspect being present on Spanish soil before an investigation could be commenced. The Spanish Congress passed the bill in June 2009 and the Senate is expected to rule on it in the coming months.<sup>120</sup> Thus, it remains to be seen what the future of universal jurisdiction in Spain will be.

## 7. Conclusion

Universal jurisdiction is not a concept that arose in the last decade — and is certainly not a concept that was created to be a political tool to ‘go after’ Bush Administration officials.<sup>121</sup> The Chief Prosecutor at Nuremberg set out the

117 See H. Ascensio, ‘Are Spanish Courts Backing Down on Universality? The Supreme Tribunal’s Decision in *Guatemalan Generals*’, 1 JICJ (2003) 690–702 and idem, ‘The Spanish Constitutional Tribunal’s Decision in *Guatemalan Generals*’, 4 JICJ (2006) 586–594. See also N. Roht-Arriaza, ‘Guatemala Genocide Case: Spanish Constitutional Tribunal decision on universal jurisdiction’, 100 *American Journal of International Law* (2006) 207.

118 For more information regarding Spanish universal jurisdiction cases, see e.g. C. Bakker, ‘Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can it Work?’ 4 JICJ (2006) 595–601; Commentator, ‘The Spanish Indictment of High-ranking Rwandan Officials’, 6 JICJ (2008) 1003–1011; S. Weill, ‘The Targeted Killing of Salah Shehadeh: From Gaza to Madrid’, 7 JICJ (2009) 617–631. For filings related to two of these cases, see Center for Justice and Accountability, ‘El Salvador: The Jesuits Massacre Case,’ available online at <http://www.cja.org/cases/jesuits.shtml> (visited 11 September 2009), and ‘Guatemala Genocide Case,’ available online at <http://www.cja.org/cases/guatemala.shtml> (visited 11 September 2009).

119 See e.g. Reuters, ‘Israel says Spain says it will amend war crimes law,’ 30 January 2009, available online at <http://uk.reuters.com/article/idUKLU674010> (visited 11 September 2009); V. Burnett and M. Simons, ‘Push in Spain to Limit Reach of the Courts,’ *New York Times*, 20 May 2009, available online at <http://www.nytimes.com/2009/05/21/world/europe/21spain.html> (visited 11 September 2009); S. Kingstone, ‘Spain reins in crusading judges,’ 25 June 2009, BBC, available online at <http://news.bbc.co.uk/2/hi/europe/8119920.stm> (visited 11 September 2009).

120 See D. Woolls, ‘Spanish lawmakers vote to clip judges’ wings,’ *The Guardian*, 25 June 2009, available online at <http://www.guardian.co.uk/world/feedarticle/8576630> (visited 11 September 2009); R. Marquand, ‘Global reach of Spain’s courts curtailed,’ *The Christian Science Monitor*, 25 June 2009, available online at <http://www.csmonitor.com/2009/0626/p06s02-woeu.html> (visited 11 September 2009).

121 See e.g. P. Weiss, ‘The Future of Universal Jurisdiction,’ in Kaleck et al. (eds), *supra* note 62, at 29–36; G. Abi-Saab, ‘The Proper Role of Universal Jurisdiction,’ 1 JICJ (2003) 596, at 599–600.

importance of prosecuting *all* individuals for serious violations of international law, regardless of which side of a conflict they are on:

Let me make clear that while this law is first applied against German aggressors, the law, if it is to serve a useful purpose, must condemn aggression by any other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law.<sup>122</sup>

Following the renewed interest in, and invocation of, the principle of universal jurisdiction in the wake of the proceedings against Augusto Pinochet,<sup>123</sup> one commentator set out three ‘Pinochet principles’ of universal jurisdiction: (1) certain crimes are so serious that they are treated by the international community as being international crimes over which any state may, in principle, exercise jurisdiction; (2) national courts, rather than international courts only, can — and in some cases must — exercise jurisdiction over these international crimes, irrespective of any direct connection with the acts; and (3) for these crimes, it can no longer be assumed that immunities will be accorded to former sovereigns or high officials, and the Convention Against Torture is incompatible with such immunities.<sup>124</sup> In the years since the *Pinochet* case, each of these principles has been severely tested. As the cases described above demonstrate, particularly when the target-defendants are from powerful countries, the results do not necessarily bode well for those who favour *accountability* (as a tool for deterrence through public assignment of individual criminal responsibility and resulting punishment, as well as a mechanism for redress) over *impunity* (whether through the failure to investigate or prosecute known serious violations, or by according certain individuals, notably high-level officials, immunity).

