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ECCHR

IN THE CENTRAL COURT FOR
PRELIMINARY CRIMINAL PROCEEDINGS NO. 6

MADRID

PRELIMINARY PROCEEDINGS
SUMMARY PROCEDURE 134/2009

SUPPLEMENTAL FILING TO 26 APRIL 2010 JOINT EXPERT OPINION

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11 December 2010

I. Introduction

On 17 March 2009, a complaint was filed against six former officials of the United States government, namely 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, 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). On 23 April 2009, the case was assigned to this Court.

On 4 May 2009, this Court issued Letters Rogatory to the United States, in accordance with the 1990 US-Spain Treaty on Mutual Assistance in Criminal Matters, asking it "whether the acts referred to in this complaint are or are not being investigated or prosecuted," and if so, to identify the prosecuting authority and to inform this Court of the specific procedure by which to refer the complaints for joinder. No response to that request was received.

On 7 April 2010, this Court issued an Order, in which it asked the parties to set forth their views on whether it is proper to continue with the investigatory procedure in Spain in light of the amendment to sections Article 23 (4)-(5) of the *Ley Orgánica del Poder Judicial* ("LOPJ"). In that Order, this Court also recalled the "urgency of responding to the International Letters Rogatory sent to the United States." The United States made no submission in response to the Order.

On 26 April 2010, the Center for Constitutional Rights ("CCR") and the European Center for Constitutional and Human Rights ("ECCHR") submitted a Joint Expert Opinion, in which we submitted that it is proper for this Court to continue the investigatory procedure of this case.[1] This finding was based upon *inter alia* Spain's obligations as a signatory to the Geneva Conventions and Convention against Torture to investigate the offences alleged in this case due to the violations falling within the scope of crimes for which universal jurisdiction is triggered and because international law envisages a system of non-hierarchical and concurrent jurisdictions. We also stated that Spain was under no legal obligation to defer from exercising jurisdiction in favor of states with purported closer territorial links to the alleged acts, and that even if it were to be found that Spain should defer as a matter of policy, the United States had not conducted any effective investigations into this matter that would warrant such a deferral.

[1] On the same date, Javier Fernandez Estrada and Gonzalo Boye, attorneys for the Spanish Association for the Dignity of Prisoners, urged the investigation to continue on the basis that the amendment to Article 23 of the LOPJ would not affect this matter. It is our understanding that the Attorney General submitted a one-sentence response to the Order, stating its opposition to the investigation continuing.

We concluded in our Joint Expert Opinion:

"The U.S. has utterly failed in its obligations to initiate an effective investigation or prosecution against the specific defendants in this case or on behalf of the named plaintiffs or other victims of the U.S. interrogation, detention and torture policies. This unfortunately remains the case under the Obama Administration. Furthermore, both the Obama and Bush Administrations have actively sought to block all efforts on behalf of victims of the detention, interrogation and torture policies from having their day in court, when in the context of habeas proceedings or civil actions. Spain, therefore, can and indeed, must, exercise its jurisdiction over the named defendants for the violations alleged in this case."

On 18 October 2010, this Court issued an Order in which it *inter alia* recalled the Rogatory Commission sent to the United States government on 4 May 2009. To date, there has been no response from the United States to the Court's Letters Rogatory.

There have been numerous developments in the United States since 7 April 2010 that are relevant to question raised by Your Honor in that Order. All of the developments make clear that this Court is the appropriate venue to investigate this matter and that the investigation should not be stayed. Recent developments demonstrate the availability of evidence against the named defendants, the sense of impunity enjoyed by former U.S. officials, and the unwillingness to investigate or prosecute the matters at issue in this case by the United States, as well as the active opposition by the United States government to all efforts to hold former U.S. officials accountable for torture or other serious violations in U.S. and non-U.S. courts.

Recalling this Court's Orders of 7 April 2010 and 18 October 2010 and taking into account developments since April 2010, CCR and ECCHR hereby submit this supplemental filing to their Joint Expert Opinion, and further request, as a matter of priority, that the Court exercise its jurisdiction over the named Defendants for the violations alleged in the complaint and continue the investigation.

II. Discussion

The United States has failed to supply this Court with any evidence that it is investigating or prosecuting the allegations against six former Bush Administrations officials who are alleged to have been complicit in committing violations of the Geneva Conventions and the Convention Against Torture. The reason it has failed to do so is because no such investigations or prosecutions are underway. Rather, recent statements by two of the Defendants and the former President of the United States that they authorized or were otherwise complicit in the torture and other serious abuse of detainees in U.S. custody have been met with silence and inaction by the United States Department of Justice.

As explained below, recent admissions and other evidence of the involvement of the Defendants in war crimes and torture, coupled with the failure to investigate or prosecute these crimes –

while seeking to block investigations in Spain, warrants the prompt investigation of the crimes alleged in the complaint by this Court.

A. New Evidence Related to Torture and the Criminal Liability of the Defendants.

The following information related to the named Defendants post-dates the Joint Expert Opinion filed in April 2010. It is not intended to serve as an exhaustive summary of the evidence related to the Defendants but rather to demonstrate the availability of evidence against the Defendants and the Defendants' own discussions on the subject-matter of the complaint. A subsequent filing will address the legal liability of the Defendants.

