

# Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law

The *Kolk and Kislyiy v. Estonia* Case before the ECHR

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## Abstract

*In January 2006, the European Court of Human Rights held that the punishment of two individuals in 2003 in Estonia for the deportation of civilians to the Soviet Union in 1949 classified as a crime against humanity, was not contrary to the principle of non-retroactivity of criminal law. According to the Court, in 1949 crimes against humanity were already proscribed and criminalized, and responsibility for such crimes could not 'be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War'. While the Court's ruling is correct, its legal reasoning lends itself to a number of serious criticisms.*

## 1. National Laws Punishing International Crimes Raise Human Rights Issues Again

The question of whether the punishment by national laws of crimes against humanity committed in the past, prior to the adoption of such laws, is contrary to Article 7 of the European Convention on Human Rights (prohibiting the retroactivity of penal laws), has recently been raised anew before the Strasbourg Court. Earlier cases related to the trial of persons who had

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perpetrated crimes during the Second World War.<sup>1</sup> Instead, the present case (*Kolk and Kislyiy v. Estonia*, decision on admissibility of 17 January 2006)<sup>2</sup> involved crimes committed *after* the war, in 1949, i.e. in time of peace. The Court reaffirmed its jurisprudence, holding that, in principle, prosecution and punishment of crimes against humanity committed in those years is not contrary to the Convention, because Article 7(2), by referring to ‘the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations’ renders the punishment of those crimes lawful, even where domestic law does not expressly provide for such punishment. In other words, according to the Court, crimes against humanity were already prohibited and criminalized in 1949 by ‘general principles of law recognized by civilized nations’. Hence Estonian courts, in convicting the two applicants in 2003–04, had not applied criminal law retroactively.

## 2. The Facts of the Case and the Applicants’ Complaints

The two applicants — of Estonian and Russian nationality, respectively — had participated in the deportation of members of the civilian population from Estonia (then occupied by the Soviet Union) to remote areas of the USSR, in March 1949. The first applicant (Kolk) had served as an investigator in the Ministry of National Security of the Estonian Soviet Socialist Republic (SSR); the second applicant (Kislyiy) was an inspector in the Ministry of Interior of the SSR. Both had participated, at the organizational and bureaucratic level, in the preparation and execution of the deportation. On 10 October 2003, they were convicted of crimes against humanity by an Estonian court and sentenced to eight years’ suspended imprisonment with a probation period of three years. The judgment and sentence were upheld by a Court of Appeal in Tallinn in 2004. That Court noted, among other things, that under Article 7(2) of the European Convention it was admissible to punish persons for conduct criminalized at the time of its commission under general principles of law recognized by the civilized nations. In 1949, crimes against humanity were punishable by virtue of Article 6(c) of the Nuremberg Charter and the ‘affirmation’ in 1946 of the ‘Nuremberg Principles’ by the UN General Assembly;<sup>3</sup> therefore the applicants’ prosecution and punishment was not contrary to the principle of non-retroactivity of criminal law.

1 See *X. c. Belgique*, decision of 20 July 1957 (application no. 268/57), in *Yearbook of the European Convention*, Vol. 1, at 239–41; *Touvier c. France*, decision of 23 January 1997 (application no. 29420/95) (online: [www.coe.int](http://www.coe.int); visited 24 February 2006); *Papon v. France*, decision of 15 December 2001 (online *ibid.*).

2 Applications no. 23052/04 and 24018/04, not yet published online.

3 GA Resolution 95(1), adopted on 11 December 1946.

The applicants complained before the European Court that they had been punished on the basis of a retroactive application of criminal law: in 1949, the Criminal Code applicable in Estonia (enacted in 1946) did not provide for the punishment of crimes against humanity. Such criminal responsibility was only introduced in 1994 by amendment to the 1992 Estonian Criminal Code. Arguing for the Court to reject the application of the Nuremberg Charter and the ‘Nuremberg Principles’, the applicants pointed out that these instruments only proscribed crimes against humanity ‘carried out in execution of or in connection with any crime against peace or any war crime’, whereas the offences imputed to them had been committed in time of peace, not ‘before or during war’.

