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WAR CRIMES BEFORE THE NORWEGIAN SUPREME COURT:

THE OBLIGATION TO PROSECUTE AND THE PRINCIPLE OF LEGALITY – AN INCUMBRANCE OR OPPORTUNITY?

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War Crimes before the Norwegian Supreme Court: The Obligation to Prosecute and the Principle of Legality – An Incumbrance or Opportunity?

Simon O'Connor*

Abstract

In proceedings in 2010 and 2011 the Norwegian Supreme Court dismissed a war crimes conviction under the relatively recently passed international crimes provisions of the Norwegian Penal Code. The Court held that the conviction was unconstitutional as it applied those provisions retroactively. This essay challenges that conclusion. It does so on the basis that whilst a originalist, though not necessarily literal reading of the Norwegian Constitution would allow such a decision, the Supreme Court in both its reasoning and finding either conceivably misinterpreted, or in some cases even failed to regard settled aspects of international law by which Norway considers it has long been bound. Furthermore the Court applied the nullum crimen rule in a manner arguably inconsistent with the general view of how that rule applies to acts recognized as criminal under international law.

The effect of the Norwegian Supreme Court's decision is that currently where, as a matter of fact (and international law), acts would constitute war crimes, genocide or crimes against humanity, if they were committed prior to the 7 March 2008 they cannot be prosecuted as those specific crimes in Norway. The argument that this paper presents is that the Supreme Court's decision is arguably untenable, inconsistent with the acknowledged obligations the state of Norway has long recognized it had (and are recognized under international law) to prosecute such acts as the international crimes they are and that in fact to do so is consistent rather than in contradiction any other than an absolutist originalist reading of the Norwegian Constitution.

The precedential consequences of their decision are already being felt. On the 14 February 2013 a trial court convicted an accused for complicity in the Rwandan genocide. His conviction and the indictment were on the charge of murder, not genocide. Whilst there are different arguments with respect to other international crimes than those constituting grave breaches of the Geneva Conventions this paper argues that the rationale and conclusions reached by the Norwegian Supreme Court need to be revisited.

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Introduction

In 2005 Norway completed an extensive revision of its Penal Code, originally from 1902, and included substantive provisions on genocide, crimes against humanity and war crimes. On the 7 March 2008 those provisions, and for those crimes, the general criminal provisions of the Code, including the scope of jurisdiction, entered into force[1]. This essay's concern is whether these facts have the consequence of limiting domestic prosecutions before Norwegian courts for those crimes to acts committed after that date. Insofar as one first instance court was concerned it thought the answer to that question in respect of crimes against humanity must be answered in the affirmative, but that there was no such limitation for war crimes. This was a view the appellate court shared. The Supreme Court in a majority judgment however was of the view that this temporal limitation applied equally to war crimes, and that attempting to apply the new war crimes provisions of the 2005 Penal Code to acts prior to that date violated the Norwegian Constitution.

It might be thought surprising by some that such a state as Norway took until 2008 to pass and enter into force domestic legislation prescribing the core international crimes of genocide crimes against humanity and war crimes. Further some might think it more remarkable that when the first war crimes trial in Norway for 60 years reached the Supreme Court of Norway ("Supreme Court") it ruled that the constitutional bar to retroactive application of law[2] prevented acts committed prior to 2008 being prosecuted as war crimes[3].

This essay is intended to offer a short, yet substantive, critique of that dismissal by the Supreme Court, by majority, of war crimes convictions for acts committed in Bosnia Herzegovina in between June and October 1992. Whilst this essay will not address theories of law concerning the manner by which countries' highest courts reach their conclusions in the

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[1] Law No. 28/2005. These are the only parts of the 2005 Penal Code currently in force. For all other types of crimes the 1902 Penal Code (as amended) still prevails. Where necessary I shall therefore refer to either the "2005 Penal Code or the "1902 Penal Code", though use "Penal Code" where which I am referring to is evident.

[2] Article 97 Norwegian Constitution: "No law must be given retroactive effect" English Translation http://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/

[3] As will be s een below at first instance the district court dismissed charges on the indictment for crimes against humanity for want of subject matter jurisdiction on the basis of non-retroactive provisions of the Norwegian Constitution. As this matter was not dealt with substantively by the Supreme Court I will address that issue only in part.

sense of a choice between alternatives rather than there being a "right" or "wrong" decision. My aim is rather to illustrate that it was open to the Supreme Court to reach a different conclusion and that a number of gaps in the Court's reasoning or its failure at times to address the relationship of international law to domestic proceedings are such as to render their current judgment unsustainable. Whilst that judgment subsists of course all lower courts are bound by it preventing the prosecution of any of the core international crimes by Norwegian Courts for acts committed prior to 7 March 2008[4].

On one view the Supreme Court's decision might well have been regarded as a simple exercise of reading the constitutional prohibition on retroactivity of laws, which permits, on its face, of no exception. However, the acts the accused was convicted of constituted war crimes as a matter of international law at the time of their commission and, as we will see below, the Supreme Court's considered they constituted grave breaches of the Fourth Geneva Convention. As a result of that finding, together with as we shall see below, the nationality of the perpetrator and victims at the time of the offence and the *loci delicti* means that this case presented questions not only of the application of one aspect of the principle of legality, namely retroactivity, but also the extent to which the issues of the exercise of universal jurisdiction. The Supreme Court saw no difficulty with in terms of *ratione personae* that the accused personally fell within the jurisdiction of a Norwegian court, nor that none of the accused victims were Norwegian, that the offence occurred outside of the territorial jurisdiction and only subsequent to the offences did the accused begin to reside in Norway. Now it is feasible to explain those acknowledgments of jurisdiction without transgressing the principle of legality. However, whether one might take a view that in this instant case, war crimes would or should constitute an exception to or are exempt from the application of the principle or indeed not of course may depend upon the manner in which one read the rule. Does one read the rule in its strictest sense "that there must be a prior written criminal statute encompassing the act charged (*nullum crimen, nulla poena sine praevia lege scripta*)"[5] or does one consider that there is a distinction to be made between such a rule in international

[4] On the 14th February 2013 the Oslo City Court convicted a former Rwandan citizen for his complicity in the 1994 genocide in Rwanda. The accused was indicted and convicted on the basis of aiding and abetting the "ordinary" crime of murder under the 1902 Penal Code and not the crime of genocide. The basis for the indictment not being on genocide charges is the Supreme Court's decision in 2010. The genocidal aspect of the offence is to be dealt with on sentence.

[5] Kenneth S. Gallant *The Principle of Legality in International and Comparative Criminal Law* (2009) Cambridge University Press p.321

and national contexts[6]. In a sense is one comfortable with a more generic notion of that if the accused is able "to appreciate that the conduct is criminal in the sense generally understood"[7] that would suffice. To this notion of foresight in respect of the accused's acts before the Norwegian courts I will return to later. Finally in interpreting a constitutional prohibition on retroactivity of law should, in the context of crimes under international law, Supreme Courts pay heed to the extent, scope and interpretation states have given to their preceding (both the trial and the acts committed) international obligations to prosecute those crimes.

The essence of my critique is thus twofold. First that the Supreme Court failed to properly consider, and to the extent it did consider, its conclusion are susceptible to challenge to such an extent as to render its current ruling unsustainable The Court ought to have offered a more substantive analysis of the principle of legality, as both a principle of national and international law, to the prosecution of war crimes. Furthermore the Supreme Court failed to properly take account of the obligation of the state of Norway to prosecute acts that constituted grave breaches of the Geneva Conventions that equally constitute war crimes, and the bearing that obligation ought to have to their deliberations on the *nullum crimen sine lege* rule.

Preliminary remarks

Before analyzing the details particular to the proceedings before the Norwegian domestic courts it is necessary to in very brief terms sketch the relevant premises from which this paper starts. This essay concerns itself with the prosecution of war crimes in a domestic jurisdiction and the relevance of the question often raised in respect of those and of genocide and crimes against humanity, of the application of *ex post facto* laws. In a domestic setting proceedings have both proceeded and been dismissed as a result of challenges based on the principle of legality[8]. Of course in terms of general criminal law one would find little to fault in Ashworth's remark that "[t]he essence of the non-retroactivity principle is that a person

[6] For a detailed consideration see Ward N. Ferdinandusse *Direct Application of International Criminal Law in National Courts* (2006), TMC Asser Press especially ch.6.
[7] ICTY, *The Prosecutor v Hadzihasanovic* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility Case No. IT-01-47-AR72, 16 July 2003, para 34
[8] See Ferdinandusse, note 6 above and Draft *Amicus Curiae* brief on behalf of the Venice Commission in proceedings before the Constitutional Court of Peru *On the case of Santiago Brysón de la Barra et al (on Crimes Against Humanity)* para 42 -51
http://magistrados.te.gob.mx/gonzalez.oropeza/sites/magistrados.te.gob.mx.gonzalez.oropeza/files/comision_venecia/CDL(2011)074-e_0.pdf

should never be convicted or punished except in accordance with a previously declared offence governing the conduct in question"[9]. Similarly one would not dispute the clear articulation offered on consistent occasions by the European Court of Human Rights in expressing the nature of the guarantee enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[10], namely that the article "should be construed and applied, as follows from its object and purpose, so as to provide effective safeguards against arbitrary prosecution, conviction and punishment", including, though not limited to, "prohibiting the retrospective application of the criminal law to the accused's disadvantage".[11] In the context of crimes that do not constitute international crimes these interpretations are reasonably clear and one can see much merit in a strict interpretation of non-retroactivity provisions. However, war crimes have particular characteristics, together with crimes against humanity and genocide, that suggest when considering the application of general principles of criminal law to them one must to take account of the cumulative effect of both international and domestic law and the inter-relationship of those effects.

