

Analysis: Judges as Perpetrators of War Crimes and Crimes Against Humanity

September 1, 2017

By: Joseph Rikhof

While it is uncommon, judges have been subject to disciplinary proceedings or even criminal trials. Often these criminal charges dealt with corruption but at times they have also involved more serious offences, such as murder.[1] However, it almost unheard of to have the criminal process used to convict judges of international crimes, such as war crimes or crimes against humanity.

Yet, this is exactly what happened on July 26 of this year in Argentina[2] when four former judges were convicted of the crimes against humanity of murder, unlawful deprivation of freedom and torture during Argentina's military dictatorship that ruled the country from 1975 to 1983. The four judges, Otilio Romano, Guillermo Petra Recabarren, Luis Francisco Miret and Rolando Carrizo, all received life imprisonment. They had been put on trial for their failure to investigate petitions of habeas corpus filed by relatives of 20 dissidents who had disappeared during the dictatorship.[3]

This is not the first time that judges have been made subject to proceedings alleging international crimes, but the reasons for their findings of guilt in this trial are more encompassing than in previous trials, all of which date back to the aftermath of the Second World War. At that time, five trials were held with judges as defendants, three in the Far East and two in Europe.

The Aftermath of World War II

To begin with the trials in the Far East, they all involved a number of Japanese military officials involved in the arrest, investigation, trial and subsequent executions of American airmen who had been captured and held as prisoners of war. Three trials were held in Shanghai by United States Military Commission between the end of February and the beginning of September 1946 and they involved the following 11 judges of Japanese Military Tribunals: (first trial) Ryuhei Okada, Yusei Wako;[4] (second trial) Naritaka Sugiura, Yoshio Nakano, Tadao Ito, Masaharu, Matsui, Jitsuo Date, Ken Fujikawa;[5] (third trial) Nishigai Kubo, Masamori Watanabe and Koichi Yamaguchi.[6]

In the first trial, the judges on the military tribunal were found guilty of war crimes and sentenced to 5 years and 9 years of hard labour respectively since they had denied the accused before them a fair trial; the lack of a fair trial was the result of accepting and using false and fraudulent evidence upon which the accused before them were sentenced to death.

In the second trial, Sugiura was sentenced to death, Nakano received a life imprisonment while Matsui, Date, Fujikawa and Ito were sentenced to 40, 30, 30 and 20 years respectively. As in the first trial, the conviction on war crimes was based on lack of a fair trial, but this time more specifics were given, namely:

- the evidence used had been falsified;
- little or no evidence connected the evidence to the charges;
- the accused were denied defence counsel;
- the accused were denied the opportunity to obtain evidence or witnesses on their own behalf;
- the greater part of the proceedings was not interpreted to the accused;
- all the trials were completed in one day.

The third trial resulted in imprisonment for life for Yamaguchi and Kubo, while Watanabe was sentenced to 50 years' imprisonment. As in the first two trials, the war crime was a lack of fair trial and this time, the circumstances in the trial leading to this verdict were: no defence counsel provided; no opportunity for the accused to prepare his own defence or secure evidence on his own behalf; no witnesses were called; and the entire proceedings did not last more than two hours.

The two trials in Europe were held in Strasbourg by the French Permanent Military Tribunal and the Court of Appeal and, in Nuremberg, by the United States Military Tribunal.

The French trial, which was held between the end of April and the end of July 1946, involved seven high German officials who, during the occupation of the Alsace, were involved in the abuse of legal process resulting in judicial murder, the killing of Allied prisoners of war and the mass deportation of Jews and other French nationals.[7] One of the seven officials was Richard Huber, the former president of the Special Court at Strasbourg, who was sentenced to life imprisonment (*in absentia*) for pronouncing objectionable death sentences against 14 Alsatians who had attempted to flee into Switzerland. During this attempt, a border guard had been killed, and the 14 accused persons became subject of a trial, during which the most elementary principles of rules of a fair trial had been disregarded, such as no proper preparation for the accused, lack of evidence connecting the charge to

the accused, and a trial that lasted less than a day.

The most well-known trial is the one by the American Military Tribunal, which was held between February 17th and December 4th, 1947.[8] Altstötter and 15 other accused were former German judges, prosecutors or officials in the German Ministry of Justice who had been charged with committing war crimes and crimes against humanity between September 1939 and April 1945 and conspiring to commit such offences between January 1933 and April 1945. The charges were, for the most part, related to the systematic degradation of the German justice system, which had become increasingly draconian. Three of the accused had been judges, namely Curt Rothenberger, Oswald Rothaug and Rudolf Oeschey. Rothaug and Oeschey received life sentences for war crimes and crimes against humanity[9], primarily because of the denial of even the basic fair trial requirements to the accused in their courts as well as imposing excessive penalties for the relatively minor offences charged.[10] Rothenberger was given a sentence of 7 years for the corruption and perversion of judicial system.[11]

Contemporary Developments

Since the trials of these 15 individuals immediately after WWII, there have been no proceedings or charges against judges in any of the international tribunals (International Criminal Tribunals for the former Yugoslavia and Rwanda), internationalized tribunals (the Special Court for Sierra Leone and the Extraordinary Chamber in the Courts of Cambodia),[12]the International Criminal Court, nor in any domestic criminal court before 2017.

