

The decision under appeal relates to that of

Pirkanmaa District Court, 29 April 2022 No 118047

Case

Jurisdiction in criminal proceedings relating to murder and related criminal acts

The appellants

State Prosecutor [REDACTED]

District Prosecutor [REDACTED]

Counterparty

[REDACTED]

Proceedings in the Court of Appeal**Background to the case**

The case concerns murders (count 1), aggravated rapes (count 2), serious war crimes (count 3) and serious violations of human rights in exceptional circumstances (count 4) allegedly committed in Liberia between 1999 and 2003. According to the document initiating the proceedings, the second civil war in Liberia, which, in terms of legal rules of war, was an ‘armed conflict of a non-international nature’, constitutes the circumstances of the acts which must be examined and assessed.

As detailed in the judgement, the District Court applied the following legal basis: Finnish law on Chapter 1, Sections 6 and 11(1) of the Criminal Code to counts 1 and 2, and Section 7 of the said chapter and Section 1(1)(2) of the Decree 627/1996 (‘the Implementing Provision’) to counts 3 and 4.

The District Court examined the case and dismissed the charges in all respects. The prosecutors appealed against the judgement.

Application for a declaration of inadmissibility

In his reply to the prosecutors’ appeal delivered in the Court of Appeal on 22 August 2022, [REDACTED] applied, inter alia, for the prosecution to be declared inadmissible on the grounds of lack of jurisdiction.

In support of his arguments, ██████ stated that, in relation to counts 1 and 2, the prosecutors had failed to provide sufficient evidence to satisfy the requirement of dual criminality laid down in Chapter 1, Section 11(1) of the Criminal Code. The counts in question do not constitute individual offences within the scope of Chapter 1, Section 7(1) of the Criminal Code. The acts described in counts 3 and 4 do not fall within the scope of the latter provision, since they are not serious crimes within the meaning of the Geneva Conventions or of the first Additional Protocol to the Conventions referred to in Section 1(1)(2) of the Implementing Provision as they are connected to the events of the Second Civil War in Liberia. To base jurisdiction on Common Article 3 of the Geneva Conventions and customary international law would be contrary to the principle of legality and would not comply with the requirement of foreseeability of a fair trial under the European Convention on Human Rights. The Finnish courts do not have jurisdiction to investigate the charges in respect of any of the counts.

Statements on the jurisdiction of the court

The Court of Appeal has invited the prosecutors to make a statement in response to the request in the defendant's reply, as described above.

In a statement filed with the Court of Appeal on 29 September 2022, the prosecutors proposed a review of the criminal and statute of limitations provisions of the Liberian Criminal Law and the Criminal Procedure Law for murder and rape that were in force at the time of the acts. The prosecutors considered that the prosecution of counts 1 and 2 was not time-barred under Liberian law. As regards counts 3 and 4, the prosecutors stated that violations of the Common Article 3 of the Geneva Conventions also constitute serious crimes within the meaning of the Geneva Conventions. As regards counts 3 and 4, the application of the universality principle may be secondarily based on customary international law. War crimes and certain crimes against humanity are subject to the universality principle under customary international law. The risk of the application of criminal liability to ██████ in Finland has been foreseeable. The Finnish courts have jurisdiction to investigate the charges on all counts.

The prosecutors also indicated that they will seek further clarification of Liberian law in relation to count 2.

The Court of Appeal has given ██████ the opportunity to respond to the prosecutors' statement. In a statement lodged with the Court of Appeal on 5 October 2022, ██████ took the view that the prosecutor had not provided sufficient evidence of dual criminality with regard to count 1 and that, in the light of the evidence provided, the prosecution was time-barred in respect of count 2.

Decision of the Court of Appeal

Objection of inadmissibility

Resolution of an objection of inadmissibility prior to the main hearing

As an absolute procedural requirement and thus a question of the basis of the proceedings, the plea on the jurisdiction of the court must be resolved as a right

before the main hearing can take place.

The jurisdiction to investigate the charges of murders (count 1) and aggravated rapes (count 2)

Applicable legal provisions and case-law

According to Chapter 1, Section 6(1) of the Criminal Code, Finnish law applies to offences committed outside of Finland by a Finnish citizen. According to Sub-section 3(1) of said Section, a person who, at the time of the offence or in the beginning of judicial proceedings, was permanently resident in Finland is equated with a Finnish citizen.