It is necessary however to make one caveat here to the analysis that follows. Whilst genocide, crimes against humanity and war crimes often share characteristics and are often described in almost inchoate terms, there are marked differences. Beyond the simple fact that genocide and crimes against humanity can occur, as a matter of law, in the absence of an armed conflict when one begins the discuss issues such as the application of the principle of legality to those crimes and the source for obligations pertinent to the investigation and prosecution of such crimes the differences become starker still. In the context of war crimes, additionally, one must differentiate between those acts that are war crimes and those war crimes that constitute grave breaches of the Geneva Conventions and their Additional Protocols. This essay concerns itself with how the Norwegian Supreme Court arguably erred in considering retroactive application of law prohibiting acts that on its own factual findings (or those of lower courts it endorsed) that constituted grave breaches of the Fourth Geneva Convention as war crimes a violation of the principle of legality, as articulated in the Norwegian Constitution. Whilst some of the arguments that follow would pertain in addressing the decision not to proceed with charges of crime against humanity in the particular case

[9] Andrew Ashworth *General Principles of Criminal Law* (1999) Oxford University Press 3rd ed. p.71
[10] Hereafter "European Convention"
[11] ECHR *Kononov v Latvia* Application No. 36376/04 Judgment 17 May 2010, para. 185; See additionally, ECHR Kafkaris v Cyprus Application No. 12 February 2008 para 137; ECHR Veerber v Estonia (No.2) Application No. 45771/99 21 January 2003 para.31

discussed here, I will address that decision in less detail. To properly address proceedings in respect of that charge, which does not have the same treaty source as the war crimes, which constitute grave breaches, I am considering, would require a slightly different approach and as a result will not be covered in detail here.

Similarly, although this is often desirable, in the context of this essay comparison with the Nuremberg and Tokyo Tribunals and the International Criminal Court (ICC) as to the manner in which they have dealt with allegations of *ex post facto* application of laws, has to be approached with caution. The arguments, in Nuremberg and Tokyo, centered in the historic post- Second World War tribunals on the absence in international law of particular crimes prior to 1945. One might contend, to be admittedly far to brief, that the defence's contentions in Nuremberg on *ex post facto* laws, applied more to crimes against peace and crimes against humanity than it did to violations of the laws and customs of war. The ICC is of course a creature of its own statute. The fact that it does not allow for retroactive application should perhaps more properly be considered in light of its own manifestation. That such provision was negotiated into the treaty establishing it does not impinge on the relevant obligations state have, or recognition given under other treaties, such as the Fourth Geneva Convention, the ICCPR or the European Convention. For those distinctions, I suggest that I need not pursue comparative arguments here in relation to this accused's crimes. Their foundation in international law is clear - as the government of Norway thought on ratification was their application in domestic law – and, as we will see in their deliberations, the Supreme Court emphasized the illegality of the accused's acts as a matter of international law (as did the trial and Appellate courts). Equally at no stage during the proceedings did the defence advance an argument that the allegation did not constitute crimes under international law.

Though none of the domestic courts I am concerned with here considered it in detail, elements of both the premise and subsequent jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY) are helpful here. It should be recalled that the ICTY (bearing in mind this was the first international tribunal to be predicated on, at least in part and *ex post facto* application of the provisions of its statute) the issue of ensuring the tribunal would not violate the principle *nullum crimen sine lege* was considered from its outset. The Secretary General's Report, requested under UNSCR 808 and relied upon under UNSCR 827 establishing the tribunal, emphasized that there needed to be certainty as to the applicable law and thus that the tribunal should apply the rules of IHL that "beyond any doubt

[formed] part of customary international law"[12] in order to avoid a circumstances where not all the parties to the conflict were bound by treaty[13]. In relying on that requirement the Appeals Chamber of the ICTY has noted that "The maxim of *nullum crimen sine lege* is also satisfied where a State is already treaty-bound by a specific convention, and the International Tribunal applies a provision of that convention irrespective of whether it is part of customary law"[14]. In the footnote to that conclusions and in its remarks that follow the Appeals Chamber made clear that its reference to treaty law as that was the body of law that established the crime at the time of its commission (which was subsequently provided for as an offence in the Tribunal's statute)[15]. The Appeals Chamber was under no doubts to the applicability of the Fourth Geneva Convention to Bosnia and Herzegovina from their date of independence, 6th March 1992. Bosnia and Herzegovina had in its Declaration of Succession on the 31 December 1992 declared itself bound by the Geneva Conventions and their Additional Protocol from their date of independence. Croatia in a similar made a similar declaration on the 11 May 1992 declaring itself a party from 8 October 1991[16]. Notwithstanding the document of succession for Bosnia and Herzegovina post-dates the events in the domestic proceedings I consider below, it seems irrefutable that the Fourth Geneva Convention applied to hostilities in Bosnia and Herzegovina in the spring of 1992.

As the source of the illegality, as a matter of international law, for acts the accused was convicted of can be clearly found in the grave breaches provisions of the fourth Geneva Convention I seems prudent to begin my analysis addressing Norway method of importing international obligations into domestic law.

Is Norway Dualist or Monist in its treaty implementation?

The application of international law to domestic systems, in general terms relies on the either on the constitutional provisions of given states or their practice in adopting a monist or dualist

[12] *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) S/25704* at para.34.
[13] For remarks on this and the manner in which the principle of legality has been addressed by other international courts and tribunals see Kenneth S. Gallant note 5 above especially ch. 6
[14] ICTY *The Prosecutor v. Dario Kordić and Mario Čerkez* Case no. ICTY-95-14/2-A Appeal Judgment 17 December 2004 at para.44
[15] Ibid para. 46
[16] Ibid, para. 44 n. 41.

method of implementing international law domestically[17]. The second paragraph of article 26 of the Norwegian Constitution, after providing for the right to conclude and denounce treaties vesting in the King, remarks "Treaties on matters of special importance, and, in all cases, treaties whose implementation, according to the Constitution, necessitates a new law or a decision by the Storting[18], are not binding until the Storting has given its consent thereto". This would seem an express of a dualist approach to treaty implementation, indicating seemingly the absence of self-executing treaties (especially those of import, though what import is not clear) and the requirement for legislation to be passed specifically giving effect to obligations under treaties before those obligations constitute Norwegian law.

Norway signed the Fourth Geneva Convention on the date it was opened for signature, ratified it on the 3 August 1951 following which it entered in force on 3 February 1952.[19] Beyond provisions the its Military Penal Code, concerning a broad prohibition for those subject to that Code (which the accused here was not) on acts that violate the Geneva Conventions and their Additional Protocols, Norway had, before 2005 enacted no legislation incorporating provisions of the Fourth, or for that manner any, of the other Geneva Conventions of 1949, into domestic law. It has nonetheless considered itself bound by the provisions of those Conventions since their entry into force[20]. In the Proposition to the Storting (the Government White Paper) No. 28 of 1951, regarding Norway's ratification of the Geneva Conventions of 1949 made it clear that the Government considered that ratification of these treaties required no legislative amendments, nor implementing legislation[21]. Of course some might view that this, if anywhere, is where the fault lies: Failing to incorporate legislation at the time of

[17] For a brief outline of those methods and some examples of state practice see Anthony Aust *Modern Treaty Law and Practice* (2002) Cambridge, Cambridge University Press pp.145 - 161

[18] The "Storting" is the Norwegian Parliament,

[19] Norway made no declarations, nor reservations, when it ratified all four Geneva Conventions of 1949 in 1951.

[20] In proceedings concerning criminal prosecution for misuse of the protected Red Cross emblem – the only other case, domestically, to address provisions of the Geneva Conventions – heard in May 2010, the Supreme Court did it is fair to say express some concern as to the extent to which the domestic criminal law concerning such misuse "in all other respects safeguards the obligations to protect the Red Cross emblem which follows from the Geneva Convention [sic] of 1949" *Public Prosecutor v AAAA Tøyen Tannlegevakt* HR-2010-00816-A Judgment 12 May 2010 (English translation on file with author). That said such a cursory (and arguably *obiter*) remark cannot be said to properly bear on deliberations of grave breaches and the obligations that append thereto. In other respects however, Norway has enacted various domestic laws incorporating international human rights instruments into domestic law, various weapons treaties that it has signed and *Act No. 65 of 15 June 2001 relating to the implementation of the Statute of the International Criminal Court of 17 July 1998 (the Rome Statute)* though this act deals principally with the surrender of persons to the ICC and other means of assistance to the Court pursuant to the Rome statute and Norwegian law. It also addresses issues of the accused's entitlement to representation, *non bis in idem* and the enforcement of sentences or sanction in Norway (English translation on file with author). This law did not address incorporating the crimes listed in the Rome Statute into domestic Norwegian law.

[21] *Public Prosecutor v AAAA Tøyen Tannlegevakt* HR-2010-00816-A Judgment 12 May 2010 para. 18-19

ratification has restricted the ability of domestic courts in Norway to try grave breaches. Be that as it may, as I indicated at the outset my intention is here to ask whether it was open to the Supreme Court to reach a conclusion different from that which it did in spite of this inaction, not to reach the conclusion it did because of it.

Norway is a party to both the International Covenant on Civil and Political Rights (ICCPR) and the European Convention. In 1994 Norway amended its Constitution adding Article 110c which reads "It is the responsibility of the authorities of the State to respect and ensure human rights. Specific provisions for the implementation of treaties thereon shall be determined by law". In 1999 Norway passed the *Act relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act)*. Section 2 of the Act provided for the entry into force of the European Convention and the ICCPR and the International Covenants on Economic, Social and Cultural, Rights "insofar as they are binding for Norway"[22]. The effect of this short piece of legislation (there are only 6 sections) is that the entirety of those treaties have the force of Norwegian law, subject to reservations or declarations Norway made. Insofar as this essay is concerned it is worth noting that no reservation nor declaration was made, neither to article 7 of the European Convention, nor article 15 of the ICCPR. Therefore, I would argue that, as a matter of Norwegian law, the exceptions provided for in articles 7 and 15 to the general principle of legality, namely not prohibiting trial and punishment for acts that "at the time they when it was committed, was criminal according to the general principles of law recognized by the community of nations"[23] are incorporated into the domestic legislation of Norway and that offences to which those exception would pertain have to be read in that light. I will comment further on the remarks the Supreme Court made with respect to Article 7 below.

