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Press and Information

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The Advocate General's Opinion in Case C-297/07

Staatsanwaltschaft Regensburg v Klaus Bourquain

ADVOCATE GENERAL RUIZ-JARABO PROPOSES THAT THE PRINCIPLE THAT A PERSON MAY NOT BE TRIED TWICE FOR THE SAME ACT SHOULD BE EXTENDED TO A DEATH SENTENCE WHICH COULD NEVER HAVE BEEN ENFORCED

In his view, a person whose trial has been finally disposed of in one State in the Schengen Area may not be tried in another for the same acts when, by virtue of the law of the State in which the sentence was pronounced, the penalty imposed could never have been enforced

Mr Klaus Bourquain, a German citizen enlisted in the Foreign Legion, was tried for the crime of murder, found guilty *in absentia* and sentenced to death in a judgment delivered in 1961 by a French military tribunal in Algeria. That court found as fact that, while attempting to desert, Mr Bourquain shot dead another German soldier in the Foreign Legion who was trying to prevent his escape. Mr Bourquain never appeared before the military court because he fled to the German Democratic Republic.

According to the Code of Military Justice applicable in 1961, the sentence would not have been enforced if Mr Bourquain had reappeared, but a new trial would have had to be held at which he appeared and the imposition of any penalty would have depended solely on the outcome of that trial.

After the judgment of the military tribunal no other criminal proceedings were brought against Mr Bourquain either in France or in Algeria. In 2002 the Public Prosecutor's Office in Regensburg brought proceedings against Mr Bourquain in order to try him in Germany for the crime committed in Algeria.

When the new trial opened in Germany the sentence imposed in 1961 was not enforceable in France since, in addition to the fact that the sentence was time-barred, that country had abolished the death penalty, and had earlier still passed a law proclaiming an amnesty in respect of the events in Algeria.

However, the Landgericht Regensburg is uncertain whether new criminal proceedings may lawfully be brought. It asks the Court of Justice to give a ruling on the application in the Schengen Area of the principle *ne bis in idem*. In accordance with this principle, a person whose

trial has been finally disposed of in one State in the Schengen Area may not be prosecuted for the same acts in another such State when, in particular, *the penalty can no longer be enforced*.

In his Opinion delivered today, **Mr Ruiz-Jarabo takes the view that the principle *ne bis in idem* prohibits Mr Bourquain from being prosecuted again for the facts dealt with in the sentence of the military tribunal.**

First, Mr Ruiz-Jarabo considers that **the sentence *in absentia* constitutes a judgment with the force of *res judicata*** even though it was impossible immediately to enforce the resulting penalty, given the procedural requirement that new proceedings must be brought once the fugitive has been found. In that regard, he observes that the principle *ne bis in idem* requires only that the judgment should be final at the time when the second set of proceedings is brought. That took place in 2002, by which time the decision of the military tribunal had already obtained the force of *res judicata*.

Mr Ruiz-Jarabo also rejects the argument that the principle *ne bis in idem* requires that at some time in the past the penalty must have been enforceable, for what is important is that it should no longer be enforceable at the time the second set of proceedings is initiated.

Lastly, Mr Ruiz-Jarabo states that although French law does not allow the sentence to be carried out without further proceedings, that does not in any way impair the legal force of the judgment as an enforceable legal act which attaches *ipso iure* to the person and the assets of the defendant.

Mr Ruiz-Jarabo concludes that a penalty imposed by a final judgment which, because of a procedural idiosyncrasy in national law, has never been enforceable is not excluded from the protection of the principle *ne bis in idem*.

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: ES, DE, EN, FR

The full text of the Opinion may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-297/07>

It can usually be consulted after midday (CET) on the day of delivery.

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