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19 January 2012

Ms. Gabriela Knaul
Special Rapporteur on the independence of judges and lawyers
c/o Office of the United Nations High Commissioner for Human Rights
United Nations Office at Geneva
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via E-mail: SRindependenceJL@ohchr.org

**Re: Complaint against the United States of America and the Kingdom of Spain:
Interference with the Independence and Impartiality of the Judiciary**

Dear Ms. Knaul:

“While we are careful to show our respect for the tragic death of [José] Couso and for the independence of the Spanish judicial system, behind the scenes we have fought tooth and nail to make the charges disappear.”

- U.S. Ambassador Eduardo Aguirre to Spain¹

This request for action is jointly filed by the Center for Constitutional Rights (“CCR”, New York) and the European Center for Constitutional and Human Rights (“ECCHR”, Berlin).² Our complaint follows the publication of U.S. diplomatic cables demonstrating that the U.S. Administration, acting in cooperation with or otherwise assisted by certain senior members of

¹ Cable 07MADRID911, 14 May 2007, para. 8.

² We are grateful for the research assistance provided by Sophia Merckens, Benedict Bartl, and Joanna Cuevas Ingram in the preparation of this complaint.

the Spanish Administration, sought to interfere in or otherwise improperly influence the Spanish judicial process in an attempt to prejudice cases that we are directly involved in.³ In short, we submit that this interference is unlawful and that members of the administration of both the governments of the United States of America and the Kingdom of Spain have acted in a manner that breaches international law.

We respectfully request that you send a communication to both governments in relation to the allegations set forth herein, and open an investigation into the allegations.

1. Introduction

The facts of this complaint engage three separate criminal cases currently before the Spanish courts. In all three cases the defendants are U.S. citizens, and were, at the time of the alleged offences, employed as members of the United States government or its armed forces. In each case, at least one victim has Spanish citizenship.

The first case, a preliminary criminal investigation initiated in April 2009, and formally opened in January 2010, relates to the use of torture inflicted on former detainees of the U.S. detention facility at Guantánamo Bay. The case, currently before Central Court No. 5 of the *Audiencia Nacional*⁴ in Madrid, is directed against “members of the American air forces or military intelligence and all those who executed and/or designed a systemic torture plan and inhuman and degrading treatment against prisoners under their custody.”⁵ Both CCR and ECCHR have been involved in this proceeding and their respective requests to be granted the status of party as “acusación particular” are pending. The case is currently before Judge Pablo Rafael Ruz Gutierrez.

The second case relates to a criminal complaint filed in March 2009 against six senior members of the former U.S. administration of George W. Bush (“the Bush Six”) who were involved in the drafting of legal memoranda that facilitated the torture of detainees at

³ The U.S. government cables, which were obtained by WikiLeaks, were first released through various newspapers around the world in November/December 2010, and at that time, included some redactions. In August 2011, the entire cache of cables was released through WikiLeaks. The cables can be found at: <http://wikileaks.org/>. Unredacted versions of certain cables can also be found at: <http://www.cablegatesearch.net/search.php>.

⁴ The *Audiencia Nacional* is competent to hear cases involving criminal offenses, pursuant to Articles 62 and 65 of the *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial* (Spanish Organic Law of the Judicial Power) (LOPJ). Article 65(1)(e) of the LOPJ states that the *Sala de lo Penal* (Criminal Division) of the *Audiencia Nacional* has jurisdiction to try those crimes committed outside the national territory, when its jurisdiction corresponds to the Spanish courts according to the Spanish legislation or international treaties (namely, the exercise of universal jurisdiction). The *Sala de lo Penal de la Audiencia Nacional* decides on appeals filed against decisions issued by the *jueces centrales de instrucción* (central instructing judges), who direct the instructing or pre-trial phase of the proceedings on crimes that fall within the jurisdiction of the *Audiencia Nacional* (Article 88 LOPJ). Decisions of the *Sala de lo Penal de la Audiencia Nacional* may be challenged by filing an appeal (*recurso de casación*) to the *Tribunal Supremo* (Supreme Court of Spain).

⁵ See Preliminary Decision of 27 April 2009, Procedimiento: Diligencias Previas 150/09—N Delito: Torturas y otros. Juzgado Central de Instrucción, No. 5, Audiencia Nacional, Madrid, *available in English and Spanish at* <http://ccrjustice.org/spain-us-torture-case> (in original: “un plan autorizado y sistemático de tortura y malos tratos sobre personas privadas de libertad sin cargo alguno y sin los elementales derechos de todo detenido, marcados y exigidos por las convenciones internacionales aplicables”).

Guantánamo Bay and other U.S. administered detention facilities around the world. Five victims, all former Guantánamo detainees, including a Spanish citizen and a Spanish resident, were named in the complaint. CCR and ECCHR have participated in these proceedings by filing expert opinions on a number of legal and factual issues. On April 13, 2011, Judge Eloy Velasco, the investigating magistrate for Central Court No. 6 of the *Audiencia Nacional*, decided to temporarily stay the proceedings and transfer the case to the United States Department of Justice. Judge Velasco’s decision is currently being appealed before the plenary of the *Audiencia Nacional*.

The third case concerns the unlawful killing of José Couso Permuy, a Spanish cameraman killed in Baghdad, Iraq on 8 April 2003 as a result of U.S. tank fire at the hotel in which he was staying. The case is currently before Central Court No. 1 (Judge Santiago Pedraz) of the *Audiencia Nacional* in Madrid.

As detailed below, we submit that the U.S. diplomatic cables - the key documents of which are annexed to this complaint – demonstrate a coordinated effort, led by U.S. officials and involving certain senior members of the Spanish government, to obstruct and otherwise interfere with the outcome of these three cases. We maintain that the aim of this concerted action was to prejudice the outcome of these cases in favor of the defendants and thereby subvert the course of justice in Spain. As a result, we submit that a number of rights and principles under international law have been violated, including:

- the right to an independent and impartial judiciary guaranteed by Article 14 of the *International Covenant on Civil and Political Rights* (“ICCPR”);⁶
- the exclusive authority of the Judiciary to determine cases without restrictions, improper influences, pressures, threats or interferences as set out in Articles 2 and 3 of the *Basic Principles on the Independence of the Judiciary* (“Principles”);⁷
- the assurance against inappropriate or unwarranted interference in the judicial process as provided for in Article 4 of the Principles;
- the respect for and observance of the Independence of the Judiciary guaranteed by Article 1 of the Principles; and
- the impartial carrying out of functions by the Judiciary as expressed in Article 13 of the *Guidelines on the Role of Prosecutors* (“Guidelines”).⁸

Notably, through repeated comments made in the cables about the independence of the judiciary and the firm adherence to that principle by judges in Spain, U.S. diplomats and other

⁶ *International Covenant on Civil and Political Rights*, 16 Dec. 1966, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

⁷ *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁸ *Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

officials both implicitly and explicitly acknowledge that their attempts to interfere with criminal proceedings are utterly improper.⁹

2. Request for Action

We maintain that this complaint readily falls within the scope of your mandate as Special Rapporteur. Specifically, Article 2 of Resolution 8/6 of the United Nations Human Rights Council renewing the mandate of the Special Rapporteur on the Independence of Judges and Lawyers (“Mandate”), requests the Special Rapporteur:

- (a) To inquire into any substantial allegations transmitted to him or her and to report his or her conclusions and recommendations thereon;
- (b) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations, including the provision of advisory services or technical assistance when they are requested by the State concerned;¹⁰

In accordance with the Mandate, we request that your office take all appropriate measures as deemed necessary to investigate the facts of this complaint, including by issuing formal communications to both the U.S. and Spanish governments to obtain further information about the breaches alleged herein. We further ask that both countries be requested to take all appropriate measures to investigate and remedy the alleged violations and to submit their responses and the results of their investigations to your offices for further consideration.

In addition, it is requested that Spain:

- Comply with its duties to investigate our clients’ allegations and, where violations of Spanish law are found to have been perpetrated, to prosecute those responsible in accordance with the law;
- Ensure that any potential legal disputes between the parties that arise following prosecution are resolved through the judicial system, strictly in accordance with Spanish Law and binding international law, and independently from any political consideration.

⁹ See, e.g., Cable 07MADRID141, 26 Jan. 2007, paras. 6 and 7 (Spanish AG Conde Pumpido “emphasized that the Spanish judiciary was entirely independent and that the decision by the Supreme Court and the actions of Judge Pedraz were beyond the Spanish Government to control” and “reiterated that there was nothing the Government could do to rein in Pedraz”); Cable 09MADRID347, 1 Apr. 2009 (“we do not know if the [Spanish] government would be willing to take the risky step of trying behind the scenes to influence the prosecutor’s recommendation on this case or what their reaction to such a request would be”); Cable 09MADRID393, 17 Apr. 2007 (explaining that “there was no political interference on the judicial process” and that while the government could advise the courts of its position through the Attorney General, “the final decision rested with the presiding judge”).

¹⁰ Article 2, United Nations Human Rights Council Resolution 8/6 (dated 18 June 2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_6.pdf.

In order to assist Spain in the carrying out of these functions, it is requested that the United States:

- Be required to abide by principles of international law outlined in this complaint – including, in particular, the *International Covenant on Civil and Political Rights* and the *Basic Principles on the Independence of the Judiciary*.
- Refrain from further obstructing or otherwise interfering with the outcome of these cases, and any other case duly filed before a court of law.

Once formal responses from both the U.S. and Spanish administrations are forthcoming, we would ask that your office present your conclusions and recommendations pursuant to Article 2(a) of the Mandate outlined above, including to the U.N. Human Rights Council and to the parties authoring this complaint.

3. Procedural History of the Cases¹¹

a. Investigation into the US Torture Program: Preliminary Proceedings 150/2009

On 27 April 2009, Judge Baltasar Garzón of the Central Court for Preliminary Criminal Proceedings No. 5 at the *Audiencia Nacional* initiated preliminary criminal investigation No. 150/2009 against those who “approved [the] systematic plan of torture and ill-treatment on persons deprived of their freedom without any charge and without the basic rights of all detainees as set out and required by applicable international treaties”¹² at the U.S. Guantánamo Bay detention facility. The investigation specifically relates to the torture and abuse of four former Guantánamo detainees, Hamed Abderrahman Ahmed, Lahcen Ikassrien, Jamiel Abdul Latif Al Banna, and Omar Deghayes,¹³ which includes 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.

¹¹ Summaries of the cases have already been circulated in the public domain and discussed extensively in the media. With respect to both the ‘*Bush Six*’ case and the Spanish investigation into the US torture program, documents filed on behalf of CCR and ECCHR, court letters, resolutions and decisions are available at <http://www.ecchr.de/index.php/us-accountability.html> and <http://ccrjustice.org/spain-us-torture-case>, in Spanish and English. For a summary of the *Couso* case (in Spanish), see <http://josecouso.info>.

¹² See Preliminary Decision of 27 April 2009, and accompanying text.

¹³ All four men had previously made confessions and consequently been charged with terrorism related offences in Spain. The charges were withdrawn after the evidence - obtained under torture and abusive interrogation techniques including sexual abuse and severe beatings - was ruled inadmissible; Hamed Abderrahman Ahmed and Lahcen Ikassrien were both tried and convicted, and had their convictions overturned, while the European Orders for Detention against Latif Al Banna and Omar Desghayes were rendered null and void. See Preliminary Decision of 27 April 2009, pp. 1-2, 9, available at: http://www.ccrjustice.org/files/Unofficial%20Translation%20of%20the%20Spanish%20Decision%2004-27-2009_0.pdf

The preliminary investigation did not name potential defendants, but included “possible material and instigating perpetrators, necessary collaborators and accomplices.”¹⁴ Judge Garzón found that the facts relate to violations under the Spanish Penal Code, the Third and Fourth Geneva Conventions,¹⁵ the UN Convention Against Torture,¹⁶ and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

Under the terms of the Spanish Organic Law of the Judicial Power (LOPJ), Article 23 (4), as amended in November 2009, the court can only exercise jurisdiction over the international crimes alleged in this complaint if “there was no other competent country or international tribunal where proceedings have been initiated that constitute an effective investigation and prosecution in relation to the punishable facts.”¹⁷ Accordingly, on 15 May 2009, Judge Garzón, pursuant to the U.S.-Spain Treaty on Mutual Assistance in Criminal Matters, issued Letters Rogatory to the United States and the United Kingdom inquiring whether any investigations are currently pending into the individual cases of the four plaintiffs. To date, neither country has responded.