The principle of complementarity prominently set-out in the preamble of the Statute of the International Criminal Court (ICC) presupposes that national courts will have jurisdiction over the serious violations, such as war crimes including torture, enumerated in the ICC’s statute.<sup>125</sup> More and more states are adopting implementing legislation for the ICC Statute containing universal jurisdiction provisions, although often with certain jurisdictional requirements

122 Opening Statement of Chief Prosecutor Robert Jackson, Nuremberg Proceedings, 21 November 1945, quoted in 2006 Complaint to German Prosecutor, available online at <http://www.ccrjustice.org/files/Introduction%20to%20the%202006%20German%20Complaint.pdf> (visited 11 September 2009), at 9.

123 See e.g. N. Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005).

124 Sands, *supra* note 98, at 38.

125 See Sands, *supra* note 98, at 37, 40 and 42 (‘The “principle of complementarity” means that in the emerging institutional architecture of international criminal justice the jurisdiction of the ICC will not be hierarchically superior to that of national courts ... [this] principle assumes that national courts are able to exercise jurisdiction and are not precluded, for example, by immunity rules.’); L. Arbour, ‘Will the ICC have an Impact on Universal Jurisdiction’, 1 *JICJ* (2003) 585–588.

such as the ‘presence’ requirement now under consideration in Spain.<sup>126</sup> It will soon become more clear whether the ‘unwilling or unable’ test for complementarity enunciated in Article 17 of the ICC Statute, and considered relevant by some national courts to consideration of universal jurisdiction cases,<sup>127</sup> pushes open the door for national prosecutions for serious international law violations under the principle of universal jurisdiction or serves as a convenient ‘escape hatch’ from prosecution — at least for more powerful defendants.<sup>128</sup>

Of course, if allegations of torture and abuse were fully and properly investigated in the home country of the defendants, and prosecutions before an impartial judiciary were carried out, then there would be no need to turn to universal jurisdiction to close the impunity gap. Until that time, in the spirit of ‘solidarity in prosecution’ of the most serious of international crimes and in the name of justice, universal jurisdiction might be the best and only resort for victims of such crimes to have their voices heard and for the individuals who caused them such grave harm to be held accountable.

126 Implementing legislation for select member-states of the ICC can be found at <http://www.iccnw.org/?mod=romeimplementation&idudctp=10&show=all> (visited 11 September 2009). See generally Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, June 2006, available online at <http://www.hrw.org/en/reports/2006/06/27/universal-jurisdiction-europe> (visited 11 September 2009).

127 In contrast to the dismissal of the German 2004 case under the subsidiarity principle, the Spanish judge examining the Gaza case found that the principle of subsidiarity does not apply in cases dealing with war crimes allegations. See Weill, *supra* note 118, at 631. On 30 June 2009, in a 14-4 decision by the Spanish Appeals Court, this decision was effectively reversed and the investigation of Israeli officials for war crimes in Gaza was closed. The Court upheld the view of the Spanish prosecutor that Israel, not Spain, was the proper forum for this case. See Palestinian Centre for Human Rights (PCHR), ‘PCHR will Appeal to Supreme Court against Spanish Appeals Court’s Decision,’ 30 June 2009, available online at <http://www.pchrgaza.org/files/PressR/English/2008/84-2009.html> (visited 11 September 2009).

128 Compare J. Wouters, ‘The Judgement of the International Court of Justice in the *Arrest Warrant* Case: Some Critical Remarks’, 16 *Leiden Journal of International Law* (2003) 253, at 261 (While observing that the prohibition against immunity before the ICC does not automatically oblige states to exclude the application of immunities within their own courts, ‘in the light of the complementarity principle and the purpose of the Statute — namely, putting an end to impunity for the perpetrators of the crimes involved — it could be submitted that, by ratifying the ICC Statute, states implicitly agree to forego the right to invoke immunity for their officials before the domestic courts of other state parties for the crimes covered by the ICC Statute’) with the outcome in cases cited in *supra* note 118.