

**REFERENCE ID: 09MADRID392**

---

**CREATED: 2009-04-17 06:06**

---

**ORIGIN: Embassy Madrid**

---

**CLASSIFICATION: CONFIDENTIAL**

---

**HEADER INFORMATION**

VZCZCXRO2165

OO RUEHDBU RUEHFL RUEHKW RUEHLA RUEHNP RUEHROV RUEHSR

DE RUEHMD #0392/01 1070607

ZNY CCCCC ZZH

O 170607Z APR 09

FM AMEMBASSY MADRID

TO RUEHC/SECSTATE WASHDC IMMEDIATE 0523

INFO RUEHZL/EUROPEAN POLITICAL COLLECTIVE IMMEDIATE

RUEHLA/AMCONSUL BARCELONA IMMEDIATE 3951

RUCNFB/FBI WASHDC IMMEDIATE

RUEHNO/USMISSION USNATO IMMEDIATE 1553

RUEAHLA/HOMELAND SECURITY CENTER WASHINGTON DC IMMEDIATE

RUCNDT/USMISSION USUN NEW YORK IMMEDIATE 0497

RUEHMD/USDAO MADRID SP IMMEDIATE

RUEKJCS/SECDEF WASHDC IMMEDIATE

RHEHNSC/NSC WASHDC IMMEDIATE

RUEILB/NCTC WASHINGTON DC IMMEDIATE

RUEAWJA/DEPT OF JUSTICE WASHDC IMMEDIATE

RUEAIIA/CIA WASHDC IMMEDIATE

---

Friday, 17 April 2009, 06:07

C O N F I D E N T I A L SECTION 01 OF 03 MADRID 000392

SIPDIS

EUR/WE FOR ELAINE SAMSON AND STACIE ZERDECKI, L/LEI FOR KEN PROPP AND CLIFF JOHNSON

CA/OCS FOR PPLATUKIS AND MBERNIER-TOTH

INR FOR JANICE BELL

S/CT FOR MARC NORMAN

EMBASSY ROME FOR MOLLY PHEE

PASS TO NSC'S TOBY BRADLEY, CAROLYN KRASS

PASS TO DOJ'S BRUCE SWARTZ AND DOJ/OIA/PAT REEDY  
EO 12958 DECL: 04/16/2019

TAGS: AORC, PREL, CASC, CJAN, PTER, PGOV, PHUM, PINS, SOCI, KCRM, KJUS, KISL, KLIG, SP

SUBJECT: SPAIN: ATTORNEY GENERAL RECOMMENDS COURT NOT PURSUE GTMO CRIMINAL CASE VS. FORMER USG OFFICIALS

REF: A. MADRID 383 B. MADRID 347  
MADRID 00000392 001.2 OF 003

Classified By: Charge D'Affaires Arnold A. Chacon for reasons 1.4 (b) a nd (d)

1. (C) SUMMARY. 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 officials, including former AG Alberto Gonzalez, for creating a legal framework that allegedly permitted torture. During a Q&A session of a previously scheduled public address, Conde Pumpido responded to a question on the issue by stating that he will not support the criminal complaint because it is "fraudulent," and has been filed as a political statement to attack past USG policies. The AG noted that the GOS could not pursue a complaint that targeted USG advisors while a similar suit against the Defense Secretary Rumsfeld (see REF B) had failed. While Conde Pumpido defended the GOS's investigation of universal jurisdiction cases to defend human rights, he said that the policy will not be used as a toy or a tool to force the GOS into investigating the decisions of another government. The AG added that if there is evidence of criminal activity by USG officials, then a case should be filed in the United States. Addressing next steps, the AG's press chief subsequently told the media that the Prosecutor's office will deliver the AG's recommendation to the National Court, where it will be up to investigating judge Baltasar Garzon - an outspoken critic of the Guantanamo detention facility who has publicly stated that former President Bush should be tried for war crimes - to decide whether to pursue the case or not. As reported in REFTELS, Conde Pumpido's public announcement follows outreach to GOS officials to raise USG deep concerns on the implications of this case.  
END SUMMARY.

//BACKGROUND ON THE CASE//

2. (C) As reported in REF B, a Spanish NGO - Association for the Dignity of Spanish Prisoners - in March 2009 requested that the National Court indict six former U.S. officials for creating a legal framework that allegedly permitted torture. The six accused are: former AG Alberto Gonzales; David Addington, former chief of staff and legal adviser to the Vice President; William Haynes, former DOD General Counsel; Douglas Feith, former Under Secretary of Defense for Policy; Jay Bybee, former head of the DOJ Office of Legal Counsel; and John Yoo, a former member of Bybee's staff. The NGO claimed that Spain had a duty to open a "universal jurisdiction" case because five Guantanamo detainees are either Spanish citizens or were/are Spanish residents. 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.