On 29 October 2009, Judge Garzón issued a decision admitting Lahcen Ikassrien as a victim-witness in the case. Three months later, in the absence of any response to the Letters Rogatory, on 27 January 2010, Judge Garzón issued a decision in which he found that Spain had jurisdiction over the alleged violations and that the case could proceed. In April 2010, in a separate matter relating to, *inter alia*, Judge Garzón’s attempt to investigate the Franco regime’s most serious crimes which were previously included in an amnesty, he was indicted for exceeding his authority. Judge Garzón was suspended, pending trial.¹⁸ Preliminary criminal investigation No. 150/2009 has since been transferred to Judge Pablo Rafael Ruz Gutiérrez.

On 6 April 2011, in an appeal pertaining to one of the plaintiffs in this case (Lahcen Ikassrien), the Plenary of the *Audiencia Nacional*’s Criminal Division (*Sala de lo penal*) affirmed that the Spanish Courts were competent to hear this complaint, thus dismissing an earlier appeal by the Public Prosecutor’s Office arguing, *inter alia*, that Spain lacked

¹⁴ See Preliminary Decision of 27 April 2009, at 10 (in original: “Incoar Diligencias Previas con el número 150/2009 por presuntos delitos de los artículos 608, 609 y 611, en relación con los artículos 607 bis y 173 del Código Penal, contra los posibles autores materiales e inductores, cooperadores necesarios y cómplices de los mismos.”).

¹⁵ *Third Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 U.N.T.S. 135 (entered into force 21 Oct. 1950) and *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 U.N.T.S. 287 (entered into force 21 Oct. 1950) (collectively, the ‘Geneva Conventions’).

¹⁶ *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, opened for signature 10 January 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987).

¹⁷ *Ley Orgánica del Poder Judicial (LOPJ)*, B.O.E. No. 266, 4 Nov. 2009, sect. I.

¹⁸ Both signing organizations filed a formal complaint for consideration and action to six UN Special Rapporteurs and UN Working Groups, including your office, on 20 May 2010, regarding the suspension and indictment of Judge Garzón for investigating Spanish enforced disappearance cases; the complaint is available at <http://www.ecchr.de/index.php/garzon-case.html> and <http://www.ccrjustice.org/newsroom/press-releases/international-legal-and-human-rights-groups-petition-un-support-spanish-judg>.

jurisdiction.¹⁹ The majority of the bench found that the facts relating to Mr. Ikassrien were “sufficient to affirm that there is a relevant connection with Spain,” in accordance with the revised Article 23(4) of the Spanish LOPJ. In addition, “in the preliminary proceedings 150/09 where Ikassrien presented the complaint, there is also a Spanish victim, Hamed Abderrahman Ahmed, which in and of itself would fulfill the requirements of the LOPJ, regardless of the jurisdictions and/or the principle of subsidiarity.”²⁰

In a 13 April 2011 resolution, Judge Ruz noted the dismissal of the appeal. In light of Mr. Ikassrien's status in the proceedings and to ensure his presence in the country, taking into account the seriousness of the crimes alleged in the complaint, Judge Ruz urged the Spanish Ministry of Security and the Ministry of Immigration and Emigration to issue Mr. Ikassrien temporary residency.²¹

In a decision dated 13 January 2012 and issued on 14 January, Judge Ruz reaffirmed his competence over the proceedings, and issued a number of orders to further the proceedings.²² He also confirmed that despite reminders, neither the United States nor the United Kingdom had responded to the Letters Rogatory sent in relation to this case.²³

In this case, CCR and ECCHR have filed motions to join the investigation as private parties (*acusación particular*). Amongst other submissions, in January 2011, we submitted a dossier to Judge Ruz pertaining to U.S. Major General Geoffrey Miller - the former commander of the Guantánamo Bay detention facility.²⁴ This dossier highlights, *inter alia*, Miller's role in the torture of detainees at Guantánamo and in Iraq. Based on the information contained in the dossier, we requested that a subpoena be issued for Miller to testify in the current proceedings. This request is pending.

b. Investigations against the ‘Bush Six’: Preliminary Proceedings No. 134/2009

On 17 March 2009, a criminal complaint was filed with the *Audiencia Nacional* in Madrid by the Association for the Dignity of Spanish Prisoners against six former senior members of the US Bush Administration. The complaint alleges that a number of breaches of international law, including violations of the *Geneva Conventions* and the *UN Convention against Torture*, were committed against detainees at Guantánamo Bay and other prisons abroad – including

¹⁹ The written decision is dated 16 May 2011, *available at*: <http://ccrjustice.org/files/Resolution%20High%20Court-%2017%20May%202011%20-ENG.pdf> (English) and <http://ccrjustice.org/files/Resolution%20High%20Court%20Not.%2017.5.11%20SPAN.pdf> (Spanish).

²⁰ *Id.*

²¹ Decision *available at*: <http://www.ccrjustice.org/files/No.%205%20-%2013%20April%202011%20Order%20%28LEXNET16%29%20ENG.pdf> (English) and <http://www.ccrjustice.org/files/No.%205%20-%2013%20April%202011%20Order%20%28LEXNET16%29%20SPAN.pdf> (Spanish).

²² Decision in Spanish *available at*: <http://ccrjustice.org/files/2012-01-13%20AUTO%20GUANTANAMO.pdf>

²³ *Id.* at p. 19, section 5, listing the following dates for the Letters Rogatory or reminders: 26 May 2009, 11 August 2009, 30 October 2009, 4 January 2011 and 19 September 2011. A copy of the initial Letters Rogatory sent by Judge Garzón to the United States and United Kingdom is *available here*:

<http://www.ccrjustice.org/files/May%202009%20Letter%20Rogatory%20English.pdf> (English) and

<http://www.ccrjustice.org/files/Auto%20Comission%20Rogatoria%20y%20central%202-1.pdf> (Spanish).

²⁴ CCR and ECCHR, *Defendant Dossier: Geoffrey Miller*, 4 Jan. 2011, *available at* http://www.ecchr.eu/us-accountability/articles/ecchr-and-ccr-call-on-the-spanish-courts-to-subpoena-former-guantanamo-commander-for-torture.883.html?file=tl_files/Dokumente/Counterterrorism/Guantanamo%20Miller%20en.pdf

against at least five particular victims: Hamed Abderrahman Ahmed, Reswad Abdulsam, Lahcen Ikassrien, Jamiel Abdul Latif Al Banna and Omar Deghayes. Specifically, the complaint alleges that David Addington (former Counsel to, and Chief of Staff for, former Vice President Cheney); Jay S. Bybee (former Assistant Attorney General, Office of Legal Counsel (OLC), U.S. Department of Justice (DOJ)); Douglas Feith (former Under Secretary of Defense for Policy, U.S. Department of Defense (DOD)); Alberto R. Gonzales (former Counsel to former President George W. Bush, and former Attorney General of the United States); William J. Haynes (former General Counsel, DOD); and John Yoo, (former Deputy Assistant Attorney General, OLC, DOJ), now collectively referred to as the “Bush Six,” had:

“participated actively and decisively in the creation, approval and execution of a judicial framework that allowed for the deprivation of fundamental rights of a large number of prisoners, the implementation of new interrogation techniques including torture, the legal cover for the treatment of those prisoners, the protection of the people who participated in illegal tortures and, above all, the establishment of impunity for all the government workers, military personnel, doctors and others who participated in the detention center at Guantánamo.”²⁵

On 28 March 2009, the case was initially admitted by the competent investigating judge of Central Court No. 5, Judge Garzón. On 16 April 2009, Spain’s Attorney-General Cándido Conde-Pumpido Tourón raised objections to the continuance of the case. Subsequently, on 17 April 2009, the Public Office Prosecutor of the National Court filed a report requesting that the current complaint be discontinued. On 23 April 2009, the responsibility for investigating this matter was referred to Judge Eloy Velasco.

On 4 May 2009, to satisfy the requirements of the LOPJ and, pursuant to the U.S.-Spain *Treaty on Mutual Assistance in Criminal Matters*, Judge Velasco issued an International Letter Rogatory to the United States asking them to confirm “whether the facts to which the complaint makes reference are or are not now being investigated or prosecuted.”²⁶

A year later, on 7 April 2010, Judge Velasco issued an order asking the parties to brief the effect of the amendment to the LOPJ, Articles 23 (4)-(5) on the investigation, and whether the investigation should continue. On 26 April 2010, CCR and ECCHR filed an expert opinion in this matter, outlining how the requirements of the LOPJ were plainly met in this case and how the US investigations that had occurred to date fell far short of the standard for ‘effective investigations’ required under international law.²⁷

On 27 April 2010, the Spanish Association for the Dignity of Prisoners filed its response, also submitting that the investigation should proceed. Judge Velasco granted Requests 1-3 of that submission in an 18 October 2010 order, in which he also noted the urgency of compliance with the Letters Rogatory sent to the United States in May 2009.

²⁵ Complaint (in Spanish) *available at*:

http://imágenes.publico.es/resources/archivos/2009/3/27/1238184153397QUERELLA_VERSION_FINAL.pdf.

²⁶ See <http://ccrjustice.org/files/Bush%20Six%20Order%20Rogatory%20Letter%20English%20%282%29.pdf>.

²⁷ Joint Expert Opinion of CCR and ECCHR for the Central Court for Preliminary Criminal Proceedings No.6, 26 Apr. 2010, *available at* <http://www.ecchr.de/index.php/us-accountability/articles/ecchr-files-legal-submission-in-spanish-guantanamo-case.html>.

On 14 December 2010, CCR and ECCHR submitted a Supplemental Joint Expert Opinion, advising the Court of recent factual developments in relation to the U.S. torture program, defendants, and related actions taken by U.S. officials to interfere with these proceedings, as revealed through the released State Department cables two weeks earlier.²⁸ In response, on 15 December 2010, Judge Velasco issued an order in which he instructed the Prosecution to submit its views on whether the case should proceed or by which date the United States must reply to the Letters Rogatory.²⁹

Finally, in the absence of a response from the United States to the Letters Rogatory, despite the two reminders, on 28 January 2011 Judge Velasco issued an order setting a deadline of 1 March 2011 for the United States to provide an answer and inform him whether a prosecutor has been appointed to investigate the abuses at Guantánamo.³⁰

A letter dated 1 March 2011 and marked received on 4 March 2011, was submitted by the U.S. in response to the Letters Rogatory issued by Judge Velasco, claiming “the United States’ clear jurisdiction over any such allegations” and requesting that “the complaint be sent to the United States for further review and investigation, as appropriate, by United States authorities.”³¹

On 13 April 2011, CCR and ECCHR released their response to the U.S. submission, in which they set forth that Spain is the proper jurisdiction for this case and demonstrate that the U.S. has not, and will not, investigate or prosecute the defendants or the punishable acts.³²

On 13 April 2011, Judge Velasco issued a ruling in which he “temporarily stayed” the case in Spain, and transferred it to the U.S. Department of Justice “for it to be continued, urging it to indicate at the proper time the measures finally taken by virtue of this transfer of procedure.”³³

²⁸ A month later, on 7 January 2011, CCR and ECCHR submitted an expert opinion setting out the legal basis for holding the “Bush Six” criminally liable under international criminal law, and summarize the key evidence against the defendants; *see*

<http://ccrjustice.org/files/FINAL%20English%20Lawyers%20Responsibility%20Submission.pdf>.