It is stated in Chapter 1, Section 11(1) of the Criminal Code that, if an offence has been committed in the territory of a foreign state, Finnish law may apply only under Section 6 if the offence is also punishable by the law of the place where the crime was committed and punishment could also have been imposed for it by a court in that foreign state. In this event, no sanction in Finland that is more severe than what is provided by the law of the place of commission shall be imposed for the offence.

In its judgement KKO 2022:38 (Section 15), the Supreme Court stated that, as a rule, in order to establish dual criminality, it is necessary to know the exact wording of the criminal provision of the law of the place where the offence was committed and of the provisions relevant to the punishability of the offence, such as the statute of limitations. In some situations, the legal terminology used in the criminal provision or grounds for contesting the charge may require a more extensive review of, for example, the grounds for exemption from liability under the law of the place where the offence was committed or the general principles of criminal law.

Once the Finnish court has been declared competent and the prosecution has been declared admissible, the requirement of dual criminality must be reassessed for the purposes of imputation and punishment by checking whether also the imputable acts fulfil the requirements of dual criminality (KKO 2022:38, Section 13).

The evidence in the case and its adequacy

The public prosecutors have provided evidence of dual criminality in the case. According to a statement by the Solicitor-General of Liberia during the preliminary investigation, murder is a punishable offence under Liberian law and was also a punishable offence between 1999 and 2003. According to a statement by the Solicitor-General of Liberia, which was attached to the statement submitted by the prosecutor to the District Court on 18 December 2021, rape is a punishable offence under Liberian law and was also a punishable offence between 1999 and 2003.

The prosecutors have also provided the Court of Appeal with English extracts from the Liberian Criminal Law (approved on 19 July 1976 and published on 3 April 1978) and the Criminal Procedure Law.

According to an extract from the Liberian Criminal Law, Chapter 14, Section 1(14.1.)(1) A person is guilty of murder if they (a) purposely or knowingly cause the death of another human being; or (b) cause the death of another human being under circumstances manifesting extreme indifference to the value of human

life.

According to Sub-section 2 of the said section, murder is a felony of the first degree, but a person convicted of murder may be sentenced to death or life imprisonment as provided in Section 5(50.5.) of Chapter 50 and Section 3(51.3.) of Chapter 51 of Liberian Criminal Law.

According to the extract from the Liberian Criminal Procedure Law, based on Chapter 4, Section 1(4.1.), prosecution for a capital offence may be commenced at any time after it is committed.

The Court of Appeal notes that, with regard to the number and seriousness of the offences alleged to have been committed in relation to count 1, it has been sufficiently substantiated from the Liberian legislation that the offences in question may be punishable by a penalty before a Liberian court. Therefore, the charges can be investigated with regard to count 1.

As shown in the excerpt from the Liberian Criminal Law, according to Chapter 14, Section 70(14.70)(1) of the said Law which was in force until 16 January 2006, a male who has sexual intercourse with a woman who is not his wife has committed rape if he compels the woman to submit to it by force, or by threat of imminent death, by serious bodily injury, or by threat of kidnapping.

According to the extract of the Liberian Criminal Procedure Law, Chapter 4, Section 2(4.2), provides that prosecution for crimes not punishable by the death penalty must be commenced within five years after they are committed.

The prosecutors have not yet submitted to the Court of Appeal any further evidence of fulfilling the requirement of dual criminality for count 2. The acts under counts 1 and 2 form part of the acts under counts 3 and 4. Taking into account the outcome of the Court of Appeal's decision on the jurisdiction for counts 3 and 4, the facts under count 2 are competently investigated regardless of whether the requirement of dual criminality is fulfilled. If necessary, the Court of Appeal will issue a separate decision on jurisdiction with regard to count 2.

Jurisdiction to investigate charges of serious war crimes (count 3) and gross violations of human rights in exceptional circumstances (count 4)

National provisions

In accordance with Section 1(3) of the Constitution of Finland (731/1999, hereinafter also referred to as the 'Constitution'), which entered into force on 1 March 2000, Finland participates in international cooperation for the protection of peace and human rights and for the development of society.

According to Section 8 of the Constitution, no one shall be found guilty of a criminal offence or be sentenced to a punishment on the basis of a deed, which has not been determined punishable by an Act at the time of its commission. The penalty imposed for an offence shall not be more severe than that provided by an Act at the time of commission of the offence.

According to Section 21(1) of the Constitution, everyone has the right to have their case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to their rights or obligations reviewed by a court of law or other independent organ for the administration of justice.

