

COURT FOR PRELIMINARY CRIMINAL PROCEEDINGS No. 006  
MADRID

PRELIMINARY REPORT, SUMMARY PROCEEDINGS 0000134 /2009

## RULING

In MADRID April 13, 2011

## FACTS

**ONE:** These proceedings began with a complaint on March 17, 2009 presented by the Association for the Dignity of Male and Female Prisoners of Spain against MR. ADDINGTON, MR. BYBEE, MR. FEITH, MR. HAYNES, Mr. YOO and MR. GONZALEZ for alleged crimes against protected persons and goods in the event of armed conflict. After issues of assignment were resolved, it was assigned to this court which began these preliminary procedures on April 23, 2009.

**TWO:** On May 4, 2009 a ruling was issued on the proceedings, ordering that before deciding on whether the complaint was being admitted to be considered or not, International Letters Rogatory were to be sent to the United States so that it could tell this Central Court for Preliminary Criminal proceedings whether the events contained in it are or are not being investigated or prosecuted before its authorities, or whether it is going to do so, indicating the specific authority that was doing so and the specific procedure.

When the proper Letters Rogatory had been translated into English as of May 6, 2009, they were sent through the presidency of the National Court on May 14, 2009 to the Spanish Central Authority (Ministry of Justice) to be sent to the United States.

On June 2, 2009 it was ruled in the case that the result from the aforementioned Letters Rogatory should be awaited in order to rule on the request for standing in the court made as *acusación popular* by the Free Association of Lawyers, the United Left, and the Association for Human Rights of Spain.

On April 7, 2010 a reminder on complying with the Letters Rogatory was sent to the U.S., and the parties were asked to report on the impact that the modification made to art. 23 of the LOPJ might have on this case by establishing new requirements for ability to prosecute, in what has been called justice of universal prosecution. After receiving the replies from the Office of Public Prosecutor and *acusación popular* with court standing, at the urging of the Office of Public Prosecutor, another reminder of complying with the International Letters Rogatory was sent on October 18, 2010.

**THREE.-** After the gathering of various briefs from the *Acusación Popular* requesting that the complaint be admitted without waiting any more time for any reply from the International Letters Rogatory to the U.S., on the grounds that not doing so is a delaying tactic, and after procedures were carried out to check the nationality of some of the victims, the Office of Public Prosecutor asked that the International Letters Rogatory continue to be awaited and at the same time that the U.S. be asked whether it had actually appointed a special prosecutor to investigate the events that took place in Guantanamo. On March 15, 2011 there was received from the Ministry of Justice a March 1, 2011 brief from the director of the office of international relations (criminal section) of the U.S. Department of Justice (received in Spain on March 4, 2011), replying to the aforementioned letters rogatory, which is what is being considered in this ruling, after examining the report of the Office of Public Prosecutor, who, because of the matters considered therein, seeks to "reject competency to consider the facts that are the object of this procedure, due to the preferential character of the jurisdiction of the state where those deeds were perpetrated, and to rule in accordance with Article 23.4 of the LOPJ that the proceedings be temporarily stayed. It is likewise proper, in view of the request of those authorities, to apply article 19 of the bilateral treaty of mutual legal assistance in criminal matters and to send a record of everything done them for investigation into the events, as preferential jurisdiction, for the legal reasons established in the Treaty itself."

### LEGAL ARGUMENTS

**ONE:** The procedural actions must be carried out by competent bodies, and hence, without entering into considerations on the substantive grounds of the matter, what must be done first is to **examine the competency itself** (Art. 9.1 LOPJ), so that then the proper body may make the proper decision, in accordance with the principle "forum regit actum." [venue governs act]

Accordingly, having made an accusation of an alleged crime against protected persons and goods in the event of armed conflict, which according to Art. 65.1.e) LOPJ, as allegedly committed outside of the country involving the 1949 Geneva Convention and its additional protocols and the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, it is competency of the National Court, if in accordance with legislation or treaties it falls to Spanish courts to hear it, it is advisable, in view of the result of the Letters Rogatory to the US (henceforth LR) solely accepting the deeds presented in the complaint by way of hypothesis, to see whether the requirements for doing so demanded by the recently reformed Art. 23.4 LOPJ are present. On that matter the parties represented had already claimed that for crimes of this type it requires that "*in order for the Spanish courts to be able to try the foregoing crimes it must be established that:*

- *their presumed perpetrators are in Spain*
- *or there are victims of Spanish nationality,*
- *or some relevant binding connection to Spain be established*

*and, in any case that no proceeding entailing an investigation and effective prosecution, if indicated, of such punishable deeds has been initiated in another competent country or in an international tribunal."* For if that is being done, in application of the principle of subsidiarity, the criminal case initiated before Spanish jurisdiction shall be temporarily stayed, which is what must take place in this instance, not allowing the complaint to be processed, but transferring to the Department of Justice in Washington (USA) a copy of it, as requested in the LR and allowed for in article 19 of the complete text of the legal assistance agreement between the USA and the European

Union, signed June 25, 2003, on the application of the Treaty of Mutual Legal Assistance in Criminal Matters between the US and the Kingdom of Spain, signed November 20, 1990, done *ad referendum* in Madrid November 17, 2004 (BOE Jan. 26, 2010), as also the Office of Public Prosecutor likewise agrees in its most recent report.