²⁹ *See* 15 December 2010 Order, *available at*:

<http://www.ccrjustice.org/files/15%20December%202010%20Order.pdf> (English) and

<http://www.ccrjustice.org/files/15%20December%202010%20Order%20Spanish.pdf> (Spanish).

³⁰ *See* 28 January 2011 Order, *available at*:

<http://www.ccrjustice.org/files/28%20January%202011%20Order%20English.pdf> (English) and

<http://www.ccrjustice.org/files/Order%2028%20January%202011%20Spanish.pdf> (Spanish).

³¹ *See* U.S. Submission, Response to Letters Rogatory, at 2, *available at*

<http://ccrjustice.org/files/US%20Letters%20Rogatory%20Response%20March%202011%20-%20ENG.pdf>.

³² *See* CCR/ECCHR Response to US Submission, 13 Apr. 2011, *available at*:

<http://www.ccrjustice.org/files/Spain%20rebuttal%20submission%20FINAL.pdf> (English) and

<http://www.ccrjustice.org/files/Spain%20rebuttal%20submission%20FINAL%20April%202011%20SPANISH.pdf> (Spanish).

³³ *See* 13 April 2011 Order, at 4, *available at*:

<http://ccrjustice.org/files/13%20April%202011%20Order%20ENG.pdf> (English) and

<http://www.ccrjustice.org/files/13%20April%202011%20Order%20SPAN.pdf> (Spanish).

Notably, one of the cables reveals that Judge Velasco had purportedly “offered to transfer the proceedings to the U.S.” upon receipt of the case in May 2009. *See* Cable 09MADRID440, 5 May 2009. (“We [the U.S.] learned on May 5 that Velasco has declined to process that case saying that before moving forward the USG should be asked if proceedings are underway in the U.S.”).

On 19 April 2011, a 139-page appeal of Judge Velasco's 13 April 2011 order was filed on behalf of the Spanish Association for the Dignity of Prisoners. The appeal is pending before the Criminal Division of the National Court.

*c. Investigation into the Death of José Couso Permuy:
Preliminary Proceedings No.27/2007*

On 8 April 2003 José Couso Permuy, a cameraman employed by the Spanish television station, *Telecinco*, was killed following the shelling of the 'Palestine Hotel' in Baghdad by U.S. forces. At the time of his death, Couso was filming the ongoing battle for Baghdad between U.S. and Iraqi forces. The hotel he was staying at was hit by a single incendiary shell from a U.S. tank. Couso was seriously injured during the attack and died several hours later in hospital.

In May 2003 a criminal lawsuit was filed by José Couso's mother, Maria Isabel Permuy Lopez and other members of his family, with the Central Court for Preliminary Criminal Proceedings No. 1 at the *Audiencia Nacional* against three members of the U.S. 3rd infantry who were alleged to be responsible for the death of Couso: Lieutenant Colonel Philip de Camp (the battalion commander); Captain Phillip Wolford (who ordered the attack on the Hotel), and Sergeant Thomas (Shawn) Gibson (the tank sergeant responsible for firing the shell).³⁴ The case is before Judge Santiago Pedraz, who made certain requests for information to the United States pursuant to the 1990 *Treaty for Mutual Legal Assistance in Criminal Matters* between Spain and the United States.³⁵

On 19 October 2005, Judge Pedraz opened a preliminary investigation and issued international arrest warrants for the three U.S. soldiers on charges of murder³⁶ and war crimes³⁷ claiming that the action was "the only effective measure to ensure the presence of the suspects in the case being handled by Spanish justice, given the lack of judicial cooperation by US authorities."³⁸

On 10 March 2006, the case was closed by the Criminal Division of the National Court (*Sala II de lo Penal* of the *Audiencia Nacional*).³⁹

³⁴ See www.josecouso.info, "Presentada querrela contra militares estadounidenses," available at: <http://josecouso.info/2003/05/29/presentada-querrela-contra-militares-estadounidenses/>

³⁵ See Cable 05MADRID3694, 21 Oct. 2005, para. 2.

³⁶ Article 139 of the *Spanish Criminal Code*.

³⁷ A 'crime against the international community' pursuant to Article 611.1 of the *Spanish Criminal Code* carries a sentence of 10-15 years in circumstances in which the perpetrator "without prejudice to the harm occasioned by their conduct, in the event of an armed conflict undertake or order to be undertaken indiscriminate or excessive attacks or make the civilian population the target of attacks, reprisals, or acts or threats of violence with the intent of generating terror." Article 608.3 of the *Spanish Criminal Code* defines a protected person as "the civilian population and persons protected under the *IV Geneva Convention* of 12 August 1949 and by *Additional Protocol I* of 8 June 1977."

³⁸ See BBC News, "Spain orders arrest of US troops," 19 Oct. 2005, available at http://news.bbc.co.uk/2/hi/middle_east/4357684.stm; see also Cable 05MADRID3694.

³⁹ See CNN World, "Warrants for U.S. troops canceled," 10 Mar. 2006, available at http://articles.cnn.com/2006-03-10/world/spain.us.soldiers_1_spanish-journalist-jose-couso-arrest-warrants?_s=PM:WORLD; see also Cable 06MADRID2657, 20 Oct. 2006, para. 8.

The Spanish Supreme Court reversed the dismissal, following an appeal by the Couso family, in December 2006, finding that the Spanish courts have jurisdiction to try the matter.⁴⁰

Judge Pedraz reactivated the arrest warrants against the three U.S. servicemembers on 16 January 2007, and included in his order a provision related to a request to freeze the servicemembers' assets.⁴¹ In response to a request by Judge Pedraz to the U.S. to provide identifying information in order to have Interpol issue a Red Notice and publish the detention order, the U.S. Ambassador to Spain informed the Spanish Attorney General that "it did not intend to respond" to the request.⁴²

On 27 April 2007, Judge Pedraz indicted the three soldiers, charging them with aggravated murder "crimes against the international community" on the basis of having attacked journalists.⁴³ The National Court Chief Prosecutor appealed the charges against the U.S. servicemen on 11 May 2007.⁴⁴

On 13 May 2008, in a 3-1 ruling, the Criminal Division of the National Court (*Sala de lo Penal*) reversed Judge Pedraz's decision, in accord with the position of the state prosecutor, thereby revoking the indictments against the U.S. servicemen and invalidating the arrest warrants.⁴⁵

On 21 May 2009, Judge Pedraz issued new indictments for murder, crimes against humanity and violations of the Geneva Conventions against the three U.S. servicemembers based on new evidence including the testimony of former high-level Spanish officials, the testimony of

⁴⁰ See El País, "How US worked to get three soldiers off the hook for cameraman's death," 1 Dec. 2010, available at

http://www.elpais.com/articulo/english/How/US/worked/to/get/three/soldiers/off/the/hook/for/cameraman/elpepueug/20101201elpeng_14/Ten; see also Cable 07MADRID82, 16 Jan. 2007, para. 1.

⁴¹ See BBC News, "Spain seeks US soldiers' arrest", 16 Jan. 2007, available at

<http://news.bbc.co.uk/2/hi/6268461.stm>; see also Cable 07MADRID82, 16 Jan. 2007, para. 1.

⁴² Cable 07MADR141, 26 Jan. 2007, para. 1. The United States also complained that the magistrates request was not in the format required for a Mutual Legal Assistance request. *Id.* The U.S. appeared to Judge Pedraz's order as a media ploy, listing it under the heading "Magistrate Working the Media." *Id.* at para. 3. The purported threat of Judge Pedraz to recommend that Spain suspend implementation of US-Spain bilateral judicial cooperation agreements due to the lack of response by the U.S. is the subject of Cable 07MADRID215, 8 Feb. 2007.

⁴³ See CNN World, "U.S. soldiers face Spanish charges," 27 Apr. 2007, available at

http://articles.cnn.com/2007-04-27/world/spain.judge_1_spanish-cameraman-jose-couso-tank-fire-philip-wolford?_s=PM:WORLD; see also Cable 07MADRID800, 27 Apr. 2007.

⁴⁴ See El País, "How US worked to get three soldiers off the hook for cameraman's death," 1 Dec. 2010; see also Cable 07MADRID910, 14 May 2007.

⁴⁵ See El País, "How US worked to get three soldiers off the hook for cameraman's death," 1 Dec. 2010; see also Cable 08MADRID542, 14 May 2008. Judge Javier Gomez Bermudez, president of the Criminal Division phoned the U.S. charge d'affaires to inform him of the decision. Notably, during a follow-up conversation the next day, the Judge "emphasized the Spanish judiciary's commitment to rule on this case based on the facts and the law and not on the prevailing 'political and media winds.'" *Id.* at para 1.

additional eye-witnesses and military experts.⁴⁶ The case has continued, with the latest indictment issued in October 2011.⁴⁷

In addition to the criminal investigation into the killing of José Couso, there has also been an investigation into the integrity of the criminal investigation prompted by the release of the WikiLeaks cables. On 14 December 2010, following the revelations outlined in the following section of this complaint, the Couso family formally asked the Chief Prosecutor of Madrid to investigate evidence released in the U.S. embassy cables that two former Spanish ministers and high-level prosecutors had attempted to block the family's legal battle against the U.S. However, as the accused were high-ranking government officials, the Madrid prosecutor transferred the matter to the Prosecutor of the Supreme Court on the grounds that they were the competent body to investigate offences allegedly committed by members of the government.

On 20 January 2011, the Prosecutor of the Supreme Court responded by dismissing the criminal complaint. The Prosecutor held that the acts which were complained of – namely, (1) violating the secrecy of the existing investigation; (2) the provision of legal advice to private persons and/or institutions by Spanish state officials; (3) omission of the duty to prosecute and (4) assisting alleged perpetrators to elude investigation and prosecution – were not proscribed offences that could give rise to an investigation. Subsequently, the Prosecutor invited the Couso family's counsel to make a formal judicial complaint to the Court that has the requisite jurisdiction for such matters.

4. U.S. Embassy Cables Revelations: How U.S. and Spanish officials interfered with the independence of the Spanish Judiciary

On 28 November 2010, WikiLeaks, which describes itself as a not-for-profit media organization dedicated to “bring[ing] important news and information to the public” and providing “an innovative, secure and anonymous way for sources to leak information to our journalists,”⁴⁸ commenced publication of a vast amount of confidential or secret correspondence between the U.S. State Department and its diplomatic missions around the world. The “U.S. Embassy Cables” as they came to be known, numbering 251,287 documents and spanning the years 1966 – 2010, were first forwarded to five major newspapers around the world (*The Guardian* (U.K.), *New York Times* (U.S.), *Der Spiegel* (Germany), *El País* (Spain) and *Le Monde* (France)), who continued to progressively publish selected material over the months that followed. In August and September 2011, the remaining cables were made public. By September 2011, previously redacted text was made available.

In the following section, we outline the key material originating from the U.S. embassy in Madrid, Spain, and directly relating to the three present cases. As is made clear below, the

⁴⁶ See BBC News, “Spain revives US army murder case”, 21 May 2009, available at <http://news.bbc.co.uk/2/hi/8061747.stm>; see also Cable 09MADRID496, 22 May 2009.

⁴⁷ See Al Goodman, 3 U.S. soldiers indicted in death of Spanish journalist, CNN, 5 Oct. 2011, available at <http://www.cnn.com/2011/10/05/world/europe/spain-us-troops/index.html>. The decision is available in Spanish at: <http://imagenes.publico.es/resources/archivos/2011/10/5/1317810251523autocouso.pdf>.

