IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
No. 2:15-MJ-1021-KS

In re REQUEST BY SPAIN FOR THE EXTRADITION OF INOCENTE ORLANDO MONTANO MORALES	)))	**CERTIFICATION OF EXTRADITABILITY & ORDER OF COMMITMENT**

This matter is before the court on an Extradition Complaint, filed April 8, 2015 [DE #1] and Motion to Certify Extradition, filed April 15, 2015 [DE #4] by the United States Attorney for the Eastern District of North Carolina, acting on behalf of the Kingdom of Spain ("Spain"), pursuant to its request for the arrest of Inocente Orlando Montano Morales ("Relator") for purposes of extradition. The court conducted an extradition hearing on August 19, 2015, at which it received evidence and heard arguments from the parties. After taking this matter under advisement, the court has carefully reviewed the submissions by the parties, the extradition hearing transcript, and the record. This matter is ripe for adjudication.

PROCEDURAL HISTORY

In October 2008, a non-profit organization based in the United States, Center for Justice and Accountability ("CJA"), along with its Spanish counterpart, filed a criminal complaint in Spain as a private "popular prosecutor" charging Relator and nineteen other former military officials from El Salvador with crimes against humanity and the "terrorist murder" of six Jesuit priests, their housekeeper, and her daughter in 1989. The criminal complaint was assigned to an investigating magistrate, Judge Eloy Velasco, and on May 30, 2011, he issued an indictment against Relator and the others for the crimes alleged, including eight counts of terrorist murder and one count of crimes against humanity. (Indictment [DE #3-2] at 73-74.) After Judge Velasco issued

a European arrest warrant for Relator identifying his residence in Everett, Massachusetts, the United States Attorney for the District of Massachusetts filed a criminal complaint charging Relator with immigration fraud based on his alleged communication of materially false statements on his application for Temporary Protective Status. *See United States v. Montano*, No. 12-CR-10044-DPW (D. Mass. 2013). On August 27, 2013, Relator was sentenced to a term of imprisonment of 21 months after pleading guilty pursuant to a written plea agreement. *See id.*

On November 4, 2011, Judge Velasco issued an order requesting that the Spanish government seek Relator's extradition from the United States. In response, the Spanish government submitted diplomatic notes to the United States in support of its extradition request. One diplomatic note, submitted in 2014, limited the scope of Spain's extradition request to the sole charge of "terrorist murder" and only as to the killings of five Spanish-born Jesuit priests following Spain's amendment of its universal jurisdiction statute.[1] (*See* Supplemental Brief Supp. Extradition, Ex. 4 to Notice of Filing of Extradition Materials [DE #3-4] at 20, n.61.)

On April 8, 2015, the United States Attorney for the Eastern District of North Carolina, on behalf of Spain, filed a complaint seeking extradition of Relator to face prosecution for "terrorist acts involving the murder of five Jesuit priests" committed on November 16, 1989, in El Salvador. (Extradition Compl. [DE #1] at 1.) The complaint identifies Articles 174 bis and 406 of the Spanish Penal Code of 1973 ("terrorist murder statute") as the coupled bases for the charge of "terrorist murder." The court issued an arrest warrant that same day pursuant to 18 U.S.C. § 3184, commencing the extradition proceedings. (Arrest Warrant [DE #2].)

[1]In 2014, Spain enacted legislation limiting its exercise of universal jurisdiction over certain crimes, including crimes against humanity. Consequently, Spain does not seek Relator's extradition on the crimes against humanity charges set forth in the indictment issued by Judge Velasco.

On April 15, 2015, Relator finished serving the term of imprisonment imposed in the Massachusetts case and was served with the extradition warrant upon his release from Rivers Correctional Institution, which is located within the Eastern District of North Carolina. Relator appeared for his initial appearance on April 16, 2015, at which time the court appointed the Federal Public Defender's Office to represent Relator and remanded him into custody pending further proceedings.

Counsel for Relator filed two motions to dismiss, the first of which was subsequently withdrawn. The second motion, which remains pending before the court, is premised upon Spain's alleged lack of jurisdiction. (Second Mot. Dismiss for Lack of Jurisdiction [DE #37].) The court conducted an extradition hearing on August 19, 2015. At the hearing, the government relied upon its documentary submissions, and counsel for Relator moved to introduce forty-four exhibits, primarily consisting of expanded content from sources cited in the government's submissions. The government objected to the admission of these exhibits, and the court took the government's objection under advisement to be considered along with the extradition case-in-chief.

STATEMENT OF THE FACTS

From the late 1970s through the early 1990s, a civil war raged in the Republic of El Salvador between its armed forces ("ESAF") and the leftist guerilla group, Farabundo Martí National Liberation Front ("FMLN"). The United States provided military training and financial assistance to El Salvador in its defense against FMLN aggression.