Norway is not a party to the Vienna Convention on the Law of Treaties, though it nonetheless accepts elements of that Convention form part of customary law. It undeniably recognizes its obligation to perform treaties in good faith (*pacta sunt servanda)* and one could argue that whilst dualist in principle, it has evidently considered it permissible to be, at times, monist in practice[24].

[22] Law No. 30/1999. Available at http://www.ub.uio.no/ujur/ulovdata/lov-19990521-030-eng.pdf
[23] ECHR article 7(2) and ICCPR article 15 (2).
[24] It is worth recalling here Aust's remark that monism and dualism are "doctrines developed by scholars in an attempt to explain the different approaches taken by states" note 16 above p.145. This would not seem to exclude both doctrines being applied within states.

It would seem thus as a matter of international law Norway accepts both an obligation under Article 146 of the Fourth Geneva Convention to pass legislation to provide effective penal sanctions for persons who commit grave breaches of the Fourth Geneva Convention and that insofar as the principle of legality is concerned it acknowledges and accepts the exception to the general rule of *nulla crimen poena sine lege* provided for in international human rights instruments. The recognition of such, which as we will see, the Supreme Court either failed to address at all or did so only in passing, raises significant questions as to the sustainability of their conclusion as to the non-retroactivity application of war crimes provisions of the Norwegian Penal Code. I will now turn to the relevant provisions of the Penal Codes.

Relevant Provisions of the Norwegian Penal Code 1902 and 2005

Chapter 1 of the Norwegian Penal Code of 2005[25] contains general provisions on the scope and extent of the criminal legislation and chapter 16 defines the crimes of genocide, crimes against humanity and war crimes. Section 3 of the Penal Code address the temporal scope of the legislation and provides for a general rule on the applicable criminal law, namely that law in force at the time the offence is committed is that which applies, but provides a caveat concerning chapter 16 crimes. The relevant part reads

> (2) The provisions of Chapter 16 apply to acts committed prior to their entry into force if the act was punishable at the time it was committed under the criminal legislation in force at the time and was regarded as genocide, a crime against humanity or a war crime under international law. The penalty may nevertheless not exceed the penalty that would have been imposed pursuant to the criminal legislation in force at the time the act was committed.

I shall address how this provision was addressed in the Supreme Court's reasoning in due course.

Section 5 concerns the extraterritorial jurisdiction of the Penal Code. Whilst not only limited to these issues in its scope it provides for its application to acts that are regarded as a war

[25] The current Penal Code has not yet been officially translated in full. The author holds on file a translation of parts of the Code (including all those cited) prepared by the Norwegian Ministry of Justice.

crimes, genocide or a crime against humanity or are regarded as a breach of the international law of war and can extend to persons who since the act was committed has become a Norwegian national. The accused in the proceedings discussed below arrived in Norway in 1993 and subsequently acquired Norwegian citizenship. To undertake a prosecution in Norway in 2008 for acts committed in 1992 by a then member of the Croatian Defence Force against ethnic Serbs in Bosnia-Herzegovina, would seem an archetype of an exercise of universal jurisdiction[26]. These facts were however not the subject of substantive dispute at any stage of the proceedings and the Supreme Court evidently considered he fell within the jurisdiction of Norwegian courts in passing the ultimate sentence it did. As an issue of course this exercise of universal jurisdiction merits consideration in all its aspects (personal, temporal and geographical). I will not however dwell (for want of space) on significant further discussions regarding the scope of jurisdiction that seemed not to trouble the Supreme Court.

With respect to crimes against humanity the relevant provisions, in so far as this accused was concerned, are to be found at §102 of the Penal Code, the pertinent part of which reads

> (1) A person is liable to punishment for a crime against humanity who, as part of a widespread or systematic attack directed against any civilian population… (e) imprisons or otherwise severely deprives a person of physical liberty in violation of fundamental rules of international law.

Similarly for the war crimes charges faced, §103 reads

> (1) Any person is liable to punishment for a war crime who in connection with an armed conflict … (h) in violation of international law deports or forcibly transfers a protected person from an area in which the person is lawfully present or unlawfully confines a protected person… (3) A protected person is a person who does not take, or who no longer takes, active part in hostilities or is otherwise protected under international law.

Finally the provisions the Penal Code from 1902 on which the Supreme Court based its judgment and sentence are to be found at §223 of that Code which provides that

[26] See Roger O'Keefe *Universal Jurisdiction Clarifying the Basic Concept* Journal of International Criminal Justice 2 (2004), 735-760

> Any person who unlawfully deprives another person of his liberty or who aids and abets such deprivation of liberty shall be liable to imprisonment for a term not exceeding five years.
>
> If the deprivation of liberty has lasted for more than one month or has caused any person abnormal suffering or considerable injury to body or health or has resulted in the death of any person, imprisonment for a term of not less than one year shall be imposed.
>
> Any person who conspires with another person to commit an act referred to in the second paragraph shall be liable to imprisonment for a period not exceeding 10 years[27].

With respect to extraterritorial application §12 of the 1902 Penal Code provides for a number of listed offences committed by Norwegians and foreigners outside of the territory of Norway to nonetheless be capable of falling within its jurisdiction. An offence under §223 is one such offence.

Trial before the Court of First Instance

The prosecution commenced before the Oslo District Court in 2008 concerning alleged offences committed in Bosnia Herzegovina between June and October 1992[28]. The accused, Misrad Repak, was a member of the Croatian Defence Force (HOS) and held a position of seniority[29] in the Dretejl camp/prison in the municipality of Čapljina[30]. The case concerned

[27] For a full translation of the 1902 Penal Code (as amended) See http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf. Whilst this text refers to amendments up to December 2005, this is not to be confused with the 2005 Penal Code (see note 2)

[28] *The Public Prosecutor v Misrad Repak*, Case No. 08-018985MED-OTIR/08 Trial Judgment 2 December 2008. A translation of the trial judgment can be found at http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/45061a413067e31cc125755c004a5773/$FILE/Public%20Prosecutor%20v.%20Misrad%20Repak.PDF

[29] The precise characteristic of that position and the issue of whether he held a particular rank was the subject of part of the accused defence though at both first instance and on appeal it was not felt necessary to demonstrate unequivocally that position or rank but that each court was satisfied the accused held a position of authority that could properly attract criminal responsibility.

[30] Three other cases have been prosecuted in respect of this camp, though in some cases relating to periods different from those of Repak's indictment. Two domestically in Scandinavia; *Prosecution v Refic Saric* in Denmark and Ahmet Makitan in Sweden. Saric indicted under domestic legislation with reference to the Geneva Conventions was convicted of 14 counts of causing grievous bodily harm to individuals detained at the Dretejl prison camp. He was sentenced to 8 years imprisonment in November 2004 and had his sentenced confirmed by the Danish Supreme Court see http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/9d9d5f3c500edb73c1256b51003bbf44!OpenDocument. Makitan was convicted to five years imprisonment in April 2011 for his participation in the detention and abuse of Serbs

the detention of ethnic Serbs in the Dretejl camp and this accused was alleged to have arbitrarily deprived 18 persons of their liberty during that aspect of the armed conflict in the former Yugoslavia. At first instance the accused faced an indictment containing 39 charges. There were 18 counts of crimes against humanity of unlawful imprisonment and 18 counts on the same facts for the war crime of unlawful confinement. The accused was also indicted with one count of the war crime of rape and two counts of violent assault that would in effect constitute torture. The appearing prosecutor withdrew 3 counts at trial, one from the list of crimes against humanity and its war crimes corollary and one of the counts for the war crime of torture[31]. The indictment was put to the accused, to which the accused pleaded not guilty, though made admissions as to the fact of his involvement in a number of the relevant arrests. Before the hearing of evidence, the court dealt with the substantive legal issue of the questions of retroactivity of provisions under which the accused was indicted[32]and whether given the passage of time, recalling the offences occurred 16 years prior to trial whether they were time-barred.[33]

The trial court considered the question as to whether proceeding with the indictment based on 2005 legislation would be unconstitutional for acts alleged to have occurred in 1992, which would of course ordinarily be subject to 1902 Penal Code. Its conclusion is worth citing in full

> The Court has concluded that Article 97 of the Constitution does not bar the application of the new provisions concerning war crimes as long as they concern the same acts, the same penalty, the same prescription period, and the penal provisions protect the same interests when applying the new provisions as when applying the

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in the Dretejl camp in 1992. He at the time was also a member of HOS. The third case, before the ICTY is currently pending its trial judgment. See ICTY *The Prosecutor v Jadranko Prlić et al*. Case No. IT-04-74. See Second Amended Indictment http://www.icty.org/x/cases/prlic/ind/en/080611.pdf for charges related to the Dretejl camp p.65

[31] Above, n.28, pp. 10-16

[32] The court additionally addressed a number of admissibility issues pertaining to, the record of the accused police interview, which it proceeded to admit (though reserved to itself the necessary evidential weight it would attribute to those records); that written statements prepared between 1992 and 1995 be read. Defence counsel objected to their submission as evidence and for want of ability to cross-examine the court chose not to allow the statements to be read save where they might fall to be admitted in different circumstance (a challenge on consistency of a witnesses testimony with an earlier statement); and the reading of a previous statement of a now uncooperative witness. This too was denied. Ibid. pp. 18-21.