⁴⁸ See WikiLeaks, About, available at: <http://wikileaks.org/About.html>.

documents unquestionably demonstrate that senior U.S. officials - including an Ambassador, diplomatic staff, and two members of the U.S. Senate - actively and surreptitiously met with senior members of the Spanish Government, Administration and prosecutorial authorities to express critical views of, and seek information about, ongoing criminal investigations and preferred courses of action in relation to those investigations, and engage in discussions with Spanish officials in an attempt to interfere in the judicial process and thereby prejudice the cases in favor of the American defendants.

All of the relevant cables cited in our submission have been annexed to this complaint for your reference. The first section combines cables published in regard to the two torture cases mentioned above because of their mutual link to the U.S. torture program, followed by revelations concerning the case of José Couso.

a. Interferences with Independent Investigations into the Responsibility of Former U.S. Officials for Torture

Following the filing of a complaint against U.S. officials for their alleged involvement in the torture of individuals held in U.S. custody at various locations outside of the United States, a flurry of meetings were held between U.S. and Spanish officials to discuss that case – and how to end it.

In two cables, both dated 17 April 2009,⁴⁹ the U.S. Embassy in Madrid details numerous discussions held between high-ranking U.S. and Spanish officials in which the U.S. government directly, and over a period of weeks, sought to influence the outcome of the investigations outlined above, ultimately seeking to dismiss these complaints, in violation of the principle of independence of the judiciary.

The first cable's main section title reads: "ANNOUNCEMENT FOLLOWS INTENSIVE USG [U.S. Government] OUTREACH" and details the various phone calls and meetings carried out by the United States with the Spanish authorities in order to influence on the outcome given to the Bush Six complaint.⁵⁰ The 'intensive outreach' followed the very first comment on this matter in a 1 April 2009 cable, stating that "*we do not know if the government would be willing to take the risky step of trying behind the scenes to influence the prosecutor's recommendation on this case or what their reaction to such a request would be.*"⁵¹

Officials from both countries were plainly aware of the contradiction between their efforts and the independence of the Spanish judiciary: On 31 March 2009 and 1 April 2009, the U.S. Acting Deputy Chief of Mission "phoned" Agustin Santos, the Spanish Foreign Minister's chief of Staff and Aurora Mejia, the Director General for International Judicial Cooperation with the Ministry of Justice to discuss the Bush Six complaint.⁵² During these calls, "both [Spanish officials] expressed their concern at the case *but stressed the independence of the Spanish judiciary.*"⁵³ In response, the Acting Deputy Chief of Mission "stressed to both of

⁴⁹ Cable 09MADRID392, 17 Apr. 2009; Cable 09MADRID393, 17 Apr. 2009.

⁵⁰ See *ibid.*

⁵¹ Cable 09MADRID2009, 1 Apr. 2009 (emphasis added).

⁵² See *ibid.*; see also Cable 09MADRID347, 1 Apr. 2009.

⁵³ *Ibid.* (emphasis added).

them that this was a very serious matter for the USG and asked that the Embassy be kept informed of any developments.”⁵⁴ U.S. Senator Judd Gregg, who visited the Spanish Ministry of Foreign Affairs on 13 April 2009, and “expressed his concern” about the case to Luis Felipe Fernandez de la Pena (Director General, Policy Director for North America and Europe).⁵⁵ Fernandez de la Pena “lamented this development” and “*that judicial independence notwithstanding*, the MFA [Chief Prosecutor] disagreed with efforts to apply universal jurisdiction in such cases.”⁵⁶

Despite the acknowledged soundness of the complaint, Spanish Chief Prosecutor Zaragoza tells U.S. officials he will argue for a set of rules for universal jurisdiction to be drafted, and for the case not to be assigned to Judge Garzón. The cable reads:

Although he seemed displeased to have this dropped in his lap, Chief Prosecutor Javier Zaragoza on April 1 privately told Embassy officials the complaint - at first glance - appeared well-documented and in all likelihood he would have no option but to open a case.⁵⁷

In a telephone conversation between Chief Prosecutor Zaragoza and U.S. Embassy Madrid’s FSN Legal Adviser on 14 April 2009, initiated by Zaragoza, he noted that he would ask the Spanish Attorney General Conde Pumpido to review the question of jurisdiction, and “indicat[ing] that he hoped the Spanish AG would draft a clear set of rules on how and when Spain should prosecute universal jurisdiction complaints.”⁵⁸ The cable further notes that Zaragoza has told U.S. officials that he “will argue that the case should not be assigned to Garzón,” whom AG Conde Pumpido describes as an outspoken critic of the Guantanamo detention facility who has publicly stated that former President Bush should be tried for war crimes.”⁵⁹ The cable describes Zaragoza being “visibly displeased” with his involvement with this case.⁶⁰ Zaragoza describes the initiation of an investigation in the U.S. as “the only way out” for the U.S. in this case.⁶¹

In a meeting held on 15 April 2009 between U.S. Senator Mel Martinez and Ángel Lossada, the acting Spanish Foreign Minister, the U.S. officials expressed their “deep concern” and “noted that the prosecutions would neither be understood nor accepted in the U.S. and *would have an enormous impact on the bilateral relationship*” between the two countries.⁶² Martinez asked “where were the checks and balances of Spanish governance to ensure that one judge could not express personal opinion through the judicial process?”⁶³ Lossada allegedly responded that the Government of Spain (GOS) would advise the Attorney General Pumpido that “the official administration position was that the GOS was not in accord with

⁵⁴ Cable 09MADRID392, 17 Apr. 2009.

⁵⁵ *Ibid.*; see also Cable 09MADRID383, 15 Apr. 2009.

⁵⁶ Cable 09MADRID383, 15 Apr. 2009 (emphasis added).

⁵⁷ *Ibid.*; see also Cable 09MADRID347, 1 Apr. 2009.

⁵⁸ *Ibid.*

⁵⁹ Cable 09MADRID347, 1 Apr. 2009 and Cable 09MADRID392, 17 Apr. 2009.

⁶⁰ Cable 09MADRID347, 1 Apr. 2009.

⁶¹ *Ibid.*

⁶² Cable 09MADRID393, 17 Apr. 2009 (emphasis added); see also Cable 09MADRID392, 17 Apr. 2009.

⁶³ Cable 09MADRID393, 17 Apr. 2009.

the National Court.”⁶⁴ The following day, the Spanish Attorney General “publicly stated that prosecutors will ‘undoubtedly’ not support [the] criminal complaint,” adding that he himself would “not support the criminal complaint.”⁶⁵

U.S. officials conducted “intensive outreach” in order to influence the Spanish Attorney General’s position on the Bush Six case. As one cable explains in its introduction:

On April 16, Candido Conde Pumpido, Spain's Attorney General (AG), publicly stated that prosecutors will ‘undoubtedly’ not support a criminal complaint, filed by a Spanish NGO with the National Court, to investigate six former USG [U.S. Government] officials, including former AG Alberto Gonzalez, for creating a legal framework that allegedly permitted torture. ... because it is ‘fraudulent,’ and has been filed as a political statement to attack past USG policies.⁶⁶

The cable’s summary continues:

As reported in REFTELS [Reference Telegrams], Conde Pumpido's public announcement follows outreach to GOS [Government of Spain] officials to raise USG [U.S. Government] deep concerns on the implications of this case.⁶⁷

While current U.S. officials are clearly seeking to stop investigations into the responsibility of former American officials in authorizing torture, one cable shows that they are considering creating an investigation in the U.S. – with a clear lack of genuine intention to investigate the allegations set forth in the ‘Bush Six’ complaint – so as to forestall a genuine investigation in Spain:

Zaragoza has also told us that if a proceeding regarding this matter were underway in the U.S., that would effectively bar proceedings in Spain. We intend to further explore this option with him informally (asking about format, timing, how much information he would need, etc.) while making it clear that the USG has not made a decision to follow this course of action.⁶⁸

Another cable, dated 5 May 2009, details a meeting held the day before between Chief Prosecutor Zaragoza and officials of the U.S. Embassy to discuss the announcement by Judge Garzón that he was going to pursue a broad investigation into the U.S. torture program (preliminary investigation 150/2009).⁶⁹

The cable reports that the Chief Prosecutor “tells us [U.S. embassy officials] he will also fight Garzón’s latest move.”⁷⁰ At this meeting, Zaragoza outlined the way he could “embarrass”

⁶⁴ *Id.* See also Cable 09MADRID392, 17 Apr. 2009, para. 6. Lossada also made numerous comments about the independence of the judiciary.

⁶⁵ Cable 09MADRID392, 17 Apr. 2009.

⁶⁶ Cable 09MADRID392, 17 Apr. 2009.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Cable 09MADRID440, 5 May 2009.

⁷⁰ *Ibid.*

Judge Garzón into dropping the investigation into the U.S. torture program, and “has a strategy to force his hand.”⁷¹ “Zaragoza said that if Garzón could not be shamed into dropping the case, then he would formally recommend Garzón do so and appeal if Garzón ignored him.”⁷² The U.S. officials also plainly admit they find it necessary to force Garzón’s hand. The last comment of the cable reads as follows:

We believe *Zaragoza* is acting in good faith and *playing a constructive role*. Certainly he knows Garzón better than we do, having sparred with him before. Nevertheless, we do not share his optimism that this problem will go away anytime soon. Having started, it is hard for us to see why the publicity-loving Garzón would shut off his headline-generating machine *unless forced to do so*. And *forcing him to do so* could take months.⁷³

In this cable, it is further explained that Chief Prosecutor Zaragoza has encouraged the U.S. to move on to take a stand *affirming* investigating in the United States the allegations of torture, seemingly, regardless of whether or not this is true in fact,⁷⁴ in order to obtain the dismissal of the criminal case: “As we have reported, with respect to the earlier complaint against six Bush Administration officials, *Zaragoza has repeatedly suggested that a USG affirmation that the U.S. is investigating the torture issue could help dispose of Spanish judicial inquires into the subject.*”⁷⁵

b. Interferences with the Investigation into the Death of José Couso Permuy

At least twenty cables released through WikiLeaks, dated between May 2004 and May 2009, relate to the killing of José Couso and the proceedings brought against the three U.S. servicemembers in the Spanish courts. The cables demonstrate that, in the words of the former U.S. ambassador to Spain, the United States “*have fought tooth and nail to make the charges disappear,*”⁷⁶ and in so doing, sought to interfere with and otherwise improperly influence an ongoing criminal investigation.

The following summary provides an overview of the improper actions taken by U.S. and Spanish officials to interfere with the independence of the judiciary in Spain:

- In a cable dated 22 July 2004, the U.S. charge d’affaires Robert Manzanares conveyed the U.S.’s “concerns” about the *Couso* case, “noting our [the U.S.] desire to avoid a situation in which U.S. soldiers could be indicted by a foreign court.” Should indictments be issued, the U.S. urged the Spanish Ministry of Foreign Affairs to “issue a strong ‘friend of the court’ type brief clearly expressing opposition to such a

⁷¹ *Ibid.* “Zaragoza’s strategy hinges on the older case in which Garzón investigated terrorism complaints against some Guantanamo detainees. In connection with those earlier investigations, Garzón ordered the Spanish police to visit Guantanamo and collect evidence against the suspected terrorists. Zaragoza reasons that he can use this fact to embarrass Garzón into dropping this latest case by suggesting Garzón in some sense condoned the U.S. approach to detainee issues circa 2004. Garzón took no action in 2004 when the suspects returned to Spain and reported to him their alleged mistreatment.”

⁷² *Ibid.*

⁷³ *Ibid.* (emphasis added).

⁷⁴ *See ibid.*

⁷⁵ *Ibid.* (emphasis added).