The European Court dismissed the application, finding that the complaints were manifestly ill-founded. The Court’s final ruling is correct, but the legal reasoning can be criticized on several counts.

### 3. The Court’s Findings

The Court’s arguments, which were set out in a somewhat illogical order, can be summed up in five main points:

- (i) although the Nuremberg Tribunal was established to try German defendants, the ‘Nuremberg Principles’, as affirmed by the UN General Assembly in 1946 had ‘universal validity’. Hence, ‘responsibility for crimes against humanity cannot be limited to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War only’ (at 8–9). It follows, according to the Court, that the acts committed by the two applicants were also covered by the international criminal rules of 1945–46;
- (ii) the crimes attributed to the applicants did not fall under the statute of limitations, because Estonia acceded in 1991 to the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968, and this Convention clearly applies to crimes perpetrated both after 1968 (or the Convention’s entry into force for each State party) and after the adoption of the Convention (at 9). In other words, according to the Court, the Convention also has retroactive force on the strength of its own language;
- (iii) in addition, ‘the rule’ that ‘crimes against humanity cannot be time-barred was laid down by the Charter’ of the Nuremberg Tribunal, as held by previous decisions delivered by the European Court: *Touvier v. France* (decision of 23 January 1997, Legal Grounds, § 7) and *Papon v. France* (decision of 15 December 2001, Legal Grounds, § 5) (at 9);
- (iv) Article 7(2) of the European Convention, in allowing the prosecution and trial of persons who engaged in acts that were criminal under ‘general principles of law recognized by civilized nations’ also refers to proceedings

- initiated against persons accused of crimes against humanity committed during or after the Second World War (*ibid.*);
- (v) although the acts performed by the applicants were lawful under Soviet law applicable at the time of their commission, it is consistent with the European Convention to hold that the applicants were nevertheless to be punished for those actions. The Soviet Union was a party to the London Agreement instituting the Nuremberg Tribunal and was of course aware of the adoption of the 'Nuremberg Principles' by the UN General Assembly. As these 'principles' were not unknown to the 'Soviet authorities', the applicants' claim that they could not reasonably be expected to have been aware of the criminal nature of their own acts was to be disallowed (at 9–10).

#### 4. Flaws in the Court's Reasoning

While its point concerning the retroactive force of the 1968 UN Convention on Statutory Limitations is correct, all the other points made by the Court are open to objection.

The Court's first consideration is initially compelling — it is true that the 'Nuremberg Principles' were conceived as applying to any crime falling within the categories laid down in Article 6 of the London Agreement, regardless of the offender's nationality. In other terms, contrary to what the French Court of Cassation, in 1993, held in *Sobanski Wladyslav* (the so-called *Boudarel* case),<sup>4</sup> those principles were also applicable to crimes other than those perpetrated by Germans during the Second World War. The aforementioned General Assembly resolution intended to proclaim their universal value and applicability. In this respect, the European Court is right. However, it neglected to note that in 1949 those 'principles' still applied only to crimes against humanity committed *in connection with or in execution of* war crimes or crimes against peace. In other words, the indispensable link between those crimes and war had not yet been severed. It is only later, in the late 1960s, that a general rule gradually began to evolve, prohibiting crimes against humanity even when committed in time of peace.<sup>5</sup> Hence, the Court should have squarely faced

4 Judgment of 1 April 1993, in *Bulletin des arrêts de la Cour de Cassation, Chambre Criminelle*, 1993, no. 143, at 354–55 (also in *Revue générale de droit international public*, 1994, at 471–74). The Court held that the IMT Charter as well as the UN General Assembly Resolution 3(1) adopted on 13 February 1946 (and recommending the extradition and punishment of persons accused of the crimes provided for in the Nuremberg Charter) only related to 'offences perpetrated on behalf of the Axis European States' and therefore, could not apply to atrocities committed elsewhere.