//ANNOUNCEMENT FOLLOWS INTENSIVE USG OUTREACH//

3. (C) Following revelations by the Spanish press that the complaint had been filed, the Acting DCM on March 31 and April 1 phoned FM Moratinos' Chief of

Staff Agustin Santos, and MOJ Director General for International Judicial Cooperation Aurora Mejia about the matter. Both expressed their concern at the case but stressed the independence of the Spanish judiciary. The A/DCM stressed to both that this was a very serious matter for the USG and asked that the Embassy be kept informed of any developments. MADRID 00000392 002.2 OF 003

4. (C) As reported in REF A, Senator Judd Gregg, accompanied by the Charge d'Affaires, raised the issue with Luis Felipe Fernandez de la Pena, Director General Policy Director for North America and Europe during a visit to the Spanish MFA on April 13. Senator Gregg expressed his concern about the case. Fernandez de la Pena lamented this development, adding that judicial independence notwithstanding, the MFA disagreed with efforts to apply universal jurisdiction in such cases.

5. (C) Zaragoza on April 14 called Embassy Madrid's FSN Legal Adviser and informed her that a more thorough study had revealed that the complaint was targeted against legal advisors with no executive authority and that it was legally difficult to establish what type of offense the six had committed and the degree to which they participated in the alleged offenses. Zaragoza said the complaint lacked details and was directed against USG policy rather than a specific perpetrator. He said he would ask Conde Pumpido to review whether Spain has jurisdiction in this case and indicated that he hoped the Spanish AG would draft a clear set of rules on how and when Spain should prosecute universal jurisdiction complaints.

6. (C) As reported in SEPTTEL, Senator Mel Martinez, accompanied by the Charge d'Affaires, met Acting FM Angel Lossada during a visit to the Spanish MFA on April 15. Martinez and the Charge underscored that the prosecutions would not be understood or accepted in the U.S. and would have an enormous impact on the bilateral relationship. The Senator also asked if the GOS had thoroughly considered the source of the material on which the allegations were based to ensure the charges were not based on misinformation or factually wrong statements. Lossada responded that the GOS recognized all of the complications presented by universal jurisdiction, but that the independence of the judiciary and the process must be respected. The GOS would use all appropriate legal tools in the matter. While it did not have much margin to operate, the GOS would advise Conde Pumpido that the official administration position was that the GOS was "not in accord with the National Court." Lossada reiterated to Martinez that the executive branch of government could not close any judicial investigation and urged that this case not affect the overall relationship, adding that our interests were much broader, and that the universal jurisdiction case should not be viewed as a reflection of the GOS position.

7. (C) Meanwhile, the Embassy has been involved in DOJ-led talks to have Zaragoza - who attended the April 16 press conference - lead a four-person team of GOS officials to Washington for a possible meeting with U.S. Deputy AG David Ogden or AG Eric Holder during the week of May 18. Zaragoza's wife, who is Conde Pumpido's chief of staff, would reportedly be one of the four.

//COMMENT//

8. (C) Although not legally binding on the National Court, Conde Pumpido's announcement puts pressure on crusading judge Garzon, who has not yet accepted the case, not to proceed with the investigation. As described in REF B, Zaragoza has indicated to Post - and reconfirmed this in his April 14 phone call in Para 3 - that he would argue that the case should not be assigned to Garzon and instead would recommend that Garzon's colleague, Investigating Judge Ismael Moreno, should be assigned the case. Zaragoza said

the case ties in with Moreno's ongoing investigations into alleged illegal "CIA flights" that have transited Spain carrying detainees to Guantanamo. Zaragoza acknowledges that Garzon has the "right of first refusal," but has told Post that if Garzon MADRID 00000392 003.2 OF 003 disregards his recommendation and takes the case, the prosecutor will appeal. When a judge disagrees with the prosecutor on how or what to investigate, then the prosecutor has the right to appeal to a higher court, in this case the National Court's Criminal Chamber, led by Javier Gomez Bermudez. During this period in which the jurisdiction of the case is in question, Garzon could still proceed with the case, including preparing MLATs to question to the accused, formally naming the accused as defendants, and issuing arrest warrants against them. Investigating judges in Spain, including and especially Garzon, have used this tactic frequently, particularly when these actions are popular with sizable segments of the Spanish population. This worst-case scenario remains a possibility at this point. 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. CHACON