TO THE CONSTITUTIONAL COURT

I, Mr. JAVIER FERNÁNDEZ ESTRADA, Attorney 561 of the Courts of Madrid and the Association for the Dignity of Male and Female Prisoners of Spain, come before this Court, and in the proper legal manner, **DECLARE**:

That in accordance with article 44.1 of the Organic Law Of the Constitutional Court on behalf of my clients, I come to file a **APPLICATION FOR CONSTITUTIONAL *AMPARO*** [*] against the ruling issued by the Supreme Court, Criminal Division dated December 20, 2012 in Appeal procedure no. 1133 / 2012, against the ruling of March 23, 2012, Docket 148/2011, issued by the Criminal Chamber of the National Court, in plenary, resulting from Summary Procedure 124/2009, of Central Court No. 3.

We believe[**] that that Ruling violates the following constitutional clauses, which declare fundamental rights, namely:

> Article 24.1, which declares the right of all to obtain effective protection from judges and courts.

The next step in this Lawsuit is to present the background of fact, the legal grounds, and the claims of *amparo* that are invoked in order to preserve or restore the constitutional rights that are regarded as violated.

---

[*] [*amparo* left in Spanish because there is no equivalent in the common-law tradition – appeal for constitutional protection]

[**] [lit. = "it is estimated that"]

We will likewise detail the fulfillment of procedural requirements for the admission of this Application.

BACKGROUND

A) On March 17, 2009 this party filed complaint on behalf of my clients against **Alberto R. Gonzales,** counsel to President George W. Bush in the White House, **David Addington,** General Counsel if Vice-president Dick Cheney in the White House, **William J. Haynes**, General Counsel of the Office of Secretary of Defense in the Defense Department, **Douglas Feith,** Undersecretary of Defense for Legal Affairs in the Defense Department, **Jay S. Bybee**, Assistant of the Attorney-general as Chief of the Office of Legal Counsel of the Department of Justice, and **John Yoo,** Second Assistant of the Attorney General of the Office of Legal Counsel of the Department of Justice.

The complaint was filed on the grounds that they were responsible for a whole scheme orchestrated by them, which was carried out by setting up a plan of torture and inhumane treatment inflicted on detainees at the Guantanamo Detention Center.

The direct consequence of this illegitimate set of actions, carried out by the defendants, was that 528 people of different nationalities, including five Spanish citizens, suffered abuses, degrading treatment, and torture to the point where two of them died during it.

B) On May 4, 2009, Central Court for Preliminary Criminal Proceedings No. 6 issued a Ruling to the effect that prior to ruling on the admission of the complaint, international Letters Rogatory should be sent to the United States to learn whether the deeds set forth in the complaint were being investigated before its authorities, or, if so, they were going to be prosecuted, and that the Authority and the specific proceeding be identified.

C) On October 29, 2009 a ruling was issued admitting the complaint for processing.

D) The Letters Rogatory of the United States requested by Central Court for Preliminary Criminal Proceedings 6 in the Ruling are received on May 4, 2009.

E) On April 13, 2011 a Ruling is issued ordering provisional staying of this case; and this party presented the resulting appeal.

F) On April 23, a Ruling is issued by the Criminal Chamber of the National Court in plenary, dismissing the appeal lodged by this party and joined by the United Left and the Free Association of Lawyers.

G) This party presents the binding Notice of appeal.

H) On December 2012 the TS [Supreme Court] issues a Ruling stating that the appeals for reversal are not admissible.

I) On January 29, 2013 this party presents Motion for Dismissal.

J) On February 7, 2013 the Criminal Division of the Supreme Court issues an order by virtue of which it is decided not to admit the motion for dismissal.

SPECIAL CONSTITUTIONAL IMPORTANCE

This party believes that my clients have been rendered defenseless, preventing them from protecting their legitimate interests with the argumentation and presentation made in the ruling that the appeal for reversal inadmissible, **in relation to which an investigation is underway or has been made in the United States, even though neither the object nor the subjects possibly responsible in those investigations matches.**

Moreover, this High Court has repeatedly stated the legal doctrine on the application of the Principle of International Jurisdiction, from which the Criminal Division of the National Court in Plenary has departed, as has the Second Division of the Supreme Court in the case before us.

