Stuttgart Regional Appeals Court

Criminal Panel 5

Decision

of 21 April 2009

In the matter of the complaint by

1. Ahmed Hassan Mahawis Derweesh

2. Abdul Hafeeth Sha'alan Hussein

3. Abdulkareem Hussain Ma'roof

5. Umer Abdulkareem Hussein

6. Ali Abdulkareem Hussein

7. Ibraheem Jebar Moustafa

8. Faisal Abdualah Abdualatif

9. Ahmed Salah Nouh

10. Mufeed Abdul Ghafoor Al-Ann

11. Buthaina Khalid Mohammed

12. yousif Mahmood Abdulkarim Al-Jubori

13. Mohamed al Qahtani, represented by his lawyer Gitanjali Gutierrez, Center for Constitutional Rights, Broadway 666, 10014 New York, USA

Represented by Attorney Wolfgang Kaleck,

10405 Berlin, Immanuelkirchstrasse 3-4

against

1. the former Secretary of Defense of the United States of America, Donald H. Rumsfeld, 23946 Mount Misery Road, St. Michels, MD 21663-2522, USA

2. the former Director of the Central Intelligence Agency (CIA), George Tenet, 10312 Bells Mill Terriver Rd., Potomac, MD 2084, USA

3. the former Undersecretary of Defense for Intelligence, Stephen Cambone, last known address 1000 Defense Pentagon, Washington, DC 2031-1000, USA

4. Lieutenant General Ricardo Sanchez, last known function and address; Commanding General, 5th Corps, Romestrasse 168, 69126 Heidelberg, Germany

5. now retired Major General Geoffrey Miller, private address unknown.

6. Major General Walter Wojdakowski, last know function and address: 5th Corps, Romestrasse 168, 69126 Heidelberg, Germany

7. Colonel Thomas Pappas, last known function and address: Brigade Commander of the 205th Military Intelligence Brigade, Army Airfield, Wiesbaden, Germany

8. Major General Barbara Fast, last known function and address: Commanding General US Army Intelligence Center and Ft. Huachuca, Attn: ATZS-CG, Fort Huachuca, AZ 85613-6000, COM: 520/533-1140, USA

9. Marc Warren, last known function and address: Center for Military Law and Operations, United States Army, Rosslyn, VA, Office of the Judge Advocate General, Attn: DAJA-IO, 1777 North Kent Str., 11th Floor, Rosslyn, VA 22209-2194, USA, or 5th Corps, Romestrasse 168, 69126 Heidelberg, Germany

10. former Attorney General of the United States of America Alberto Gonzales, last known address; U.S. Department of Justice, 950 Pennsylvania Ave., NW, Washington, DC 20530-0001, USA

11. William J. Haynes, II, General Counsel, Department of Defense, 1600 Defense Pentagon, Washington, DC, 20301-160, USA

12. David S. Addington, The White House, 1600 Pennsylvania Avenue NW, Washington, DC 20500, USA

13. John Yoo, Professor of Law, U.C. Berkeley School of Law, 890 Simon Hall, Berkeley, CA 94720, USA

14. Jay Bybee, 9th Circuit U.S. Court of Appeal, 95 Seventh Street, San Francisco, CA 94103 USA

On the charge of war crimes under the Code of Crimes Against International Law etc.

The motion for a court ruling on the April 26 2007 decision of the Federal Prosecutor Gneral at the Supreme Court is

rejected

as inadmissible.

Reasons

I.

On November 14, 2006, the attorney of record, Attorney Kaleck, filed charges with the Federal Prosecutor General in Karlsruhe, first—also in the name of a large number of organizations—for complainants no. 1 to 11 and 13, later augmented in a brief on 8 December 2006 by complainant no. 12, against the 14 US citizens named in the brief with the accusation that, as civil or military superiors of direct actors, they were responsible for mistreatment of prisoners in the detention camp at Guantanamo Bay, Cuba and the prison camp Abu Ghraib, Iraq, especially in the years 2002 to 2004. They therefore had to face charges before German courts for war crimes under §§ 4, 8, 13 and 14 of the German Code of Crimes Against International Law and other domestic criminal provisions, in conjunction also with treaties binding on the Federal Republic of Germany.

In an order of 26 April 2007, the Federal Prosecutor General at the Federal Supreme Court informed the complainants' attorney of record that pursuant to § 153 (f) (1) sentence 1 his criminal complaint would not be considered and that no investigation would be initiated. His rationale was based essentially on the fact that the crimes charged were foreign acts. According to the senior legal advisor at the department of foreign law of the headquarters of US land forces in Europe, none of the persons named in the complaint as having residency in Germany were still stationed or otherwise present in the country. Nor could they be expected to be present in the near future. Therefore, despite the applicability of the universality principle, there was no room for action by German investigative authorities. There was no reason to expect that the accused could be tried in

Germany or that an appreciably successful investigation could be carried out to prepare a later criminal prosecution.