The ESAF had a promotion and command assignment system that operated in accordance with each year's officer training class. These classes were commonly referred to as "tandas." Members of a tanda served together throughout their ESAF careers, rising to and falling from

power as a class. The graduating officer class of 1966 to which Relator belonged was unusually large and became known as "La Tandona."

In 1989, La Tandona officers, including Relator, assumed key positions within the government of El Salvador. Alfredo Cristiani was elected President and appointed Relator as his Vice-Minister of Public Security. Relator assumed his cabinet post on June 1, 1989, along with other new appointees, including Colonel Emilio Ponce as Chief of Staff of the Estado Mayor and Colonel Guillermo Alfredo Benavides Moreno as head of the Salvadoran Military Academy. As Vice-Minister of Public Security, Relator commanded the National Police, the Treasury Police, and the National Guard. He was also charged with "authorizing and communicating the decrees, accords, orders, and motions" of the High Command, a senior military decision-making cabinet consisting of the Minister of Defense, two Vice-Ministers, the Chief of Staff, and the President.

During 1989, peace negotiations were being conducted between El Salvador and the FMLN. Father Ignacio Ellacuria, professor and rector of the Universidad Centroamericana ("UCA"), was the primary intermediary between the government and the FMLN. The FMLN conditioned any peace agreement on the removal of La Tandona from power; and the government, as expected, balked at that condition. Following FMLN demands for the removal of La Tandona from power, the Salvadoran government engaged in a public campaign to thwart the rebel group's efforts. As part of this public campaign, threats were made against FMLN leaders and sympathizers, including Father Ellacuria and other Jesuit priests, on the government's official radio station over which Relator exercised supervision.

The conflict between the Salvadoran government and the FMLN escalated in November 1989 when FMLN rebels launched an offensive targeted at the capital city, San Salvador. In response to the aggression, President Cristiani imposed a curfew from 6:00 p.m. to 6:00 a.m. and

consolidated the High Command and the Estado Mayor into the Armed Forces Joint Operational Center ("COCFA"). As a member of the COCFA, Relator exercised some decision-making authority over the ESAF. On November 9, 1989, President Cristiani invited Father Ellacuria, who had been visiting Spain, to return to El Salvador and participate in an independent investigation of a labor confederation bombing. Father Ellacuria accepted the invitation and provided his travel itinerary to the government, revealing his arrival date of November 13.

On November 11, the official government radio station broadcast threats against FMLN leaders and sympathizers, including Father Ellacuria, and accused Father Ellacuria of being an armed terrorist and an intellectual figurehead for the rebel FMLN. The next day, a military patrol conducted a search of the UCA and cordoned off the university complex, preventing unauthorized ingress or egress. During the search, no weapons were found but an unexploded device was discovered. The search of another nearby Jesuit facility, the Loyola Center, unearthed buried weapons reportedly abandoned by FMLN rebels. Then, on November 13, the Altacatl Battalion, an elite ESAF unit trained by the United States military, was directed by Relator's subordinate to conduct a second search of the university. This search was limited to housing units for the resident Jesuit priests. By this time, Father Ellacuria had returned to the UCA and was the only person permitted to enter the university premises while it was on lockdown. After the search was complete, Colonel Benavides, who was assigned authority over the Altacatl Battalion, confirmed in his report to Colonel Ponce that Father Ellacuria had in fact returned to the UCA.

On November 15, Relator participated in meetings of senior La Tandona officials who discussed the need to wage "total war" against the FMLN. At the last meeting of the day, Relator was present along with four other senior officials when Colonel Ponce issued an order to Colonel Benavides to kill Father Ellacuria. Although Colonels Ponce and Benavides were allegedly

subordinates of Relator (*see* Decl. Maria Teresa Sandoval [DE #19-1] at 8), the exact organizational structure of the officials remains dubious due to the consensus leadership approach employed by La Tandona and at least one statement in the indictment alleging Colonel Ponce was a "main leader" of the group (*see* Notice of Filing of Extradition Materials, Ex. 2 [DE #3-2] at 5.) Notwithstanding this scruple, Relator had decision-making authority, did not object to Colonel Ponce's order to kill Father Ellacuria, and disseminated information about Father Ellacuria's location in the November 15 meeting.

Upon leaving the meeting, Colonel Benavides caused an order to be delivered to the Atlacatl Battalion directing the elimination of the Jesuits. Thereafter, in the early morning hours of November 16, the order was executed, resulting in the killings of Father Ellacuria, five other Jesuit priests, a housekeeper, and her daughter. After the massacre, Colonel Benavides caused a report to be delivered to Colonel Ponce notifying him the mission was complete.

In the following days, Relator, along with other government officials and the ESAF, made efforts to conceal the responsibility of the ESAF, especially La Tandona, for the Jesuit massacre. For example, Colonel Benavides ordered the destruction of log books showing the movement of the Atlacatl Battalion on the night of the massacre. Further, an Honor Commission was established and several military personnel were arrested as part of the concealment efforts. Relator himself contributed to the concealment efforts when he threatened the wife of a witness who asked how it was possible that the government could issue an order to kill the Jesuits. Relator replied, "Do not repeat that again. Remember that this is a time of war, and in such time, anything can happen to anyone, including you." (Decl. Maria Teresa Sandoval at 11.)

