

ORDER OF THE SUPREME COURT
made on Thursday, 26 April 2012

Case 2/2012

The Prosecution Service

vs

T

(Attorney Bjørn Elmquist, appointed)

In the lower courts, Orders were made by the Court of Roskilde on 31 May 2011 and the 6th Division of the Eastern High Court on 26 October 2011.

Five judges participated in the adjudication: Børge Dahl, Marianne Højgaard Pedersen, Vibeke Rønne, Jens Peter Christensen and Michael Rekling.

Requests

The Prosecution has requested a reversal of the Order of the Eastern High Court of 26 October 2011 so that the Prosecution's primary charge concerning genocide will not be dismissed pursuant to section 846(1) of the Administration of Justice Act.

T has requested that the Order be upheld.

Applicable law

The Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide as ratified by Denmark by Executive Order No. 21 of 26 May 1952 states the following:

”Art. I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Art. II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.

Art. III

The following acts shall be punishable:

- a) Genocide;
- b) Conspiracy to commit genocide;
- c) Direct and public incitement to commit genocide;
- d) Attempt to commit genocide;
- e) Complicity in genocide.

Art. IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Art. V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Art. VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

Danish Act No. 132 of 29 April 1955 on punishment for genocide states the following:

”1. A person who, with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,

- a) Kills members of the group;
- b) Causes serious bodily or mental harm to members of the group;

- c) Deliberately inflicts on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - d) Imposes measures intended to prevent births within the group; or
 - e) Forcibly transfers children of the group to another group;
- shall be guilty of genocide and sentenced to imprisonment for life or for a fixed term of no more than 16 years.

2. An attempt to commit or aiding and abetting the acts enumerated in section 1 shall be punished in accordance with Part 4 of the Civil Criminal Code."

The explanatory notes to the bill on which the Act is based state the following (Official Report of Parliamentary Proceedings 1954–55, Supplement A, 1641ff.):

"By Articles I and V of the Convention on the Prevention and Punishment of Genocide ratified by Denmark by royal resolution of 25 May 1951, Denmark is obliged to enact legislation prescribing effective penalties for persons guilty of genocide (Article II) or one of the other acts enumerated in Article III of the Convention.

...

In accordance with statements by the Minister of Justice when the question of ratification of the Convention was presented to the Parliament, the Ministry of Justice has considered the question about the amendments to Danish criminal law that are deemed necessary and the form such legislation should take.

...

In its consideration of the form in which Denmark should seek to enact the statutory authority to prosecute required to meet the obligation under the Convention, the Ministry of Justice has applied the assumption that – as can be seen from the above comparison of the Convention and the Criminal Code – there is a need for statutory authority to prosecute at least as regards the acts referred to under Article II(c)–(e). In principle, it would be preferable if acts of genocide were covered by the Criminal Code like all other serious crimes and that the penalty was also imposed in accordance with the Criminal Code. However, this would require rewriting of numerous provisions of the Criminal Code as well as the addition of new provisions. On the other hand, it would be of no special value if the Convention's concepts of crime were to be included in a special part of the Criminal Code. The acts covered by the Convention are of such a special nature that the provisions are only likely to be applied in practice in exceptional circumstances in Denmark. If these criminal acts were to be included in the current provisions of the Criminal Code, it would complicate the wording of them to a disproportionate extent. Therefore, it has been decided not to insert these elements of crime in the Criminal Code but, instead, propose a special act on punishment for genocide."

In paragraphs 183 and 184 of its Judgment of 26 February 2007, the International Court of Justice stated, in the case concerning *Application of The Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *I.C.J. Reports 2007*, p. 43, as follows:

“(6) The Possible Territorial Limits of the Obligations

183. The substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question. The extent of that ability in law and fact is considered, so far as the obligation to prevent the crime of genocide is concerned, in the section of the Judgment concerned with that obligation (cf. paragraph 430 below). The significant relevant condition concerning the obligation not to commit genocide and the other acts enumerated in Article III is provided by the rules on attribution (paragraphs 379 ff. below).

184. The obligation to prosecute imposed by Article VI is by contrast subject to an express territorial limit. The trial of persons charged with genocide is to be in a competent tribunal of the State in the territory of which the act was committed (cf. paragraph 442 below), or by an international penal tribunal with jurisdiction (paragraphs 443 ff. below).”

Submissions

The Prosecution has submitted primarily that section 1, para (a), of the Genocide Act has extraterritorial effect and thus applies to genocide committed outside Denmark. The Genocide Act does not contain any specific definition of the territorial scope of the Act. Whether the provision has an extraterritorial effect depends on an interpretation of the *actus reus* covered by the specific provision and, in particular, the object of protection of the provision.

Article VI of the Genocide Convention does not imply any limitation of a country's access to prosecute a person for genocide committed in another state's territory. An interpretation of the legislative history of the act or consideration of the comments made during the reading for the parliamentary resolution on ratification in 1951 does not provide any decisive aid towards the proper interpretation, rendering it possible to determine the territorial scope of the Act on that basis. The circumstance that the implementation of the Genocide Convention was carried out by a special act and not by introducing new provisions in the Criminal Code cannot in itself be considered to be of decisive importance for the assessment of the territorial scope of the Act.

