

THE EUROPEAN COURT OF HUMAN RIGHTS AND INTERNATIONAL CRIMES

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By: Joseph Rikhof

Recently, this journal discussed the jurisprudence of the European Court of Human Rights (ECtHR) with respect to the international crime of genocide (Regime Change May Allow Prosecution of a Former Oppressive Regime's Enforcers for Genocide). This article will discuss seven other decisions, which address various aspects of other international crimes, namely torture, war crimes and crimes against humanity and which have resonated in decisions by the specialized institutions mandated to examine such crimes, such as the Extraordinary Chambers in the Courts of Cambodia (ECCC) (see The Legality of the charges against Khmer Rouge leaders) and the International Criminal Court (ICC). Issues such as the legality and vagueness of national legislation regulating such crimes, amnesties as well as procedural issues have been examined by the court over the last two decades.

Legality

Four cases have dealt with the issue of the legality of national legislation regulating international crimes based on extraterritorial jurisdiction, namely *Korbely v. Hungary,* Application No. 9174/02, 19 September 2008 (Grand Chamber) (here), *Ould Dah v. France*, Decision, 13113/03, 17 March 2009 (

here), *Kononov v. Latvia*, Application No. 36376/04, 17 May 2010 (Grand Chamber) (here) and *Van Anraat v. The Netherlands*, Decision, 65389/09, 6 July 2010 (here).

The background in the **Korbely** case was that during the Hungarian Revolution in October 1956, Korbely, as the commanding officer of two police platoons, had been ordered to disarm insurgents who had taken over a number of public buildings in Budapest. In one such operation, his unit exchanged gun fire with a group of insurgents, which resulted in the killing of three of them including their leader, Tamás Kaszás, as well the wounding of two others. In December 1994 Korbely was charged with crimes against humanity pursuant to legislation passed the year before; one of the reasons for charging him with crimes against humanity was the fact that unlike regular crimes, like murder, the statute of limitations would not apply. In 2001 he was convicted of multiple homicide constituting a crime against humanity pursuant to common article 3 of the 1949 Geneva Conventions and was sentenced to three years imprisonment, a verdict upheld on two subsequent appeals. His started to serve his sentence in March 2003 and was released in May 2005. (paras. 9-48)

The Grand Chamber, which examined the case from the perspective of whether the charges of crimes against humanity conformed with the principles of legality (as enshrined in article 7 of the European Convention of Human Rights or ECHR), which means whether the essence of the offence could have been reasonably foreseen at the time of the conduct (para. 72). With respect to the issue of crimes against humanity, the court indicated that while murder was an underlying offence of crimes against humanity, this international crime in 1956 also required proof of other requirements, such as "that the crime in question should not be an isolated or sporadic act but should form part of "State action or policy" or of a widespread and systematic attack on the civilian population" (para. 83) (However, the Court indicated in paragraph 82 that a requirement set out in the Charter of the International Military Tribunal (IMT) in 1945, an important precedent, namely a connection to a war, might not have been necessary at the time of the commission of the offence). The national courts did not decide whether the act was part of State policy, as a result of which "it is thus open to question whether the constituent elements of a crime against humanity were satisfied in the present case." The court also addressed the question whether the victim had taken no active part in hostilities as required by common article 3 of the Geneva Conventions, which sets out minimum standards of behavior of armed forces engaged in a non-international armed conflict. In that respect it found that based on the facts of the case, it could not be said that Kaszás had laid down his weapon at the exchange of fire and as such had not taken an active part in hostilities, as a result of which there would not have been a violation of article 3. (paras. 90-94) The overall conclusion of the court was "that it has not been shown that it was foreseeable that the applicant's acts constituted a crime against humanity under international law." (para. 95)