Nearly two years after these events, in September 1991, a jury in El Salvador found Colonel Benavides and one other participant, Lieutenant Yusshy Rene Mendoza Vallecillos, guilty of the

murders. The judge sentenced each to thirty years' imprisonment. The jury acquitted six others, but the trial judge, as permitted under Salvadoran law, convicted one of the six of a lesser offense that carried a term of imprisonment of three years. Relator was never charged with any crimes in El Salvador in connection with the Jesuit massacre.

On January 16, 1992, at the conclusion of a negotiations process sponsored by the United Nations, the government of El Salvador and the FMLN signed a peace accord ending the civil war. A little over one year later, in March 1993, the government of El Salvador enacted an amnesty law which applied to crimes committed by members of both the ESAF and the FMLN. As a result of the amnesty law, Colonel Benavides and Lieutenant Mendoza were released from prison after having served approximately fifteen months of their thirty-year sentences.

COURT'S DISCUSSION

When presented with a request by the government for certification of extradition, the court must determine whether there is a treaty or convention for extradition between the United States and the requesting foreign government and whether the application for extradition of a fugitive found within the court's jurisdictional boundaries is "sufficient to sustain the charge" under the applicable treaty or convention. 18 U.S.C. § 3184; *see also Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir. 1986) ("The right of a foreign sovereign to demand and obtain extradition of an accused criminal is created by treaty."). Extradition treaties are to be liberally construed so as to effect the surrender of a fugitive for trial for the alleged offense. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 14 (1936). For extradition to be proper, the court must find: (1) a criminal charge pending in a foreign state; (2) the charge is included in the treaty as an extraditable offense; and (3) probable cause to believe that a crime was committed and that the person before the court

committed it. *United States v. Fernandez-Morris*, 99 F. Supp. 2d 1358, 1360-61 (S.D. Fla. 1999); *see Ordinola v. Hackman*, 478 F.3d 588, 606 (4th Cir. 2007) (Traxler, J., concurring).

In making this determination, "the credibility and weight of the evidence are exclusively within the discretion of the Magistrate Judge." *Fernadez-Morris*, 99 F. Supp. 2d at 1361. The extradition hearing, however, is not designed to be a full trial, as reflected by the nature and limitation on the admissibility of certain kinds of evidence. *Ordinola*, 478 F.3d at 608 (Traxler, J., concurring). In fact, evidence "may be based upon hearsay in whole or in part." *Id.* (quoting *United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997)). Further, the alleged fugitive may only present "explanatory evidence" related to the underlying charge and may not offer evidence that contradicts the government's evidence. *Id.* at 608-09.

I. Jurisdiction for Extradition Determination

The court has jurisdiction over a fugitive found within its jurisdictional boundaries. 18 U.S.C. § 3184. Relator having been found at Rivers Correctional Institution, which is located in the Eastern District of North Carolina, the court has jurisdiction over Relator for purposes of this extradition matter.

II. Extradition Treaty

The court assumes "a deferential posture when it comes to determining the existence or continuing validity of an extradition treaty on the grounds that such questions are essentially political." *Ordinola*, 478 F.3d at 607 (Traxler, J., concurring). In this case, an attorney on behalf of the Department of State has certified that an extradition treaty between the United States and Spain is in full force and effect, and the government has filed a copy of the treaty. (Notice of Filing of Extradition Materials, Ex. 1 [DE #3-1].) In deference to the executive branch's determination, the court finds that an extradition treaty between the United States and Spain is in full force and

effect, a copy of which has been submitted to the court by the government as part of Exhibit 1 to its Notice of Filing of Extradition Materials.

III. Spain's Extraterritorial Jurisdiction

Spain seeks to extradite Relator for "terrorist murders" that are alleged to have occurred not in Spain, but in El Salvador. Relator challenges Spain's exercise of extraterritorial jurisdiction on the following bases: (1) that insufficient evidence was submitted to show the alleged victims were of Spanish nationality; and (2) that he could not be considered a member of an armed gang or terrorist or rebel organization at the time of offense. Further, Relator asserts that Spain's exercise of extraterritorial jurisdiction is unfair because: (1) he has never entered the territory of Spain; (2) Spain's definition of a "terrorist act" is arbitrary; and (3) the evidence to support or defend against the charges is found in El Salvador.

The first question presented is whether a criminal charge predicated on offense conduct committed outside the territorial jurisdiction of Spain is an extraditable offense under the extradition treaty. Article III subsection B of the extradition treaty authorizes extradition for offenses committed outside the territorial jurisdiction of the requesting country so long as the laws of the requested country "provide for the punishment of such an offense committed in similar circumstances."[2] (Notice of Filing of Extradition Materials, Ex. 1 [DE #3-1] at 12.) For reasons more fully set forth in Section IV *infra*, the court finds Relator's alleged offense conduct would be punishable under the laws of the United States.

