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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 NSC'S TOBY BRADLEY
PASS TO DOJ'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,
KLIIG, 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)

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 "universal jurisdiction" cases. Garzon has passed the complaint to the prosecutor'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

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 Bybee's staff.

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.

4. (C) The NGO is emphasizing that Spain has a duty to investigate because five 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 "The Spanish Taliban"); Lahcen Ikassrien (aka Chaj Hasan); Reswad Abdulsam; Jamiel Abdul Latif al Bana (aka Abu Anas); and Omar Deghayes. MADRID 00000347

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 NGO'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 NGO's complaint to the prosecutor's office for them to determine if there is a legitimate case.

The Complaint

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. courts' 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 it says held the February 2002 memo violated international law and President Obama's recent Executive Order on ensuring lawful interrogations.

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 NGO's goals may be to encourage the U.S. to begin judicial proceedings on this matter.

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

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 "right of first refusal," but said he will 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 said that if Garzon disregards his recommendation and takes the case, he will appeal. Zaragoza added that Garzon'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.

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 "the only way out" 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.

11. (C) On March 31 and April 1, the Acting DCM discussed the case separately with FM Moratinos' 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 "horror." 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

12. (C) Given Spain'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 "stepping-stone" strategy designed to pave the way for complaints against even more senior officials. Both the media and Post'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 NGO'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 (Garzon'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 Argentina'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 Moreno'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 prosecutor's recommendation on this case or what their reaction to such a request would be. CHACON