[33] The statutory time limit for relevant offences is 15 years. The accused was charged on 8 May 2007. It should be noted this was prior to the amendment of the Penal Code incorporating war crimes and as such the initial charges were, by necessity, under the preceding 1902 Penal Code. With the absence of the identification of each individual detainee, the court considered the charge sheet sufficiently informative to halt the limitation period, notwithstanding amendments to include victim's identities and of course an amended indictment following the entry into force of the new Penal Code and war crimes provisions. The prosecution was thus not time barred.

> 1902 Penal Code that was in force when the acts were committed. Thus, the District Court concludes that neither the new Penal Code's section 3 second subsection nor its section 103, "war crime against person", is unconstitutional. Consequently, in principle the said provision may be applied in this case. However, applying section 102 of the Penal Code,"crime against humanity", would in this concrete case be unconstitutional.[34]

Crimes against humanity, Norway and the ICTR's Rule 11*bis*

Before addressing the constitutionality of continuing with charges of war crimes and the Appellate and Supreme Courts' views of that decision, it is worth commenting briefly on the unconstitutionality of proceeding with crimes against humanity charges. This was due, principally, to the fact that prior to 2005 the Norwegian Penal Code did not provide for any offence which, as a constituent element, included the chapeau requirement in crimes against humanity of a widespread and systematic attack directed against any civilian population. Under the 1902 Penal Code the only relevant offence to the acts of the accused would have been deprivation of liberty under section 223. The trial court considered this provision did not protect the same interests as those protected under crimes against humanity[35]. In short those interests are collective – protecting populations from widespread and systematic attack – as opposed to individual. The trial court, in effect, acknowledged that prior to 2005 and thus for offences committed in 1992, they lacked subject matter jurisdiction for crimes against humanity.

A similar conclusion was reached by the International Criminal Tribunal for Rwanda (ICTR) two years earlier in respect of the crime of genocide[36]. In 2006 attempts were made to transfer the case of Michael Bagaragaza from the ICTR to Norway for prosecution. Trial Chamber III refused the Prosecution Motion under Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence on the basis that domestic Norwegian legislation, in force at the time, lacked the necessary jurisdiction *ratione materiae* over the crime of genocide.[37] In effect the possibility at that time of prosecuting Bagaragaza for domestic crimes of homicide and applying aggravating features of genocidal acts on sentencing was that the "alleged criminal acts

[34] Above, n.28 at p.27
[35] Ibid at p.27-28
[36] The Supreme Court, as we shall see, relied in part of the rationale of the ICTR in reaching its decision. Supra n. 51, at para 111.
[37] ICTR, *The Prosecutor v. Michel Bagaragaza* Case no. ICTR-2005-86-r11*bis* Decision on the Prosecution Motion for Referral to the Kingdom of Norway *Rule 11 bis of the Rules of Procedure and Evidence*

cannot be given their full legal qualification under Norwegian law".[38] The case would not therefore be transferred for want of subject matter jurisdiction. The Prosecution appealed this decision and Norway filed an *Amicus Curiae* brief[39] to the Appeals Chamber. The Appeals Chamber upheld the decision of Trial Chamber III[40]. In its analysis the Appeals Chamber contrasted the fact that notwithstanding the possibility of addressing the gravity of genocidal acts in sentencing, proceedings in Norway would be "under legislative provisions dealing with the prosecution of ordinary crimes" and that "conviction or sentence would still only reflect conduct legally characterized as the "ordinary crime" of homicide."[41] The Appeals Chamber equally concluded, in a manner that the trial court in Norway is evidently consistent with (though didn't cite), that insofar as the characterization of the crime of genocide and the crime of homicide, "the protected legal values are different. The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives."[42]

Thus for want of the additional elements of the collective interests protected under the core international crimes of genocide and crimes against humanity, for acts committed prior to 7 March 2008, domestic Norwegian criminal legislation has been considered by both international and domestic courts as lacking material jurisdiction over those offences. Genocide and crimes against humanity, cannot nor should not arguably, be charged, nor convicted merely as "ordinary" crimes whatever effect as to gravity may be given on sentence.

War crimes, their context and the interests they protect

Returning to the issue of war crimes, the trial court considered it had the necessary subject matter jurisdiction. Unlike crimes against humanity, the trial court considered that as §103(h)

[38] Ibid at para 16
[39] ICTR, *The Prosecutor v. Michel Bagaragaza* Case no. ICTR-2005-86-PT *Amicus Curiae* Brief filed by the Kingdom of Norway http://trim.unictr.org/webdrawer/rec/79439/view/BAGARAGAZA%20-%20AMICUS%20CURIAE%20BRIEF%20FILED%20BY%20THE%20KINGDOM%20OF%20NORWAY%2023%20JUNE%202006.PDF
[40] ICTR, *The Prosecutor v. Michel Bagaragaza* Case no. ICTR-2005-86-AR11*bis* Decision on Rule 11 *bis* Appeal: For a further review of the proceedings in light of the practice of State referrals by international tribunals see Lisa Yarwood and Beat Dold *Towards the End and Beyond: The ''Almost'' Referral of Bagaragaza in Light of the Completion Strategy of the International Criminal Tribunal for Rwanda* Chinese Journal of International Law (2007), Vol 6, No. 1, 95, 106.
[41] Ibid at paras 16, 17
[42] Ibid. at para. 16

of the Penal Code "concerns war crime against persons and unlawful confinement of protected persons. This war crimes provision addresses the same act and protects the same interest as section 223"[43]. The court nonetheless recognized that there were additional elements to characterize unlawful confinement as a war crime not least the fact of the acts connection to an armed conflict.

In its judgment the court would seem to indicate that there is no disagreement as to the existence of an armed conflict and the connection of the alleged acts to that armed conflict was not in dispute. The court felt that the conflict could be characterized either as an international or non-international armed conflict as that the allegations would amount to a violation of international law governing either typology of conflict[44]. The trial court recognised that, in order to be prosecuted domestically, the confinement must be contrary to international law. The court relied on provisions of the Fourth Geneva Convention as its source of international law[45]. The court considered in part, erroneously, that the relevant provisions of that Convention could apply either in an international or a non-international armed conflict and made a finding that at the relevant time there existed an international armed conflict[46]. It reached that conclusion on the basis of expert evidence on the conflict in Bosnia-Herzegovina. Whilst the court recounts some of that evidence its reasoning as to the existence of an international armed conflict is whilst somewhat cursory[47] and thus may be of limited assistance in any future trial in which war crimes are alleged and at issue is the existence or not of an armed conflict.

In the alternative, the trial court suggested that, were the conflict to be considered non-international, the alleged acts would nonetheless constitute a violation of Common Article 3 to the Geneva Conventions under the prohibition either on inhumane treatment or the taking of hostages found in that article[48]. Though the court indicated that it considered the criterion necessary for establishing a non-international armed conflict had been met, I believe this contention is problematic, particularly in light of some of the court's findings of fact. I shall

[43] Above n 28 at p.27
[44] Ibid at p.28
[45] It did not however specifically cite the grave breaches provisions of that Convention, rather noting the acts a violation of the Fourth Geneva Convention citing *inter alia*, rather its Article 30-32 and 43. Ibid at p.29
[46] Ibid at p.27
[47] Ibid and see remarks on "The Conflict in Bosnia-Herzegovina" at p.32.
[48] Article 3 (1) (b) Common to the Geneva Conventions of August 12 1949

not address those issues in detail here though again future trials ought to be more rigourous in its analysis of the classification question.

Regardless of the conflict's characterization the court considered the defendant aware of the illegality of his actions as a matter of international law. The accused was convicted of 11 counts of unlawful confinement of a protected person.

Appellate Proceedings.

The defendant appealed his conviction and sentence pleading errors of law and fact in respect of conviction sentencing and compensation. The prosecution appealed against the decision to acquit on the crimes against humanity charges (for want of subject matter jurisdiction) and in respect of three other acquittals of war crimes charges. On appeal the accused's conviction for war crimes was upheld and the prosecution's appeal against acquittal on two of the war crimes in the original indictment succeeded and thus the Borgarting Court of Appeal (one of the six regional courts of appeal ("Court of Appeal") convicted the accused on two further counts of unlawful confinement. It upheld the acquittal on the torture charge. The Court of Appeal dismissed the prosecution's appeal on the retroactivity of the crimes against humanity provisions, concurring with the view of the first instance court.[49]. It perhaps though merits remark that in its judgment the Court of Appeal having conducted, albeit brief, review of international sources, concluded that in its view the relevant section of the Penal Code (§103 (h)) would correspond to acts that were punishable under international law in 1992. Included in those sources it explicitly referred to were Articles 147 *and* 146 of the Fourth Geneva Convention. The Court of Appeal was in no doubt that the accused acts constituted grave breaches of the Fourth Geneva Convention and had a clear and solid foundation as crimes under international law. Having such a basis enabled, in its view, for the Appeal Court to consider that the non-retroactivity provision of the Norwegian Constitution did not constitute a bar to convicting the accused of war crimes[50].

[49] *Det nasjonale statsadvokatembetet v Misrad Repak* Saksnr. . 09-024039AST-BORG/01 (*The Public Prosecuting Authority v Misrad Repak* Court of Appeal Case No. 09-024039AST-BORG/01) Appeal Judgment 12 April 2010 - on file with author.
[50] Ibid p. 13-16

The Supreme Court's Judgments

The Supreme Court delivered two judgments in respect of the parties' appeal from the Court of Appeal, first on the 3 December 2010[51], and subsequently on 13 April 2011[52]. The grounds of appeal were almost identical to those before the lower appellate court[53]. The initial judgment dealt with substantive matters of law, especially and specifically the retroactivity question, the second dealt with the appeal on sentencing.