Although extradition is not required under the treaty when an accused is charged with offenses committed outside the territory of the requesting country (*see id.* (providing that

[2] Although a second condition precedent exists, specifically that the relator must not be the "subject of a request from another State whose jurisdiction over the person may take preference," no evidence has been submitted to show a third party has requested the extradition of Relator.

"extradition *may* be granted" when the accused is charged with extraterritorial offenses)), the absence of an extradition mandate alone "does not affect the authority of this court to certify extradit[ion]," *Demjanjuk v. Petrovsky*, 776 F.2d 571, 581 (6th Cir. 1985). Significantly, the United States has elected to comply with Spain's request for extradition and has filed the instant extradition complaint and motion to certify extradition, revealing its discretionary election to seek extradition under the treaty. Therefore, the court finds that the extradition treaty permits discretionary extradition of an accused charged with offenses committed outside of the requesting country's territory.

Next, the court must determine whether the laws of Spain provide for its jurisdiction over offenses committed outside of its territory. As part of the government's evidence, a brief was submitted that was signed by the Spanish magistrate who conducted the investigation. In this brief, Judge Velasco concludes that Spain has jurisdiction over Relator "pursuant to Article 23.4 of the Spanish Organic Law of the Judiciary, as amended by the Organic Law 1/2014 of March 13, 2014, Ref. BOE-A-2014-2709." (Supplemental Brief Supp. Extradition [DE #3-4] at 24.) This statute permits Spanish courts to exercise extraterritorial jurisdiction over crimes classified as terrorism under Spanish law if the victim is of Spanish nationality at the time of the alleged offense. (*Id.* at 23-24; Relator's Proposed Findings & Conclusions of Law [DE #64] at 19.) With regard to the offenses at issue here, Judge Velasco explains, "The charged murders constitute terrorism under Spanish law as defined by Article 406 of the Spanish penal code (murder) in conjunction with Article 174 bis." (Supplemental Brief Supp. Extradition [DE #3-4] at 24, n.61.) Article 174bis(b) of the Spanish Penal Code of 1973, in effect at the time of the offenses alleged, provides for the punishment of

> [t]hose who, acting as members of armed gangs or terrorist or rebel organi[z]ations, or collaborating with their purposes and goals, commit any

> criminal [act] that contributes to the activity of said gangs and organi[z]ations, using fire weapons, bombs, grenades, explosive substances or devices or incendiary devices of any sort, irrespective of the results . . . .

(Notice of Filing of Extradition Materials, Ex. 2 [DE #3-2] at 118.) Therefore, Spanish law permits Spanish courts to adjudicate charges for murder of Spanish nationals committed outside of Spain's national territory by those "acting as members of armed gangs or terrorist . . . organi[z]ations, or collaborating with their purposes and goals . . . using fire weapons" or other destructive devices.

Finding the exercise of extraterritorial jurisdiction permissible under the laws of Spain, the court must now determine whether Relator is properly subject to Spanish extraterritorial jurisdiction for the charged offenses of terrorist murder. There is no dispute in this case that Relator is a foreigner who has never entered the territory of Spain. Relator challenges Spain's exercise of extraterritorial jurisdiction, arguing there is insufficient evidence to show that the victims were Spanish nationals and that Relator was a member of an armed gang or terrorist or rebel organization.

Relator asks this court to disregard the Spanish magistrate's interpretation and application of Spanish law made following his examination of public records in Spain. This is no small request. Judge Velasco's findings as to the victims' nationalities were unequivocal: "In accordance with the Spanish Constitution and the Civil Code, the Spanish nationality of origin is a fundamental right that cannot be renounced or taken away." (Notice of Filing of Supplemental Extradition Materials, Ex. 1 [DE #34-1] at 4.) Each of the five victims of the charged offenses "w[as] born in Spanish territory, and w[as] the child[] of a Spanish father and a Spanish mother." (*Id.* at 3.) Judge Velasco's findings in this regard were supported by birth certificates for each of the five victims. Relator relies on contradictory facts derived from sources, such as news accounts, and apparently contrary Spanish law to support his claim that at least some of the victims forfeited their Spanish

nationality by acquiring Salvadoran nationality. This court must, however, like others facing similar requests, decline Relator's invitation to contradict the Spanish magistrate's unambiguous and founded interpretation and application of Spanish law as to the nationality of the victims. *See, e.g., In re Matter of Assarsson,* 635 F.2d 1237, 1244 (7th Cir. 1980) ("We often have difficulty discerning the laws of neighboring States, which operate under the same legal system as we do; the chance of error is much greater when we try to construe the law of a country whose legal system is much different from our own. The possibility of error warns us to be even more cautious of expanding judicial power over extradition matters.").