According to the preparatory works for the Constitution, Sections 8 and 21(1) correspond to Sections 6a and 16 of the form of government in force before the Constitution (Government Proposal 1/1998 vp p. 79 and 80).

According to the preparatory works of Section 6a of the form of government, only an act that was punishable under the Parliament Act at the time it was committed can be punishable as a criminal offence. This provision entails both a prohibition on retroactive criminal law and a prohibition on the expansive (analogous) application of criminal law. The section does not include a provision similar to those of Article 7(2) of the European Convention on Human Rights and Article 15(2) of the International Covenant on Civil and Political Rights on the criminalisation of acts against international law, notwithstanding the proposed provision. This is because Finnish criminal law has sought to criminalise acts defined as crimes in international law. (Government Proposal 309/1993 vp p. 50)

It has been stated in the preparatory works of Section 16 of the form of government that, although the section in question does not contain an express reference to criminal proceedings, the right expressed in that section concerns all criminal proceedings (Government Proposal 309/1993 vp p. 73).

According to Section 22 of the Constitution, the public authorities shall guarantee the observance of basic rights and liberties and human rights.

Section 22 of the Constitution obliges the court to choose the option that best safeguards human and fundamental rights from the possible options for interpreting the law. The court must seek an interpretation that is constitutional and in favour of human rights in the exercise of its discretion under a specific provision and in compliance with the requirements of human rights obligations. However, the interpretation precludes, at least, an interpretation contrary to the wording of the law which alters the substance of the provision from the intention expressed by the legislature. (KKO 2021:42, Section 8)

The interpretation of the provisions of the Constitution is affected not only by national sources of law, but also by the European Convention on Human Rights (hereinafter referred to as the 'ECHR') and the case-law of the European Court of Human Rights (hereinafter referred to as the 'ECtHR').

According to Chapter 1, Section 7(1) of the Criminal Code, Finnish law applies to such an offence committed outside of Finland where the punishability of the act is, regardless of the law of the place of commission, based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland (international offence). Further provisions on the application of this section are issued by decree.

In the government proposal that led to the enactment of Chapter 1, Section 7(1) of the Criminal Code and the Implementing Provision, it was stated that the Geneva Conventions on war crimes and human rights violations (Treaty Series 8/55) define only the serious crimes described in more detail in the Conventions as world crimes. According to the government proposal, the section would be limited to a general clause stating that Finnish law applies to an international crime irrespective of the law of the place where the offence was committed. The Implementing Provision would list exhaustively the agreements and offences to which Finnish law can be applied on the basis of the universality principle. The content of the Regulation corresponds to the corresponding list in the report of the Scandinavian Committee on Criminal Law. The government proposal then points out that, under customary international law, states are entitled to punish certain crimes regardless of the nationality of the perpetrator, the place where the crime was committed or the target of the crime. It is unclear which crimes are international crimes in the strict sense of the word, i.e. crimes under international law. There is a wide consensus that piracy, war crimes and certain crimes against humanity are such. These offences are subject to the universality principle directly under customary international law, and their punishment does not require international agreements or national criminal law. There is no provision for them in this bill. (Government Proposal 1/1996 vp p. 22 and 23)

According to Section 1(1)(2) of the Implementing Provision (627/1996) in force at the time of the offence, the following offences were considered international crimes for the purposes of Chapter 1, Section 7 of the Criminal Code: such war crimes, violations of human rights in exceptional circumstances, aggravated war crimes, gross violations of human rights in exceptional circumstances and other similar punishable acts which are to be considered as serious crimes referred to in the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Relative to the Treatment of Prisoners of War, and Relative to the Protection of Civilian Persons in Time of War (Treaty Series 8/55) and the First Additional Protocol to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Treaty Series 82/80).

According to Chapter 1, Section 15 of the Criminal Code, if an international treaty binding on Finland or another statute or regulation that is internationally binding on Finland in some event restricts the scope of application of the criminal law of Finland when compared with the provisions of this chapter, such a restriction applies as agreed. Notwithstanding the provisions of this chapter, the restrictions on the scope of application of Finnish law based on generally recognised rules of international law shall also apply.

According to Chapter 3, Section 1(1) of the Criminal Code, which entered into force on 1 January 2004, a person may be found guilty of an offence only on the basis of an act that was specifically punishable under law at the time of its commission. Pursuant to paragraph 2 of that section, punishments and other criminal sanctions shall be based on law. According to the government proposal that led to the enactment of Chapter 3, Section 1 of the Criminal Code, the provision is essentially the same as the provision introduced in the form of government in 1995, Section 6a (Government Proposal 44/2002 vp pp. 13 and 31).