In July 2005, **Ely Ould Dah**, a Mauritanian army captain, was sentenced in absentia to 10 years imprisonment for torture committed in Mauritania in 1990 and 1991. Ould Dah had been in France when the investigation was opened, but he managed to flee to Mauritania during a conditional release. The background of the case was that his crimes were conducted in the context of clashes between Mauritanians of Arab-Berber origin and others belonging to black African ethnic groups; some

servicemen from these ethnic groups, accused of mounting a coup d'état, were taken prisoner, and some of them were subjected to acts of torture or barbarity by their guards. Among these guards was Ould Dah, an intelligence officer at the Nouakchott army headquarters in Mauritania. The specific legal question in this case was that at the time of his conviction there had been no provisions in French criminal law to criminalize torture. (see heading "A. Circumstances of the case")

In the view of the court, there was no question of retroactive application of this provision as France had already incorporated the Torture Convention in December 1985, a number of years before the commission of torture by Ould Dah. The fact that this incorporation into French law was only as an aggravating circumstance during sentencing for an underlying offence, rather than a substantive offence of torture in the legislation (which only became part of French law in March 1994) was not considered to be decisive for a determination of legality, or in the words of the court: "these are essentially a development of the Criminal Code that have not introduced a new offence, but rather make legislative provision for conduct that had already been expressly referred to and classified as an offence by the former Criminal Code." and "the Court considers that at the time when the offences were committed, the applicant's actions constituted offences that were defined with sufficient accessibility and foreseeability under French law and international law, and that the applicant could reasonably, if need be with the help of informed legal advice, have foreseen the risk of being prosecuted and convicted for acts of torture committed by him between 1990 and 1991." (see "B. The Court's assessment", citing both the Jorgic and Korbely judgments)

Kosonov, living in Soviet occupied Latvia during WWII, was called up as a soldier in the Soviet Army in 1942. In June 1943 he and some twenty soldiers were parachuted into Belarus territory, then under German occupation, near the Latvian border and thus to the area where he was born. The applicant joined a Soviet commando unit composed of members of the "Red Partisans" (a Soviet force which fought a guerrilla war against the German forces). In March 1944 he was put in command of a platoon by his two immediate superiors, whose primary objectives were to sabotage military installations, communication lines and German supply points, to derail trains and to spread political propaganda among the local population. In February 1944, the German army had discovered and wiped out a group of Red Partisans led by Major Chugunov who were hiding in the barn of Meikuls Krupniks in the village of Mazie Bati. The German military administration had earlier provided some men living in Mazie Bati with a rifle and two grenades each. The applicant and his unit suspected the villagers of having spied for the Germans and of having turned in Major Chugunov's men to the enemy. They decided to take reprisals against the villagers, which resulted in the killing of them. (paras. 13-20). In September 2004, he was convicted of war crimes as defined in 1946 by the IMT and sentenced to one year in prison. (para. 39)

The court repeated the essence of legality of the previous case by saying that:

Accordingly, Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that

the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable. (para. 185)

The specific question about the legality of the national law under which he was convicted and sentenced for war crimes was whether war crimes could have been committed in the specific situation where there was no war between two states because Latvia was part of the Soviet Union, a requirement at that time. After a lengthy overview of the law with respect to the prosecution of war crimes in the forties (paras. 205-209), the court came to the conclusion:

While in 1944 a nexus with an international armed conflict was required to prosecute acts as war crimes, that did not mean that only armed forces personnel or nationals of a belligerent State could be so accused. The relevant nexus was a direct connection between the alleged crime and the international armed conflict so that the alleged crime had to be an act in furtherance of war objectives. The domestic courts found that the operation on 27 May 1944 was mounted given the suspicion that certain villagers had cooperated with the German military administration so that it is evident that the impugned events had a direct connection to the USSR/German international armed conflict and were ostensibly carried out in furtherance of the Soviet war objectives. (para. 210)

It also found that there was sufficient international practice to hold persons with command responsibility liable for the commission of war crimes by persons reporting to him. (para. 211-213). All this resulted in the conclusion while relying, among other cases, on the Korbely judgment, that the actions by Kosonov were offences defined with sufficient accessibility and foreseeability by the law and customs of war. (paras. 234-244).