On 3 December 2010 the Supreme Court found it unconstitutional to apply the crimes against humanity and war crimes provisions of the 2005 Penal Code to crimes committed in 1992, prior to the entry into force of that law. That conclusion was it seems not whether the conduct constituted war crimes as a matter of international law, but rather whether they could be punished as war crimes under Norwegian legislation. The Supreme Court in addition to its analysis of the domestic criminal and constitutional law of Norway referred to the ICTR decisions in *Bagaragaza* citing the paragraph referred to above concerning the interests protected by both ordinary crimes and the concepts of war crimes or crimes against humanity[54]. The Supreme Court also alluded to the "stigmatization" attributable to such crimes, as compared to "ordinary crimes"[55].

This relationship between typologies of crimes was also commented upon in the second Supreme Court judgment. When delivering the Court's unanimous judgment and verdict on sentencing, Justice Matningsdal when commenting on the gravity of crimes committed, stated that "although I will not go into the question of whether the crimes in the present case satisfy the requirements for war crimes as laid down in international law, I stress that the abuse is clearly contrary to the rules that apply in wartime. I find it sufficient to refer to Article 147 of the [sic] Geneva Convention of 12 August 1949",[56] which he then cites in its entirety. Here then we find the Supreme Court's starkest recognition of the typology of the crime. The accused acts in the Court's own view constitute grave breaches of the Fourth Geneva

[51] See http://www.domstol.no/upload/HRET/Avgj%C3%B8relser/2010/saknr2010-934-plenum(anonymisert).pdf
[52] See http://www.domstol.no/upload/HRET/Avgj%C3%B8relser/2011/saknr2010-934(anonymisert).pdf An English translation of this second hearing can be found at http://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/Summary-of-Recent-Supreme-Court-Decisions/Summary-of-Recent-Supreme-Court-Decisions/
[53] Ibid paras.12, 13
[54] Above n.51 at para 111
[55] Ibid, para. 106
[56] Above n 51 at para 89; Norway ratified the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, (hereinafter the Fourth Geneva Convention).

Convention which the Court seemingly concludes "war crimes laid down in international law". They are not.

Later in the judgment, on the question of the comparable sentences, Justice Matningsdal, compounding it seems his earlier error when referring to certain judgment of the ICTY for guidance, remarks that, "In my opinion these decisions provide limited specific guidance. Firstly, the cases concern war crimes, while in the present case the crimes are adjudicated as deprivation of liberty committed in time of war without applying the aggravating term war crime." For those involved in the area of the law applicable in war the phraseology used seems to border on a tautology. There are of course crimes that occur in times of war that do not constitute war crimes, or for that matter, grave breaches. This may be for want of nexus to the conflict or the characteristic of the crime itself. However there is no doubt that each of the three domestic courts which heard proceedings four times in this case were of the view that the accused acts were committed in connection with the armed conflict occurring in 1992 in Bosnia and Herzegovina and that the acts of the accused constitute grave breaches of the Fourth Geneva Convention.

In endeavouring to parse terminology it may be thought that the Supreme Court has erred in its understanding of the relevance and significance of international law to the proceedings before it. With respect Justice Matningsdal's rationale seems contradictory. On the one hand he does not rule on whether the crimes in the case before him constitute war crimes as a matter of international law but he is satisfied that they constitute crimes committed in war and as a result are contrary to the Fourth Geneva Convention. What the Judge failed to do was to decide whether those acts contrary to Article 147 of the Fourth Geneva Convention constitute war crimes, (recalling the finding at first instance and on appeal (and not contradicted) that the offence occurred in connection with an international armed conflict to which the Fourth Geneva Convention applied). Article 147 describes the graves breaches of that Convention, of which, unlawful confinement of a protected person constitutes one such breach. It is certainly considered by some that, whether one chooses to term them grave breaches or serious violations of international humanitarian law, grave breaches or serious violations constitute war crimes[57]. The Appeal Court in its deliberations had concluded that, in light of the Fourth Geneva Convention, the Rome Statute and the Statute of the ICTY, §103 (1) (h) concerned

[57] Jean-Marie Henckaerts and Louise Doswald-Beck (eds.) Customary International Humanitarian Law Rule 156 p. 568. State practice 3854 - 3883 http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule156

acts which were punishable and constituted war crimes as a matter of international law in 1992[58]. Whilst he seems at pains not to state such, Justice Matningsdal does to my mind concede that the acts alleged would be punishable as a matter of international law for the very fact that of their clear contrariness to the prohibition on grave breaches under the Fourth Geneva Convention. In response to a further ground of appeal by the Defendant namely that to subsume the offence under the earlier penal code for that originally charged under the Penal Code would violate his right to a fair trial (in effect that he was not informed as to the proper charges he was facing), Justice Matningsdal cites in part §3 of the Penal Code on acts only being punishable pursuant to legislation in force at the time[59]. He however fails then, importantly, to my mind, to cite the relevant remainder of that section, namely subsection (2). To not have considered that paragraph seems to me to have caused a substantive error in failing to consider the extent to which this evident exception to the general rule was applicable in this case.

The aim of § 3(2) must it seems be to sanction the retroactive effect of the provisions on core international crimes, where the act was punishable as a criminal act and considered, as a matter of international law, genocide, crimes against humanity or a war crime. This would seem a proper and intended interpretation of its terms. In both respects these criteria would seemingly be met in this case, and met on the court's own conclusions. The act was both punishable under section 223 of the 1902 Penal Code and constituted a war crime under international law in 1992. Such is the conclusion the Court of Appeal and trial court made in reaching and in confirming the accused conviction for war crimes. Were this not the intent then paragraph 3 (2) would be otiose[60].

In both its judgments, as we have seen the Supreme Court considered that the stigmatization attributable or the aggravating nature of terming an act a war crimes, as opposed to an ordinary crime and in that respect seems to focus its analysis more on the sentencing aspects of the crime rather that the characteristic of the crime itself.

Drawing on the ICTR's analysis in the *Bargaragaza* case the Supreme Court's view was that as the elements of war crimes (and other core international crimes) similarly differed so

[58] Above n.49
[59] Above n.52 para 36
[60] This provision has not been amended subsequent to the Supreme Court's decision.

markedly from those of ordinary crimes that this in and of itself would suffice for denying retroactivity (as a constitutional bar) to provisions in the Penal Code for acts committed prior to 7 March 2008.

That said Article 96 of the Norwegian Constitution requires inter alia, fulfilling the *nullum crimen nulla poena* rule that "No one may be convicted except according to law, or be punished except after a court judgment"[61]. But is not the precise purpose of the second paragraph to §3(2) of the Penal Code is to provide war crimes prosecution for acts prior to 2008 that accordance? The question which follows is what of a law that purports to give retroactive effect and how if such is possible does one reconcile the relationship between Articles 96 and 97 of the Constitution in those circumstances? Whilst not an issue ordinarily, as Article 97 will be a requirement of the laws that are envisaged under Article 96, in that the laws which provide for conviction will not apply retrospectively, what of a situation where there existed prior to the adoption of domestic law an obligation to pass laws to provide for effective prosecution of crimes under international law. Put in other terms what of the international obligation, Norway has to prosecute grave breaches of, inter alia, the Fourth Geneva Convention?

In delivering the dissent, in the first hearing before the Supreme Court delivered, Justice Skoghøy considered that the criminal acts regardless of their domestic characterization were evidently acts punishable under international law as war crimes and or crimes against humanity at the material time in relation to this accused's indictment.

In neither its first majority judgment nor its second did the Supreme Court dispute this fact. Arguably it affirmed it certainly in the second judgment. The Supreme Court in neither judgment substantively addressed the applicability of the Fourth Geneva Convention, the definition of armed conflict or the constituent elements of war crimes under international law. But it does it seem make clear it accepts the accused acts were unlawful under international law in 1992, though it takes that conclusion no further. An argument to suggest why this was the case is that having found that to extend retroactively the Penal Code's provision on war crimes would violate Norway's Constitution, the Supreme Court need only then concern itself

[61] Above n.2

with the elements of the domestic criminal law applicable in 1992, namely the 1902 Penal Code.

As we have seen the Supreme Court considered that both the differences between the war crimes provisions of the Penal Code and the crimes under §223 were so stark as to negate any retroactive application of the war crimes and crimes against humanity provisions in the Penal Code. The concept of stigmatization is, to my mind, irrelevant to the question of what sentence a court passes. The court could easily pass a sentence provided for under the 1902 Penal Code for a war crime conviction under the 2005 Penal Code. In fact the custodial sentence ultimately passed by the Supreme Court (8 years imprisonment) was greater than that passed at first instance (5 years) when the accused was convicted of the "aggravating" concept of a war crime – with its purported associated stigmatization. The Supreme Court felt the increase necessary to more correctly reflect the gravity of the acts the accused was convicted of[62].

Principles of the Principle of Legality

The question, which, I suggest, the court failed to address correctly was whether it is foreseeable and accessible to a perpetrator that his concrete conduct was punishable at the time of commission[63] and that the perpetrator could reasonably foresee that his action constituted war crimes as a matter of international law at the time of their commission. If that were the case then there is an argument that this would not, properly considered, constitute a retroactive application of law. This is precisely the conclusion that European Court of Human Rights reached in the case of *Kononov v Latvia*[64]. Whilst not the only case to address the topic of this essay it is one with remarkably proximity and in many sense similar if not alike issues to the case before the Norwegian Supreme Court. Though it addressed in passing certain

[62] Above n. 52 para. 104.
[63] See further ICTY *Prosecutor v Enver Hadižhasanović, Mehmed Alagić and Amir Kubura* (Trial Chamber) Decision on Joint Challenge to Jurisdiction 12 November 2002 at para 62
[64] ECHR *Case of Kononov v Latvia* (Application no. 36376/04) Grand Chamber Judgment 17 May 2010 at http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=83754828&skin=hudoc-en&action=request For further analysis of this decision see Guilia Pinzauti *The European Court of Human Rights' Application of Criminal and Humanitarian Law: A Critical Discussion of Kononov v Latvia* Journal of International Criminal Justice 6 (2008) 1043- 1060 and Justinas Žilinskas *Kononov Case and the Baltic States* Jurisprudence 2011 18 (3): 859-870. For a student paper situating this case in the broader jurisprudence of the European Court see Tom Booms and Carrie van der Kroon *Inconsistent Deliberations or Deliberate Inconsistencies? The Consistency of the ECHR's Assessment of Convictions based on International Norms* Utrecht Law Review Volume 7 Issue 3 (October 2011) 156-179.

issues relating to Article 7 of the European Convention, it did not addressed in any detail the line of the decisions from that Court with *Kononov* being the latest iteration at the time of the Supreme Court's decision.