1. Admission by the Former President of the United States that he Authorized Torture upon the Advice of his Lawyers.

George W. Bush, the former president of the United States, released his memoir "DECISION POINTS," on 9 November 2010. In the book, he admits that he authorized the torture, including waterboarding, of individuals held in U.S. custody – and highlighted the central role that the Defendants played in authorizing torture. Bush details how at his direction, Department of Justice and Central Intelligence Agency lawyers conducted a legal review of the list of interrogation techniques proposed by the CIA. These techniques included waterboarding, which the current Attorney General, Eric Holder, has unequivocally defined as an act of torture.[2] Bush states that the lawyers concluded that waterboarding and other techniques "complied with the Constitution and all applicable laws, including those that ban torture."[3] Having received this legal advice from government lawyers that it is permissible to waterboard detainees, Bush admits that he responded "damn right" to the query of whether a particular detainee could and should be waterboarded.[4]

In an interview with Matt Lauer of NBC News on 8 November 2010, Bush again admitted – apparently without any fear of punishment or consequence – that he authorized torture. Most importantly here, he states that it was based on the legal advice that the torture technique of waterboarding is legal that he decided to authorize torture:

> BUSH: […] one of the high value al Qaeda operatives was Khalid Sheik Mohammed, the chief operating officer of al Qaeda, ordered the attack on 9/11, and they say he's got

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[2] *See* Transcript of Confirmation Hearing for Eric Holder as Attorney General of the United States, 16 January 2009, available at: http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?_r¼1&pagewanted¼all. Harold Koh, the State Department Legal Advisor, recently confirmed during the Universal Periodic Review of the United States in Geneva that the Obama Administration "defines waterboarding as torture as a matter of law" and affirmed this is "not a policy choice." *See* "Press Conference by the U.S. Delegation to the UPR (Transcript)", 5 November 2010, *available at*: http://geneva.usmission.gov/2010/11/05/upr-press-conf/

[3] G.W. Bush, DECISION POINTS (Crown Publishing Group: New York, 2010), p. 169.

[4] *Id.* at 170.

information. I said, "Find out what he knows." *And so I said, "are the techniques legal?" And our legal teams says, "yes, they are," and I said, "use them."*
LAUER: Why is waterboarding legal, in your opinion?
BUSH: Because the lawyers said it was legal. He said it did not fall within the Anti-Torture Act. I'm not a lawyer, but you gotta trust the judgment of people around you and I do.
LAUER: You say it's legal and "the lawyers told me."
BUSH: *Yeah*.
LAUER: Critics say that you got the Justice Department to give you the legal guidance and the legal memos that you wanted.
BUSH: Well—
LAUER: Tom Kean, who a former Republican co-chair of the 9/11 commission said they got legal opinions they wanted from their own people.
BUSH: He obviously doesn't know. I hope Mr. Kean reads the book. That's why I've written the book. He can, they can draw whatever conclusion they want.[5]

Bush's statement only confirms what is alleged in the complaint before Your Honor, which is that without the Defendants' legal opinions, the torture program could not and would not have happened.

2. Defendant John Yoo.

John Yoo, a named Defendant in the complaint, served as Deputy Assistant Attorney General in the Office of Legal Counsel ("OLC") of the US Department of Justice ("DOJ") from July 2001 - June 2003. As Deputy Assistant Attorney General, Yoo worked under the OLC Assistant Attorney General, Jay S. Bybee, another named Defendant in the complaint. As Deputy Assistant Attorney General, Yoo authorized several legal memoranda in response to questions from the White House about *inter alia* Presidential war powers, the applicability of the Geneva Conventions, and torture. Yoo currently serves as a professor of law at University of California, Berkeley School of Law, Boalt Hall.

The Office of Legal Counsel "drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department."[6] OLC "is responsible for providing legal advice to the Executive Branch on all constitutional questions and

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[5] Transcript, "'Decision Points,' Former president George W. Bush reflects on the most important decisions of his presidential and personal life," Part 3, NBC, 8 November 2010, available at: http://www.msnbc.msn.com/id/40076644/ns/politics-decision_points/

[6] http://www.usdoj.gov/olc/.

reviewing pending legislation for constitutionality. All Executive orders and proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various other matters that require the President's formal approval."[7]

While working as a lawyer in the OLC, Yoo authored memoranda claiming that: the Geneva Conventions did not apply to Al Qaeda or Taliban detainees; the President had Constitutional authority to wage war against suspected terrorists anywhere in the world; the President was not bound by domestic or international treaties on torture;[8] and the definition of torture includes only acts that "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[9]

On 19 November 2010, Yoo then acknowledged that the legal advice he was given was influenced *not* by objective standards as required by law, but by the political environment and the post-9/11 atmosphere in that he consistently emphasizes the context in which he gave the advice: "I think my legal judgment then was right *under the circumstances*."[10] When discussing the use of waterboarding or the definition of torture, Yoo qualifies both by "at the time," demonstrating his improper consideration of policy or political considerations in undertaking a legal analysis.[11] This complies with the Department of Justice's Office of Responsibility conclusion that through his work on the "torture memos," Yoo "failed to provide a thorough, objective, and candid interpretation of the law" and committed intentional professional misconduct in "put[ting] his desire to accommodate the client above his obligation to provide thorough, objective and candid legal advice."[12]

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[7] *Id*.

[8] Letter from John Yoo, Deputy Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, available at http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html . See also Memorandum from John Yoo to William J. Haynes, II, General Counsel of the Department of Defense, Memo Regarding the Torture and Military Interrogation of Alien Unlawful Combatants Held Outside the United States, 14 March 2003 available at http://www.aclu.org/safefree/torture/34745res20030314.html.

[9] Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under *18 U.S.C. 2340*-2340A (Aug. 1, 2002) at 1, available at http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf (although the letter is signed by Bybee, it is known that Yoo was the principal author of the memo. *See* Office of Professional Responsibility, Report, Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists," 29 July 2009, p. 1, available at: http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf).

[10] "Yoo Stands by the 'Torture Memos," CNN, 19 November 2010, available at: http://www.cnn.com/video/data/2.0/video/bestoftv/2010/11/19/exp.ps.john.yoo.torture.cnn.html. It is recalled that the prohibition against torture is non-derogable; no exceptional circumstances can ever warrant its use.

[11] *Id*.