Relator also asks this court to find he was not a member of an armed gang or terrorist or rebel organization. In support of his argument, Relator cites a case decided by the Supreme Court of Spain in which it was held that "paramilitary actions or violent offenses committed by members of the security forces organized as an illegal group to fight against terrorists" were not considered terrorists. (Def's Ex. 42 (Summarizing S.T.S., July 29, 1998 (Recurso No. 2530/1995, Resolucion No. 2/1998) (Spain).) In that case, Relator argues, the Supreme Court of Spain did not find the Antiterrorist Groups of Liberation ("G.A.L.") an armed gang despite its paramilitary nature because the G.A.L. was aligned with governmental security forces. In his application of this holding to the instant case, Relator argues that he, as an official of the Salvadoran government and not simply a loosely connected paramilitary group, cannot be considered a member or collaborator of an armed gang. Relator's argument, although logical and perhaps persuasive, especially in light of the United States' support of the Salvadoran government, once again contradicts the investigating Spanish magistrate's interpretation and application of Spanish law.

In support of its extradition request, Spain alleges Relator was a member of a group of officers who decided to murder a group of civilian Spanish nationals. (*See* Decl. Maria Teresa

Sandoval at 7; Notice of Filing of Extradition Materials, Ex. 4 [DE #3-4] at 26-27.) This group of officers allegedly commissioned the highly armed and trained Atlacatl Battalion to kill the victims. (*Id.* at 8; Notice of Filing of Extradition Materials, Ex. 2 [DE #3-2] at 54-58.) From these and other facts, Judge Velasco found sufficient evidence showing Relator was a member of a qualifying armed gang. This finding is not so unreasonable as to compel this court to reject the Spanish magistrate's interpretation and application of Spanish law. A government official who acts in collaboration with others outside the scope of his lawful authority to commit alleged *jus cogens* offenses by use of firearms may reasonably be considered a member of an armed gang under the Spanish terrorist murder statute. Whether Relator will ultimately be convicted is not within the scope of this court's review. The court, therefore, declines Relator's invitation to contradict the Spanish magistrate's interpretation and application of Spanish law as to Relator's membership in a qualifying armed gang or terrorist or rebel organization. *See, e.g., In re Matter of Assarsson*, 635 F.2d at 1244.

The court finds Relator's remaining fairness arguments unpersuasive as to the issue of Spain's lawful exercise of extraterritorial jurisdiction. Having determined that there exists a sufficient basis for Spain's exercise of extraterritorial jurisdiction over Relator and the alleged offenses, the court denies Relator's second motion to dismiss for lack of jurisdiction.

IV. Dual Criminality

Pursuant to the extradition treaty, the United States and Spain have agreed to extradite to each other, subject to procedural compliance and qualifying exception, any person charged with an offense punishable under the laws in both countries by imprisonment of at least one year. (Notice of Filing of Extradition Materials, Ex. 1 [DE #3-1] at 11.) Despite the requirement of

similitude, the compared offenses need not be identically categorized or described by the same terminology. *Id.*

The Supreme Court has held that dual criminality is satisfied "'if the particular act charged is criminal in both jurisdictions,' even if the name of the offense or the scope of the liability [is] different in the two countries." *Zhenli Ye Gon v. Holt*, 774 F.3d 207, 217 (4th Cir. 2014) (quoting *Collins v. Loisel*, 259 U.S. 309, 312 (1922)). More simply, the offenses must "punish the same basic evil" but need not contain identical elements. *Holt*, 774 F.3d at 217.

Relator urges the court to find sufficient distinction between Spain's terrorist murder statute and its proposed United States equivalent, 18 U.S.C. § 2332, as to reject a finding of dual criminality. Relator bases his argument on the alleged divergent "evils" punished by each statute. He argues that Spain's terrorist murder statute, in pertinent part, proscribes the "evil" of membership in a particular class, such as an armed gang, terrorist, or rebel organization. *See* art. 174 bis, 406 (C.P. 1973) (Spain). In contrast, the United States crime, 18 U.S.C. § 2332, Relator argues, proscribes the terrorist evil of having the intent "to coerce, intimidate, or retaliate against a government or a civilian population." (*See* Relator's Proposed Findings & Conclusions of Law at 24 (analyzing 18 U.S.C. § 2332).)

Although the elements of the Spanish terrorist murder statute and 18 U.S.C. § 2332 are not identical, the primary distinction is one of scope, not character. Here, the basic evil proscribed by both countries' statutes is murder. Both statutes require "malice aforethought" before committing an act of killing another person. *Compare* 18 U.S.C. § 2332(a)(1) (incorporating the definition of murder found in 18 U.S.C. § 1111(a)); *with* art. 174 bis, 406 (C.P. 1973) (Spain). The scope of the American statute is broader than its Spanish counterpart inasmuch as it proscribes murder committed by any person so long as he or she has the intent "to coerce, intimidate, or retaliate

against a government or a civilian population" regardless of his or her affiliation in a particular class. This distinction, however, does not impeach a finding of dual criminality because the same basic evil of murder is punished by each statute. Therefore, the requirement of dual criminality has been satisfied.