Vasiliy Kononov was convicted of war crimes pursuant to the 1961 Criminal Code of Latvia for acts committed in 1944. As to whether a prosecution and conviction for war crimes committed in 1944 under domestic legislation passed in 1961 constituted a violation on the rule against retroactive application of criminal law in Article 7 of the European Convention on Human Rights, the Grand Chamber found there had been no violation of Article 7. Their main rationale was that the basis in, or perhaps put another way, the accordance with, law was to be found in international not domestic law. The requirement, that it was both accessible and foreseeable to Kononov that his acts were war crimes, and that he could be prosecuted for such was found to have been met by the Grand Chamber. It reached this conclusion having conducted an extensive review of the laws and customs of war, including the Fourth Geneva Convention, relevant to the illegality of Kononov's acts. This conclusion equally enabled the court to consider offences not statute barred as there exists no such bar to prosecution in international law[65]. This rationale and the *Kononov* decision do not stand in isolation. It was merely the most recent (at the time of the case under consideration here) in a long line of international *and* domestic decisions and judgments on the principle of legality[66].

This paper does not offer an exhaustive discussion here of the decisions before both international and national courts as to the proper interpretation of the principle of legality to the commission of war crimes. Varying, though perhaps not differing views have been offered to reconcile the requirements *nullum crimen sine lege* with prosecution of core international crimes, domestically; where acts that that where the acts committed constituted crimes under international law there cannot be said to be ex post facto or retroactive pronouncements[67] by courts arbitrating on the charges, that prosecuting of such core international crimes (in

[65] In this respect also see above n. 57 Vol I p. 614 - 618 http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule160; Vol II p4004 - 4073 updated at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule160

[66] In addition to Ferdinandusse above at note 6 and Gallant above at n 5 see Beth Van Schaack *Crimen Sine Lege*: *Judicial Lawmaking at the Intersection of Law and Morals* 97 The Georgetown Law Journal 2008 p.119. Whilst Gallant's book predated the proceedings under discussions here and limits his discussions to aspects of the Norwegian Military Penal Code and the *Klinge* decision, he does acknowledge that as with all legal publication they remain works in progress.

[67] Ferdinandusse above n. 6 p. 225 citing U:S, Military Tribunal at Nuremberg *United States v Von List et al* (Hostages case), 1948, Annual Digest, No.215 p. 634 -635

domestic courts) constitutes an exception to the prohibition on non-retroactivity[68], such falls outside of the manner in which the principle of legality is formulated domestically[69], that a *retrospective* conferral of jurisdiction is not a retroactive or ex post facto criminal[70] or reflects the permissible exception provided for by international or regional human rights instruments.[71]

Ward Ferdinandusse, in an article specifically addressing the manner in which Grave Breaches have been prosecuted domestically, indicates a variety options adopted by prosecutors, some which reflect the practice in the case under consideration[72]. Whilst indicating a variety of outcomes the general sentiment of the article, noting a lack of uniformity between states, is that the so-called "grave breaches regime" (indicative of the obligation all states ought to exercise under the Four Geneva Conventions) is yet to reach it proper potential. The opportunity that I am suggesting the Supreme Court had to offer a further reinforcement to that regime is a clear opportunity missed.

The European Court decided *Kononov* on 17 May 2010. In December 2010 one of the defendant's grounds of appeal before the first hearing in the Norwegian Supreme Court was that his rights under Article 7 of the European Convention were violated by the retroactive application of the Penal Code's war crimes provisions. Having cited Article 7 in full, the judge delivering the majority judgment, Justice Møse[73] remarked that the Article "implies that the Convention does not prevent penal codes giving retroactive effect if the act was punishable according to ordinary legal principles at the time when the act was committed… [m]eanwhile, these provisions do not in effect provide legal authority for punishment"[74]. Acknowledging that where an act is punishable under recognized ordinary legal principles at

[68] Ibid citing East Timor, Special Panel for Serious Crimes, *Domingos Mendoca, Decision on the defense motion for the Court to order the Public Prosecutor to amend the indictment*, 24 July 2003, para 20.
[69] Ibid, at p. 226 citing France, Court de Cassation, *Barbie (No.2)*, 26 January 1984, Bull. crim., no.34
[70] Ibid at p. 227 citing Australia, High Court, *Polyukhivich v the Commonwealth of Australia and Another* 14 August 1991 in particular the remarks of Justice Dawson at para 18. http://www.austlii.edu.au/au/cases/cth/HCA/1991/32.html
[71] The relevant part of Article 15 of the International Covenant on Civil and Political Rights reads "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according the general principles of law recognized by the community of nations." The relevant part of Article 7 of the European Convention reads "This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by civilized nations."
[72] Ward Ferdinandusse *The Prosecution of Grave Breaches in National Courts* Journal of International Justice 7 (2009) 723-721
[73] Justice Møse served for a number of years as a judge and President at the ICTR is perhaps thus the Supreme Court Justice most versed in both international criminal and humanitarian law.
[74] Above n. 51 para. 76

the time when the act was committed, and that one would not be prevented by Article 7 of the European Convention, encapsulating non-retroactivity,[75] from applying a penal code that enter into force after that commission how can the Supreme Court then conclude that an act committed in 1992 which it evidently considered punishable according to ordinary legal principles, namely the laws and customs of war generally or Article 147 of the Fourth Geneva Convention be prevented from being prosecuted under legislation in 2008?

The Relevance of the Obligation to Prosecute

Questions relating to the scope and extent of the obligation to extradite or prosecute (*aut dedere aut judicare*) have come before both the International Court of Justice (ICJ) recently and remain on the current programme of work for the International Law Commission. Now of course these two fora are principally concerning themselves in this regard with the obligation as it pertains to states. It may well be thought that the proper question with respect to the obligation to prosecute under international law is whether Norway has committed an international wrongful act in (if this is the view taken) failing (through ineffective or untimely implementing legislation) to meets its obligation under Article 146 of the Fourth Geneva Convention. Be that as it may (and a subject that will not be discussed here) I believe it brings into stark relief the inadequacies of the Supreme Court's judgments to claim that the acts with which they concerned themselves with constituted grave breaches of the Geneva Conventions to then fail to address the attendant state obligation to those violations of international law and how the state of which they are the highest judicial body has addressed itself to the implementation of those obligations. That the Supreme Court singularly failed to even recognized the existence of such obligation raises a basis for challenging the sustainability of its decision.

Belgium v Senegal (ICJ)

On the 20th July 2012 the ICJ delivered its judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*. The proceedings concerned Belgium's contention that Senegal had failed in its obligation to either to extradite or

[75] The principle of legality may differentiate between no punishment without law and no retroactive or the two might be conflated into the first see Raul C. Pangalangan Article 24 Non-retroactivity *ratione personae* in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court Observers' Notes, Article By Article* 2nd Ed. Verlag C.H. Beck oHG 2008 pp754-760 p. 735

prosecute the former President of Chad, Hissène Habré in relation to allegation of international crimes which occurred during his presidency between 1982 and 1990. Despite the fact that in both its application and in oral proceedings Belgium addressed its arguments about the premise for its contended obligation that Senegal had failed to fulfil to include the grave breaches provisions of the Fourth Geneva Convention[76], the ICJ restrict its analysis for reasons of fact[77] only to provisions of the Convention Against Torture. Those provisions, included articles 5 and 7 of the Torture Convention and whilst not identical might be thought of encapsulating, in the context of the Torture Convention, the obligation provided for in Article 146 of the Fourth Geneva Convention. Article 5 requires that states establish jurisdiction over offences under Article 4 of the Torture Convention and Article 7 addresses the obligations of states where persons alleged to have committed an offence are found, to then exercise that jurisdiction (contemplated in Article 5) to prosecute or extradite. Whilst differing a little in form I would argue that these articles in substance reflect the first and second paragraphs of Article 146 of the Fourth Geneva Convention.

It is perhaps also of note that in terms of the criminal offences that were at issue in the proceedings before the ICJ were offences that entered into force in domestic law *after* their commission[78]. Indeed given the fact that Senegal had adopted domestic legislation to fulfil its obligation under Article 5 of Torture Convention and had amended its Constitution so its amended Article 9 in effect reflected the exceptions provided for in the ECHR and ICCPR that I have referred to above, meant that there was no longer an issue of dispute between Belgium and Senegal resulting in the ICJ lacking jurisdiction to decide on that aspect of Belgium claim[79]. Whilst as I have indicated the ICJ restricted its judgment to provisions of the Torture Convention and did not address other treaty obligations (such as the grave breaches provisions of the Geneva Conventions) that might apply to Habré's conduct, the ICJ in its judgment found by a significant majority that Senegal had breached its treaty obligations under Article 7 of the Torture Convention and that Senegal must submit Habré's case without delay for the purpose of prosecution if it does not extradite him. Whilst of course there are

[76] Application instituting proceedings at p.91 see http://www.icj-cij.org/docket/files/144/15054.pdf and Submissions on behalf of Belgium in oral proceedings on provisional measures at p.23/24 see http://www.icj-cij.org/docket/files/144/15119.pdf and in proceedings on merits at p.22 see http://www.icj-cij.org/docket/files/144/16945.pdf

[77] ICJ *Questions relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal)* Judgment 20 July 2012, para 54

[78] In respect of Senegal those provisions were passes in 2007 see ibid para 28 – 31; In Belgium the relevant domestic legislation is from 1993 (and amended in 1999) – see ibid para 19.