According to Chapter 11, Section 1(3) of the Criminal Code (578/1995) in force at the time of the offence, a person who in an act of war violates the provisions of an international agreement on warfare binding on Finland or the generally acknowledged and established rules and customs of war under public international law in a manner other than described in sub-sections 1 and 2 shall be sentenced for a war crime. According to Section 4 of the said chapter, in exceptional circumstances a person who violates or fails to comply with what

Finland or the established rules of public international law stipulate are to be followed in relation to the protection of the wounded, sick or displaced persons whether prisoners of war or civilians during war, armed conflict or occupation, may be prosecuted for breach of human rights. Section 2 of the same chapter contains a provision on aggravated war crime and Section 5 on aggravated violation of human rights in exceptional circumstances.

Serious crimes within the meaning of the Geneva Conventions as grounds for jurisdiction

The report of the Scandinavian Committee on Criminal Law referred to in the preparatory works to the law (Government Proposal 1/1996 vp p. 23) contains a list of provisions of international treaties which, according to the report, at least justify the application of the universality principle (Straffrättslig jurisdiktion i Norden, 1992, pp. 117 and 118). This list includes, inter alia, the articles of the Geneva Conventions and their First Additional Protocol relating to 'grave breaches'. These articles oblige the parties to the treaties to bring serious crimes, as defined in more detail in the articles, before their courts, regardless of the nationality of the perpetrator. The list does not contain any reference to Common Article 3 of the Geneva Conventions or to the Second Additional Protocol supplementing it.

According to the general rule of Common Article 2 of the Geneva Conventions, the Geneva Conventions are to be applied in the event of a declaration of war or other armed conflict between two or more parties to the treaties. According to the preparatory works of the Geneva Conventions, only the specifically mentioned provisions of the Conventions are applicable to civil wars (Final Record of the Diplomatic Conference of Geneva of 1949, vol. II, Section B. p. 36 and 37). The articles on serious crimes in the Geneva Conventions do not contain any reference to their applicability to an armed conflict of a non-international character.

Serious crimes have been held to be committed only in international armed conflicts (Judgement of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia of 2 October 1995 in Case No IT-94-1, Prosecutor v. Dusko Tadic, sections 71 and 79–84). In its decision of 10 November 2022, the Swedish Supreme Court also held that the articles of the Geneva Conventions relating to serious crimes which are binding on the exercise of universal jurisdiction apply only to international armed conflicts (Case Ö 1314-22, Section 29).

In light of the reference framework for prosecution, the case does not qualify for the application of Finnish law on the basis of Section 1(1)(2) of the Implementing Provision, as explained above.

In terms of the case, it will, then, have to be considered whether jurisdiction to

investigate charges of serious war crimes and gross violations of human rights in exceptional circumstances can be based on customary international law.

Basing jurisdiction on customary international law

According to the government proposal underlying Chapter 1, Section 7 of the Criminal Code, there is a wide consensus that war crimes fall directly under the universality principle by customary international law. Their punishment does not require international agreements or national criminal law. (Government Proposal 1/1996 vp p. 23)

According to a 2005 study published by the International Committee of the Red Cross, states have the right, under customary international law, to grant their national courts universal jurisdiction to deal with war crimes committed in a non-international armed conflict (Customary International Humanitarian Law, 2005, pp. 604 and 605). Such war crimes include, inter alia, serious violations of Article 3 of the Geneva Conventions (cited above, pp. 568 and 590). Under customary international law, such war crimes include serious violations of international humanitarian law, including acts of sexual violence, including, in particular, rape (cited above, pp. 591 and 592). The interpretative positions of the study are based on extensive source material, including judgements of international and national courts and tribunals in the 1990s and 2000s, as well as statements by international organisations.

According to Common Article 3 of the Geneva Conventions, Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

According to the said article, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b) taking of hostages;
- c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

Given the context of the charges, the acts alleged in counts 3 and 4 may constitute serious violations of Common Article 3 of the Geneva Conventions, which at the time of their commission constituted war crimes giving rise to individual criminal liability and war crimes subject to the universality principle under customary international law. In Finnish law, these acts were criminalised by Chapter 11, Sections 1(3) and 4, of the Criminal Code (578/1995), with references to the provisions of international treaties binding Finland and customary international law.