V. Probable Cause

The legal term "probable cause" is not expressly mentioned in 18 U.S.C. § 3184, but courts have uniformly interpreted the statutory language directing the court to determine whether there is evidence sufficient to sustain the charge under the provisions of the proper treaty or convention as requiring a finding of "probable cause." *Ordinola*, 478 F.3d at 608 (Traxler, J., concurring). To support a finding of probable cause, the government must show "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the guilt of the accused." *Fernandez-Morris*, 99 F. Supp. 2d at 1365 (citing *Coleman v. Burnett*, 477 F.2d 1187, 1202 (D.C. Cir. 1973)). Nevertheless, the court need not "determine whether evidence is sufficient to justify a conviction, but rather, to determine whether evidence is sufficient to hold the accused." *Fernandez-Morris*, 99 F. Supp. 2d at 1365 (quoting Collins, 259 U.S. at 316); *see also Ordinola*, 478 F.3d at 608 (Traxler, J., concurring).

The court's probable cause review is independent and should not rest on "mere conclusions" contained in the government's submission "that the person whose arrest is sought has committed a crime." *Id.* (quoting *Giordenello v. United States*, 357 U.S. 480, 486 (1958)). Therefore, the court must "closely examine the requesting country's submissions to ensure that any hearsay bears sufficient indicia of reliability to establish probable cause." *In re Extradition of Khochinsky*, No. 1:15-MJ-847-JSR, 2015 WL 4598869, at *7 (S.D.N.Y. Aug. 3, 2015) (citation omitted).

In the instant case, Spain has invoked extraterritorial jurisdiction to charge Relator with terrorist murder under Article 406 in conjunction with Article 174 bis of the Spanish Penal Code of 1973, which together proscribe the murder of Spanish nationals outside of Spain's national territory by those "acting as members of armed gangs or terrorist or rebel organizations, or collaborating with their purposes and goals . . . using fire weapons" or other destructive devices. art. 174 bis, 406 (C.P. 1973) (Spain). Spain alleges Relator was a collaborator or member of a qualifying armed gang or terrorist or rebel organization who conspired to murder a group of civilian Spanish nationals.

To show probable cause that Relator committed the offenses of "terrorist murder," the government must show facts sufficient to support a reasonable belief of Relator's guilt. *See Nezirovic v. Holt*, 739 F.3d 233, 236 (4th Cir. 2015); *Fernandez-Morris*, 99 F. Supp. 2d at 1365. Relator argues the government has failed to meet this burden.

A. Admissibility of Evidence

The standard for determining the admissibility of evidence submitted at an extradition hearing is set forth in 18 U.S.C. § 3190. *See In re Extradition of Lehming*, 951 F. Supp. 505, 514 (D. Del. 1996). The court must accept as true the evidence properly provided and certified by the Spanish government. *See, e.g., In re Extradition of Marzook*, 924 F. Supp. 565, 592 (S.D.N.Y. 1996). The evidence provided by Spain includes: (1) the Spanish indictment (Notice of Filing of Extradition Materials, Ex. 2 [DE #3-2]); (2) the Supplemental Brief in Support of Extradition signed by Judge Velasco, the investigating magistrate of Spain's National Court (Notice of Filing of Extradition Materials, Ex. 4 [DE #3-4]); (3) the Declaration of Maria Teresa Sandoval, the lead prosecutor in the case, incorporating statements by two witnesses as exhibits (Decl. Maria Teresa Sandoval [DE #19-1]); (4) the supplemental findings made by Judge Velasco regarding the

nationality of the victims (Notice of Filing of Supplemental Extradition Materials, Ex. 1 [DE #34-1]); and (5) the Second Expert Report of Professor Terry Lynn Karl (Notice of Filing of Supplemental Extradition Materials, Exs. 1 & 2 [DE #34-1 & #34-2]). The Spanish Ministry of Justice has certified each of these documents; therefore, they are admissible "without further certification, authentication, or other legalization." (Notice of Filing of Extradition Materials, Ex. 1 [DE #3-1] at 15.)

At the extradition hearing, Relator offered forty-four exhibits for admission. The United States objected to their admission, and the court took the matter under advisement. (Extradition Hr'g Tr. [DE #52] at 41.) The rule of non-contradiction allows Relator to submit evidence that either explains evidence submitted by the government, *see Ordinola*, 478 F.3d at 608-09 (Traxler, J., concurring), or completely obliterates probable cause, *see Hoxha v. Levi*, 465 F.3d 554, 561 (3d Cir. 2006) (citing *Barapind v. Enomoto*, 360 F.3d 1061, 1069 (9th Cir. 2004)). To the limited extent the court relies upon facts contained in these exhibits, in whole or in part, it deems them admissible for the purpose of explaining evidence submitted by the government. The remaining exhibits or parts thereof, although perhaps important for consideration by the Executive in the review of this matter, are excluded as contradictory and deemed insufficient to "completely obliterate" probable cause.