Therefore, the **special constitutional significance** of this appeal is based on the following criterion, the reasoning of which is set forth below:

The legal doctrine of the Constitutional Court on the fundamental right that is claimed in the appeal is being breached broadly and repeatedly by the ordinary courts.

> We refer specifically to the non-application of restrictive criteria in interpreting article 23.4 of the Organic Law of the Judicial Power, since such restrictions would directly impact the violation of the fundamental right to effective judicial protection in its manifestation of the *pro actione* principle. This argument is established by this Court in Judgment 237/05 of the "Guatemala" case which stated the absolute principle of Universal Jurisdiction and the non-application of the previously mentioned restrictive criteria.

LEGAL FOUNDATIONS

SOLE FOUNDATION: VIOLATION OF THE FUNDAMENTAL RIGHT TO EFFECTIVE JUDICIAL PROTECTION IN RELATION TO THE NON-APPLICATION OF ARTICLE 23.4 OF THE ORGANIC LAW OF THE JUDICIARY.

The fundamental right to effective judicial protection, in its aspect of access to the courts, or the so-called *pro actione* principle, imposes, in case of violation, the duty to compel the courts to interpret the procedural requirements proportionately, *"preventing certain interpretations and applications of them from disproportionately eliminating or hindering the right to having a judicial body hear and legally rule on the claim submitted to it"* (for all, STC 122/1999, of June 28, FJ 2).

Likewise, the Constitutional Court has established that:

> *"For the purposes of a thorough understanding of the scope and inclusion of the aforementioned pro-actione principle under the protective cover of section 24.1 CE it is not irrelevant to emphasize* ***the more incisive character of the norm of access to the courts, in the sense that judicial interpretations of the procedural legality that meet the test of reasonableness, and of which "their correctness from a theoretical standpoint" could be claimed, may entail a "denial of access to jurisdiction based on an excessively rigorous consideration of applicable law"*** (STC 157/1999, of September 14, FJ 3) ***and may thereby violate the right to effective judicial protection in that aspect."***

The facts contained in our complaint have to do with the active and decisive participation in the preparation, approval, and implementation of a body of law that made it possible to nullify the most minimal fundamental rights linked to the person, to implement new interrogation techniques extended to torture itself, and to legally protect all those involved, including officials, physicians, members of the military, and all persons who participated in such outrages.

Everything described previously, orchestrated by the individuals accused, through multiple memoranda that they wrote and which concluded with the signing by the then President, on November 13, 2001, of an executive order for detention, treatment, and trial of certain foreigners in the war against terrorism.

Hundreds of individuals then began to be transferred to the Guantanamo Center, on January 11, 2002, a number of them Spanish or with significant ties to Spain.

The President subsequently signed a new memorandum on February 7, 2002, establishing that no Taliban or Al Qaeda prisoner could be considered a prisoner of war, and therefore with this statement they were denied the guarantees of Common Article 3 of the Geneva Conventions.

Following these events the interrogation techniques began, which were classified in groups and which this party explained in detail in its complaint, which it does not repeat in this pleading, for the sake of procedural economy.

Accordingly, these facts fall under the **crimes encompassed in Chapter III of title XXIV of the Criminal Code, "CRIMES AGAINST PERSONS AND GOODS PROTECTED IN THE EVENT OF ARMED CONFLICT,"** and of those that may emerge from the investigation.

As stated in the Ruling of the Criminal Division of the Supreme Court, *"..in order for the Spanish courts to be able to try the offences set forth ... and, in any case, says the law, that no proceeding entailing an investigation and an effective prosecution, if appropriate, of such sanctionable deeds has been initiated in another competent country or in an International court."*

Bearing in mind this clause, we believe that both the Plenary of the Criminal Division and the Supreme Court have made a restrictive interpretation of article 23.4 of the Organic Law of the Judiciary, and, moreover, without any basis, it has been claimed that the United States was conducting different investigations considered "effective" on the same facts and the same individuals.

This party could admit that claim, if it were to be shown that in another competent country or in an International Tribunal the sanctionable deeds stated in the complaint were being investigated, and it would be admissible that the Spanish courts would not be competent for prosecuting them.

However, this is not the case, nor has it been so in all these years. If we take as our basis the international obligation to investigate and prosecute criminally those regarded as the perpetrators of unlawful acts, in this case, this point has not been carried out, and hence contrary to what is stated in the Ruling of the Division, this party claims that applying the principle of subsidiarity in this case would be not in accord with the Law.