Under customary international law, the administration of justice for criminalised war

crimes must satisfy the requirements of a fair trial set out in Section 21 of the Constitution and Article 6(1) of the ECHR, as well as the principle of legality of criminal proceedings set out in Section 8 of the Constitution, Chapter 3, Section 1 of the Criminal Code and Article 7 of the ECHR.

In its judgement on universal jurisdiction in *Jorgic v. Germany*, the ECtHR has held that Article 6(1) of the ECHR requires that a court established by law has been given jurisdiction under national law to investigate the acts at issue. The exercise of jurisdiction should not be arbitrary but justified with regard to the applicable rules of international law. (*Jorgic v. Germany*, Application No 74613/01, judgement of 12 July 2007, Sections 64-72)

In the above-mentioned judgement, the ECtHR reiterated the well-established interpretation of its case-law that Article 7 of the ECHR does not preclude the gradual clarification of the rules on criminal liability through case-law, provided that the result of the development is consistent with the essence of the offence and was reasonably foreseeable at the time of the offence (Section 101).

In its ruling on the ill-treatment and killing of civilians and prisoners of war on the territory of Croatia in 1991 and 1992, the ECtHR held that the rules of customary international law governing armed conflicts of a non-international nature in force at the time of the commission were sufficiently foreseeable. In the case, the ECtHR considered that the criterion of foreseeable penalties required by Article 7 of the ECHR was met when the defendant, in view of the apparent unlawfulness of war crimes committed by his subordinate police officers, was able to understand that his conduct was a criminal offence. (*Milankovic v Croatia*, Application 33351/20, judgement of 20 January 2022, Sections 62–66)

For the purposes of the present prosecution, the customary international law on which universal jurisdiction is based may be interpreted as embodied in the meaning of an international statute which is binding on Finland as referred to in Chapter 1, Section 7(1) of the Criminal Code. In Chapter 1, Section 7 of the Criminal Code, the phrase ‘or on another statute or regulation internationally binding on Finland’ was added to the bill during the parliamentary debate. This addition was justified by the fact that the resolutions of the United Nations Security Council had established an International Criminal Tribunal for crimes committed on the territory of Yugoslavia and the corresponding tribunal for Rwanda, binding the Member States (Report of the Legal Affairs Committee 4/1996 vp p. 2). The report did not propose the inclusion of these resolutions in the Implementing Provision.

The legislator's intention with regard to the addition to Chapter 1, Section 7(1) of the Criminal Code, as described above, remains unclear, given that the United Nations Security Council Resolutions 827 (1993) and 955 (1994) referred to in the report of the Legal Affairs Committee do not establish universal jurisdiction for states. In legal literature, it has been held that the addition also introduced obligations under customary international law to the provision (Tupamäki, Matti: *Valtion rikosoikeudellisen toimivallan ulottuvuus kansainvälisessä oikeudessa* [‘Extent of State criminal jurisdiction in international law’], 1999, p. 358). In any event, it is clear from the rationale for the government proposal (Government Proposal 1/1996 vp p. 23) that punishment of war crimes and crimes against humanity and the universal jurisdiction of a court to investigate them can, at least for the most serious

offences, be based on customary international law.

The acts alleged in counts 3 and 4 are, as charged, serious violations of international humanitarian law, which are proper international crimes, i.e. crimes of international law. Such crimes affect the international community as a whole and are considered to be a threat to international order and peace, as well as to the existence and development of states.

The investigation of the charges on counts 3 and 4 is part of Finland's constitutional obligation to participate in international cooperation for the protection of peace and human rights. The interpretation of offences based on customary international law as falling within the scope of Chapter 1, Section 7(1) of the Criminal Code, is not contrary to the wording of the provision or to the intention of the legislature as set out in the preparatory works. The application of Finnish law based on this provision meets the requirements of the Finnish Constitution and the justice of the Council of Europe (ECHR and ECtHR case-law on its application).

In conclusion, the Court of Appeal states that the application of Finnish law in relation to counts 3 and 4 is grounded on Chapter 1, Section 7(1), of the Criminal Code.

The question of jurisdiction will need to be re-assessed in relation to the potential prosecution and punishment, at the latest.

Resolution

██████████'s objection of inadmissibility is dismissed in respect of counts 1, 3 and 4. The proceedings will continue before the Court of Appeal.

Appeal

This processing decision cannot be appealed separately.

The case has been resolved by submission.

██████████, Judge of the Court of Appeal
██████████, Judge of the Court of Appeal, ██████████, Judge of the Court of Appeal

██████████, Rapporteur of the Court of Appeal

The decision is unanimous.