The response by the complainant's attorney of record on 22 June 2007, which called for fuller consideration of the universality principle, was rejected by the Federal Prosecutor in a decision dated 11 August 2007.

In a brief of 30 October 2007, Attorney Kaleck, on behalf of the complainants, petitioned the Frankfurt am Main Regional Appeals Court for a court ruling. The Federal Prosecutor moved that the petition be rejected as inadmissible.

II.

1) The Stuttgart Regional Appeals Court has subject matter and venue jurisdiction to decide this motion.
Subject matter jurisdiction is derived from § 172 (4) sentences 1 and 2 of the Code of Criminal Procedure [StPO] in conjunction with § 120 (1) no. 8 of the Constitution of Courts Act [GVG].

Venue jurisdiction is derived for the defendants Sanchez, Wojdakowski and Warren (accused persons nos. 4, 6 and 9) from § 8 (1) StPO, in conjunction with §9 (1) sentence 2 of the Federal Civil Code [BGB]. These are members of the military whose last posting within the country is said to have been Heidelberg.

Insofar as the criminal complaint concerns the persons named in the motion as nos. 1-3, 5, 8 and 10-14, the Federal Supreme Court determined in a decision of 12 February 2009 that the Stuttgart Regional Appeals Court has jurisdiction over the complainants' motion. On 13 March 2009, the Federal Prosecutor linked this case to the case against the accused Pappas (accused person no. 7), whose last location within the country is said to be Wiesbaden, due to related subject matter under § 13 (1) StPO.

2) The motion was made in timely fashion, as the Federal Prosecutor's determination, which found an appeal inadmissible, did not include an explanation of rights of appeal.

III.

To the extent the petition for a court ruling not only seeks the institution of a public suit against the accused, but also, alternatively, the initiation of an investigation by the Federal Prosecutor it need not be determined whether this alternative goal can be achieved at all in mandamus proceeding [*Klageerzwingungsverfahren*] (see Meyer-Gossner, StPO, 51st ed., note 2 to § 175, and KK-Schmid, StPO, 6th ed., note 3 to § 175 with additional cites). The question may also remain undecided whether the motion regarding the charged acts sufficiently meets the pleading requirements of § 172 StPO or improperly assumes knowledge of the criminal charge and other submissions from which the Panel would itself have to compile a sufficiently concrete set of facts regarding the individual defendants and victims. The petition is inadmissible for the following reasons:

1) Insofar as it concerns the non-prosecution of crimes under the Code of Crimes Against International Law, the implementation of a mandamus proceeding is inadmissible due to unobjectionable application of § 153(f) StPO by the Federal Prosecutor (§172 (2), sentence 3, last clause, StPO in conjunction with § 153 (f) StPO).

a) § 172 (2) sentence 3, last clause StPO explicitly rules out a mandamus proceedig in cases in which the prosecutor has decided not to prosecute the crime under §§ 153(c) to 154 StPO. The rule continues unchanged since its last amendment in a law of 20 December 1999 (BGBl. I p. 2491). Neither in the simultaneous introduction of the Code of Crimes Against Criminal Law and § 153 (f) StPO on 26 June 2002 (BGBl. I p. 2254) nor at later opportunities did the legislature amend the rule in § 172 StPO. The Panel does not consider justified the argument that this was simply an inadvertent omission due to lack of time. Instead, it stands by its prior jurisprudence and assumes the legislature made a conscious decision (see Panel decision of 13 September 2005, published in NStZ 2006, 117 et seq., and Panel decision of 27 March 2008).

b) The Federal Prosecutor correctly confirmed the legal requirements of § 153(f) (1) StPO as applied and did not exceed the scope of the suspension norm.

§ 153(f)(1), sentence 1, StPO provides the prosecutor the opportunity to refrain from initiating an investigation for foreign acts under § 153 (c)(1)(1) or (2) StPO or if the accused are not present in the country and cannot be expected to be. That is the case here.

aa) The acts imputed to the accused in the period after 30 June 2002 that can be judged under §§ 4 to 14 of the Code of Crimes Against International Law were all committed abroad, according to the charges, specifically in Cuba, Iraq or the United States. Within the territorial scope of this law, neither the places where the acts occurred nor where they produced their effects have been substantiated under § 9 of the Criminal Code (StGB). It is not evident that the offenses in question that harmed the complainants were ordered, prepared or planned in Germany. The mere stationing of US troops is, contrary to the view of the attorney, no more a preparation of the charged war crimes than is the guarding of US military installations in Germany by German soldiers that results in making US soldiers available for deployment to Iraq. There is no factual evidence that American soldiers in Germany were specifically trained in the use of so-called enhanced interrogation methods, including torture. A generally "inadequate" training of soldiers in regard to international humanitarian law, as alleged, would have insufficient connection to concrete actions. The same is true of the concession of overflight rights, the permission of stopovers on German soil, and the use of German nationals in training Iraqis abroad.