Thus, in the words of the judges who dissented from the majority comprising formed the Plenary of the Criminal Division of the National Court (particular vote), there has been no investigation or adequate and effective prosecution of a criminal nature in the United States of the deeds that are the object of the complaint. Moreover, the principle of subsidiarity would not apply to the case inasmuch as the third and fourth Geneva Convention attributes jurisdiction to party States absolutely and without considering subsidiarity; the foregoing should be treated under what is set forth in article 23.4 LOPJ, for what is involved is an obligation imposed by international law on our State.

Furthermore, the words of the same judges, according to national and international standards, there is not nor has there been any investigation or prosecution on the matter of the complaint; that matter is built on the basis of the facts narrated and of the persons identified as responsible. This is a core issue which has been ignored by the contested decision and by the ruling of the criminal division.

Another related issue is the fact that the same article 23.4 of the LOPJ establishes **"a procedure involving an investigation and an effective prosecution, if indicated, of such punishable acts."** By that expression, this party understands that only procedures of a criminal nature satisfy this maxim, and of course that it must be carried out by figures completely independent from those that may have been a party to, or the origin of, such unlawful practices.

Analyzing investigations supposedly carried out by the American administration, and this party basing itself on the report prepared by the Ms. Mary Ellen Warlow, which is in the court records, such a need for a criminally effective and sufficient criminal investigation into the members of the legal team that prepared the documents with which the practices carried out in the Guantanamo prison would be begun, it does not exist. *

But besides the fact that such investigations have not been carried out, this party cannot accept as valid those investigations that supposedly have in fact been carried out, except for the investigation of an ethical** nature, because the events that have been investigated are not the same as those that this party stated in presenting the complaint, and moreover the people are not the same, that is, there is neither objective nor subjective identity; the events are completely foreign to this proceeding.

However, we must not ignore the fact that allegations have been filed away and have not led to any investigation.

Moreover, the very Ruling of the Supreme Court indicates that neither the investigation ordered by Mr. Holder on the treatment of some of the detainees at the Guantanamo Detention Center, nor that begun because of the alleged destruction by the CIA of videotapes in which some interrogations of detainees had been filmed focuses on the defendants or on the specific action of which each of them is accused in the complaint, and **hence this party cannot understand how it can still be maintained that there are investigations in the same sense as was set forth in this regard in the complaint presented by this party.**

* [syntax confusing; grammatically what does “not exist” is “need,” whereas it should be the “investigation” that does not exist.]

** [lit. “deontological”]

Therefore, and taking into account the previous assertion, it would not be sufficient, as the Criminal Division seems to claim, to investigate the treatment to which some of those held at Guantanamo were subjected, in the expectation that the responsibility of the defendants derives from finding that the such treatment constituted torture and inhumane treatment.

Thus, in this regard, the Division of Preliminary Matters of the European Court of Human Rights in various rulings has established the requirements of identity, as complete identity of people and conduct, i.e. objective and subjective identity; it is blatantly obvious that there is no such identity in the case before us.

Indeed, in the case of torture, as is the case with which we are concerned, the ECHR states that the level of legal protection must be strengthened inasmuch as the protection of the courts is the ultimate safeguard of the rights of the individual against the arbitrary actions of power.

Therefore, and taking the foregoing into account, mere acknowledgement by our courts of an apparent effective investigation could constitute an indirect violation of the Constitution, as this High Court has stated in its Ruling 123/2009.

In this regard the American administration states that it has undertaken numerous actions related to the alleged ill-treatment, as well as the legal advice provided in relation to the treatment meted out to the detainees. It is in the aforementioned report where it is stated that both Yoo and Bybee were investigated and that the investigation concluded with a 69-page report on January 5, 2010 in which the Deputy Assistant Attorney General decided that, while it may be the case that both used "poor" judgment, they were not

guilty of misconduct that would violate legal or ethical requirements, and hence it was not proper to refer the case to the competent authorities.
Indeed, the report by Ms. Warlow concludes that there is no legal basis for prosecuting Bybee, Yoo, or any other official of the executive, including those named in the complaint.

