

****** UNOFFICIAL TRANSLATION ******

(Special Thanks To: Deborah Popowski, Harry Anduce, and Scott Horton)

Proceedings: Preliminary Investigations 150/09--N

Offense: Torture and others.

CENTRAL COURT FOR PRELIMINARY CRIMINAL PROCEEDINGS

NUMBER FIVE

NATIONAL COURT

MADRID

DECISION

IN MADRID, THE TWENTY-SEVENTH OF APRIL, TWO THOUSAND AND NINE.

FINDINGS OF FACT

FIRST. - Indictment 25/03 was initiated in this Court against Hamed Abderrahman Ahmed, Ikassrien Lahcen, Jamiel Abdul Latiff Al Banna and Omar Deghayes for alleged offenses of Involvement in the Terrorist Organization Al Qaeda.

- 1) Subsequently, the Criminal Division of the National Court handed down a sentence on 10/04/05, condemnatory against the first of those cited above (Hamed Abderraman Ahmed), even though the sentence of the Supreme Court dated 06/22/06 annulled [the lower court decision], acquitting the indicted party.

- 2) In the second case (Ikassrien Lahcen), the Criminal Division of the National Court handed down a sentence on 10/10/2006, acquitting the indicted party.
- 3) and 4) In the case of Mr. Al Banna and Mr. Deghayes, this Court issued European Orders for Detention dated 05/24/04, orders that were repeated on the 14th and 19th of December 2007 before the imminent arrival in the United Kingdom of said indicted parties, obtaining their detention with the object of extradition.
- 5) Finally, on March 5, 2005, based on suitable medical reports, a decision was handed down by which the Decision dated 12/26/03 for provisional imprisonment was rendered invalid, cancelling the European Detention Orders for Mr. Al Banna and Mr. Deghayes dated 12/19/07, and the case was concluded by passing it up to the Court, which started proceedings under its files.

SECOND. - On 03/23/09, the case was re-opened by transferring it to the Ministry of Public Prosecution, which, on 04/17/09, reported on what is referred to as the object of this case, "..., 2. *Without prejudice to the claim that the acts, as alleged and within the framework of the adopted executive decisions, would constitute crimes under our criminal code of offenses against persons or assets protected in situations of armed conflict (arts. 608 et seq. of the Penal Code).....*" *"the only judicial body with jurisdiction to decide on facts that impact as passive subjects of the crime those who were originally charged by the Investigating Court for crimes of terrorism during their imprisonment at Guantanamo (Hamed Abderramam Ahmed, Lahcen Ikassrien, Jamil Abdullafit Al Bamma and Omar Deghayes), is the Central Court for Preliminary Criminal Proceedings Number Two of the National Court."*

THIRD. - On 04/17/09, it was resolved to remit the findings to the Senior Member of the Central Court for Preliminary Criminal Proceedings of this National Court, the dispatch taking place on 04/23/09, once the evidence was on record, for its distribution, by proceedings having been sent to this Court, which is responsible for the procedure for handling an inference of extraordinary evidence of indictment 25/03, in accordance with Distribution Rule Four, which says in subsection 3 that: *"[For proceedings] that have been initiated due to extraordinary evidence adduced in any of the Central Courts for Preliminary Criminal Proceedings, it is the Court hearing the case that has given rise to the release of the evidence in question that shall carry out the investigations."*

The "DAN" (a computerized registration number) was requested so as to electronically register the case, which was obtained on 04/24/09, by assigning it Preliminary Investigation Number 150/09.

FACTS

FIRST. — Hamed Abderraman Ahmed, Lahcen Ikassrien, Jamiel Abdulatif Al Banna and Omar Deghayes, at different times, either in their testimonies during the investigation and in the court decisions, in the first two cases, or through the physicians that attended to them in the last two cases, alleged that they had suffered various acts of physical or psychological aggression on their persons, all under the authority of American military personnel to whom they had been handed over following their detainment in the respective locations where these acts occurred (Afghanistan, Pakistan or Gambia).

Since October 7, 2001, the United States has been at war with Afghanistan, having occupied its territory with U.S. troops.

SECOND. - HAMED ABDERRAMAN AHMED, a Spanish citizen, fled, together with others, from Afghanistan after said military action, and in November 2001 was captured in Pakistan and held there for two months by that country's soldiers. From Peshawar, he was transferred by American military forces to a prisoner camp in Kandahar (Afghanistan), where he remained approximately one month until his transfer at the end of January 2002 to the detention camp at the military base under US jurisdiction in Guantanamo (Cuba).