[79] Ibid paras. 31, and 47-48

some differences between the proceedings before the ICJ and the domestic proceedings that are the subject of this essay, there are stark similarities in both facts and issues. In my view it is a fair point to contend that the ICJ ruling indicates the existence of an obligation to prosecute under the Torture Convention and it would be difficult to deny that such a treaty obligation is not similarly extant in the Fourth Geneva Convention. And furthermore the ICJ explicitly required that submission of the Habré case either to Senegalese authorities for the purpose of prosecution or that he be extradited. Now whilst some might contend that this does not directly address the issue of the principle of legality to either of those proceedings, both jurisdictions which the court must have been contemplating here (Senegal and Belgium) both had passed domestic legislation pursuant to the Torture Convention after the acts which form the basis of allegations against Habré occurred. Additionally the ICJ having dealt with the factual circumstances of the discontinued criminal proceedings (based on the lack of jurisdiction) in Senegal in 2000 and 2001[80] and its subsequent legislative and Constitutional amendments[81] the ICJ observed

> "that under Article 27 of the Vienna Convention on the Law of Treaties , which reflect customary law, Senegal cannot justify its breach of the obligation provided for in Article 7, paragraph 1 of the Convention against Torture by invoking provisions of its internal law, in particular by invoking the decisions as to the lack of jurisdiction referred to in its courts in 2000 and 2001, or the fact that it did not adopt the necessary legislation pursuant to Article 5, paragraph 2, of that Convention until 2007."[82]

If one were to accept that the paragraphs of Articles 5 and 7 referred to by the ICJ are variations in form rather than substance of the first two paragraphs of Article 147 of the Fourth Geneva Convention then I would contend that this recent ICJ judgment, and arguably the most substantive on states' obligations with respect to the prosecution of international crimes, provides a strong indication that it is clear where such an obligation exists in a treaty that obligation has subsisted since the entry into force of that treaty and that domestic legislative inadequacies cannot and do not dissolve the state (and thus its courts) from prosecuting for offences covered by a treaty for want of extant domestic law.

[80] Ibid para 18
[81] Ibid paras 28-31
[82] Ibid para 113. Whilst Norway if not a party to the VCLT, the Court here clearly indicates the customary staus of the relevant Article.

International Law Question (ILC)

Though in its work the ILC continues to struggle with the proper scope of the obligation to prosecute or extradite[83], it would seem undeniable that such an obligation can be found in the Article 146 of the Fourth Geneva Conventions.

The *Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare)[84] undertaken by the Secretariat cites the obligation in Article 146 Geneva Conventions of 1949, together with the like provisions in the other three Geneva Conventions[85] to which it noted no reservations have been made. The Secretariat's report also notes that "the obligation to undertake measures against an alleged offender is not conditioned by any jurisdictional consideration of States"[86]. Additionally neither the reports from the sixty-fourth session of the ILC or the Sixth Committee even in circumstance where caution is expressed or contrary views are offered as to the customary character of the obligation there is constant and clear affirmation that where the obligation is found in a treaties[87] and certainly with respect to those war crimes that constitute grave breaches[88] are subject to the obligation *aut dedere aut judicare*.

Of course both processes I have discussed above with respect to the obligation post-date the domestic proceedings I am concerned with. However that there is repeated affirmation of such obligations under areas of international including a clear obligation to prosecute under 146, in light of the fact that the Supreme Court failed to recognize its relevance notwithstanding its recognition of the crimes it was concerned with falling within the scope of Article 146, begs the question as why they did not deal with the relevance of that obligation in considering how that ought to affect their reasoning with respect to non-retroactivity provisions in internal law.

[83] See for instance its 2011 report A/67/10 pp.116-120 http://www.un.org/law/ilc/
[84] UN A/CN.4/630 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/412/77/PDF/N1041277.pdf?OpenElement
[85] Ibid para 44.
[86] Ibid.
[87] See UN A CN.4/648 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/358/84/PDF/N1135884.pdf?OpenElement
[88] See UN A 66/10 para 324 http://untreaty.un.org/ilc/reports/2011/2011report.htm

Aut dedere aut judicare before the Supreme Court – or the lack thereof.

When the Supreme Court concluded that the acts of the accused "were clearly contrary to the rules that apply in wartime" citing the grave breaches provisions of the Fourth Geneva Convention, as the source of those rules, without determining categorically that the Court also considered it foreseeable to the perpetrator that his acts could constitute grave breaches, it missed a crucial issue as to the offence which the accused should properly be charged with. If the accused knew (or could reasonably foresee) that his acts constituted war crimes as a matter of international law then it should follow that §3 (2) of the 2005 Penal Code, applying the domestic provisions on war crimes to acts committed in 1992, should pertain. In effect this is not a retroactive application of the law in the sense Article 97 prohibits. This was evidently not the case. The law that prohibits the act as a war crime existed in 1992 as a matter international law and international law that applied to Norway.

As we have seen repeated in the remarks above the Supreme Court thought the accused's acts were a grave breach of the Fourth Geneva Convention. However having cited in full Article 147, the Court failed to consider Norway's obligation under Article 146. It is not possible to identify and act as falling within Article 147 and then not address the obligation in relation to that act that Article 146 clearly requires. It has of course to be acknowledged that the remarks the Supreme Court made on grave breaches were in its second decision. However the weight of the Court's own conclusion in its second decision is such as to render it first decision no longer tenable.

Article 146 requires that states undertake to enact legislation to provide effect penal sanction to those alleged to have committed grave breaches and are under an obligation regardless of an accused nationality to bring them before their courts[89]. Norway has been a party to the Four Geneva Conventions of 1949, and thus required to implement such domestic legislation since 1951. Norway has recognized that unlawful confinement in times of international armed

[89] The same obligation in precisely the same term appears at Articles 49, 50 and 129 of the First Second and Third Geneva Conventions respectively. The following articles then list the greave breaches for each respective Convention. It should perhaps be noted however that in the list of acts that constitute grave breaches unlawful confinement (of a protected person) is only a grave breach under the Fourth Geneva Convention. For an argument that there is clear and unequivocal obligation to enact penal provisions to prosecute grave breaches see Knut Dörmann and Robin Geiß *The Implementation of Grave Breaches into Domestic Legal Orders* Journal of International Criminal Justice 7 (2009) 703. The article laments though some of the problems that seem to have been evident in such domestic implementation but make clear the clarity of the obligation that exists.

conflict has constituted a grave breach of the Fourth Convention by its ratification of the treaty and thus as a matter of treaty law for Norway (in addition to its generic obligation to respect and ensure respect for the Geneva Conventions[90]) domestic criminal law should provide for its effective prosecutions, and as grave breaches constitute war crimes,[91] the penal provision should provide for prosecution of unlawful confinement of protected persons, in violation of the Fourth Geneva Convention, as a war crime.

Now of course Article 146 does not entitle (nor does it provide for) retroactive effect of legislation to meet the obligation the Article requires. However the concept of retroactive application of the Norwegian Penal Code to acts that constitute war crimes has been discussed by the Supreme Court previously. On 8th December 1945 the Eidsivating Court of Appeal (sitting at first instance) convicted Karl-Hans Hermann Klinge[92] of war crimes for the ill-treatment and or torture of 18 Norwegian citizens whilst interrogated at the Gestapo headquarters in Oslo between November 1944 and April 1945. The prosecution was undertaken under both the Penal Code in force at the time of the offences and war crimes provisions of the Provisional Decree of 4th May 1945 on the Punishment of Foreign War Criminals[93]. The accused was sentenced to death and the case was appealed to the Norwegian Supreme Court. The grounds of appeal offered have a marked similarity to those raised in the more recent proceedings, namely that an application of law (the Provisional Decree) was unconstitutional and that the punishment should be limited to that which the domestic criminal law in force at the time provided for. The Court in an 8/5 split between the 13 judges considered that the retroactive application of the Provisional Decree was not unconstitutional and confirmed Klinge's sentence. In delivering the majority judgment Judge Skau is reported to have made it clear that the acts Klinge was accused of were criminal not only according to Norwegian law (the provisions under the domestic law at the time were generic violence or causation of harm offences – torture does not appear in the domestic law) but also violations of the laws and customs of war and that the criminal character of the acts (in addition to their punishment) was *already* laid down in the provisions of international law relating to the laws and customs of war. Judge Skau in light of the declarations signed by countries who had been

[90] Article 1 Common to the Four Geneva Conventions of 1949.
[91] As to the customary status of this contention see above n. 57 Vol I at p. 574.
[92] Case No. 11 Trial of Kriminalassistent Karl-Hans Hermann Klinge *Law Reports of the Trials of War Criminals* 1948 United Nations War Crimes Commission HMSO p. 1 available at http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-3.pdf.
[93] Norwegian Law Concerning Trials of War Criminals *Law Reports of the Trials of War Criminals* 1948 United Nations War Crimes Commission HMSO p.81 available at http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-3.pdf

occupied by Axis Powers and it seems alluding to the Nuremberg and Tokyo Charters (as conventions) commented that the passing of the Provisional Decree was a link to Norway's adherence to those international agreements and that

> "The claim of the Allied belligerent nations, including Norway, to exercise the right to punish war criminals became effective the moment their crimes were committed, this right being based and circumscribed by the provisions of international law regarding the laws and customs of war.
> The real effect of the Decree was merely to *authorize the Norwegian courts to make effective the already existing demand for punishment in conformity with the conventions concluded*"[94]

A similar demand has existed for Norway since 1952. The obligation to criminalize grave breaches has existed as a matter of treaty law since then. Whilst the Supreme Court may have taken a view as to the *sui generis* characteristics of domestic war crimes trials in Norway in 1946 that the acts with which the Supreme Court were concerned with both in 1946 and in 2010 and 2011 were criminal. The issue of course is whether manifest criminality as a matter of treaty displaces restrictions imposed in the application of domestic law. Part, if not the principal tenet of this argument turns on what is encapsulate by the terms "law" in Articles 96 and 97 of the Constitution, and to a lesser degree on the term in §3(2) of the Penal Code. In short the question is whether or not international law falls within that term. In terms of the Constitution in the *Klinge* case two of the Judges are considered to have thought it a proper interpretation of the term "law" in Article 97 to include the laws and customs of war as well as domestic Norwegian laws.[95] As we saw above the Supreme Court was certainly of the view that Article 7 enables retroactive application of penal codes to offences understood to be punishable under ordinary legal principles – of which it seems difficult to deny that unlawful confinement of protect persons as a war crime is not so punishable. If this is so then a proper interpretation of the term "law" in the relevant Norwegian instrument must also include ordinary legal principles, derived in this context from international law.