However, in two other related areas of law, there has been some discussion regarding the liability of judges for the commission of crimes against humanity, namely in domestic refugee and immigration law.

In the refugee context, there is a notion called exclusion, which removes the entitlement of persons to obtain refugee status, which is contained in article 1F of the *1951 Refugee Convention* and which reads as follows:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

While there is extensive exclusion jurisprudence in Western Europe, North America, Australia and New Zealand,[13] only in Canada has the judiciary, namely the Federal Court and Federal Court of Appeal, addressed the issue of liability of judges and then only on four occasions and without referring

to any of the above post WWII cases.[14]

Two cases involving judges and judicial institutions in Somalia during the repressive regime of Siad Barre, who was in power from 1969 until 1991, were examined by the Federal Court of Appeal and Federal Court when they upheld on judicial review, the decisions of the Refugee Protection Division of the Immigration and Refugee Board, which had applied category 1F(a) of the above exclusion clause to these functionaries, and refused to grant them refugee status. The Federal Court of Appeal was of the view that Nationality Security Courts under this regime were of such a nefarious nature with as only purpose to be an instrument of the repression in Somalia that is was deemed an organization with a brutal, limited purpose, the consequence of which was that every member was excluded without inquiring into the individual activities of such a person.[15] In a second case, the Federal Court excluded the Chief Judge or Chairman of the Military Court in Hargheisa in northern Somalia who served as such from February 1987 until May of 1988.[16] While doing so the Military Court was described as a slaughterhouse and an instrument of repression in the Barre regime while it was also said that in 1987 and 1988, when Mohamud was Chief Judge of the Military Court, a mobile unit of the Military Court held hearings in small centres outside Hargheisa and executed large numbers of civilians.

The third case pertained to a person who had been a magistrate for a short period of time in 2000 in the Democratic Republic of the Congo. While the Federal Court entertained the possibility that it was possible for judges in that country to be complicit in crimes against humanity as part of exclusion ground 1F(a),the court was of the view that, in this case, the person in his function as a judge had no influence on any decisions of the government related to the commission of crimes against humanity in that country.[17]

The fourth case was the result the decision of the Refugee Protection Division of the Immigration and Refugee Board, an administrative tribunal dealing with refugee and immigration matters.[18] The case concerned a military judge of the Palestinian Authority between 1998 and 2001. The member of the panel was of the view that a judge who relied on confessions obtained under torture, was aware of this widespread practice, but still proceeded to sentence people to lengthy terms of imprisonment, was involved in the commission of crimes against humanity. The last case was not decided in full by the Federal Court as leave to hear the case was denied.

Lastly, with respect to immigration law, the Canadian *Immigration and Refugee Protection Act*[19] has the following provision:

35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for …

(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity…

So far only nine regimes have been designated by the Minister[20] and only senior officials in those regimes can fall within the parameters of this section.

The notion of a prescribed senior official is set in the *Immigration and Refugee Protection Regulations,* [21] section 16, as follows:

For the purposes of paragraph 35(1)(b) of the Act, a prescribed senior official is a person who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position, and includes

(a) heads of state or government;

(b) members of the cabinet or governing council;

(c) senior advisors to persons described in paragraph (a) or (b);

(d) senior members of the public service;

(e) senior members of the military and of the intelligence and internal security services;

(f) ambassadors and senior diplomatic officials; and

(g) **members of the judiciary**.

While it is likely that some persons applying to come to Canada as a resident or visitor have been refused because they had the function of a judge (this section does not require that a senior official, including a judge, had actually committed international crimes as having the position by and in itself is sufficient for this section to apply), there has been no jurisprudence in regards this specific provision.

What can be observed from the above international and domestic jurisprudence is that the 19 persons **,** the 15 post-WWII cases and the above 4 Canadian cases, who have been made subject to judicial proceedings, were found guilty based on three distinct but related aspects of their judicial functions, namely admitting tainted evidence (either false or obtained by torture), not adhering to the basis tenets of fair trial procedures (no defence counsel, no ability to call evidence, no interpretation and very short trial durations) or imposing sentences which were clearly excessive in relation to the criminal offences charged, often in combination.

The Argentinian judgment has moved beyond these traditional parameters of judges' criminal involvement in international crimes by also finding them guilty of omission:[22] for their failure to investigate legitimate allegations of crimes against humanity committed by other branches of the same government. This is a very encouraging development in international criminal law and as a result, the arsenal of tools in the fight against impunity has expanded, which should be welcomed.

Please cite this article as: Joseph Rikhof, “Judges as Perpetrators of War Crimes and Crimes Against Humanity” (2017) 1 PKI Global Just J 9.