[12] Office of Professional Responsibility, Report, Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on

3. Defendant Alberto Gonzales.

Alberto Gonzales, a named Defendant in the complaint, was as Chief White House Counsel to President George W. Bush from January 2001-February 2005, at which time he became Attorney General of the United States. Gonzales resigned as Attorney General in September 2007 and currently teaches political science.

Among numerous other relevant actions during his time as a lawyer with the Bush Administration, Gonzales signed a legal memorandum in January 2002 written for President Bush which states that the Geneva Conventions, including the prohibition on torture, do not apply to Taliban and Al-Qaeda detainees.[13]

In November 2010, Gonzales acknowledged his involvement in, and awareness of the torture program alleged in the complaint:

> What I can say is that, yes I was aware of the techniques, I did have knowledge, and I know that a number of lawyers worked to look to see whether it could be administered in a way that was consistent with the anti-torture statute and guidance was given by the Department of Justice while I was in the White House about how these techniques could be implemented to gather important information, in a dangerous period for our nation, to gather information from the enemy that would be in America's favor.[14]

Notably, this acknowledgment emphasizes the *context* in which the legal advice was given, again suggesting that the non-derogable prohibition against torture did not apply to the U.S. interrogation program.

When asked if he was involved with decisions about waterboarding certain detainees, Gonzales indicates only that he, too, will soon be publishing a book, and to learn of his full involvement in the torture program, one must purchase the book.

Suspected Terrorists," 29 July 2009, p. 251-54, available at: http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf

[13] Memo from White House Counsel Alberto Gonzales to President George W. Bush, *Decision Re Application Of The Geneva Convention On Prisoners Of War To The Conflict With Al Qaeda And The Taliban*, 25 January 2002, available at: http://www.slate.com/features/whatistorture/LegalMemos.html. For more on Gonzales' role in reviewing the "torture memos" and the proposed CIA interrogation techniques, see Senate Armed Services Committee Report, Inquiry into the Treatment of Detainees in U.S. Custody, available online at http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf at *e.g.,* xv-xvi, xxvi.

[14] R.J. Reilly, "Gonzales: I Was 'Aware' Of Waterboarding," 22 November 2010, available at: http://tpmmuckraker.talkingpointsmemo.com/2010/11/gonzales_i_was_aware_of_waterboarding.php.

B. New Evidence that the United States is Unwilling to Investigate Torture and War Crimes by U.S officials – or Allow others to Conduct such Investigations.

1. The Justice Department has Rejected the Prosecution or Punishment of Persons Responsible for the Destruction of Evidence of Torture.

On 2 January 2008, after concluding "that there is a basis for initiating a criminal investigation of this matter," the former Attorney General of the United States opened an investigation into the destruction by personnel from the Central Intelligence Agency of videotapes of interrogations of persons in U.S. custody using methods that constitute torture, including waterboarding.[15] Assistant U.S. Attorney John Durham was appointed to lead the investigation and the Federal Bureau of Investigations was tasked with assisting in the investigation.

The impetus for opening the investigation into the destruction of tapes was "disclosure by CIA Director Michael Hayden on December 6, 2007, that the tapes had been destroyed."[16] The tapes included evidence of the use of so-called "enhanced interrogation techniques" – or torture – of detainees.[17] The detainees on the tapes in question remain in custody in Guantánamo Bay.

On 9 November 2010, upon expiration of the statute of limitations, the Department of Justice announced that no criminal charges would be issued against any of the individuals responsible for the destruction of the tapes containing evidence of torture.[18]

2. There Is No Pending Criminal Investigation into Acts of Torture or Cruel, Inhuman or Degrading Treatment in the United States.

As detailed in our April 2010 Joint Expert Opinion, President Barack Obama has embraced a policy that favors impunity for war crimes, torture and crimes against humanity.[19] In so doing,

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[15] Statement by Attorney General Michael B. Mukasey Regarding the Opening of an Investigation Into the Destruction of Videotapes by CIA Personnel, 2 January 2008, available at: http://www.justice.gov/opa/pr/2008/January/08_opa_001.html. The criminal investigation was opened after concluding that there "is sufficient predication to warrant a criminal investigation of a potential felony or misdemeanor violation."

[16] *Id*.

[17] *See, e.g*., "Court Orders Government Not to Destroy Torture Evidence: Federal Court's Order Comes Amid CIA Tape Destruction Scandal," CCR, Press Release, 12 December 2007, available at: http://www.ccrjustice.org/newsroom/press-releases/court-orders-government-not-destroy-torture-evidence; "CIA Confirms 12 Destroyed Videotapes Depicted 'Enhanced Interrogation Methods': Government To Release Tape Destruction Records In ACLU Lawsuit On March 20," ACLU, Press Release, 6 March 2009, available at: http://www.aclu.org/national-security/cia-confirms-12-destroyed-videotapes-depicted-enhanced-interrogation-methods.

[18] Department of Justice Statement on the Investigation into the Destruction of Videotapes by CIA Personnel, 9 November 2010, available at: http://www.justice.gov/opa/pr/2010/November/10-ag-1267.html

he has disregarded the obligations on the United States, as a signatory of the Geneva Conventions and the Convention Against Torture, to investigate and prosecute the commission of, or complicity in, war crimes and torture.