Combine this with recognition of unlawful confinement as a serious violation of international humanitarian law and constituting a war crime since certainly prior to 1992 and the decision

[94] Above, n.92 at p.4
[95] Ibid at p.14

of the Supreme Court to rule as it did on the unconstitutionality of §103 without giving proper regard to the solid premise in international law and in Norway's international legal obligations for the prosecution of war crimes, as war crimes for acts committed prior to 7 March 2008 as §3 (2) provides for seems tenuous at best, erroneous at worst. The Supreme Court, not being subject *stare decisis* can of course depart from its earlier decisions. An amendment to the Constitution to except certain crimes from the veto of Article 97 would of course be possible though perhaps not feasible. The fact that Norway, albeit belatedly has sought to extend it jurisdiction (including temporally) to meet the international obligation it has had for the past 60 years to effectively prosecute grave breaches of the Geneva Conventions (which are recognized – universally – as constituting war crimes) ought to be recognized for precisely what it is, a means by which Norway provides effective sanction for acts that already are (and certainly were in 1992) punishable as war crimes[96].

Conclusion

No one would seem to dispute that the accused's acts in 1992 would constitute a war crime (if properly understood as in the relationship between grave breaches and war crimes) and indeed the Supreme Court emphatically recognized that the acts violated the laws of war[97]. In that sense it is difficult to see how the Supreme Court can conclude that to avail domestic courts of the opportunity to prosecute acts that were evidently unlawful at the time of their commission, but not criminalized under domestic law until after they were committed, notwithstanding the fact that Norway had recognized the illegality of the acts 40 years before they were committed, as an exercise in *ex post facto* law making. The Court might well be considered to have mistaken the retrospective application of its jurisdiction with what it perceived to be

[96] It should be recalled that he decisions by the ICTR precede evidently not only the entry into force of the provisions on core international crimes but also §3(2) giving effect domestically to crimes that were already unlawful internationally and this is the point. To draws from the remarks given in Klinge to a first instance judge in other domestic proceedings "In my opinion Art. 97 of the Constitution vetoes a new law introducing punishment for acts which before its promulgation were regarded as lawful"[96]. The absence from Norwegian legislation of the war crime of unlawful confinement does not mean that act is lawful. No one contended that the absence of genocide from Norwegian legislation renders that act lawful under Norwegian law. Rather that it was not punishable as such in 2006. There is a difference between the issues of subject matter jurisdiction and the temporal jurisdiction of that subject matter. There is an interesting question as to how the ICTR might deal with such a referral today. Though I cannot unfortunately pursue that further here sufficed to say that I believe there is a sustainable argument that were the ICTR to now contemplate a referral to Norway, with core international crimes part of the subject matter jurisdiction of Norwegian courts, it could do so for acts committed in for example 1994 where those acts constituted crimes under international law and that it could be foreseeable to the accused that those acts constituted crimes under international law and that the accused could be prosecuted for them.

[97] Above n. 52 at para 89

retroactive legislation. The prohibition on retroactivity both in its general understanding, and I would contend, under the Norwegian Constitution, is intended to prevent prosecutions of acts there were lawful at the time of their commission, not to prevent prosecutions of evidently unlawful acts, and evident to both the accused and to the Court that the acts constituted war crimes.

The Supreme Court on a number of occasions both on its own conclusions and on adopting factual findings of the Court of Appeal made clear that the accused met the requisite intent standard for a finding of guilt. The Supreme Court cited with approval evidence from the Court of Appeal and in respective of the accused subjective guilt (*mens rea*) remarked

> "it follows from the jury's verdict that A is guilty of deprivation of liberty with intent, or complicity in such offence…in order to convict pursuant to Penal Code section 223 (2), it is sufficient that A 'could have foreseen the possibility of such consequence'. Above I have given several examples which show that A's subjective guilt, even if he did not act with intent, displayed a guilt which in part far exceeds the minimum requirements in the Penal Code section 43. I addition to these examples I refer to the Court of Appeal's general discussion of A's knowledge: 'A was familiar with the conditions under which the detainees at Dretejl Prison lived and was aware that they were being abused…It is completely unlikely that A could not have been aware of the conditions under which the detainees were living.'"[98]

Whilst this is a discussion of the requisite intent as a matter of domestic law: the accused acting in the knowledge that his act is unlawful. It must also follow (and especially so as the accused one suspect had no knowledge if the illegality of his act under §223 of the Norwegian Penal Code) that the accused considered his actions unlawful *per se* and if that is to expect too much that the accused could have foreseen that his acts constituted war crimes and that he would be prosecuted for those acts. The Supreme Court clearly considered the accused aware that his acts were unlawful and if one follows the rationale in *Kononov*[99] combined with Norway's obligations under the grave breaches regime it must be reasonable to conclude that the accused could have foreseen the acts could be qualified as war crimes. To cite the two final paragraphs before the European Court's conclusion, which to my mind could apply

[98] Above n.52 at paras 84-85
[99] Above n. 65 at paras 234 -239

mutatis mutandis in the Norwegian context (and something the Supreme Court ought to have taken light of)

> "accordingly the applicant's prosecution (and later conviction) by the Republic of Latvia, based on international law in force at the time of the impugned acts and applied by its courts cannot be considered unforeseeable.
> In light of all of the above considerations, the Court concludes that, at the time when they were committed, the applicant's acts constituted offences defined with sufficient accessibility and foreseeability by the laws and customs of war."[100]

The argument is not that section 3 (2) of the Penal Code gives retroactive effect to laws. Laws prohibiting unlawful confinement as a war crime have long been extant, and certainly before 1992, thus to domesticate the international obligation which recognizes the illegality of those acts, a recognition against extant since at least 1951 cannot be said to violate neither Article 97 nor for that matter Article 96 of the Norwegian Constitution. The stronger argument thus is to suggest that prosecuting war crimes committed before 2008 is not a violation of Article 97 as it is not giving retroactive effect to the rule/law that confining protected persons in international armed conflict is unlawful, and has long been so under international law. If that argument is sustainable which I believe it is, I hope to have demonstrated that it remains a live issue as to whether the current view of the Supreme Court can be properly and justifiably sustained.

Coda

The concern of this essay has been principally with respect to the possible flaws in the decision of the Supreme Court with respect to crimes that constitute grave breaches of the Geneva Conventions. Those violations of those treaties do not of course cover all acts of illegality committed in connection with armed conflict there are other acts that constitute war crimes and are not grave breaches and there are of course core international crimes that need not necessarily (though invariably they do) occur in armed conflicts; genocide and crimes against humanity.

[100] Ibid, paras 243-244

Whether one chooses to premise their objection to the decision of the Supreme Court dismissing the accused prosecution for war crimes on issues of the reasonable foreseeability of the criminality of the accused acts, premised either *mala in se* or by recognition of the criminality of the alleged acts and that their occurrence in war-time with nexus to that war means they constitute war crimes; that one considers the Norwegian Constitution, notwithstanding one's views on the intention of the framers, ought to be interpreted cognizant of Norway's obligation under international law to effectively prosecute grave breaches of the Fourth Geneva Convention - which the Supreme Court itself stressed the acts of the accused constituted; or that one considers the proper view of the amended penal code is, in the context of the case considered above, as a jurisdictional scheme or mechanism giving effect to an extant crime evidently punishable at the time of its commissions as a matter of law *per se* and is certainly not the creation of a *new* crime, then it is difficult to conclude with confidence that the Supreme Court came to the right conclusion in that dismissal.

I have not pursued all of these arguments to their fullest extent and there are of course further and more substantive elaborations one could make with regard to customary law – though my view is that these arguments are not necessary with respect to this case. And this is my final point and reason for a short coda. I have not dealt with the consequences of this Supreme Court decision for every other crime than grave breaches[101]. In part that is because I do not consider that it directly impinges on them. It is evident that further cases will need to find their way to the Norwegian Supreme Court for them first to address the sustainability of the decision I have criticized here and to develop jurisprudence to demark the jurisdictional parameters of the prosecution of core international crimes under Norwegian law. My hope is that this essay offers a short contribution to defining what those parameters might properly be.

[101] As has been indicated there has been a very recent conviction for complicity in the Rwandan genocide before the Oslo City Court. The decision (only in Norwegian at present) can be found at http://www.domstol.no/upload/OBYR/Internett/Nyheter/Rwanda%20Dom.pdf. This conviction is likely to be appealed but is unlikely to address the issues I have touched on in this essay. There are I believe grounds to advance some of the arguments outlined above, with others, in respect of genocide or other offences. I intend to address those arguments in a subsequent paper.