B. Factual Sufficiency

The court finds sufficient evidence contained in Spain's submissions to warrant a finding of probable cause to believe Relator committed the charged offenses. *See Manta v. Chertoff*, 518 F.3d 1134, 1147 (9th Cir. 2008) (probable cause established by investigator's report summarizing witness statements and other evidence); *Afanasjev v. Hurlburt*, 418 F.3d 1159, 1165 (11th Cir. 2005) (106-page bill of indictment sufficient to establish probable cause); *Bovio v. United States*,

989 F.2d 255, 259-60 (7th Cir. 1993) (investigator's hearsay statement containing recitations of witness statements established probable cause); *Jean v. Mattos*, No. 2:13-CV-5346-KSH, 2014 WL 885058 (D.N.J. Mar. 5, 2014) (unpublished) (affirming probable cause finding based on a charging document certified by the prosecutor, which incorporated a detective's hearsay statements, including names of witnesses and specific dates of known events).

In addition to recapitulating arguments challenging Spain's jurisdiction and the national origin of the victims, Relator argues there must be evidence he was a "principal in the murder" to sustain a finding of probable cause that he committed the offense of terrorist murder. (Relator's Proposed Findings & Conclusions of Law at 22-23.) The court incorporates its analysis set forth in Section III *supra* and rejects Relator's arguments that there exists an insufficient factual basis to show Spain has properly exercised extraterritorial jurisdiction and the victims were of Spanish nationality and origin at the time of the charged offenses. The court also declines Relator's invitation to contradict Judge Velasco's interpretation and application of Spanish law as to the sufficiency of Relator's participation in the charged offenses. *See, e.g., In re Matter of Assarsson*, 635 F.2d at 1244.

In short, the government's evidence shows Relator was a decision-maker and member of a group of officers who collectively ordered the unlawful killings of Jesuit priests located at the UCA in El Salvador. Taken as true, this evidence shows the following: Relator provided necessary information, namely the location of one victim (Father Ellacuria) in advancement of the group's unlawful aim. The group or its agents commissioned the Atlacatl Batallion, a highly trained military unit possessing firearms, to carry out the mission of killing Father Ellacuria and others. After five Jesuit priests of Spanish origin and others present were killed, Relator and others within the group attempted to conceal the acts underlying the charged offenses. Specifically, in his effort

to conceal the offenses, Relator threatened a witness' wife who questioned how the government could perform such an act. These facts and others more fully set forth in Spain's submissions show sufficient probable cause to justify holding the accused.

VI. Constitutional Concerns

Relator also raises constitutional due process concerns related to Spain's exercise of extraterritorial jurisdiction and the unreasonable burden placed on Relator to defend himself in Spain. Although minimal safeguards are necessary to ensure a fair trial in a foreign court, the general rule established by the Supreme Court is that extradition may not be avoided simply because the criminal process afforded by the foreign country fails to accord with guarantees found in the United States Constitution. *Neely v. Henkel*, 180 U.S. 109, 123 (1901). Exceptional circumstances, such as "particularly atrocious procedures or punishments employed by the foreign jurisdiction," may rise to the level of constitutional import, *see Fernandez-Morris*, 99 F. Supp. 2d at 1370 (citing *In re Burt*, 737 F.2d 1477, 1487 (7th Cir. 1984)), but Relator does not make any such showing.

VII. Rule of Non-Inquiry

The court notes, however, some of Relator's concerns regarding the process by which this case developed. First, Relator's case in Spain was initiated by a non-profit organization in the United States acting as a popular prosecutor, a practice that is the subject of increasing international scrutiny and, according to Relator, should not have been permitted in this instance.[3] Furthermore,

[3] Relator asserts that under Spanish law "only the 'Ministerio Fiscal' (equivalent to our Attorney General) or the actual victim of an alleged crime can initiate a prosecution which asserts universal jurisdiction over the enumerated crimes in Subsection 23.4(e)(4)" but that the Supreme Tribunal of Spain overlooked this, "reasoning that the Ministerio Fiscal eventually became involved in the case to a sufficient extent." (Second Mot. Dismiss for Lack of Jurisdiction, [DE #37] at 13 n.14)

Relator was a member of a government officially recognized and, in part, supported by the United States. In fact, the Altacatl Battalion, which carried out Colonel Benavides' order to kill Father Ellacuria, had been trained by United States Armed Forces. This does not mean Relator's participation in the charged offenses was condoned by the United States; but it may cast doubt, albeit insufficient to obliterate probable cause, as to Relator's inclusion in an offender class enumerated in the Spanish terrorist murder statute.