The Attorney General has similarly demonstrated an unwillingness to prosecute these violations of domestic and international law. As explained in the Joint Expert Opinion, AG Holder has taken only the small step of opening a narrow and preliminary investigation into a small number of incidents in August 2009.[20] Significantly, this preliminary investigation *excludes the subject-matter of this complaint and explicitly excludes the acts of Defendants in this case from review.* AG Holder made clear that members of the U.S. intelligence community "need to be protected from legal jeopardy when they acted in good faith and within the scope of legal guidance. *That is why I have made it clear in the past that the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees….this preliminary review will not focus on those individuals*."[21]

While recently offering some criticism of the torture memos drafted by the Defendants, AG Holder confirmed that these memos – and their authors (the Defendants) – are not subject to legal review by the Department of Justice, but only those persons who went beyond what was "authorized" in the memos may be investigated:

> It's a question of whether people went beyond those pretty far-out [Office of Legal Counsel] opinions, people who went beyond that. That's what we're looking at.[22]

In June 2010, AG Holder said that the results of this narrow investigation would soon be released;[23] six months later – and more than eight years after some of the alleged acts of torture occurred – no announcement has been made. In any event, it is clear that this narrow investigation goes no way toward meeting the investigative obligations against the named Defendants in this case, and therefore has no bearing on the continuation of this particular matter.

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[19] *See* Joint Expert Opinion, at 8-10, available in English and Spanish at: http://ccrjustice.org/files/FINAL%20Expert%20Opinion%20final%20es.pdf and http://www.ccrjustice.org/files/FINAL%20EXPERT%20OPINION%20ENG_0.pdf .

[20] *Id.* at 9-10.

[21] *See* Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees, 24 August 2009, available online at http://www.usdoj.gov/ag/speeches/2009/ag-speech-0908241.html

[22] R. Reilly, "Holder: Review of CIA's Treatment of Detainees Nearly Complete," 18 June 2010, available at: http://www.mainjustice.com/2010/06/18/review-of-cias-treatment-of-detainees-nearly-complete/

[23] *Id*.

3. U.S. State Department Cables Reveal that the United States Sought to Interfere with the Course of Justice and Accountability in Spain.

While refusing to pursue criminal investigations and prosecutions domestically, it is now known how the United States attempted to subvert the cause of justice in Spain, including in relation to this specific case. This Court has repeatedly asked the United States to express its views on whether ongoing investigations or prosecutions are ongoing in the United States which will weigh against this Court investigating the crimes set-forth in the complaint. Rather than answer the Court directly, the United States has engaged in a political campaign to have this case dismissed that wholly disregards the independence of prosecutors and the judiciary.

United States State Department cables released in the press and on the internet paint a detailed picture of the efforts undertaken by U.S. diplomats and members of Congress to obstruct and otherwise interfere with these proceedings and other pending before the *Audiencia Nacional.* Indeed, 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 officials both implicitly and explicitly acknowledge that their attempts to interfere with criminal proceedings is utterly improper.[24]

Specifically, on 1 April 2009, the U.S. Embassy in Madrid issued a cable (09MADRID347, attached hereto as Exhibit A) entitled "Spain: Prosecutor Weighs GTMO Criminal Case vs. Former USG Officials." This cable details the filing of the present case against six former Bush administration officials, providing an overview of the legal theory and some of the supporting evidence cited in the complaint. The cable describes a meeting between U.S. officials and Chief Prosecutor Javier Zaragoza who was reported to be "displeased to have this [case] dropped in his lap," but informed the U.S. officials that "in all likelihood he would have no option but to open a case," as "the complaint appears well-documented." The cable indicates that Zaragoza purportedly informed the U.S. officials of the position he will take regarding assignment of the case ("He will also argue against the case being assigned to Garzon") and that he will not act quickly in the case ("Zaragoza said he was in no rush to proceed with the case"). The cable also indicates that U.S. officials discussed the case with Spanish officials from the Ministry of Foreign Affairs and the Ministry of Justice on 31 March and 1 April 2009. ("MFA contacts have told us that they are concerned about the case, but have stressed the independence of the judiciary. They too have suggested the case will move slowly.") The cable also reveals that advice was given by Spanish prosecutor Zaragoza to US officials to open an investigation into the acts alleged in the complaint as "the only way out" for the US. ("Zaragoza also noted that

[24] *See, e.g.,* Cable 09MADRID34, 1 April 2009, Ex. A: "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."

Spain would not be able to claim jurisdiction in the case if the USG opened its own investigation.").

On 17 April 2009, the U.S. Embassy in Madrid wrote cable 09MADRID392, entitled "Spain: Attorney General Recommends Court Not Pursue GTMO Criminal Case vs Former USG Officials." (Attached hereto as Exhibit B). This cable details numerous meetings held between U.S. officials and Spanish officials in which the U.S. government seeks to influence the outcome of this criminal proceeding. The cable details the announcement by Attorney General Candido Conde Pumpido that he will "undoubtedly" not support this case, which he refers to as "fraudulent." The cable states that the "ANNOUNCEMENT FOLLOWS INTENSIVE USG OUTREACH." (emphasis in original). It then lists the various meetings between U.S. government officials and Spanish government officials:

- Call by US Acting Deputy Chief of Mission to Spanish Foreign Minister's chief of Staff Agustin Santos and Ministry of Justice Director General for International Judicial Cooperation Aurora Mejia on 31 March and 1 April 2009: "both expressed their concern at the case but stressed the independence of the Spanish judiciary. The A/DCM *stressed to both of them that this was a very serious matter for the USG and asked that the Embassy be kept informed of any developments*";
- U.S. Senator Judd Gregg 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; Fernandez de la Pena "lamented this development" and "disagreed with efforts to apply universal jurisdiction in such cases";
- Telephone conversation between Zaragoza and U.S. Embassy Madrid's FSN Legal Adviser on 14 April 2009, initiated by Zaragoza, in which Zaragoza gave comments about the facts and legal theory set forth in the case and said he would ask Conde Pumpido to review the question of jurisdiction, "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";
- U.S. Senator Mel Martinez met with Acting Foreign Minister Angel Lossada on 15 April 2009, and "underscored that the prosecutions would not be understood or accepted in the U.S. *and would have an enormous impact on the bilateral relationship*"…Losada said that the Government of Spain would advise Conde Pumpido that "the official administration position was that the GOS was 'not in accord with the National Court'".