Since his capture, and in his testimonies, he relates having been subjected to ill-treatment, physical violence and humiliating and inhumane treatment. Specifically:

1) The cell in which he was confined at the so-called Camp X-Ray at Guantanamo left him little more than a half-meter by half-meter of space to move in;

2) For almost one year, they only allowed him and the other inmates (who, at that time, numbered in the several hundreds), to leave his cell for 15 minutes two times a week.

3) He suffered constant interrogations without legal counsel during his detention.

4) The cells were made of iron at the so-called Camp Delta, and of a metal mesh, like chicken wire, at Camp X-Ray, which intensified the heat on the detainees.

5) The cells were permanently (day and night) lit with electric lights, which produced vision and sleep disorders.

6) They constantly played loud music (American patriotic songs), intensified through loudspeakers.

He was handed over to Spain on February 13, 2004 and acquitted by the Supreme Court.

THIRD. — LHACEN IKASSRIEN, a Moroccan citizen and resident of Spain for more than 13 years, was detained in November 2001 in Afghanistan and was transferred by American military forces from Kandahar to Guantanamo (Cuba) on 02/06/02. As he testified in Spain, they never explained to him why he had been deprived of freedom. During his stay at the American military base in Guantanamo, he allegedly:

1) Was subjected to ill-treatment and threats.

2) Was subjected to interrogations without the presence of an Attorney.

3) Was isolated in a cell for a long time.

4) Received blows to his testicles.

5) He relates that they inoculated him through injection with “a disease for dog cysts.”

6) The cell in which he remained was very white in color and constantly lit, which kept him from sleeping sufficiently and affected his vision.

7) They introduced into the cell very cold air and chemical substances that affected his breathing and joints.

He was handed over to Spain on July 18, 2005 and acquitted by the Criminal Division of the National Court.

FOURTH. - JAMIEL ABDELATIF AL BANNA, a Palestinian citizen, was detained by American military forces in November of 2002 in Gambia, transferred to Afghanistan, and then held at the US military base of Guantanamo (Cuba) from January of 2003 to December of 2007.

During this entire period (almost 5 years) he did not have access to any of the guarantees recognized for detainees. Before arriving at Guantanamo, he was subjected to various physical and psychological attacks and ill-treatment, as well

as insults and humiliations; he received strong blows to the head with a loss of consciousness, endured detention underground in total darkness for three weeks with deprivation of food and sleep, and, forced him to witness torture carried out on other prisoners in Afghanistan.

Allegedly, once at the Guantanamo Military Base, Mr. Al Banna:

- 1) Was subjected to some one thousand interrogations in sessions lasting from 2-10 hours per day, including twice per day, at any hour of the day or night, in conditions of extreme heat or cold, held by shackles on the hands and feet (wrists and ankles), in forced positions, seated on the floor with his body doubled forward and with pressure from the interrogators on his back to increase the pain until it made him scream and rendered him unable to stand upright on his feet for several hours afterwards.
- 2) For months, during the continuous interrogations, he received only punishment, without even being asked any questions.
- 3) He was subjected to threats of death by poisoning or by drowning in the sea, which produced a state of helplessness and despair in him.
- 4) They subjected him to humiliating and degrading treatment, such as, treatment degrading to his Islamic religion, stripping him of his clothes until he was naked, sexual provocations during interrogations, relating these types of practices in front of other detainees.
- 5) He was under a regimen of total isolation for one year, permanently bound with shackles, subjected to continuous harassment and disturbances in 10-minute intervals for several hours, day and night, which kept him from sleeping; he was subjected to heavy, repeated blows on the doors of the cells and activation of machines next to the cell which made constant noise.
- 6) They subjected him to conditions of extreme cold or heat through the air conditioning system; to constant exposure to extremely loud music; to a very strong smell of disinfectants, either through the air conditioning or through their direct application to the floor, causing him coughing fits and respiratory problems.
- 7) Any act of resistance or lack of cooperation was treated with overwhelming force by the team known as "Emergency Reaction Force (E.R.F.)." In one of these attacks, Al Banna suffered injuries to the ring finger of his right hand, left side of his forehead and the back part of his left knee.
- 8) His confinement in cages of galvanized wire fencing produced asthenopia (eyestrain) in him and in other prisoners, to the point of rendering him incapable of reading.