5 Although Control Council Law no. 10 of 20 December 1945, did not require the link with war crimes or crimes against humanity, such link was still envisaged in the principles adopted in 1950 by the International Law Commission. The Genocide Convention of 1948 provided for the prohibition of genocide in time of war or peace, but of course it only related to genocide.

this serious dilemma: either by holding that in 1949 the conduct attributed to the two applicants was not criminalized under international law, and consequently their application was to be upheld; or, by stating that those crimes were indeed included in the ‘Nuremberg Principles’ because they had been perpetrated in connection with, or in execution of, an international crime imputable to the leaders of the Soviet Union and falling under the Nuremberg Charter. The crime in question was the war of aggression (or in violation of international treaties) against Estonia, undertaken in June 1940, when Soviet troops invaded and militarily occupied Estonia. It seems to me that the latter alternative is correct, for the deportation of Estonian civilians to remote areas of the Soviet Union was manifestly a direct consequence of, or at any rate closely linked with, the Soviet aggression (see further).

The third point made by the Court is also wrong. No provision of the Nuremberg Charter contains a principle stating or implying that the crimes enumerated in Article 6 are not subject to statutory limitations. Moreover, had the Nuremberg Charter contained such provisions, there would have subsequently been no need to draft the aforementioned 1968 Convention on the Non-Applicability of Statutory Limitations. Clearly, on this matter the European Court has passively reprised its previous — and erroneous — jurisprudence, without subjecting it to critical scrutiny.

The fourth point is objectionable as well. Article 7(2) refers to ‘general principles of law common to civilized nations’, whereas the criminalization of conduct amounting to crimes against humanity derives from international rules of international customary law. It is true that the preparatory works show that, by means of this provision, the drafters of the European Convention intended to shelter the Nuremberg principles from possible legal attacks on such principles as being contrary to the *nullum crimen sine lege* principle.<sup>6</sup> However, the text of the provision is clear, and it is therefore warranted to set aside the consideration of preparatory works, pursuant to Article 32 of the 1969 Vienna Convention on the Law of Treaties (and the corresponding customary rule), which provides for resort to preparatory works only when a text is ambiguous or obscure, or its literal interpretation leads to a manifestly absurd or unreasonable result. The reference to the Nuremberg Principles (as crystallized into customary international law) is implicitly made in Article 7(1), where it refers to criminal conduct under

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It is probably with the 1968 Convention on the Non-Applicability of Statutory Limitations that the process of a gradual crystallization in international customary law of a rule proscribing crimes against humanity even in time of peace was set in motion. This crystallization became indisputable after being established in 1995 by the Appeals Chamber of the ICTY: see, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94–1), 2 October 1995, § 141.

6 See, for instance, P. Rolland, ‘Art. 7’ in L.-E. Pettiti, E. Decaux and P.-H. Imbert, *La Convention européenne des droits de l’homme — Commentaire article par article* (Paris: Economica, 1995), at 299–301. See also European Commission of Human Rights, decision of 20 July 1957 (*X. c. Belgique*), in *Yearbook of the European Convention*, 1, at 241; *De Becker c. Belgique*, decision of 9 June 1958 *ibid.*, 2, at 227; *X. c. Belgique*, decision of 18 September 1961 *ibid.*, 4, at 335–337.

'International' Law.<sup>7</sup> The purpose of Article 7(2),<sup>8</sup> such as can be deduced from its clear wording, is instead to ensure that conduct which is not criminalized by either *treaty or customary* rules, may nevertheless be held criminal and therefore punishable by the virtue of 'general principles of law recognized by the whole international community'. General principles of law recognized by the community of nations constitute a subsidiary source, which courts may resort to whenever primary sources of international law (treaty and custom) do not yield any results.<sup>9</sup>

Let us add that a further reason why the Court's reference to Article 7(2) is not correct lies in the fact that in 1949 there surely did not exist a 'general principle of law recognized by civilized nations' prohibiting crimes against humanity. True, the requirements for the existence of such a principle are different from, and less stringent than, those relating to customary rules: *usus* and *opinio juris* are not necessary; only the objective existence of the fact that most countries of the world uphold the same general principle of law in their legislation or case law is needed. Nevertheless, in 1949 the proscription of crimes against humanity manifestly did not amount to a general principle of law, let alone to a rule laid down in the legislation of most countries of the world.<sup>10</sup> At that stage, the international criminalization of that category of offences remained at the limited stage of *treaty law* (Article 6(c) of the Charter of the Nuremberg Tribunal) as well as *customary rules* (which had evolved soon after the Nuremberg judgment, by virtue both of the passing of Control Council Law no. 10 and the 'affirmation' by the UN General Assembly of the 'Nuremberg Principles' as well as the copious national judicial pronouncements in 1946–55 on crimes against humanity committed by

7 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence *under national or international law* at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed' (emphasis added).