On 5 May 2009 – one day after Your Honor sent the Letters Rogatory to the United States – the Embassy of Madrid wrote cable 09MADRID440, entitled "Garzon Opens Second Investigation Into Alleged U.S. Torture of Terrorism Detainees." (attached hereto as Exhibit C). This cable describes the opening of proceedings in Court 5, case 150/9. The cable details a meeting between Zaragoza and a U.S. Embassy official to discuss the investigation commenced by Garzon, in which Zaragoza cited ways he could "embarrass" Garzon into dropping the case. The cable also

comments on the assignment of this case to Your Honor and the likelihood of the case proceeding.

Other cables reveal other attempts by the United States to influence proceedings in the *Audiencia Nacional*, demonstrating that what it has attempted to do in this case is not an isolated incident.[25]

4. The Obama Administration has Opposed Every Civil Action brought against U.S. officials for Damages.

The Joint Expert Opinion details the way in which the Obama administration has continued to block current and former detainees access to justice;[26] this policy continues in relation to the 174 men who continue to be detained at Guantánamo and was demonstrated through recent submissions by the Department of Justice in civil actions brought by torture victims against former U.S. officials. For example, the Obama administration recently opposed efforts by extraordinary rendition victim Maher Arar to have his case reviewed by the U.S. Supreme Court.[27] The Obama administration also continued to oppose efforts by the families of two men who died while detained at Guantánamo to seek answers into how they died.[28]

III. Conclusion

The United States must not be permitted to continue to stall the course of justice, whether domestically or in Spain. The Geneva Conventions and the Torture Statute both mandate that the authors of violations contained therein be brought to justice and subjected to criminal prosecutions. This Court has issued Letters Rogatory pursuant to Treaty on Mutual Legal Assistance in Criminal Matters to ascertain whether the United States is fulfilling its obligations under those treaties through pending criminal investigations in an effort to ensure that it is exercising its jurisdiction efficiently and appropriately. However, with the passage of 19 months and after three formal requests, we respectfully submit that the United States has been afforded more than ample opportunity to make their views known to the Court. It is evident that no investigations or prosecution will be conducted in the United States into the acts contained in the

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[25] For efforts by U.S. officials to influence or otherwise interfere with criminal proceedings pending in Spain, *see, e.g.,* 07MADRID1805/122552, 18 Sept. 2007(discussing meeting between U.S. Embassy staff in Madrid and Javier Zaragoza to discuss proceedings in Spain against former Guantánamo detainees); 07MADRID82/92692, 16 Jan. 2007, 07MADRID101/93036 18 Jan. 2007, 07MADRID141/94177 26 Jan. 2007, and 07MADRID911, 14 May 2007/12958 (discussing meeting between U.S. officials and Spanish officials, including Attorney General and Chief Prosecutor, regarding *Couso* case); 06MADRID3104/91121, 28 Dec. 2006 (discussing the rendition case pending before Judge Moreno).

[26] *See* Joint Expert Opinion, *supra* n. 19 at 10.

[27] *See* http://www.ccrjustice.org/ourcases/current-cases/arar-v-ashcroft and http://www.ccrjustice.org/ourcases/current-cases/arar-v-ashcroft.

[28] *See* http://www.ccrjustice.org/ourcases/current-cases/al-zahrani-v.-rumsfeld

complaint. Rather, a culture of impunity exists in the United States. Without accountability, not only will the authors of the "torture program" profit from (rather than be punished by) confessing their acts, but the acts will likely be repeated.

It is respectfully submitted that this Court must allow the investigation of this case to proceed not only so to ensure Spain's compliance with its international obligations but also to allow for justice to be done. In light of our submissions, we request that the Court issue such an order as a matter of priority.

EXHIBIT A

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Viewing cable 09MADRID347, SPAIN: PROSECUTOR WEIGHS GTMO CRIMINAL CASE VS.

If you are new to these pages, please read an introduction on the structure of a cable as well as how to discuss them with others. See also the FAQs

Reference ID	Created	Released	Classification	Origin
09MADRID347	2009-04-01 17:05	2010-12-01 23:11	CONFIDENTIAL	Embassy Madrid