bb) To assume a sojourn in the country, the decisive factor is the presence of a suspect that is ongoing, but not already ended, at the time of the assessment. A possible future presence in the country must be supported by concrete evidence. This is not the case if the suspect has no ties or relationships at all of a professional, personal or family nature to Germany. The ascertainment or assessment of such evidence is solely within the discretion of the prosecutor (Beulke, in Löwe-Rosenberg, StPO, 26th ed., § 153 (f) note

16). Contrary to the view of the complainants, however, the expectation of a suspect's future sojourn in the country cannot be based simply on the fact that it cannot be ruled out. A sojourn in the country can only be expected if actual circumstances exist that suggest a presence in Germany within the foreseeable future.

According to information obtained by the Federal Prosecutor from the European headquarters of the US land forces, none of the persons named in the complaint as having residency in Germany are still stationed in the country or otherwise present there, and their presence is not to be expected in the future. As this information was provided by a person in a leadership position, specifically the senior legal advisor, the Federal Prosecutor can consider it sufficiently certain and may base his decision on it, contrary to the view of the complainants' lawyer. In the view of the Panel, an additional formal request to the US for legal assistance is not necessary. The prosecutor could even have limited his investigative efforts on the question of residency to data available within the country (see also LR-Beulke, op. cit., § 153 (f) StPO, note 16).

With respect to the complainants' attorney's statement that the former US Secretary of Defense, Donald Rumsfeld, is regularly present in Germany for conferences and meetings, along with numerous other high-level former US politicians involved in foreign and defense affairs, this concerns in part events that lie in the past, and in part—as with the accused Gonzales in May 2007—invitations under § 20 (1) GVG, which exempts foreign representatives from German jurisdiction. It cannot be ruled out that such visits will take place in the future even after the change of government in the US, but no

concrete evidence of this exists. When the attorney refers to the business and corporate activities of various accused, these in some cases lack the necessary domestic link under § 153 (f)(1), sentence 1, StPO, while in some cases the assertion consists of nothing more than general, unsubstantiated claims.

c) The Federal Prosecutor exercised the discretion granted him within the framework of § 153(f) StPO without committing any errors of law. He undertook a careful assessment, appropriately considered all important points of view, and did not arbitrarily exceed his discretion. The court is not authorized to undertake a more extensive review under §172 (2), sentence 3, in conjunction with § 153(f) StPO (see the above-cited Panel decisions, LR-Beulke, op. cit., §153(f) note 45, Meyer-Gossner, op. cit., § 153(f) note 10). The actual discretionary decision, that is, discretion in the narrower sense, is not justiciable.

Since the Federal Prosecutor's contested decision rests on the basic constellation of §153(f) StPO, specifically paragraph 1, sentence 1 of this provision, as a result of the lack of any domestic linkage, it is not necessary to decide whether there is a case for non-prosecution according to paragraph 2 of this provision. In particular, the question can remain open whether the acts charged were sufficiently prosecuted by other states. The Federal Prosecutor did not, in any case, fail to recognize in his assessment that a fundamental argument exists for carrying out investigations from the point of view that the broadest possible worldwide prosecution of crimes against international law should be ensured, and that he must take account of the consequences arising from the applicability of the universality principle.

However, no fault can be found when he counters this with the argument that, in the instant case, no prospect exists of comprehensively investigating the acts from Germany and actually bringing the accused before a court here. The reference to the problematic legal and security situation in Iraq and the fact that no cooperation can be expected from the US within the framework of legal assistance requests concerning the facts alleged and the high-level defendants appears justified, and causes the decision to refrain from bringing proceedings to seem not at all arbitrary.

2) With respect to the attorney for the complainants charge that the acts constituting crimes under international criminal law also constitute crimes under §§ 221 et. seq., 223 et seq., 239 et seq. StGB in conjunction with § 6 no. 9 StGB and the UN Torture Convention, as well as Art. 129 of the Third Geneva Convention on the Treatment of Prisoners of War this concerns the very same acts since 30 June 2002. They are covered in their entirety by the non-prosecution decision.

3) To the extent the petition of 30 October 2007 is also directed at the initiation of a public prosecution or the undertaking of investigations regarding acts charged to have been committed before the Code of Crimes Against International Law came into force, the petition is also inadmissible for lack of jurisdiction on the part of the Federal Prosecutor to prosecute these charged acts.

The petition must therefore be denied.

Rebsam-Bender

Presiding judge of the

Regional Appeals Court

Dr. Grünberg

Judge of the Regional Appeals Court

Dr. Wagner

Judge of the Regional Appeals Court

Prepared

Stuttgart, May 4, 2009

Documentary Clerk of the Regional Court of Appeals

s/Kwinton, Senior Justice Secretary