FIFTH. - OMAR DEGHAYES, a Libyan citizen, was detained in Lahore (Pakistan) in April of 2002, where he remained for one month, tied and subjected to death threats, kicking and punching, witnessing the torture of other prisoners with pins stuck in their flesh; as well as the death of one of these [prisoners]; threats to his family; systematic beatings; whipping with a strip of fine wood or with canes on a table with his head tied down, and electric shock.

Next, he was subjected to similar treatment in Islamabad, with torture consisting of dunking his head into water in a drum 6 or 7 times until he almost felt drowned; stress postures, such as keeping his head down all night (by doing a handstand).

Later he was moved to Bagram (Afghanistan) under American control. There they placed bags on his head and coverings on his ears, which distorted any external sound; prolonged interrogations, suspension by his arms handcuffed behind his back until they were elevated above his head with a risk of dislocation; placing of a black bag over his head; restrictions of feeding; kept in dark rooms with no lighting; as well as inside a closed box with a lock and limited air; he was subjected to repeated beatings; and he was kept nude, as part of the process of humiliation due to his religion.

Once at Guantanamo (September 2002 until December 2007) he was allegedly subjected to:

- 1) A sexual attack in March 2004 by the Emergency Reaction Forces (E.R.F.).
- 2) Being sprayed in the eyes with mace by soldiers in March 2004, which caused him agonizing pain that kept him from seeing clearly for two weeks, to the point of not recovering any vision in his right eye.
- 3) Complete isolation for long periods.
- 4) Degrading treatment consisting of smearing feces and dunking his head underwater by guarding soldiers;
- 5) Blows by the members of the ERF to the knees and nose.
- 6) Restraint by means of shackles on his feet, hands and head at the order of the ERF team members.
- 7) Pressurized introduction of water through the nose until there was a sensation of drowning. All this in the presence of medical personnel on at least three occasions.

8) The ERF team sprayed Mr. Deghayes with mace; they threw him in the air and let him fall on his face, all in the presence of ERF personnel.

9) Up to 15 people attempted to commit suicide at Camp Delta due to the abuses of the ERF officials.

10) They subjected him to total or partial nudity, against the rules of Islam, which prohibits such extreme conduct.

11) He remained incommunicado at Camp V with a sheet, a blanket and a mattress.

12) Fracture of his right index finger by an American soldier.

13) Multiple interrogations without advice of counsel for hours per day, including twice a day, or at any time of the day or night, under conditions of extreme cold and heat, immobilized by shackles on his wrists and ankles.

14) Being kept in solitary confinement under very adverse conditions through harassment, sleep interruptions, and constant slamming of walls and doors.

15) Changing the air conditioning to create extreme cold or heat for long periods of time.

16) Playing of music at very high volumes.

17) They did not provide him with medication to alleviate the ailment to his right eye causing him to lose it.

18) Breaking of his nose due to blows by the guards.

FIFTH. — On February 18, 2008, medical reports were received for each Mr. Albania [sic – Tr.] and Mr. Ikassrien, signed by the doctors Jonathan Derek Fluxman and Helen Bamber, in which an opinion was given, with respect to Jamiel ABDULLATIF AL BANNA, that he has suffered from:

- . Post Traumatic Stress Disorder.
- . Severe Depression.
- . Non-insulin dependent diabetes mellitus.

- . Hypertension.
- . Lumbar pain and arthrosis of the wrists and knees.
- . Injury of the left posterior knee.
- . Nasal obstruction.

and with respect to Omar DHEGAYES, that he suffers from

- . A PTSD complex.
- . Profound depression.
- . Blindness of the right eye.
- . Fracture of the nasal bone.
- . Fracture of the right index finger.

The cited reports have been analyzed by the forensic physicians Dr. Syra A. Peña López and Dr. Jose Luis Miguel Pedrero, who have given the opinion that the physical consequences of Jamiel ABDULLATIF AL BANNA and Omar DEGHAYES cannot be disputed and that the psychological ones appear perfectly related to the events that have been related; that the situations of post traumatic stress and the depressive syndrome indicate a before and after in the life and psyche of the affected parties. Recovery is uncertain and in many cases impossible or over a very long period, and in this case, the stresses only ended just two months ago. They conclude their forensic reports stating that they are in agreement with the medical quality of the medical reports brought in connection with the reported facts, with what has been examined, and with the current state of science as far as the treatment that they must follow and the prognosis.