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PP RUEHDBU RUEHFL RUEHKW RUEHLA RUEHNP RUEHROV RUEHSR
DE RUEHMD #0347/01 0911701
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P 011701Z APR 09
FM AMEMBASSY MADRID
TO RUEHC/SECSTATE WASHDC PRIORITY 0465
INFO RUEHZL/EUROPEAN POLITICAL COLLECTIVE PRIORITY
RUEHTV/AMEMBASSY TEL AVIV PRIORITY 2439
RUEHLA/AMCONSUL BARCELONA PRIORITY 3928
RUEHIT/AMCONSUL ISTANBUL PRIORITY 0258
RUEHSR/AMCONSUL STRASBOURG PRIORITY 0007
RUCNFB/FBI WASHDC PRIORITY
RUEHNO/USMISSION USNATO PRIORITY 1549
RUEAHLC/HOMELAND SECURITY CENTER WASHINGTON DC PRIORITY
RUCNDT/USMISSION USUN NEW YORK PRIORITY 0492
RUEHMD/USDAO MADRID SP PRIORITY
RUEKJCS/SECDEF WASHDC PRIORITY
RHEHNSC/NSC WASHDC PRIORITY
RUEILB/NCTC WASHINGTON DC PRIORITY
RUEAWJA/DEPT OF JUSTICE WASHDC PRIORITY
RUEAIIA/CIA WASHDC PRIORITY
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Wednesday, 01 April 2009, 17:01
C O N F I D E N T I A L SECTION 01 OF 04 MADRID 000347
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 NSCâ€™S TOBY BRADLEY
PASS TO DOJâ€™S BRUCE SWARTZ AND DOJ/OIA/PAT REEDY
EO 12958 DECL: 03/31/2019
TAGS AORC, PREL, CASC, CJAN, PTER, PGOV, PHUM, PINS, SOCI,
KCRM, KJUS, KISL, KLIG, SP
SUBJECT: SPAIN: PROSECUTOR WEIGHS GTMO CRIMINAL CASE VS.
FORMER USG OFFICIALS
REF: A. OSC EUP20090329950015  B. OSC EUP20090330950017  C. 06 MADRID 1914  D. 07
MADRID 2282  E. 08 MADRID 409  F. 07 MADRID 911  G. 07 MADRID 863  H. OSC
EUP20080828085019
MADRID 00000347 001.2 OF 004
Classified By: ADCM William H. Duncan for reasons 1.4 (b), and (d)
Â¶1. (C) SUMMARY: A Spanish NGO has requested that the National Court indict six
Bush Administration officials for creating a legal framework that allegedly
permitted torture. The NGO is attempting to have the case heard by Investigating
Judge Baltasar Garzon, internationally known for his dogged pursuit of
â€œuniversal jurisdictionâ€  cases. Garzon has passed the complaint to the
prosecutorâ€™s office for them to determine if there is a legitimate case.
Although he seemed displeased to have this dropped in his lap, Chief Prosecutor
Javier Zaragoza told us that in all likelihood he would have no option but to open
a case. He said he did not envision indictments or arrest warrants in the near
future. He will also argue against the case being assigned to Garzon. MFA and MOJ
contacts have told us they are concerned about the case, but have stressed the
independence of the Spanish judiciary. They too have suggested the case will move
slowly. END SUMMARY.
The Accused
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Â¶2. (U) The six accused are: former Attorney General 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 Bybeeâ€™s staff.
Â¶3. (SBU) The NGO that filed the criminal complaint is the Association for the
Dignity of Spanish Prisoners. According to Spanish press reports, a team of four
lawyers worked on the complaint. This team also brought a case for a different
Spanish NGO in January 2009 against Ehud Barak and six senior Israeli military
officials for alleged war crimes in Gaza in 2002. (Note: In early 2009, the press
reported that FM Moratinos had told the GOI Spain would revise its universal
jurisdiction laws to prevent such cases; we cannot corroborate this. End note.)
Gonzalo Boye Tucet is one of the four lawyers behind the current lawsuit and is
taking the lead with the media. Open source material identifies Boye as a Chilean-
born lawyer who is a former member of the International Revolutionary Movement. He
served eight years in a Spanish prison as part of a 14-year sentence he received
for his role in the 1988 kidnapping of a Spanish businessman, a plot which
reportedly was financed in part by ETA.
Â¶4. (C) The NGO is emphasizing that Spain has a duty to investigate because five
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Guantanamo detainees are either Spanish citizens or were/are Spanish residents. However, the NGO does not claim to be representing these individuals. Their names are: Hamed Abderrahman Ahmed (known in the media as â€œThe Spanish Talibanâ€); Lahcen Ikassrien (aka Chaj Hasan); Reswad Abdulsam; Jamiel Abdul Latif al Bana (aka Abu Anas); and Omar Deghayes.
MADRID 00000347 002.2 OF 004
Â¶5. (C) The NGO has attempted to steer this case directly to National Court Investigating Judge Baltasar Garzon. For two decades, Garzon has generated international headlines with high profile cases involving Spanish politicians, ETA, radical Islamic terrorists, and crimes against humanity. Perhaps his most famous case was his attempt to bring to trial in Spain former Chilean ruler Augustin Pinochet. Garzon has a reputation for being more interested in publicity than detail in his cases. The NGOâ€™s argument for Garzon taking the case is that he investigated some of the individuals named in paragraph four as part of an investigation of al Qaeda cell in Spain. Garzon has passed the NGOâ€™s complaint to the prosecutorâ€™s office for them to determine if there is a legitimate case.
The Complaint

Â¶6. (U) Post has forwarded the 98-page complaint to L. In sum, it alleges that the accused conspired with criminal intent to construct a legal framework to permit interrogation techniques and detentions in violation of international law. The complaint describes a number of U.S. documents, including: a December 28, 2001, memorandum regarding U.S. courtsâ€™ jurisdiction over Guantanamo detainees; a February 7, 2002, memorandum saying the detainees were not covered by the Geneva Convention; a March 13, 2002, memorandum on new interrogation techniques; an August 1, 2002, memorandum on the definition of torture; a November 27, 2002, memorandum recommending approval of 15 new interrogation techniques; and a March 14, 2003, memorandum providing a legal justification for new interrogation techniques. The complaint also cites a 2006 U.S. Supreme Court case which its says held the February 2002 memo violated international law and President Obamaâ€™s recent Executive Order on ensuring lawful interrogations.
Â¶7. (C) The complaint asserts Spanish jurisdiction by claiming that the alleged crimes committed at Guantanamo violated the 1949 Geneva Convention and its Additional Protocols of 1977, the 1984 Convention Against Torture or Other Cruel, Unusual or Degrading Treatment or Punishment, and the 1998 Rome Statute. The GOS is a signatory to all three instruments. The complaint cites Article 7 of the 1984 Convention Against Torture, which states that if a person accused of torture is not extradited to the nation that is bringing a case against him or her, then the competent authorities in the country where the person is should bring a case against him or her. There is media speculation that one of the NGOâ€™s goals may be to encourage the U.S. to begin judicial proceedings on this matter.
Â¶8. (U) The complaint does not specifically call for arrest warrants. Rather, it ends with a call for the Spanish courts to take statements from the accused and to request information from the USG about the various internal documents cited in the complaint (declassification dates and authorities, an official report about the legal nature of memoranda such as the ones cited in the complaint, and an official report on the legal nature and binding force of Executive Orders).
Contacts with Spanish Authorities