Moreover, Judge Velasco's investigation into the killings of the five Jesuit priests was initiated approximately twenty years after the massacre and more than fifteen years after the Salvadoran civil war was put to rest. Following the killings, El Salvador conducted a two-year investigation into the matter. In 1991, a Salvadoran jury found Colonel Benavides (the one who directly ordered the Jesuit massacre) and Lieutenant Mendoza guilty of the murders. The trial judge sentenced both to a term of imprisonment of thirty years. At least one other participant was convicted of lesser offenses, and a number of Atlacatl commandos were found not guilty. After the trials, the United States Department of State concluded, "We believe that the GOES [Government of El Salvador] conducted a thorough and professional investigation." (Second Mot. Dismiss for Lack of Jurisdiction, Ex. 2: "Notes on Moakley Wash Post Op-Ed on Jesuit Verdicts" [DE #37-2] at 3.) After two years of peace talks mediated by the United Nations, the Salvadoran government and the FMLN ended the civil war upon their execution of a peace accord, the Accords of Chapultepec. A nine-month cease fire took effect in February 1992, and the civil war officially ended in December 1992. *El Salvador (04/02) Fact Sheet*, U.S. Dept. State, http://www.state.gov/outofdate/bgn/elsalvador/23889.htm (last visited Feb. 4, 2016). The year after the signing of the peace accord, El Salvador enacted legislation granting amnesty for criminal acts committed by both the ESAF and FMLN. Colonel Benavides, Lieutenant Mendoza and others

sentenced to imprisonment for offenses related to the Jesuit Massacre were released once the amnesty law was passed.

These and other similar, situational or political concerns raised by Relator, including his receipt of amnesty from El Salvador and perturbations with the Spanish judicial process as applied to him, although concerning, are not proper subjects for this court's consideration. The rule of non-inquiry requires "courts [to] refrain from delving into and assessing the competence of the requesting government's system of justice." *See Ordinola*, 478 F.3d at 607 (Traxler, J., concurring). As the Fourth Circuit explained in *Ordinola*:

> Questions about the procedural fairness of another sovereign's justice system or whether the individual to-be-surrendered faces inhumane treatment are within the purview of the executive branch. . . . "It is not that questions about what awaits the Relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed."[] Likewise, it is a question for the executive branch, not the courts, whether the requesting nation is sincere in its demand for extradition or is merely using the process as a subterfuge to exact revenge against an opponent of the government. The rule of non-inquiry, then, "serves interests of international comity by relegating to political actors the sensitive foreign policy judgments that are often involved in the question of whether to refuse an extradition request."

Id. (citation omitted) (quoting *Kin-Hong*, 110 F.3d at 110-111, and *Hoxha v. Levi*, 465 F.3d 554, 563 (3d Cir. 2006)). The court, therefore, refrains from performing a function reserved for the Executive but respectfully urges the Department of State to carefully examine and consider Relator's submissions, along with those submitted by Spain, in the performance of its unique function.

CONCLUSION

The court is satisfied that the government's request for certification of extraditability should be granted and finds as follows:

1. The undersigned judicial officer is authorized under 18 U.S.C. § 3184 to conduct an extradition hearing.

2. The court has personal jurisdiction over Relator and subject matter jurisdiction over the case.

3. There is currently in force an extradition treaty between the United States and Spain.

4. Relator was charged in Spain with extraditable offenses under the terms of the extradition treaty between the United States and Spain, namely the terrorist murder of five Jesuit priests of Spanish origin and nationality.

5. Probable cause exists to believe Relator committed the charged offenses of terrorist murder.

Based on the foregoing findings, the court concludes that Relator is subject to extradition and surrender for the charged offenses for which extradition was requested and hereby CERTIFIES this finding to the Secretary of State as required under 18 U.S.C. § 3184.

IT IS THEREFORE ORDERED that:

1. Relator's Second Motion to Dismiss for Lack of Jurisdiction [DE #37] is DENIED;

2. Relator's Oral Motion to Admit 44 Exhibits into Evidence (*see* Extradition Hr'g Tr. [DE #52] at 40) is GRANTED IN PART and DENIED IN PART. The clerk is directed to enter Relator's forty-four exhibits offered for admission into the record for the limited purposes of showing those parts the court admitted and relied upon as explanatory evidence in this order and

to preserve a record of the remaining parts excluded as inadmissible for further judicial proceedings or executive review;

3. The government's Motion to Certify Extradition [DE #4] is GRANTED;

4. A certified copy of this Certification of Extraditability and Order of Commitment shall be FORWARDED without delay by the clerk to the United States Department of State, to the attention of the Office of the Legal Advisor; and

5. Relator shall be COMMITTED to the custody of the United States Marshal pending final disposition of this matter by the Secretary of State and, if ordered, his surrender to designated agents of Spain.

This 4th day of February 2016.

KIMBERLY A. SWANK
United States Magistrate Judge