It is therefore obvious, contrary to what is claimed by the Ruling of the Division of the Supreme Court and of the National Court in Plenary, that no investigation has been carried out on the persons specified in the complaint, completely ignoring the norms of international law, and of course implicitly regarding as lawful the recommendations that they made on the interrogation methods used on people confined at the Guantanamo Center, which cost the lives of two people and has inflicted many consequences on hundreds more of them.

Indeed, the American administration is so wrong that even the "intellectual" authors of the legal recommendations that ended in the torture with impunity of hundreds of people have not hesitated to acknowledge the following points c**ontained in the CCR and ECCHR report which we attach as Information Document:**

- ***John Yoo,*** *while serving as a lawyer in the Office of legal Counsel, wrote opinions in which he stated that the Geneva Conventions did not apply to Al Qaeda detainees or Taliban detainees, and that the President was not bound by any national or international treaty on torture. He subsequently acknowledged on November 2010 that the legal advice he had given was influenced not by objective standards as required by law, but by the political environment and the post-September 11 environment. "I believe that my legal criteria were correct under the circumstances," and hence it is clear that as*

the Office of Liability of the Department of Justice says, Yoo did not offer a thorough, objective, and candid interpretation of the law, and was guilty of a serious breach of professional conduct that was improper and intentional by "placing his desire to satisfy the client above his obligation to provide thorough, objective and candid legal advice."

- ***Alberto Gonzales,*** *among many other deeds, signed a memorandum in January 2002 written for President Bush declaring that the Geneva Conventions, including the prohibition of torture shall not apply to Taliban or Al Qaeda detainees.*

  Subsequently, in November 2010 he acknowledged his participation in, and his knowledge of, the torture program and said that he was aware of the techniques and had knowledge of it, and he knows that various lawyers strove to see if it could be applied in a manner consistent with the statute against torture, and the guidance given by the Department of Justice while I was in the White House, about how these techniques could be implemented to gather important information, at a time when our country was serious danger, to gather information from the enemy that would favor the U.S."[*]

  Again reference is made to the context, suggesting that the prohibition against torture did not apply to the interrogation program.

Further proof of lack of intention by the United States of addressing these facts is that Attorney General Holder has made it very clear that the members of the American intelligence community *"have to be protected from any legal*

[*] [sic – unclear where direct quotation begins]

risk when they act in good faith and within the scope of the legal guidance given them."

Furthermore, although Attorney Holder has disclosed certain critiques about the memos written by the defendants, he confirmed that such documents were not subject to any study by the Department of Justice. Therefore, we have before us yet another proof that there neither is, nor has there been, any investigation by the U.S. into the facts set forth in the complaint.

Continuing the arguments presented thus far, another "so-called investigation" should be noted, that begun by the Office of Professional Responsibility (OPR).

In it, an investigation into the professional conduct of two of the six defendants was begun. That investigation lasted for the considerable amount of time of almost five years and focused on their conduct in the process; however, once again, the results of that investigation were nullified.

Again the U.S. states that this investigation has been carried out, with the clear intention of continuing to give the impression that it is conducting investigations into the events at the Guantánamo Center, but it does not recognize or present its findings, failing to mention that it* concludes that both John Yoo and Jay Bybee intentionally committed professional misconduct.

Furthermore, and with respect to that same investigation, the United States declares that "there is no basis for proceeding with criminal prosecution of Yoo or Bybee based on the modified findings of a deputy attorney general, David Margolis, who, after a review that lasted several months and was based

* [*ésta* = this or "the latter" – referent unclear possibly "investigation"]

largely on the replies given by Bybee and Yoo to the OPR July 2009 report, determined that neither of them had committed professional misconduct."

Indeed, the presentation by the United States asserts that "the Department of Justice has concluded that it is inappropriate to initiate criminal proceedings against any other official of the Executive Branch, including those named in the complaint who have acted on the basis of those memoranda and others produced by the Office of Legal Counsel during the course of their involvement, with respect to the rules and procedures of detention and interrogation."

With that statement, it can once more be proven that the United States is not willing to investigate these facts, and hence the Spanish courts ought not to refuse to do so, as has been happening thus far.

Another of the investigations that the United States claims to have carried out is that carried out involving into two civilian contractors, David Passaro, and Don Ayala, for crimes committed in Afghanistan. With this presentation the United States again attempts to demonstrate that it is going to handle the complaints for torture and other violations committed against thousands of people in detention centers that their country maintains around the world.