Â¶9. (C) On April 1, POLOFF and Embassy FSN Legal Adviser met National Court Chief Prosecutor Javier Zaragoza, who said
MADRID 00000347 003.2 OF 004
that he personally will decide whether to open a criminal case. There is no statutory timeframe for his decision. Zaragoza said the complaint appears well-documented and in all likelihood he will have no option but to open a case (the evidence was on his desk in four red folders a foot tall). Visibly displeased with this having been dropped in his lap, Zaragoza said he was in no rush to proceed with the case and in any event will argue that the case should not be assigned to Garzon. Zaragoza acknowledged that Garzon has the â€œright of first refusal,â€ but said he will recommend that Garzonâ€™s colleague, Investigating Judge Ismael Moreno, should be assigned the case. Zaragoza said the case ties in with Morenoâ€™s ongoing investigations into alleged illegal â€œCIA flightsâ€ that have transited Spain carrying detainees to Guantanamo. Zaragoza said that if Garzon disregards his recommendation and takes the case, he will appeal. Zaragoza added that Garzonâ€™s impartiality was very suspect, given his public criticism of Guantanamo and the U.S. war on terror (we note that, among other things, Garzon narrated a documentary in 2008 that was extremely critical of the U.S. involvement in Iraq and Afghanistan and its approach to fighting terrorism) and his August 2008 public statements that former President Bush should be tried for war crimes.
Â¶10. (C) Zaragoza noted that Spain would not be able to claim jurisdiction in the case if the USG opened its own investigation, which he much preferred as the best way forward and described as â€œthe only way outâ€ for the USG. He cited the complaint against Israeli officials mentioned above and said he would request the investigating judge close that case once he had formal notice that the Israelis had opened their own investigation.
Â¶11. (C) On March 31 and April 1, the Acting DCM discussed the case separately with FM Moratinosâ€™ Chief of Staff Agustin Santos, and MOJ Director General for International Judicial Cooperation Aurora Mejia. Santos said the case was worrisome. He noted that the Spanish judiciary was independent, but he opined that these universal jurisdiction cases often sputtered out after the initial burst of publicity. He also noted that they tended to move very slowly through the system. Mejia also stressed that the judiciary was independent, and added that the MOJ had no official information regarding the case and knew nothing about it beyond what the media had reported. She said privately that the reaction to the complaint in the MOJ was â€œhorror.â€ 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.
Comment

Â¶12. (C) Given Spainâ€™s reputation for liberally invoking universal jurisdiction, this may not be the last such case brought here (nor is it the first -- in 2007, a different Spanish NGO brought a complaint against former

SECDEF Rumsfeld for crimes against humanity based on the Iraq war and Abu Ghraib. Zaragoza told us that case was quietly dismissed although he could not recall the grounds). The fact that this complaint targets former Administration legal officials may reflect a â€œstepping-stoneâ€ strategy designed to pave the way for complaints against even more senior officials. Both the media and Postâ€™s FSN Legal Advisor suspect the complaint was prepared with the assistance of lawyers outside Spain, perhaps in the U.S., and perhaps in
MADRID 00000347 004.2 OF 004
collaboration with NGOâ€™s such as Human Rights Watch or Reprieve. It appears to have been drafted by someone who understands the U.S. legal system far better than the average Spanish lawyer. For all the publicity universal jurisdiction cases excite (Garzonâ€™s attempt to extradite Pinochet from the UK comes to mind), we only know of one case ever tried here (involving a former member of Argentinaâ€™s military junta). Based on what Zaragoza told us, we suspect the case will eventually be referred to the National Court for investigation, although that step may not come for some time. Once it reaches the National Court, these cases seem to move slowly, periodically generating publicity as new evidence is taken (as with Morenoâ€™s investigation into so-called Guantanamo flights). Whether this case will end up with Garzon, Moreno, or some other judge, we cannot say. Garzon, despite his penchant for publicity and criticism of certain aspects of U.S. policy, has worked well with the U.S. on more routine criminal matters (although we think a direct approach to him on this case could well be counter-productive). Moreno, while his reputation as a judge stands higher among legal insiders, has been cooler in his dealings us. We suspect the Spanish Government, whatever its disagreements with the policies of the Bush Administration, will find this case inconvenient. Despite the pro forma public comment of First Vice President Fernandez de la Vega that the GOS would respect whatever decision the courts make in this matter, the timing could not be worse for President Zapatero as he tries to improve ties with the U.S. and get the Spanish public focused on the future of the relationship rather than the past. That said, we do not know if the government would be willing to take the risky step of trying behind the scenes to influence the prosecutorâ€™s recommendation on this case or what their reaction to such a request would be. CHACON

EXHIBIT B

Viewing cable 09MADRID392, SPAIN: ATTORNEY GENERAL RECOMMENDS COURT NOT

Reference ID	Created	Released	Classification	Origin
09MADRID392	2009-04-17 06:06	2010-12-01 23:11	CONFIDENTIAL	Embassy Madrid

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
RUEAHLC/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 SEPTEL, 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

EXHIBIT C

Viewing cable 09MADRID440, GARZON OPENS SECOND INVESTIGATION INTO ALLEGED

Reference ID	Created	Released	Classification	Origin
09MADRID440	2009-05-05 15:03	2010-12-01 23:11	UNCLASSIFIED//FOR OFFICIAL USE ONLY	Embassy Madrid

VZCZCXRO6630
RR RUEHAG RUEHAST RUEHDA RUEHDBU RUEHDF RUEHFL RUEHIK RUEHKW RUEHLA
RUEHLN RUEHLZ RUEHNP RUEHPOD RUEHROV RUEHSK RUEHSR RUEHVK RUEHYG
DE RUEHMD #0440/01 1251534
ZNR UUUUU ZZH
R 051534Z MAY 09
FM AMEMBASSY MADRID
TO RUEHC/SECSTATE WASHDC 0590
INFO RUEHZL/EUROPEAN POLITICAL COLLECTIVE
RUEHLA/AMCONSUL BARCELONA 3971
RUCNFB/FBI WASHDC
RUEAWJA/DEPT OF JUSTICE WASHDC
RHEHNSC/NSC WASHDC