Joseph Rikhof **About the Author**

Globally-recognized as an expert in cases of war crimes, Dr. Joseph Rikhof is with the Crimes Against Humanity and War Crimes Section of the Canadian Department of Justice and teaches International Criminal Law in the Faculty of Law at University of Ottawa. Dr. Rikhof was a visiting professional with the International Criminal Court in 2005 and Special Counsel & Policy Advisor to the Modern War Crimes Section of Canada’s Department of Citizenship and Immigration between 1998 and 2002. Extensively published, Dr. Rikhof lectures around the world on organized crime, terrorism, genocide, war crimes, and crimes against humanity.

References

1. In Canada, judge Jacques Delisle had been convicted of this crime, see http://montrealgazette.com/news/quebec/retired-quebec-judge-convicted-of-murder-to-remain-in-prison-pending-case-review.
2. Argentina has been very active in the prosecution of crimes against humanity of officials of former regimes in that over 650 persons have been put on trial since 2006.
3. For a more contextual piece, indicating that the four judges were part of a trial with 24 other accused, see http://www.telesurtv.net/english/news/In-Landmark-Ruling-28-Former-Officials-of-Argentinas-Military-Dictatorship-Sentenced-20170726-0039.html while for a more detailed account in Spanish see http://www.mendozapost.com/nota/67963-los-exjueces-mendocinos-condenados-a-prision-perpetua/.
4. They were two accused out of four in the Trial of Lieutenant-General Shigeru Sawada and Three Others, Law Reports of Trials of War Criminals, Volume V, pages 1-24 (the fifteen volumes of these reports can be found on-line here: http://www.loc.gov/rr/frd/Military_Law/law-reports-trials-war-criminals.html).
5. They were six accused out of eight in the Trial of Lieutenant General Harukei Isayama and Seven Others, Law Reports of Trials of War Criminals, Volume V, pages 60-65.
6. They were three accused out of six in the Trial of General Tanaka Hisakasu and Five Others, Law Reports of Trials of War Criminals, Volume V, pages 66-81.
7. The Trial of Robert Wagner, Gauleiter and Head of the Civil Government of Alsace during the Occupation, and six others, Law Reports of Trials of War Criminals, Volume III, pages 23-55.

8. Trial of Josef Altstötter and Others, Law Reports of Trials of War Criminals, Volume VI, pages 1-110. This trial was made famous in the movie “Judgment at Nuremberg”. This trial, as well as the three Japanese ones are mentioned by the Appeals Chamber of the Sierra Leone Special Court in the case of Charles Taylor, see Judgment, Taylor (SCSL-04-01-T), 26 September 2013, paragraph 369.
9. Trial of Josef Altstötter and Others, Law Reports of Trials of War Criminals, Volume VI, page 76.
10. Idem, pages 22-26; see also pages 96-102.
11. Idem, page 75.

Fair trial guarantees had been included in the constitutive documents of the most important judicial institutions after WWII, namely the Charter of the International Military Tribunal (article 16) and the Charter of the International Military Tribunal for the Far East (article 9).

12. More recently, the ECCC Trial Chamber did discuss the requirements of a fair trial in Judgement, Kaing Guek Eav alias Duch (Case File 001/18-07-2007/ECCC/TC), 26 July 2010, paragraphs 458-460, which pertained to head of an infamous prison in Cambodia but there was no reference to any of the post-WWII cases; it relied on provisions in the 1949 Third and Fourth Geneva Conventions, which in turn had been partially inspired by these cases and the above Charters.

As well, in respect to the notion of fair trial, on February 16, 2017, the Stockholm District Court sentenced a 46 year old Syrian citizen, Haisam Omar Sakhanh, for participation in a mass execution of seven people that took place in the Idlib province in Northwestern Syria in May 2012; his argument that the execution was carried out by order and related to the enforcement of an adjudicated death sentence by a legitimate court following a fair trial, was rejected and he was sentenced to life imprisonment, which was upheld on appeal on May 31, 2017.

13. See Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (2012), pages 210-274.
14. There have been just over 270 judicial decisions re exclusion in Canada since 1992.
15. *Demiye v. Canada (Minister of Employment and Immigration)*, A-137-93.
16. *Mohamud v. Canada (Minister of Employment and Immigration)* (1994) 83 F.T.R 257.
17. *Mankoto v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 294.
18. *Nidal Abualdeber et al v. MCI*, IMM-5340-06.
19. S.C. 2001, c. 27.
20. See *Canada’s Program on Crimes Against Humanity and War Crimes – 2011–2015: 13th Report* , Appendix 4: Regimes Designated Pursuant to Paragraph 35(1)(b) of the Immigration and Refugee Protection Act (http://www.justice.gc.ca/eng/rp-pr/cj-jp/wc-cdg/wc20112015-cdg20112015/toc-tdm.html).

21. SOR/2002-227 (emphasis added).

22. ICTY and ICTR jurisprudence has discussed liability for omission in the context of aiding and abetting as well as command/superior responsibility but never in connection with the role of judges.