8 'This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations'.

9 For the way general principles of criminal law recognized by the community of nations may be resorted to by international courts, see ICTY Judgment, *Furundžija* (IT-95-17/1), Trial Chamber, 10 December 1998, §§ 177–8; see also the author's volume, *International Criminal Law* (Oxford: Oxford University Press, 2003), at 32–35; and G. Werle, *Principles of International Criminal Law* (The Hague: Asser Press, 2005), at 47–8.

10 According to authoritative commentators in the 1950s, 'general principles of law recognized by civilized nations' still included such principles as the duty of reparation for breach of a legal undertaking; litispendency; the duty to make reparation for both *damnum emergens* and *lucrum cessans*; estoppel; *res judicata*; the admissibility of indirect evidence; equality of parties in the administration of justice; the impossibility for a person to plead his own wrongful act (see e.g. L. Oppenheim and H. Lauterpacht, *International Law – A Treatise*, vol. 1 (8th edn, London–New York–Toronto: Longmans, Green and Co., 1955), at 29–30; M. Sørensen, 'Principes de droit international public', in 101 *Hague Recueil*, 1960-III, at 26–34; A. Verdross and B. Simma, *Universelles Völkerrecht – Theorie und Praxis* (3rd edn, Berlin: Duncker und Humblot, 1984), at 390–4.

Germans or in any case in connection with the Second World War).<sup>11</sup> One can also add that it is indeed very difficult for conduct to be internationally criminalized on the sole basis of a general principle of law; such general principles, it is submitted, may rather fulfil the role of filling gaps in the treaty or customary regulation of offences, or the way such offences are prosecuted and punished.<sup>12</sup>

Finally, the fifth point made by the Court is also open to doubt. That the two applicants were to be punished may not be inferred from the fact that the leaders and diplomats in Moscow had to be aware of the criminal nature of deportation of civilians. After all, the Criminal Code applicable at that time in Estonia did not criminalize that conduct. The criminal nature of deportations was rather to be deduced from the *primacy* of international criminal law over national legislation. This primacy was asserted in the Nuremberg Charter: under Article 6(c), crimes against humanity were punishable ‘whether or not [they had been committed] in violation of domestic law of the country where perpetrated’. Such primacy was asserted and brought into effect by the Nuremberg Tribunal, which stated that ‘the very essence of the Charter [instituting the Tribunal] is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state.’<sup>13</sup> That primacy was also implicitly reaffirmed by the General Assembly in its celebrated resolution on the ‘Nuremberg Principles’.

## 5. *Nullum Crimen v. Prevalence of International Law*

The point just made raises the question of a possible clash between two legal constructs: on the one hand, the notion, set out by the European Court in various cases,<sup>14</sup> that in order to be consonant with the *nullum crimen* principle, criminal rules must meet the requirements of accessibility and foreseeability; and, on the other, the concept that general international rules of a criminal nature may override national legislation and thus, render criminal a behaviour that is otherwise lawful under national legislation. This clash occurred at the time of the Nuremberg Trial. The International Military Tribunal clearly embraced the doctrine of *substantive justice*

11 It could therefore be said that, although *usus* (the existence of national laws punishing crimes against humanity and the prosecution of such crimes by many national courts) was not widespread, *opinio juris* (namely, the legal conviction at the international level that crimes against humanity must be proscribed and punished) was shared by most states.

12 For specific examples of how international criminal courts have recently relied on general principles of law recognized by the community of states, refer to the author’s volume, *International Law* (2nd edn, Oxford: Oxford University Press, 2005), at 193–4.

13 *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946* (Nuremberg 1947), Vol. 1, at 223.

14 For instance, see *Cantoni v. France*, judgment of 15 November 1996, at 33–35 (online at: [www.coe.int](http://www.coe.int); visited 24 February 2006).