Van Anraat, a Dutch national, was convicted at the trial level of complicity in war crimes in December 2005 and sentenced to 15 years' imprisonment for having provided between 1984 and 1988 chemicals used by the Saddam Hussein regime in chemical attacks against Kurds within Iraq in 1988 and against the Iranian army during the Iraq-Iran war in 1980–88. He was acquitted of complicity in genocide with respect to those attacks, as it was not established that he had actual knowledge of the genocidal intent of the Saddam government but was convicted aiding and abetting violations of the laws and customs of war. During the appeal of this case the court increased his sentence to 17 years in May 2007, which was confirmed by the Supreme Court in June 2009. (paras. 3-17)

The issue with respect to the legality was whether the legislation in place at time he was charged (the War Crimes Act) when using the language of customs of war was too vague compared with the legislation that it replaced it in 2003 (the International Crimes Act), which, as it has incorporated the Rome Statute, had specific references to crimes which could capture the use of chemical weapons, such as willfully causing great suffering and the use of poisoned weapons. With respect to the general principles of foreseeability the court expanded the parameters as set out in Korbely and Kosonov (to which it refers to in the judgment) by saying:

The scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails. (para. 81)

Applying this general tenet to the situation at hand, the court dismissed the argument of vagueness by comparing the two pieces of legislation by saying that it is not always necessary for legislation to be precise and that it is entirely permissible for national legislators to use the technique of general categorizations of crimes as opposed to using an exhaustive listing. (para. 83) Secondly, the prohibition against using chemical weapons, as contained already in the 1925 Geneva Gas Protocol, could be considered customary international law during the eighties due to the ratification of large number of states to this treaty and the near universal condemnation of its use by Iraq during its war with Iran. (para. 86-92) Thirdly, in response to the argument that Van Anraat could not have been responsible for the use of chemical weapons within Iraq as that would amount to a non-international armed conflict, the court made reference to the October 1995 ICTY Appeals Chamber decision in the *Tadi?* case (here) to come to the conclusion that the prohibition of the use of chemical weapons would also apply in a conflict of that nature. (para. 94). This led the court to say:

In conclusion, it cannot be maintained that, at the time when the applicant was committing the acts which ultimately led to his prosecution, there was anything unclear about the criminal nature of the use of mustard gas either against an adversary in an international conflict or against a civilian population present in border areas affected by an international conflict. The applicant could therefore reasonably have been expected to be aware of the state of the law and if need be to take appropriate advice. (para. 96)

Conclusion re legality

The requirements for the test of foreseeability for acts constituting international crimes at the time they were committed, which is an important part of the legality principle, have evolved considerably over the almost two years (September 2008 – July 2010) that the court directed its attention to it. While in the first case, Korbely, these requirements were set out in a rather rudimentary fashion, namely that “the essence of the offences could have been reasonably foreseen” subsequent cases provided more elaboration to this test, such as “could reasonably, if need be with the help of informed legal advice, have foreseen the risk of being prosecuted and convicted” in the Ould Dah case and Kosonov cases to the most detailed iteration of this test by repeating what had been said in the previous two cases but then adding the following: “This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation.”.

In order to determine what was reasonably foreseeable in the circumstances, the court in each case had to determine what the state of international law was as related to the national legislation for the time period under consideration, namely the forties in the Kosonov case, the fifties in the Korbely case, the eighties in the Van Anraat case and the nineties in the Ould Dah situation. The jurisprudence of the court regarding its view of international criminal law (ICL) as part of the determination of legality and non-retroactive legislation has shown an interesting trajectory. In general, the court has shown a very good understanding of the main concepts in ICL regarding war crimes and crimes against humanity. At times it has expressed notions with respect to those crimes, which were ahead of these developments by the international institutions specifically created to deal with ICL, especially the ICTY while at other times the opposite occurred, and the court did not apply ICL as set out by those same tribunals.