⁷⁶ Cable 07MADRID911, 14 May 2007, para. 8.

development.” When the Spanish acting foreign minister Bernardino Leon responded by emphasizing “the completely independent nature of the Spanish judiciary and the lack of ability of the government to influence decisions on court cases,” the U.S. official said the U.S. would return to the Ministry of Foreign Affairs “to again raise the matter and urge a strong statement of opposition” from Spain.⁷⁷

- Following the issuance of arrest warrants by Judge Pedraz on 19 October 2005, a cable entitled “Spanish Ministers Working to Challenge Arrest Warrants,”⁷⁸ documents communication between U.S. officials and Spanish officials, including Spanish Justice Minister Lopez Aguilar, who called the U.S. ambassador the day the decision was issued to inform him that the Government of Spain “will make every effort to challenge the judge’s decision on technical grounds,” and Spanish Foreign Minister Moratinos who told the U.S. ambassador that the First Spanish Vice President, Maria Teresa Fernandez de la Vega, “is involved in the case.”⁷⁹ The U.S. “comment” section of the cable is particularly revealing:

“Top ministers moved quickly to let us know that *the [Spanish] Government is working to resolve this situation. The Government must act carefully as it tries to influence Spain’s fiercely independent judiciary.* In order to avoid aggravating the situation GOS [Government of Spain] leaders must *publicly show* their respect for the independent workings of the courts [...].”⁸⁰

- Following the dismissal of the *Couso* case in March 2006, the U.S. ambassador to Spain met with Spanish Vice President de la Vega. She “expressed the Spanish government’s appreciation for the USG response to the Spanish request for judicial cooperation” in the *Couso* case and said “Attorney General Conde Pumpido had briefed her on the excellent cooperation he had enjoyed from the Embassy and U.S. authorities *in helping bring this case to a conclusion.*”⁸¹
- Following the issuance of international detention orders and reference to possibly freezing the U.S. servicemembers’ assets, the U.S. embassy in Madrid prepared a cable updating other U.S. officers of the development. The cable confirms that the U.S. “Mission has been engaged with Spanish authorities on this issue at various levels, from the Ambassador with the Vice President and Interior Minister to action officers in contact with judicial officers.” The cable notes that the U.S. officials would meet with the Spanish National Court’s chief prosecutor, Javier Zaragoza “to determine the full range of possibilities in this case.”⁸² Following the meeting with Zaragoza, the U.S. referred to him as a “seasoned prosecutor with a clear understanding of the political implications of this case,” who would proceed “carefully.” The Embassy in Madrid advised that it would “also follow up at higher levels in the Spanish Government *to reinforce the implications of this case for bilateral relations and on international law.*”⁸³

⁷⁷ Cable 04MADRID2804, 23 July 2004, para. 2.

⁷⁸ Cable 05MADRID3694, 21 Oct. 2005.

⁷⁹ Cable 05MADRID3694, 21 Oct. 2005, para. 3.

⁸⁰ Cable 05MADRID3694, 21 Oct. 2005, para. 5 (emphasis added).

⁸¹ Cable 06MADRID722, 22 Mar. 2006, para. 2.

⁸² Cable 07MADRID82, 16 Jan. 2007, para. 2.

⁸³ Cable 07MADRID101, 18 Jan. 2007, para. 4; *see also* cable 07MADRID800, 27 Apr. 2007.

- The U.S. Ambassador to Spain, Aguirre, met with the Spanish Attorney General Conde Pumpido who voiced support for the U.S. position and offered advice on how to “undermine” Judge Pedraz: “Attorney General Conde Pumpido (strictly protect) emphasized that while there was nothing the Spanish Government could do to control the actions of the judiciary, the National Court prosecutors would continue to oppose the detention orders against the three U.S. servicemen, as well as any effort to embargo USG assets in connection with the case [...] He said he understood that the USG did not intend to respond to Spanish judicial requests with additional information, but suggested that even a perfunctory reply would undermine the magistrate's contention that the USG had been unresponsive to his requests.”⁸⁴ The cable reveals the role of the Spanish Attorney General in having the *Couso* case dismissed: “*The Ambassador thanked Conde Pumpido for his visit in late 2005 to suggest an approach that would allow the National Court to dismiss the case.*”⁸⁵ Following the meeting with Conde Pumpido, the U.S. officials in Madrid express confidence that “*the Spanish Government will search for a way to quietly terminate the case on technical grounds, while hoping to avoid a direct confrontation with the Couso family.*”⁸⁶
- The U.S. options for exerting influence and seeking to improperly interfere with the independent proceedings are set forth in one cable. Following expressions of concern that the Spanish Attorney General and Chief Prosecutor of the National Court might not be able to block the *Couso* case, the option of exerting diplomatic pressure is listed as a possible strategy: “The Ambassador could raise this to higher political levels (Minister of Justice and/or Vice President Maria Teresa Fernandez de la Vega) and reiterate that no further USG response will be forthcoming. *As in past communications on this issue with Spanish authorities, we would engage on an informal basis to avoid any public perception that we are exerting pressure on the Zapatero Government on this issue or encouraging them to interfere in the judicial process.*”⁸⁷ Disregarding the possibility that an outcome unfavorable to, or not to the liking of, the United States is one of the consequences of operating under the rule of law, the U.S. paints the choices available to the Spanish prosecutors starkly and simply as one of political expediency, making no reference to their legal obligations: “Among the next logical steps would be a bilateral request by Judge Pedraz for the extradition of the three accused servicemen, at which point the National Court prosecutors would have to choose between processing the extradition requests and risking a dispute with the USG, or appealing

⁸⁴ Cable 07MADRID141, 26 Jan. 2007, para. 2.

⁸⁵ Cable 07MADRID141, 26 Jan. 2007, para. 5.

⁸⁶ Cable 07MADRID141, 26 Jan. 2007, para. 2. *See also Id.* at para. 9.

⁸⁷ Cable 07MADRID215, 8 Feb. 2007, para. 10.

Following the issuance of an indictment against the U.S. servicemen by Judge Pedraz on 27 Apr. 2007, the U.S. again indicated that it would seek political and diplomatic assistance – interference – in the *Couso* case. *See* Cable 07MADRID800, 27 Apr. 2007, para 6 (“We will continue to engage at high levels with Spanish government officials to press the case for the dismissal of the charges against the US servicemen”). This cable also includes reference to the purported views of “respected figures in the [Spanish] Ministry of Justice and Interior and within the Zapatero Administration” that “they agree with the USG view on the legal validity of this case and have assured us that the case was so weak that would eventually crumble”). *See also id.* at para. 4 (stating that MOJ Director General for International Relations called the Deputy Chief of Mission “had worked with prosecutors in 2006 to get the case dismissed” and “agreed that there were no grounds for war crimes or murder charges”).

the extradition requests at the cost of accusations that they were acting to protect USG interests.”⁸⁸

- Following the issuance of an indictment against the U.S. servicemen in April 2007, there were a series of meetings between high-level U.S. and Spanish officials about the case. In a meeting with the First Vice President de la Vega, the U.S. ambassador made a “strong pitch for the [Spanish] government to seriously consider appealing the decision.” Vice President de la Vega gave her assurance that the case had “the attention at the highest levels of the Spanish government,” while cautioning that the government had to “tread carefully in dealing with Spain’s independent judiciary.”⁸⁹ The Spanish Secretary of State for Justice Julio Perez Hernandez said that the Spanish government “shared the USG’s concern about this case and said he would follow the case every step of the way and stay in touch with the Embassy.”⁹⁰ The U.S. saw the issuance of the indictment as “an unacceptable outcome since it will leave charges pending against three servicemen; we will continue to press for dismissal of the charges.”⁹¹
- As a result of these meetings, the U.S. Embassy in Spain was able to successfully report to U.S. Secretary of State Rice that the Government of Spain “has been helpful behind the scenes in getting the [*Couso*] case appealed.” The U.S. ambassador wrote to Secretary Rice that “[w]e want continued vigilance and cooperation by the GOS until the case is dropped,” without any qualification or concern expressed for the interference with the judicial process that such “vigilance and cooperation” necessarily implied.⁹²
- While an appeal was pending before the Criminal Division of the National Court, during a meeting between the U.S. ambassador and the Spanish Attorney General, the AG informed the U.S. that he “he continues to do what he can to get the [*Couso*] case dismissed, despite public pressure from the family, leftist group, and the press.”⁹³

c. Response to the Leaks by the Spanish Office of the Public Prosecutor

On 4 January 2011, in response to concerns raised following the release of the U.S. Embassy cables, the Office of the Public Prosecutor in Spain sought to defend itself against claims that it had acted in cooperation with the U.S. and Spanish Administrations to prejudice the outcome of these cases and thereby subvert the course of justice.⁹⁴ Unsurprisingly, the response of the Office of the Public Prosecutor ultimately exonerates its chief of any

⁸⁸ Cable 07MADRID215, 8 Feb. 2007, para. 11.

⁸⁹ Cable 07MADRID899, 11 May 2007, para. 1.

⁹⁰ Cable 07MADRID899, 11 May 2007, para. 2. Additionally, Perez Hernandez “noted that the government does not control the judiciary and it might be counter-productive to launch a formal government approach, but that the GOS would work with the US to assist in the process.” He welcomed “close coordination” with the U.S. around the case. *Id.*

⁹¹ Cable 07Madrid800, 27 Apr. 2007.

⁹² Cable 07MADRID1021, 25 May 2007, para. 18. The National Court Chief Prosecutor explained his actions to the U.S. as being based on a “technical/legal evaluation.” See 07MADRID910, 14 May 2007.

⁹³ Cable 07MADRID1428, 19 July 2007, para. 4.

⁹⁴ A full copy of the report is available here:

<http://ccrjustice.org/files/Spain%20Pros%20Response%20English.pdf> (English) and
<http://ccrjustice.org/files/Spain%20Pros%20Response%20Spanish.pdf> (Spanish).

wrongdoing and it fails to grapple with some of the most serious allegations of interference. There are no elements in this document that shed light on the nature of the relationship between the Office of the Prosecutor and the U.S. authorities, nor provide an adequate explanation of the communications between the AG and U.S. officials.

d. Broader Pattern and Practice of Abuse by the United States:

i. In Spain

In addition to these three cases, the cables reveal other instances where U.S. officials interacted with Spanish officials in an effort to influence cases involving U.S. defendants. The following provides a summary of the attempted interference or otherwise improper influence in a case filed against Donald Rumsfeld by the Sevilla Social Forum,⁹⁵ and a case pending before Judge Ismael Moreno related to thirteen U.S. officials involved in the CIA's "extraordinary rendition program" and flights which are reported to have transited in Palma de Mallorca en route to Afghanistan, Guantánamo and other detention locations.

In regards to a 2007 complaint filed against Donald Rumsfeld in Spain, at a meeting on the Vice Minister level, the U.S. expressed their "concern that this case could cause considerable bilateral friction if it were to progress."⁹⁶ The U.S. Deputy Chief of Mission said that "this matter has raised concerns in Washington regarding the use of Spanish courts for political purposes" and that "nobody in the U.S. establishment or public would support war crimes charges against USG officials in connection with the war [in Iraq]."⁹⁷ The prosecutor submitted a report recommending that the case be closed. Later, Spanish Chief Prosecutor Zaragoza informed U.S. officials that it was "quietly dismissed although he could not recall the grounds."⁹⁸

With regards to the rendition case, the U.S. officials outlined the process in the Spanish court, and expressed concern about closing the case since the judge, Ismael Moreno, had entered into evidence the testimony of German rendition victim Khaled el Masri.⁹⁹ The U.S. cite the National Court Prosecutor, Vicente Gonzalez, as someone who is "well known to us" and is a "helpful colleague and *anticipate that he will be sensitive to the Spanish Government's preference that this case not proceed.*"¹⁰⁰ The U.S. embassy further worried about Spanish-German cooperation in two similar cases. In a 1 February 2007 cable, it says "the most worrisome element of this episode is the joint timing of the announcements by the German prosecutors and Examining Magistrate in the Spanish CIA flights investigation, timing that suggests that they are coordinating to advance the cases in their respective jurisdictions. *This*

⁹⁵ See "Spanish Court Considers War Crimes Lawsuit Against Rumsfeld", *Agence France Presse (AFP)*, 30 Apr. 2007, available at: <http://dlib.eastview.com/browse/doc/11931471>. See also Cable 07MADRID863, 10 May 2007.