In the determination of the object of protection of the Genocide Act, it must be taken into account that, in principle, where the act in question is manslaughter, the Act covers the same territory as section 237 of the Criminal Code which has extraterritorial effect according to the established interpretation. It must also be taken into account that, by adopting the Genocide Act and the penalty provisions contained therein, Denmark wished to participate

in the international combat against genocide and that the Act should also today be regarded as an expression of Denmark's general interest in taking part in the combat against international crimes. Moreover, the Supreme Court should take into account the principles which it was intended to enact and protect by means of the underlying Genocide Convention as well as the overall objective of the Convention.

This case is subject to Danish criminal jurisdiction under section 7(1), para (1), and section 8A of the Criminal Code. The act for which the charge has been raised is also a criminal offence in Rwanda.

T has submitted that there is no authority under Danish law to convict a person of genocide committed in another country by foreign nationals back in 1994.

The aim when the Genocide Act was adopted was to limit the Act so that it would only cover genocide committed on Danish territory, which was fully in line with the Genocide Convention, which imposed territorial criminal jurisdiction on the states. Neither the legislative history nor the explanatory notes to the Genocide Act provide any evidence that Danish authorities were granted such extraterritorial powers.

An interpretation cannot lead to the conclusion that the Genocide Act includes extraterritoriality. Such an expansion of Danish criminal jurisdiction must require explicit statutory authority in the wording of the law itself or at least an absolutely unambiguous indication in the explanatory notes to the act. In connection with legislation adopted in 2000 and 2007 respectively, see for example the ministerial responses to the Foreign Affairs Committee in the parliamentary year 2000–01, it was stated that the 1955 Genocide Act has extraterritorial effect. However, such statements cannot, in view of section 3 of the Criminal Code and the principle expressed therein, lead to the application of the Genocide Act to acts committed by non-Danish nationals in Rwanda in 1994.

It is not contested that, in principle, the object of protection in the Genocide Act means that Denmark must not become a place of refuge for persons who are suspected of genocide. However, it must also be taken into account that the Danish legal system is not suited to ensure that the trial of a matter of this nature will be adequate. The weakened possibilities of an effective defence constitute an argument against applying a purpose-bound, expansive interpretation of the scope of the Danish criminal jurisdiction.

The Supreme Court's reasons and findings

This case is concerned with a charge of genocide committed in Rwanda. Such a charge can only be raised before the Danish courts if genocide committed in Rwanda is a criminal offence under Danish law (question of statutory authority) and the perpetrator can be prosecuted in Denmark (question of competence or jurisdiction).

Therefore, the Supreme Court must determine whether the Genocide Act has universal scope or if the scope of the Act is limited geographically to Denmark. If the Genocide Act has universal scope and thus covers genocide committed in Rwanda, the Supreme Court must also determine whether Danish courts are competent to adjudicate genocide committed in Rwanda.

The Genocide Act was adopted with a view to fulfilling Denmark's commitments under the Convention on the Prevention and Punishment of the Crime of Genocide. Under Article III of the Convention, genocide must be a criminal offence. The Supreme Court finds, in accordance with the generally accepted international view, that the criminality of genocide has universal scope. Article VI of the Convention, which is concerned with the geographically limited obligation to prosecute genocide, does not provide a basis for any other understanding.

The Genocide Act contains the statutory authority to prosecute genocide. In accordance with the Convention, the Act does not contain a provision that limits the geographical scope of the statutory authority to prosecute. Therefore, the Supreme Court finds that – like the manslaughter provision set out in section 237 of the Criminal Code – the Genocide Act has universal scope. The legislative history of the Genocide Act, including the comments on the obligation to prosecute genocide under Article VI of the Convention, does not provide any basis for finding that the intention of the Act was to limit the scope of the criminality of genocide to the territory of Denmark.

Thus, section 1, para (a), of the Genocide Act contains the statutory authority for prosecuting genocide committed in Rwanda.

The Genocide Act does not contain any provisions on the competence to prosecute genocide. This question must be determined in accordance with the general rules of Danish law contained in the Criminal Code on the extent of Danish criminal jurisdiction. The circumstance that Denmark does not have an international obligation to prosecute genocide committed outside Denmark, see Article VI of the Convention, cannot lead to any other understanding.

During the Supreme Court proceedings, it has remained uncontested that genocide is also a criminal offence in Rwanda. Consequently, the requirements for criminal prosecution set out in section 7(1), para (1), of the Criminal Code are met.

Therefore, the Supreme Court allows the Prosecution's request for an order to the effect that the primary charge concerning genocide shall not be dismissed pursuant to section 846(1) of the Administration of Justice Act.

It is ordered that:

The High Court's Order shall be reversed. Thus, the primary charge against T concerning genocide shall not be dismissed.