LEGAL REASONING

FIRST. — These acts described, as well as those by persons who would bear the responsibility as material or intellectual authors, who would have held under their guard and custody the detainees, and who would have authorized or performed the acts described, could constitute several violations of Articles 608, 609 and 611 (3 *in fine*) and (7), in relation to Articles 607-bis (1), 8 and 173 of the Spanish Penal Code, in relation to the Geneva Convention on the treatment of prisoners of war and protection of civilians, dated 8/12/1949, the Convention

Against Torture and Other Cruel, Inhumane or Degrading Treatments or Punishments, dated 12/10/84, ratified by Spain on 10/19/87, the European Convention for the Prevention of Torture and Humane [sic – Tr.] and Degrading Treatment and Punishments, dated 11/26/1987, ratified on 5/2/89 and Articles 65(1)(e) and 23(4) of the Framework Law for the Judicial System (*Ley Orgánica del Poder Judicial*), All of them being members of the American military or intelligence, as well as all those who executed and/or devised a systematic plan of inhuman and degrading torture or ill-treatment against the prisoners held in their custody, captured within the framework of the declared armed conflict in Afghanistan, and accused of terrorism.

SECOND. — As it appears to follow from the documents declassified by the US government which have been mentioned in the mass media and in this case (although as of yet not produced, such that they must be requested), what was only guessed before has now been revealed: an approved systematic plan of torture and ill-treatment on persons deprived of their freedom without any charge and without the basic rights of all detainees as set out and required by applicable international treaties.

This systematic plan may point to the existence of a coordinated action for the commission of a multiplicity of torture crimes against persons deprived of freedom at Guantanamo and other prisons, among them Bagram (Afghanistan) – a plan that would seem to approximate an official level and that, therefore, would give rise to criminal liability for the various schemes of committing, ordering, designing, and authorizing this systematic plan of torture, more so if one takes into consideration the doctrine of the Supreme Court expressed in Ruling 829/2006 by the Second Tribunal, dated June 22, 2006, the majority opinion writer, the Honorable Dr. Joaquín Giménez García, in the case of Hamed Abderrahman Ahmed, who in his Fifth Legal Finding says: “... **the detention of hundreds of people, among them the appealing party, without charges, without guarantees and therefore without control and without limits, at the Guantanamo base maintained by the United States military, constitutes a situation that is impossible to explain, much less justify, from the legal and political reality in which it is found embedded.**”

“One could well say that Guantanamo is a veritable “limbo” in the Legal Community defined by a multitude of Treaties and Conventions signed by the International Community, making it a perfect example of what some scientific doctrine has defined as “Criminal Law for the Enemy.” This criminal law for the enemy, as opposed to the criminal law for citizens, would be reserved for those who would be considered responsible for attacking or endangering the bases for coexistence and for the Rule of Law...”(Fifth Legal Finding from STS No. 829/06, majority opinion writer the Honorable Dr. Joaquín Giménez García, in the case of Hamed Abderrahman Ahmed S 25/03 JCI5)

Given the facts and the doctrine cited, we find ourselves confronted with a situation of Universal Criminal Jurisdiction, according to Spanish law (Art. 23(4) of the Framework Law for the Judicial System) and the jurisprudence of the Constitutional Tribunal (unanimous “Guatemala Case” STC dated 09/26/05, later reiterated in the Falun Gong Case ruling dated 227/07 [sic – Tr.] of October 22) and by the Supreme Court on 12/11/2006 (the “Couso case”).

Therefore, and given the articles of general application

I ORDER

1. The initiation of Preliminary Investigations with number 150/2009 for alleged violations of Articles 608, 609 and 611, in relation to Articles 607-bis and 173 of the Penal Code, against the possible material and instigating perpetrators, necessary collaborators and accomplices of said violations.
2. To submit an official notification to the Central Court for Preliminary Criminal Proceedings No. 2 such that, prior to its carrying out other investigations, it reports and remits, if appropriate, to this Court, and with the purpose of resolving the motion by the Ministry of Public Prosecution regarding jurisdiction, those records that exist in relation to the specific investigation of the facts to which these investigations refer, according to the report that is found in this resolution and the transcribed testimony that is submitted with said resolution and, if applicable, in view of the same to indicate if there is any interest in raising any jurisdictional issue.

This has been resolved, ordered and signed by DR. BALDASAR GARZON REAL, MAGISTRATE/JUDGE OF THE Central Court for Preliminary Criminal Proceedings Number Five. - I attest to this.

E/

PROCESSING.- I attest that the resolved act was immediately executed.