⁹⁶ Cable 07MADRID863, 10 May 2007, para. 3.

⁹⁷ *Ibid.*

⁹⁸ Cable 09MADRID347, 1 Apr. 2009.

⁹⁹ Cable 06MADRID3104, 28 Dec. 2006, para. 3. Mr. el Masri's flight is alleged in the case to have departed from Spanish territory before continuing to Macedonia and Afghanistan.

¹⁰⁰ Cable 06MADRID3104, 28 Dec. 2006, para. 4 (emphasis added).

coordination among independent investigators will complicate our efforts to manage this case at a discreet government-to-government level.”¹⁰¹

ii. *Internationally*

While not directly engaging the facts of the current complaint, we also draw the Special Rapporteur’s attention to the surreptitious actions of the U.S. in attempting to undermine the independence and impartiality of the judiciary in other countries engaged in investigations that have involved current and former U.S. officials over the last decade. A clear pattern emerges from a cursory review of these cases.

In 2003, in response to universal jurisdiction lawsuits initiated in Belgium (against Iraq war commander U.S. General Tommy Franks, former President George H.W. Bush, and Secretary of State Colin Powell), the then-U.S. Secretary of Defense, Donald Rumsfeld, threatened to freeze U.S. contributions to the NATO headquarters in the country, unless Belgium significantly amended its legislation in ways that would make this type of lawsuit void. Soon thereafter, the Belgian Parliament passed a law significantly limiting the application of universal jurisdiction.¹⁰²

In November 2004, a lawsuit was filed in Germany on behalf of Abu Ghraib torture survivors against U.S. high-ranking officials, including then-Secretary of Defense Rumsfeld. The legal basis for the complaint was the 2002 German Code of Crimes against International Law, a broad universal jurisdiction statute that provides for the prosecution in Germany of “criminal offences against international law designated under this Act ... even when the offence was committed abroad and bears no relation to Germany.”¹⁰³

In response, the Pentagon warned German authorities that if taken seriously by the German judiciary, this lawsuit would impact the U.S.-German relationship. The Pentagon spokesperson had said: “If you get an adventurous prosecutor who might want to seize onto one of these frivolous lawsuits, it could affect the broader relationship.”¹⁰⁴ Rumsfeld then canceled his participation to the February 2005 Munich Security Conference. Two days before the conference started, the Prosecutor dismissed the complaint arguing for the possibility of investigations in the U.S. that would have primacy, and the Pentagon announced only hours later that Rumsfeld would attend the German international conference.¹⁰⁵

On this specific case, the Center for Constitutional Rights, which had filed the German lawsuit, seized then-Special Rapporteur on Independence of Judges and Lawyers, Mr. Leandro Despouy, with a complaint. Mr. Despouy then exchanged communications with

¹⁰¹ Cable 07MADRID173, 1 Feb. 2007 (emphasis added).

¹⁰² See Ian Black, *Belgium gives in to US on war crimes law*, THE GUARDIAN, 24 June 2003, available at <http://www.guardian.co.uk/world/2003/jun/24/usa.warcimes>; see also BBCNews, *Belgium to curb war crimes law*, BBCNEWS, 23 June 2003, available at <http://news.bbc.co.uk/2/hi/europe/3012106.stm>.

¹⁰³ German Code of Crimes Against International Law, Article 1, Part 1, Section 1.

¹⁰⁴ The spokesperson added: “I think every government in the world, particularly a NATO ally, understands the potential effect on relations with the United States if these kinds of frivolous lawsuits were ever to see the light of day.” See *Pentagon concerned about legal complaint in Germany against Rumsfeld*, AGENCE FRANCE PRESS, 13 December, 2004, available at http://www.dailytimes.com.pk/default.asp?page=story_14-12-2004_pg7_51.

¹⁰⁵ Reference to this case and a subsequent case against Rumsfeld can also be found in the U.S. cables. See 06BERLIN3296, 14 Nov. 2006 and 07BERLIN865, 27 Apr. 2007.

both the German and U.S. authorities on the allegations that there had been interferences with the independence of the German judiciary. The Special Rapporteur exposed his findings in his 2007 annual report before the Human Rights Council and expressed his concerns over both countries' behavior.¹⁰⁶ In his report, he stated that in a communication to Germany, he “expressed deep concern that a decision by the prosecutor of a case involving such serious crimes had been taken in a context of strong political pressure exerted by the country of citizenship of the defendants [...and] expressed concern about the weakness of the legal justification of the dismissal” as well as its timing, coming two days before Rumsfeld was due at a conference.¹⁰⁷ The Special Rapporteur also expressed concern about “the unwillingness of the military criminal justice system to look into the involvement of those higher up the chain of command” in the United States, among other factors that he considered as demonstrating that the U.S. was not properly pursuing accountability.¹⁰⁸ In light of these facts, the Special Rapporteur “expressed his deep concern regarding the violation of the principle of the independence of the judiciary enshrined in recognized norms and standards,” stating that “[i]t is the duty of all governmental and other institutions to respect and observe the independence of the judiciary and principle 4 [of the Principles], which states ‘There shall not be any inappropriate or unwanted interference with the judicial process.’”¹⁰⁹

In his concluding observations, following a summary of the communication he received from Germany, the Special Rapporteur “notes with concern that the alleged perpetrators of the violations referred to in his allegation letter of 13 July 2006 have still not been prosecuted in the United States of America, and that on the contrary new legislation has been adopted in that country which practically impedes the prosecution of public officials suspected of being responsible for those acts. In light of this development, he notes that a new complaint has been submitted to the German prosecutor by the plaintiffs. In this context, the Special Rapporteur hopes that this complaint will be considered with the required independence, in accordance with applicable international norms and standards.”¹¹⁰ That second lawsuit was similarly rejected in April 2007.

In a separate case, a local court in Munich, Germany had issued arrest warrants in 2007 for thirteen C.I.A. Agents involved in the rendition and torture of Khaled el Masri, a German citizen who had been seized allegedly as a result of mistaken identity in December 2003 and rendered to Afghanistan where he was interrogated and tortured by the CIA for a period of several months.¹¹¹ According to cables issued from the U.S. Embassy in Berlin, U.S. officials warned their German counterparts, once again, that the “issuance of international arrest warrants would have a negative impact on our bilateral relationship” and reminded German officials “of the repercussions to U.S.-Italian bilateral relations in the wake of a similar move by Italian authorities last year.”¹¹²

¹⁰⁶ See Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Addendum, *Situations in specific countries or territories*, Human Rights Council, 5 April 2007, A/HRC/4/25/Add.1, at pp. 96-100.

¹⁰⁷ *Ibid.* at para. 154.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.* at para. 160.

¹¹¹ Reference to the extraordinary rendition of Khaled el Masri is also included in cable 06MADRID3104, paras. 2 and 3.

¹¹² Cable 07BERLIN242, 6 Feb. 2007.

The latter statement refers to the rendition case of Abu Omar, who was captured in Milan. Italian prosecutors investigated the case and in the end, 23 U.S. officials were tried in absentia.¹¹³ The U.S. exercised strong pressure on the Italian government in this case, as cables show. Referring to a meeting of the U.S.-ambassador in Rome and Italian Undersecretary of State of the Prime Minister Enrico Letta, a cable dated 24 May 2006 reads: “In the context of keeping our excellent bilateral relationship on sound footing, the Ambassador explained to Letta that nothing would damage relations faster or more seriously than a decision by the GOI [Government of Italy] to forward warrants for arrests of the alleged CIA agents named in connection with the Abu Omar case. This was absolutely critical. Letta took note of this and suggested the Ambassador discuss the matter personally with Justice Minister Mastella, who Letta suggested should be invited to Washington for an early meeting with the Attorney General.”¹¹⁴ Another cable shows how the then-Minister for Foreign Affairs for Italy, D’Alema, asks the U.S. to “send something in writing” that the U.S. would not react to an extradition request to use this “pre-emptively (...) to fend off action by Italian magistrates to seek extradition of the implicated Americans.”¹¹⁵

The actions of U.S. administration officials in Spain outlined above can therefore not be dismissed as an isolated event. Rather, the previous interventions in Belgium, Germany, and Italy suggest that they are demonstrative of a systematic pattern and practice of abuse aimed at protecting U.S. interests from adverse judicial findings abroad at the expense of the independence and impartiality of the judiciary in the countries in which they occur.

5. Legal Submissions

Resolution 8/6 of the Human Rights Council rightly stresses that “an independent and impartial judiciary, an independent legal profession and the integrity of the judicial system are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice.”¹¹⁶ In the present cases, illegitimate interferences and pressures from government officials have directly hindered the plaintiffs’ efforts to seek justice for the human rights violations they were the victims of.

The release of the U.S. embassy cables sheds light on significant breaches of international law by both U.S. and Spanish officials in this matter. The actions of the U.S. administration, and the cooperation given by certain Spanish government, administration and prosecutorial authorities, constitute inappropriate, unwarranted and unlawful interference with the independence of the Spanish judiciary. Spanish officials, and in particular the Spanish Attorney General and the Chief Prosecutor of the *Audiencia Nacional*, engaged in inappropriate dealings with the U.S. Administration by, *inter alia*, publically rejecting the cases as ‘fraudulent,’ seeking to ensure that a case was not assigned to a Judge who was

¹¹³ See, e.g., Craig Whitlock, “Italian court convicts 23 Americans in CIA rendition case; extradition undecided”, The Washington Post, 4 November 2009, available at: http://www.washingtonpost.com/wp-dyn/content/article/2009/11/04/AR2009110400776_pf.html.

¹¹⁴ Cable 06ROME1590, 24 May 2006.

¹¹⁵ Cable 07ROME710, 6 Apr. 2007.

¹¹⁶ U.N. Human Rights Council Resolution 8/6, art. 2 (dated 18 June 2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_6.pdf.

unlikely to be supportive of U.S. interests, and urging that investigations for which there exists a credible basis be closed because of prioritizing political interests instead of the rule of law.

We maintain that U.S. and Spanish administrations acted in violation of their duty to protect and uphold fundamental rights and the rule of law by, *inter alia*, interfering with a sovereign state's ability to undertake effective investigations into gross human rights violations, including torture.

These breaches have served to compromise the independence and impartiality of the judiciary in Spain and is a worrying and grave encroachment on the Separation of Powers principle. As you have noted previously, speaking in your capacity as Special Rapporteur on the Independence of Judges and Lawyers:

... a Judiciary that is not seen as independent, compromises the principle that judicial proceedings should be conducted fairly and that the rights of the parties should be respected. I must emphasize that the Judiciary should not be seen and used as a conduit of the Executive Power. It is crucial that the principle of Separation of Powers be upheld as a means of reinforcing an effective system of checks and balances, to prevent abuse of power, and to uphold the rule of law.¹¹⁷

a. The United States: Allegations of Inappropriate and Unwarranted Interference in the Judicial Process

Spain has a positive legal obligation to guarantee both an independent and impartial judiciary. This duty arises both in domestic law¹¹⁸ and internationally binding instruments - including the *International Covenant on Civil and Political Rights* (ICCPR)¹¹⁹ and the *European Convention on Human Rights* (ECHR).¹²⁰ This duty of states to ensure the protection of judicial independence is also set out in the *Principles*,¹²¹ Articles 2 – 4 of which provide:

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

¹¹⁷ Speech delivered by Gabriela Knaul, Special Rapporteur on the Independence of Judges and Lawyers. 10th Biennial International Conference of the International Association of Woman Judges in Seoul, South Korea.