Tuesday, 05 May 2009, 15:34
UNCLAS SECTION 01 OF 02 MADRID 000440
SENSITIVE
SIPDIS
FOR EUR/WE, ALSO FOR L/LEI AND CA/OCS, DOJ FOR BRUCE SWARTZ
AND PAT REEDY
EO 12958 N/A
TAGS AORC, PREL, CASC, CJAN, PTER, PGOV, PHUM, PINS, SOCI,
KCRM, KJUS, SP
SUBJECT: GARZON OPENS SECOND INVESTIGATION INTO ALLEGED
U.S. TORTURE OF TERRORISM DETAINEES
REF: A. MADRID 392 B. MADRID 393 C. 08 MADRID 1280
MADRID 00000440 001.2 OF 002
¶1. (SBU) Summary: Spanish National Court (Audiencia Nacional) investigating judge Baltasar Garzon has announced he will pursue an investigation into allegations the U.S. tortured terrorism detainees at Guantanamo. He has yet to name any targets of his investigation. This comes days after he was forced to give up a related complaint filed by an NGO against six Bush Administration officials (ref a). At the urging of Spanish prosecutors, the earlier case was reassigned to another National Court judge who now appears to be trying shelve the case. The Chief Prosecutor for the National Court tells us he will also fight Garzon's latest move. Nevertheless, we suspect Garzon will wring all the publicity he can from the case unless and until he is forced to give it up. End summary.
¶2. (U) Garzon bowed to arguments by Spanish prosecutors and April 17 forwarded to National Court docketing authorities a case recently filed against six Bush Administration officials (ref a). That case was duly assigned to investigating judge Eloy Velasco. We learned 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. He also offered to transfer the proceedings to the U.S. under the MLAT. We are waiting for a copy of Velasco's ruling and will advise further when we receive it. Meanwhile, Garzon announced April 29 that he was commencing a separate investigation into alleged U.S. torture of terrorism detainees.
¶3. (SBU) LEGATT and Embassy FSN Legal Advisor met May 4 with National Court Chief Prosecutor Javier Zaragoza (protect) to discuss Garzon's latest move. Zaragoza said he had challenged Garzon directly and personally on this latest case, asking if he was trying to drum up more speaking fees. Garzon replied he was doing it for the record only and would let it die. Zaragoza opined that Garzon, having gotten his headline, would soon drop the matter. In case he does not, Zaragoza has a strategy to force his hand. Zaragoza's strategy hinges on the older case in which Garzon investigated terrorism complaints against some Guantanamo detainees. In connection with those earlier investigations, Garzon ordered the Spanish police to visit Guantanamo and collect evidence against the suspected terrorists. Zaragoza reasons that he can use this fact to embarrass Garzon into dropping this latest case by suggesting Garzon in some sense condoned the U.S. approach to detainee issues circa 2004. Garzon took no action in 2004 when the suspects returned to Spain and reported to him their alleged mistreatment. Zaragoza said that if Garzon could not be shamed into dropping the case, then he would formally recommend Garzon do so and appeal if Garzon ignored him.
¶4. (SBU) Key to Zaragoza's plans is the fact that there is yet another Guantanamo-related case underway in the National Court. That case relates to so-called CIA flights carrying detainees to Guantanamo via Spain and is being heard by investigating Judge Ismael Moreno (ref c). The police officers whom Garzon sent to Guantanamo years ago are expected to testify before Moreno this month, and Zaragoza hopes their testimony will put on record Garzon's role in the earlier cases. (Note: In opening his most recent Guantanamo investigation, Garzon asked that Moreno turn his detainee flights case over to him; Zaragoza thought there was no chance Moreno would agree to do so. End note.) Zaragoza is also banking on the fact that Garzon is already in hot water over his excessive zeal in another case. A few months ago, Garzon opened an investigation into Spanish civil war atrocities. Garzon persisted in his investigation in the face

of all advice to the contrary from prosecutors. The case was finally wrestled away from Garzon, but there is now a criminal complaint against him in the Supreme Court, alleging abuse of authority. That complaint has the support of Spanish prosecutors. Zaragoza doubts Garzon will risk a second such complaint.
¶5. (SBU) 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
MADRID 00000440 002.2 OF 002
Spanish judicial inquires into the subject. In that regard, the Spanish press reported today that National Court investigating judge Fernando Andreu, who is handling a case against Israeli officials accused of war crimes in Gaza in 2002, has refused to drop the case despite a request from prosecutors. The prosecutors had argued that Israel was investigating the matter. In refusing to close the case, Andreu argued that Gaza was not part of Israel and thus Israeli authorities were not the ones who should be investigating crimes allegedly committed there. The press reports that the President of the Supreme Court and Spain's Judicial Council (Consejo General del Poder Judicial), Carlos Divar, is arguing for reforming the jurisdiction of the National Court to avoid having it turned into the "judicial police of the world." Zaragoza has commented to us that while many talk about limiting Spain's universal jurisdiction rules, it is unlikely politicians will act to do so.
Comment

¶4. (SBU) We believe Zaragoza is acting in good faith and playing a constructive role. Certainly he knows Garzon 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 Garzon would shut off his headline-generating machine unless forced to do so. And forcing him to do so could take months. We also fear Garzon -- far from being deterred by threats of disciplinary action -- may welcome the chance for martyrdom, knowing the case will attract worldwide attention. In any event, we will probably be dealing with this issue for some time to come. Zaragoza will be in Washington in early June for LEGATT-organized consultations on CT cooperation. L and DOJ may wish take that opportunity to discuss these cases with him directly at that time. CHACON