(whereby any conduct that is socially harmful or causes danger to society should be prohibited and punished, whether or not that conduct had already been criminalized by law at the moment it had been taken), as opposed to that of *strict legality* (postulating that a person may only be held criminally liable if at the time he commits a certain act, that act is clearly and specifically criminalized by law).<sup>15</sup> Since then, however, the latter doctrine has also gradually permeated international law and taken roots in it. This occurred through the adoption of international treaties on human rights (such as the 1950 European Convention, the 1966 UN Covenant on Civil and Political Rights and the 1969 American Convention),<sup>16</sup> which have imposed the *nullum crimen* principle in its strict dimension on states, when conducting national trials. From there the principle gradually expanded, to a large extent, to international trials.

Let us return to the aforementioned clash between two legal notions (accessibility and foreseeability of criminal rules v. pre-eminence of international criminal rules). Interestingly, the relevant provisions of the human rights treaties mentioned earlier (Articles 7(1) of the European Convention and 15(1) of the UN Covenant) require that conduct, to be punishable, should be previously criminalized under *either* national *or* international law. It follows that even if an act is lawful under national law, but punishable under international rules, its perpetrator may be prosecuted by a foreign or international court (or his own national court, after a change in regime or legislation) though at the time of the commission he did not, nor could, know that the act was proscribed by international rules. In these cases, when only international criminal rules are at stake, or when those rules conflict with national criminal law, the requirements of accessibility and foreseeability may legitimately diminish to the point of fading away. Thus, the need to make international values upholding human dignity (and the legal rules enshrining those values) prevail over diverging national legislation, tips the balance in favour of international law, to the detriment of the accessibility and foreseeability of criminal law.

## 6. Why One Can Agree with the Court's Ultimate Finding

As stated above, the Court was right in dismissing the applicants' complaints. Indeed, the deportation of civilians amounted, in 1949, to a crime against humanity prohibited by the relevant general international rule that had

15 On these notions, refer to the author's volume, *International Criminal Law*, *supra* note 9, at 139–45.

16 Article 9 of the American Convention is not, however, as specific as the other two treaties: it simply provides that 'No one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time it was committed'.

crystallized soon after the Nuremberg Trial. That deportation fell under that category of crime, for it was clearly a consequence of, or a follow-up to, the crime of aggression perpetrated by the political leaders and the relevant military commanders of the Soviet Union when Soviet forces attacked and invaded Estonia (June 1940) and incorporated it into the USSR.<sup>17</sup> The international rules existing at that period did not require that the nexus between war crimes or aggression and crimes against humanity be close in time, thus implying that the lapse of nine years between the aggression and the deportation of civilians should not constitute an obstacle to the application of the rules on crimes against humanity to those deportations. Furthermore, it should come as no surprise that no finding was made involving this crime of aggression — it is common knowledge that only crimes committed by the Germans and the Japanese were prosecuted after the Second World War, whereas no leader or serviceman of the Allies was brought to trial.<sup>18</sup> Consequently, the Estonian courts did not apply criminal law retroactively when they sat in judgment over the two applicants, for international law already criminalized deportation of civilians and those courts, therefore, did not violate Article 7(1) of the European Convention.

17 On the attack on and annexation of Estonia, see for instance, J.-B. Duroselle, *Histoire diplomatique de 1919 à nos jours* (8th edn, Paris: Dalloz, 1981), at 261 and 282.

18 Interestingly, as reported by W.A. Harriman (in W.A. Harriman and E. Abel, *Special Envoy to Churchill and Stalin 1941–1946* (London: Hutchinson, 1976), at 227 and 279), President Roosevelt did not oppose the invasion and incorporation into the USSR of the Baltic countries in 1940; however, following the German occupation of those countries (in 1941), he insisted that, after reoccupation by the Soviet troops, the populations should exercise their right to self-determination through plebiscites 'to give a colour of decency to the operation' (at 227). Stalin did not pay much attention to such requests, also because at the Teheran Conference (held in November 1943) Roosevelt was ready to make concessions in exchange for Soviet support for the establishment of the United Nations (at 279).