An example of where both of these aspects occurred was the Korbely case. On the progressive side, the court first of all set out the elements of crimes against humanity as they existed in the 1950s in a manner which found traction in the later jurisprudence of the international tribunals; secondly it made it clear that crimes against humanity are of a different nature than war crimes and so could not be subsumed in war crimes legislation; and thirdly the court implicitly developed its view that war crimes could be committed during non-international armed conflicts before 1990 (a position also taken with some caution in the Kosonov case but unreservedly accepted in the Van Anraat decision), which was not recognized at the international level until 1995 by the ICTY Appeals Chamber in the *Tadi?* case (although the ECtHR's position had already had support in precedents at the domestic level in that the Supreme Court of the Netherlands had reached the same conclusion in the Hesham and Jalalzoy case in 2008 while the same happened in Chile in the Lejderman case in 2009, both dealing with conduct in the seventies).

On the conservative side, its view of what constituted a non-international armed conflict is at odds what has been said in ICL. The court says with respect to the latter that such a conflict exists irrespective of the level of intensity of the conflict or of the manner in which the insurgents were organized, which is quite different from the long standing legal position, as reflected most recently in the Rome Statue, article 8(2)(f) (here), which states that the Statute "applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."

Similarly, while the court in Van Anraat case is very thorough and convincing that the use of chemical weapons was an international wrong in the eighties under customary international law, its reasoning that this was also an international crime in that it resulted in individual responsibility rather than state responsibility, which is an extra legal step to be undertaken, is absent and incorrectly read in. The reference to the *Tadi?* case is not convincing as the Appeals Chamber of the ICTY there analyses the use of such weapons as an example how ICL should be extended from international armed conflicts to non-international armed conflicts (paras. 120-125), but this example is not carried over into its discussion of individual responsibility for crimes committed in such armed conflicts (paras. 128-136).

Lastly, it is interesting to note that in Canada the notion of legality in the area of ICL has also been considered twice, once by the Supreme Court in the Finta case to determine whether crimes against humanity were part of international law during the Second World War (here) and once by the Quebec Court of Appeal in the Munyaneza case with respect whether war crimes could be committed in non-international armed conflicts in 1994 (here); on both occasions, the domestic legislation was found not to be retroactive.

Amnesties

Two cases, *Margus v. Croatia*, Application No. 4455/10, 27 May 2014 (Grand Chamber) (here) and the Ould Dah case (discussed above) have provided insights how amnesties in national legislation for international crimes should be considered.

In the Ould Dah case, the court indicated that amnesties for an international crime such as torture are generally incompatible with the duty of states to investigate acts of torture or "The obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law." The court relied on decisions by the United Nations Human Rights Committee and the International Criminal Tribunal for the former Yugoslavia (ICTY) as well on the Rome Statute for this proposition.

The Margus case where Croatia refused to grant an amnesty of a person convicted of war crimes for activities committed in 1991 (paras. 13-25) confirmed this approach when saying:

A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognized obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances. (para. 139)

The court relied on the same sources as the ones in the Ould Dah case but in addition also on the jurisprudence of the Inter-American Court of Human Rights as well as two ICL tribunals, the Extraordinary Chambers in the Courts of Cambodia and the Special Court of Sierra Leone. (paras. 60-68)

This approach re amnesties and international crimes was also recently followed by the ICC (The Prosecutor v. Saif Al-Islam Gaddafi, paras. 61-68, with a specific reference to the Margus case in paras. 67-68; for a commentary of this case, see "TRIED BY ANOTHER COURT" IN THE CONTEXT OF ADMISSIBILITY CHALLENGES: The Prosecutor v. Saif Al-Islam Gaddafi)

Procedural issues

In *Sari? v. Denmark*, Decision, 31913/96, 2 February 1999 (here), the underlying issue, namely having the opportunity to have witnesses examined on the accused's behalf under the same

conditions as witnesses against him, is not one specifically related to notions of international crimes but is of importance because of the circumstances of his trial. The background was that Sari? was tried in Denmark for the ill-treatment and killing of prisoners in July and August 1993 in the prison camp of Dretelj in Bosnia during the armed conflict in the former Yugoslavia. He had wanted to call eight witnesses on his behalf, which request was denied by the Danish court. The ECtHR supported the Danish court's ruling based on the following reasoning:

On the basis of the material before it, the Court finds no reason to doubt that the prosecution availed itself of accessible and adequate means in the light of the special circumstances of the case to find the witnesses in question. In that respect the Court has paid attention to the scant information available to the authorities about the witnesses requested by the defence, and to the state of war in former Yugoslavia during the period in question.