However, it is obvious that even though this investigation has been carried out, it has nothing to do with the case before us, and with the decision by the U.S. to prosecute six former officials for torture and various other violations of international law

Finally, in its presentation the United States refers to some possible investigations that might be underway in the Eastern District of Virginia on several complaints filed for abuse of detainees, but that the prosecution is prevented by United States legislation from investigating the allegations more thoroughly.

Once again we are faced with an "announcement" of investigation which nevertheless does not in any case fit into the case before us. Again they are trying to divert attention, this time trying to hide behind so-called confidentiality processes established in its judicial system for cases where the jury is involved.

Furthermore, we must not forget that the U.S. Government has never at any time mentioned that there was any investigation in Virginia, and has mentioned only the investigations to which this party has referred to in the preceding paragraphs.

In view of the foregoing, it cannot be said on any grounds that the United States is carrying out investigations on those accused in the complaint, and in relation to the facts presented in the complaint filed by this party.

Moreover, should that point be affirmed, it would translate into refusal by the Spanish courts to prosecute people who appear in the complaint presented by this party.

In this case, and in view of what has been set forth, the American jurisdictional and administrative institutions offer no assurances of an impartial investigation, or even of the very existence of any judicial investigation.

In any case, it is always good to remember that the Second Division of the Supreme Court nor the Office of Public Prosecutor, in its appeal, nor the majority of the plenary of the Criminal Division of the National Court in their ruling, have even questioned the criminal reality of the deeds alleged nor the involvement of the defendants, inasmuch as they only focus on the lack of jurisdiction of the Spanish courts to investigate the deeds alleged.

Therefore to keep questioning the unquestionable would mean continuing to allow the American administration to hinder the course that ought to be taken by the Spanish justice system.

Besides the foregoing, it is obvious that what has been done by the National Court and been supported by the Supreme Court cannot be deemed an "effective investigation" in terms of the legal doctrine of the European Court of Human Rights and of what would constitute effective legal protection in our constitutional law, because processing letters rogatory and nothing more amounts to not having exhausted a minimum of the investigation necessary to regard the aforementioned right as having been protected.

PROCEDURAL GROUNDS OF THE APPLICATION

ONE. This appeal is filed pursuant to articles 2.1 b) and corresponding of the Organic Law of the Constitutional Court, insofar as the latter is regarded as competent for examining applications for *amparo* filed in response to violation of rights and public freedoms.

TWO. - The party requesting *amparo* has standing for filing this appeal, in accordance with what is set forth in article 46.1 b) in relation to article 44 of the aforementioned Organic Law of the Constitutional Court, inasmuch as the February 7, 2013 ruling was the last that my client could invoke in the court system.

THREE - With regard to the legal correctness of the application, all the requirements set forth in article 41 of that law have been met.

In regard to everything else, all the requirements for the filing of this appeal have been met.

Accordingly,

I PETITION THE HONORABLE CONSTITUTIONAL COURT: That inasmuch as this pleading has been presented, it deign to admit and regard as properly formalized the APPLICATION FOR *AMPARO*, against the February 7, 2013 ruling made by the Second Division of the Supreme Court, and that it regard the undersigned Attorney as having appeared, ordering that it be hereby understood that the successive procedures have been carried out in the mode and manner set forth in the Law, and upon their admission and the performance of the proper procedures that may be required, that THE APPLICATION FOR *AMPARO* BE ADMITTED, because of the violation of the constitutional rights invoked and that it declare:

1. That the ruling on May 13, 2010 issued by the Second Division of the Supreme Court is utterly null and void due to violation of the fundamental right to effective judicial protection, in its expression of the *pro actione* principle ...

I FURTHER STATE

That for the purposes of what is set forth in article 49 of the L.O.T.C. we are providing along with this petition for *amparo* a copy of the rulings issued and against which we are requesting *amparo*, the original of the power-of-attorney for litigation establishing our representation, and a copy for the rest of the persons who have standing in this proceeding.

Inasmuch as it is justice that I seek in Madrid, on March 22, 2013.

[Lic.] Gonzalo Boye Tuset Attorney Javier Fernández Estrada

Cdo. 79.182 ICAM