¹¹⁸ For example, respect for the Independence of the Judiciary is contained in Article 13 of the LOPJ.

¹¹⁹ Article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

¹²⁰ See Article 6(1) of the *European Convention on Human Rights* (ECHR), 4 November 1950, entered into force, 3 September 1953. E.T.S. 5, 213 U.N.T.S. 221.

¹²¹ See *supra* note 7.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.¹²²

It is our submission that, on the facts of this complaint, U.S. officials have acted in a manner that breaches Articles 2 and 3 of the Principles and the right to an independent and impartial judiciary guaranteed by Article 14 of the ICCPR by interfering with the exclusive authority of the Spanish judiciary to determine cases before it without restrictions, improper influences, pressures, threats or interference. These breaches are particularly serious given the length of time over which the interference took place – a period which includes both a former and the current U.S. administration – and the nature of the crimes at issue in these cases. The U.S. officials’ actions have sought to deprive victims of serious crimes, including torture, not only of the right to an impartial proceeding but also the right to redress.

With respect to the *Couso* case, for example, over a period of at least five years, U.S. officials, including diplomatic staff at the U.S. embassy and the U.S. ambassador himself, initiated meetings and discussions with Spanish officials for the purpose of exerting political pressure to ensure that the case against U.S. servicemen was closed. Indeed, in the words of the former U.S. ambassador, “behind the scenes we have fought tooth and nail to make the charges disappear. Further, the Embassy in Madrid advised that it would “also follow up at higher levels in the Spanish Government to reinforce the implications of this case for bilateral relations and on international law.”¹²³ Other options were discussed in an 8 February 2008 cable: “The Ambassador could raise this to higher political levels (Minister of Justice and/or Vice President Maria Teresa Fernandez de la Vega) and reiterate that no further USG response will be forthcoming. As in past communications on this issue with Spanish authorities, we would engage on an informal basis to avoid any public perception that we are exerting pressure on the Zapatero Government on this issue or encouraging them to interfere in the judicial process.”¹²⁴ Finally, the U.S. saw the issuance of the indictment as “an unacceptable outcome since it will leave charges pending against three servicemen; we will continue to press for dismissal of the charges”.¹²⁵

In the torture cases, as discussed above, the U.S. ambassador to Spain, diplomatic staff, and members of Congress exerted “improper influences, inducements, [and] pressures,” upon Spanish officials by *inter alia* threatening that bilateral relations would be negatively

¹²² Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

¹²³ Cable 07MADRID101, 18 Jan. 2007, para. 4; see also cable 07MADRID800, 27 Apr. 2007.

¹²⁴ Cable 07MADRID215, 8 Feb. 2007, para. 10.

Following the issuance of an indictment against the U.S. servicemen by Judge Pedraz on 27 Apr. 2007, the U.S. again indicated that it would seek political and diplomatic assistance – interference – in the *Couso* case. See Cable 07MADRID800, 27 Apr. 2007, para 6 (“We will continue to engage at high levels with Spanish government officials to press the case for the dismissal of the charges against the US servicemen”). This cable also includes reference to the purported views of “respected figures in the [Spanish] Ministry of Justice and Interior and within the Zapatero Administration” that “they agree with the USG view on the legal validity of this case and have assured us that the case was so weak that would eventually crumble”). See also *id.* at para. 4 (stating that MOJ Director General for International Relations called the Deputy Chief of Mission “had worked with prosecutors in 2006 to get the case dismissed” and “agreed that there were no grounds for war crimes or murder charges”).

¹²⁵ Cable 07Madrid800, 27 Apr. 2007.

impacted if the cases were permitted to proceed. The U.S. officials acknowledge in the cables that the very purpose of the meetings with Spanish officials is to “influence the prosecutor’s recommendation” that the case be closed.

Furthermore, the actions of U.S. officials in these matters constitute “inappropriate or unwarranted interference with the judicial process”.¹²⁶ On at least two separate occasions, and in relation to at least two of our cases, U.S. officials threatened that continuation of the cases “would have an enormous impact on the bilateral relationship” between the two countries. That is, significant diplomatic repercussions would arise if Spain’s judiciary failed to discontinue cases looking into the criminal responsibility of U.S. individuals, regardless of the legal and factual grounds justifying the prosecutions.

Former Special Rapporteur Despouy observed that “[s]ince very early in the existence of the mandate, the principle of the independence of judges and lawyers has been defined as international custom and general principle of law recognized by the international community.”¹²⁷ Rapporteur Despouy accordingly found that “[a]n important indicator for the independence of the judiciary is that inquiries are conducted into improper interferences into judicial affairs.”¹²⁸ He also noted “that independent and impartial investigations into all allegations of interference be conducted thoroughly and promptly and that perpetrators be prosecuted and punished.”¹²⁹ While the content of the cables are widely available through broad dissemination in the digital media, the U.S. DOJ has neither confirmed nor denied the truth of the content in these cables,¹³⁰ and to date, there has been no independent judicial or legislative inquiry addressing this interference by representatives of either country.

b. Spain: Allegations of Inappropriate and Unwarranted Interference in the Judicial Process

Although U.S. officials appear to have been the initiators of much of the improper conduct set forth in this complaint, the cables – and many of the resulting submissions by the Spanish prosecutor in the three cases – make clear that they found a willing partner in a number of Spanish officials. As such, there is a credible basis for concluding that Spanish officials have acted in a manner that breaches Articles 2, 3 and 4 of the Principles, and warrants investigation.

In relation to the *Couso* case, the the U.S. government clearly stated that “[t]he [Government of Spain] has been helpful behind the scenes in getting the [Couso] case appealed by the Spanish Prosecutor.”¹³¹ The U.S. “comment” section of the 21 October 2005 cable is

¹²⁶ See Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Addendum, *Situations in specific countries or territories*, Human Rights Council, 5 April 2007, A/HRC/4/25/Add.1, at para. 154.

¹²⁷ Report of Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/11/41, 24 March 2009, at 6, para. 14 (citing Article 38 (1) (b) and (c) of the Statute of the International Court of Justice (ICJ), June 26, 1945, 59 Statute 1055, 1060, 33 U.N.T.S. 993).

¹²⁸ A/HRC/11/41, at 15, para. 51.

¹²⁹ *Ibid.*, (citing CCPR/CO/82/ALB, para. 18; CCPR/C/BRA/CO/2, para. 17).

¹³⁰ Respondents’ Response to Petitioner’s Emergency Application for Immediate Access to All Publicly Available WikiLeaks Documents Relevant to Petitioner’s Case, *Paracha v. Obama*, No. 04-2022, U.S. District Court for the District of Columbia (15 June 2011), at *4.

¹³¹ Cable 07MADRID1021, 25 May 2007, para. 18.

particularly revealing, and demonstrates that Spanish officials knew that they were acting contrary to their legal duties: “(...) *The Government must act carefully as it tries to influence Spain’s fiercely independent judiciary. In order to avoid aggravating the situation GOS leaders must publicly show their respect for the independent workings of the courts [...].*”¹³²

We further submit on the facts of this complaint that Spain’s Attorney-General Cándido Conde-Pumpido Tourón as well as Javier Zaragoza, the Chief Prosecutor of the *Audiencia Nacional*, have acted in a manner that breaches key international legal principles regarding judicial independence and prosecutorial integrity. The actions of prosecutors are specifically governed at the international level by the *Guidelines*,¹³³ which provide as follows:

12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

13. In the performance of their duties, prosecutors shall:

(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

(c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;

(d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

...

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.¹³⁴

Furthermore, it is a well-established principle of international law, in addition to U.S. and Spanish constitutional law, that judges must in all cases be protected from interference from all parties, including the Prosecution.¹³⁵ This core requirement is clearly reflected in the

¹³² Cable 05MADRID3694, 21 Oct. 2005, para. 5 (emphasis added).

¹³³ *Supra* note 8.

¹³⁴ *Ibid.*

¹³⁵ Judicial independence is dependent upon the separation of powers, defined as freedom from executive and legislative interference with the judicial process; *see* Inter-American Commission on Human Rights (IACHR), *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 22 October 2002 (at

Principles outlined above (especially Articles 1 - 4). It has also been confirmed by statements of the Special Rapporteur on the Independence of Judges and Lawyers who noted, for example, in 2009 that “assigning cases within the judiciary is paramount for guaranteeing the independent decision-making of judges... This means there must be no interference from the outside”.¹³⁶

It is clear from the cables concerning all three cases of this complaint that the Chief Prosecutor has had inappropriate dealings with the U.S. administration, including discussions about the strategy of the cases and ways in which judges thought unlikely to find in favor of the U.S. position could be removed. In one instance, the Chief Prosecutor threatened to “embarrass” and “shame” the investigating Judge into withdrawing from a case.¹³⁷ In another instance, the Chief Prosecutor liaised with the legal advisor of the U.S. Embassy in Madrid and provided assurances that he would have the Spanish Attorney General Conde-Pumpido review the question of jurisdiction in relation to the U.S. torture program case. Attorney General Conde-Pumpido himself stated publically after ‘intensive outreach’ of the U.S. Government to Spanish counterparts, that the Bush Six case is ‘fraudulent’, thus putting public pressure on deciding judges after the case had already been opened.¹³⁸

Such behavior constitutes a clear breach of the Guidelines outlined above, which require prosecutors to act “fairly” (Art. 12); “impartially” [Art. 13(a)]; with “objectivity” [Art. 13 (b)]. Secretly liaising with, and providing assurances to, staff of the U.S. Embassy - members of the U.S. Executive Branch Administration and thus inextricably connected to the potential defendants in these criminal investigations – is wholly partial, procedurally unfair and demonstrates a clear lack of objectivity. Furthermore, it evinces a clear failure to give “due attention to the prosecution of crimes committed by public officials ... grave violations of human rights and other crimes recognized by international law,” contrary to Article 15 of the Guidelines. Moreover, we submit that such behavior by the Attorney General and the Chief Prosecutor *prima facie* amounts to “inappropriate or unwarranted interference” in the independence and impartiality of the Spanish judicial system, contrary to Article 4 of the Principles.

para. 229). Case precedents of the European Court of Human Rights also provide support to the argument that the principle of the independence of the judiciary is indeed an established norm of customary international law. See European Court of Human Rights [GC], *Guja v. Moldova*, No. 14277/04, Judgment of 12 February 2008, paras. 90-91 (the principle of the independence of the judiciary and the definition of improper interference were found material to the Court’s determination in *Guja* that the public interest in the revelation of such interference indeed outweighed the privacy interests of the state); see also European Court of Human Rights, *Chevrol v. France*, No. 49636/99, Judgment of 13 February 2003, para. 76 (citing, among other authorities, European Court of Human Rights, *Beaumartin v. France*, No. 15287/89, Judgment of 24 November 1994, series A no. 296-B. at. 62-63, paras. 38-39; European Court of Human Rights, *Belilos v. Switzerland*, No. 10328/83, Judgment of 29 April 1988, series A no. 132, at 29, para. 64; European Court of Human Rights, *Le Compte, Van Leuven and De Meyere v. Belgium*, No. 6878/75; 7238/75, Judgment of 23 June 1981, series A No. 43, at 24, para. 55; and European Court of Human Rights, *Ringeisen v. Austria*, No. 2614/65, Judgment of 16 July 1971, series A no. 13, at 39, para. 95). (“The Court reiterates at the outset that only an institution that has full jurisdiction and satisfies a number of requirements, such as independence of the executive and also of the parties, merits the designation ‘tribunal’ within the meaning of Article 6 § 1.”).

¹³⁶ Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy A/HRC/11/41 24 March 2009 (at para. 46).