**TWO:** Indeed, since the accused are not in Spain and the Spanish nationality of only two of the victims having been established by reference, without testimony, as found in DP 150/2009 of the JCI 5 AN and since the establishment of “significant” ties to Spain is even less open to discussion (as shown in the split votes prompted by the ruling on April 6, 2011, of the plenary of this National Court on a matter very similar to this one precisely in DP 150/2009 of JCI 5 AN) it is true that the report-reply to the LR from the US Department of Justice establishes the prosecution and effective investigation of the deeds accused in the country which has the accused at its disposition through different manners, in the diversity of comparative law, thereby making obligatory in application of the principle of subsidiarity, in view of the preferential character of its jurisdiction, the non-admittance of the complaint for purely procedural reasons, temporarily staying the case, without entering into considering further attempts at legal standing of other parties, and with the sending of what has been done to the American authorities for them to pursue them further.

Article 23.4 LOPJ does not require that a judicial procedure have been undertaken in the country of preferential jurisdiction (although in this case they do exist) but merely, but determinately (“in any case”) that a procedure have been initiated (without qualifying, inasmuch as in comparative law there also arise administrative alternatives to jurisdictional protection "entailing an investigation and effective prosecution" of the alleged deeds (legal guidance justifying the alleged abuse perpetrated against prisoners of war), as derived from the report-reply to the LR, citing:

- Report-decision on January 1, 2010 of the Deputy Secretary of Justice of the office of Professional Responsibility of the U.S. Department of Justice on those here accused, Mr. Jay Bybee and Mr. John Yoo, concluding that there is no legal basis for trying them criminally, and ruling that it was not proper to file criminal procedures against any official of the Executive, including those named in the complaint.
- Federal criminal procedures completed (David Passaro, Don Ayala) and others pending initiated by the Department of Justice having to do with abuse of prisoners.
- Administrative and criminal procedures of the US. Department of Defense: Program for prisoners of the Department of Defense, over 100 prosecutions under the Code of Military Justice with criminal penalties (see for example, US vs. Graner, US vs. Maynulet, US vs. Clagett...), internal CIA studies on treatment meted out to prisoners, etc.
- Pending investigations of the U.S. Attorney Office for the Eastern District of Virginia on abuse of prisoners.
- Study of the federal office of prosecutor for the District of Connecticut underway on accusations previously dismissed for preliminary review

- of possible violation of federal law in relation to the interrogation of particular prisoners at overseas sites.
- Measures and reports of the U.S. Congress on treatment given to prisoners deprived of freedom by the U.S.

**THREE:** Since the report-reply of the LR states that “United States is clearly competent to process this accusation, it requests that it be sent the criminal complaint so that the U.S. authorities may continue studying it, and investigating it,” in accordance with what is stated in article 19 of the full text of the Agreement on Legal Assistance between the U.S. and the European Union, signed June 2003, on the application of the U.S.-Spain Treaty on Mutual Legal Assistance in Criminal Matters, signed November 20, 1990, done *ad referendum* in Madrid on December 17, 2004 (BOE 26/01/2010), it is proper to do so, after it is translated into English, which among other things obliges the U.S. to notify Spain of “the steps taken by virtue of that request.”

**FOUR:** The Supreme Court resolved a similar matter along the same lines in April of last year when it confirmed for these reasons the filing of the judicial investigation that Central No. 4 of this National Court was holding because of the attack by Israel on the Gaza Strip on July 22, 2007 upon establishing the existence of a military (non-judicial) investigation of the case, although it ended up being filed away by the Office of Prosecution of Israel, concluding, in the judgment of the division of the National Court, that the Israeli state had carried out a “real and true process,” both administrative and judicial, to investigate those events.

Upon examination of the aforementioned legal provisions and others of general and relevant application.

## **RULING**

**I ORDER:** That the case be temporarily stayed, not allowing the complaint to proceed, there being no need to pronounce on further efforts at standing in court by other parties, providing for timely transfer of it, duly translated, 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.

Thus ruled, ordered, and signed by ELOY VELASCO NUÑEZ, MAGISTRATE JUDGE of Court for Preliminary Criminal Proceedings no. 006 of MADRID.- In witness whereof.

MAGISTRATE JUDGE

PROCEDURE. What is ordered is carried out at once. In witness whereof.