Ahorugeze v. Sweden, Decision 37075/09, 27 October 2011 (here) concerned the extradition of a person suspected of being involved in the 1994 Rwandan genocide. It had followed a number of unsuccessful attempts between 2008-2009 by both the prosecutor of the International Criminal Tribunal for Rwanda as well a number of European governments to effect requests for extradition from the Rwandan government.

In 2008 the prosecutor of the ICTR filed five requests to have cases transferred to Rwanda but in all cases, the Trial Chamber and on three occasions the Appeals Chamber prevented this transfer from taking place. In the Trial Chambers, three concerns were identified in relation to the conduct of the trials and subsequent detention conditions, namely the fact that the judiciary was not independent enough from the Rwandan government; the fact that there was not sufficient witness protection, especially for defence witnesses; and the fact that Rwanda allowed solitary confinement for life as a punishment. At the appeal level the first concern was dismissed but a transfer was not allowed based on the latter two problems, which were also the reasons for refusal in two subsequent Trial Chamber decisions. (paras. 44-61)

A similar pattern occurred in Europe. Rwanda had requested the extradition of génocidaires from a number of countries, but in quick succession between October 2008 and May 2009, the courts in Germany, France, Switzerland, Finland and the UK refused to accede to these request citing the same fair trial concerns and all depending heavily on the ICTR judgments in their reasoning. However, this trend was reversed in May 2009 in Sweden, six weeks after the decision in the UK, when its Supreme Court decided that based on the evidence provided to it there was no issue in respect to the problems identified by the UK in terms of the treatment of witnesses and the independence of the Rwandan judiciary. (paras. 62-75)

The ECtHR examined all the three concerns referred to above in the ICTR and European jurisprudence. With respect to the issue of detention and whether this could amount to inhuman treatment a set out in article 3 of the European Convention on Human Rights (ECHR), the court was of the view that given the fact that the two detention facilities where Ahorugeze would spend time both pre- and post-trial, had met international standards, no violation of that article could be contemplated.

(paras. 89-95) As to argument that he would not get a fair trial in Rwanda, which were primarily based on the issues raised in the UK and ICTR context, the court felt the concerns raised had been addressed by the Rwandan government in the meantime, such as abolishing the penalty of life imprisonment in isolation (para. 118), such as taking measures to ensure that defence witnesses would be treated properly (paras. 120-123) and ensuring the independence of the judiciary. (para. 125)

As a result of this decision, a number of countries, such as Canada, Denmark, the Netherlands, Sweden and the US as well as the ICTR extradited or deported suspected genocidaires to Rwanda but the UK is still reluctant to do, primarily because of the developments since 2009 (see Government of Rwanda v Nteziryayo & Ors [2017] EWHC 1912 (Admin), paras. 156-207 for these new developments, consisting of examining seven cases of persons actually transferred to Rwanda and the fair trial issues faced by them and paras. 498-499 for the conclusion).

Conclusion

The court has examined several issues related to the prosecution of persons involved in international crimes, such as torture, war crimes and crimes against humanity, both in terms of substantive elements of these crimes as well as their procedural aspects. The court had to carefully balance the fundamental rights of accused in criminal or quasi-criminal processes in European countries with preventing impunity for the heinous character of these crimes. It would appear that this balance on the whole has been achieved while recognizing that some of the issues under consideration might have had a different outcome if the crimes in question had been of a less serious character. The judgments in respect to legality, fair trial and especially amnesties are clear examples of this observation.

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About the Author

*Joseph Rikhof**Globally-recognized as an expert in cases of war crimes, Dr. Joseph Rikhof was 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.*