¹³⁷ See Cable 09MADRID440, 5 May 2009.

¹³⁸ See Cable 09MADRID392, 17 Apr. 2009.

c. *Certain U.S. and Spanish Officials Demonstrated a Fundamental Lack of Respect for Separation of Powers and the Rule of Law*

Former Special Rapporteur Despouy observed that it “is the principle of the separation of powers, together with the rule of law, that opens the way to an administration of justice that provides guarantees of independence, impartiality and transparency,” noting that the Human Rights Committee, in its General Comment No. 32, clarified that a situation “where the functions and competencies of the judiciary and the executive are not clearly distinguishable, or where the latter is able to control or direct the former, is incompatible with the notion of an independent tribunal.”¹³⁹

The separation of powers lies at the heart of the principle of the independence of the judiciary as a check upon executive or legislative overreaching under U.S. Constitutional Law, Spanish Constitutional Law, as well as under customary international law, and the ICCPR.¹⁴⁰ Noted scholars of jurisprudence in the U.S. also recognize the importance of judicial independence to the nature of the government envisioned by the framers of the U.S. Constitution, including James Madison and Andrew Hamilton.¹⁴¹ Former Chief Judge Wallace of the U.S. Ninth Circuit Court of Appeals, for example, finds that “The existence of any unchecked political pressure, however infrequently used, casts a long shadow over the independence of the courts, causing them to be aware of political considerations extraneous to the cases at hand.”¹⁴² As a matter of foreign policy, the U.S. also continues to promote “a real commitment to the independence of the judiciary” and the provision of “essential checks and balances” as the cornerstone of its diplomatic relations with its own military and political allies.¹⁴³

As you, in your role as current Special Rapporteur, rightly pointed out in your first report to the Human Rights Council on 25 March 2010, the former Commission on Human Rights

¹³⁹ *Ibid.*, at 7, para. 18.

¹⁴⁰ See, e.g., Constitución Española, (hereinafter CE), art. 117.1; art. 1, LOPJ (“Justice derives from the people and is administered in the King’s name by Judges and Magistrates who make up the judiciary and who are independent ... and subjected solely to the Rule of Law.”); Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (establishing a universal standard for the conduct of trials); *Islamic Shura Council of S. California v. F.B.I.; U.S. Dept. of Justice*, 635 F.3d. 1160, (9th Cir. U.S. 2011), *remanded to Islamic Shura Council of S. California v. F.B.I., et al.*, No. SACV07-1088-CJC ANX, 2011 WL 1576476 (C.D. Cal. Apr. 27, 2011) at *4-5, *7 (citing *U.S. v. Nixon*, 418 U.S. 683, 707, 709 (1974); *Marbury v. Madison* 5 U.S. 1 Cranch 137, 177 (1803) and THE FEDERALIST NO. 51 (James Madison) (1788)); (“The United States Constitution entrusts the Judiciary with the power to determine compliance with the law.”); see also 16A AM. JUR. 2D, *Constitutional Law* § 237, *Principle of separation of powers; generally*.

¹⁴¹ See former Chief Judge for the U.S. Ninth Circuit Court of Appeals, J. Clifford Wallace, *An Essay on the Independence of the Judiciary: Independence from What and Why*, 58 N.Y.U. ANN. SURV. AM. L. 241, 243 n. 7 (2001) (citing THE FEDERALIST NO. 78, at 227–28 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed., Johns Hopkins Univ. Press 1981) ((quoting M. DE SECONDANT, BARON DE MONTESQUIEU, 1 THE SPIRIT OF LAWS 165 (Thomas Nugent trans., Edinburgh 1772) (1748)) (other citations omitted)).

¹⁴² *Ibid.* at 243.

¹⁴³ Pablo Gorondi, Clinton worried about Hungary's free press, courts: Clinton praises Hungary's economic reforms but says US concerned about free press, judiciary, AP, 30 June 2011, 11:22 AM EDT, available at <http://finance.yahoo.com/news/Clinton-worried-about-apf-2325150179.html?x=0&.v=1> (“As friends of Hungary, we expressed our concerns and particularly call for a real commitment to the independence of the judiciary, a free press and governmental transparency.”); see also, Remarks by the Delegation of the United States of America, UPR Working Group Intervention for Paraguay, 10th Sess., 2 February 2011, delivered in English, available at <http://geneva.usmission.gov/2011/02/02/paraguay-upr/>.

examined the independence of the judiciary and the separation of powers as two elements inextricably linked and fundamental to the maintenance of a democratic society; you noted that this principle is established in the UN Basic Principles on the Independence of the Judiciary, and the UN Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors.¹⁴⁴ Your conclusion that the independent judiciary is also “fundamental to combating corruption, to guaranteeing equal access to justice, to providing effective justice and remedies to citizens, to countering patterns or contexts of abuse and to guaranteeing health, labour rights and non-discrimination,”¹⁴⁵ makes clear that an investigation into this interference is warranted.

We draw clarity from your insight from your 2010 visit to Mozambique, where you observed that “the need for impartiality and transparency in judicial decisions, which should always be based on facts, and be made in accordance with the law, without undue influences, inducements, pressures, threats or interferences, whether direct or indirect.”¹⁴⁶ In your visit to Romania, you also rightly emphasized that “[a] legal system based on respect for the rule of law also needs strong, independent and impartial prosecutors willing to resolutely investigate and prosecute suspected crimes committed against human beings even if these crimes have been committed by persons acting in an official capacity.”¹⁴⁷

The evidence set forth herein demonstrates U.S. and Spanish officials failed to demonstrate respect for the rule of law in these cases. Their actions were based not on facts or a factual rebuttal to the credible allegations set forth in each case, but simply, we maintain, on politics. In an effort to elevate political considerations over the rule of law, officials of both countries violated fundamental legal principles.

6. Conclusion

The United Nations Human Rights Council has previously noted “the close link between the weakening of safeguards for judges, lawyers and court officials and the frequency and gravity of violations of human rights”.¹⁴⁸ Breaches of judicial independence foster a culture of impunity that is incompatible with international and domestic obligations to prosecute authors of human rights violations.

¹⁴⁴ See Report of Special Rapporteur on Judges and Lawyers, Gabriela Knaul de Albuquerque e Silva, A/HRC/14/26, 25 March 2010, at 9, para. 17, n.2 (citing Commission on Human Rights Resolution 2002/46 entitled “Further measures to promote and consolidate democracy” para. 1; and Commission on Human Rights Resolution 1999/57 on “Promotion of the right to democracy”, para. 2.).

¹⁴⁵ *Ibid.*, at 30, 32 paras. 93, 99.

¹⁴⁶ Report of Special Rapporteur on Judges and Lawyers, Gabriela Knaul de Albuquerque e Silva, *Preliminary conclusions and observations to the Visit to Mozambique by the Special Rapporteur on the independence of Judges and Lawyers*, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10596&LangID=E>.

¹⁴⁷ Report of Special Rapporteur on Judges and Lawyers, Gabriela Knaul de Albuquerque e Silva, *Preliminary conclusions and observations by the Special Rapporteur on the Independence of Judges and Lawyers: Visit to Romania*, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11058&LangID=E>.

¹⁴⁸ ‘Independence and Impartiality of the judiciary, jurors and assessors and the independence of lawyers’, United Nations Human Rights Council resolution 1995/36, 3. March 1995, available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/297efd3ff64b33a0802566db0051679a?Opendocument>.

The independence and impartiality of the judiciary, respect for the rule of law, the separation of powers and the administration of justice are fundamental components of international human rights law. These are core principles that are legislatively and constitutionally recognized in the United States of America and in the Kingdom of Spain. Yet, both countries failed to uphold their domestic and international obligations in the present cases.

The U.S. embassy cables demonstrate that various high-ranking members of the U.S. and Spanish Administrations were engaged in inappropriate and unwarranted interference with the Spanish judicial process. They have done so with the explicit aim of disturbing the integrity of at least three separate ongoing legal proceedings before the Spanish courts with a view to shielding potential U.S. defendants allegedly responsible for gross human rights violations from criminal liability.

In light of the above, we formally request that, in your capacity as United Nations Special Rapporteur on Independence of Judges and Lawyers, and in accordance with the terms of your mandate, you take all appropriate measures to investigate this complaint. In particular, we request that you enter in communication with both the governments of the United States and Spain regarding the allegations specified in this complaint.

If we can be of any further assistance, or provide any further information to support your enquiries, please do not hesitate to contact us.

Yours sincerely,



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European Center for Constitutional
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ANNEX

A. Index of Cables: Torture cases:

1. 06ROME1590, 24 May 2006, “Italy: New Undersecretary to the PM Calls Relationship with U.S. ‘Essential;’ Says Italy will be Supportive of Israel, Will Stick with EU on Iran”
2. 06MADRID2657, 20 October 2006, “Spain: Update on Key Terrorism-Related Cases”
3. 06BERLIN3296, 14 November 2006, “NGO Files another Complaint against Senior U.S. Officials”
4. 06MADRID 3104, 28 December 2006, “Spain/CIA Flights: Plaintiffs Demand 13 USG Officials be Named as Suspects”
5. 07BERLIN242, 6 February 2007, “Al-Masri Case – Chancellery Aware of USG Concerns”
6. 07ROME710, 6 April 2007, “Italy: FM D’Alema on Kosovo, Afghan NGO Detainee, Lebanon Iran Sanctions, Guantanamo and Abu Omar”
7. 07BERLIN865, 27 April 2007, “German Prosecutor Drops Legal Complaint against Senior USG Officials”
8. 07MADRID863, 10 May 2007, “Spain: Legal Suit against Former Secretary Rumsfeld”
9. 07MADRID1428, 20 July 2007, “Spanish Attorney General Reviews CT and Judicial Cooperation with Ambassador”
10. 09MADRID347, 1 April 2009, “Spain: Prosecutor Weighs GTMO Criminal Case vs. Former USG Officials”
11. 09MADRID383, 15 April 2009, “Codel Gregg’s April 13 Meeting with FM Moratinos”
12. 09MADRID392, 17 April 2009, “Spain: Attorney General Recommends Court not Pursue GTMO Criminal Cases vs. Former USG Officials”
13. 09MADRID393, 17 April 2009, “Spain: Senator Mel Martinez Meetings with Deputy FM Lossada and MOD SEC GEN Cuesta”
14. 09MADRID440, 5 May 2009, “Garzon Opens Second Investigation into Alleged U.S. Torture of Terrorism Detainees”

B. Index of Cables: José Couso case:

1. 04MADRID2804, 23 July 2004, “Spain: Letter from Secretary Powell to FM Moratinos”
2. 05MADRID3694, 21 October 2005, “Spanish Ministers Working to Challenge Arrest Warrants”

3. 06MADRID722, 22 March 2006, “Vice President on Syria, Africa, Bilateral Relations”
4. 07MADRID82, 16 January 2007, “Spain/Couso Case: Judge Issues Detention Order Against Three U.S. Servicemen”
5. 07MADRID101, 18 January 2007, „Spain/Couso Case: Meeting with Chief Prosecutor”
6. 07MADRID141, 26 January 2007, “Spain/Couso Case: Ambassador Meet with Attorney General”
7. 07MADRID215, 8 February 2007, “Spain/Couso Case: Judge Threatens to Obstruct US-Spain Judicial Cooperation”
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10. 07MADRID910, 14 May 2007, “Spain/Couso Case: Prosecutor Appeals Charges Against US Servicemen”
11. 07MADRID911, 14 May 2007, “Scenesetter for US-Spain High Level Defense Talks”
12. 07MADRID1021, 25 May 2007, “Scenesetter for Secretary Rice’s June 1 Visit to Madrid”
13. 08MADRID542, 14. May 2008, “Spain/Couso Case: National Court Dismisses Charges Against Three U.S. Servicemen”
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