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POLISH PRACTICE IN INTERNATIONAL LAW

*Oktawian Kuc**

KRSTIĆ CASE CONTINUED

Decision of the Circuit Court in Warsaw of 6 December 2012
(Ref. no. VIII Kop 222/12)[1]

THE DECISION:

The Circuit Court in Warsaw, pursuant to Articles 609 § 1, 611 § 4, 611a § 1 and § 6 of the Polish Code of the Criminal Proceedings and to Article 2.4 of the Agreement between the Government of the Republic of Poland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY") signed in The Hague on 18 September 2008, on the basis of a motion filed by the Minister of Justice has affirmed the legal permissibility of taking over the ICTY Judgment of 19 April 2004 regarding Radislav Krstić, which imposed a 35 year prison sentence, in order to enforce it. Additionally, the Court ordered a preventive measure in the form of preliminary detention for 2 months from the day of taking custody of the convict by the relevant authorities on the territory of the Republic of Poland.

FACTUAL BACKGROUND:

The massacre in Srebrenica is probably the most shocking example of atrocities on civilians, which occurred during the wars following the disintegration of the former

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[1] Case not reported, on file with author.

Yugoslavia. Although it was designated by the UN Security Council as a "safe area", Srebrenica was seized by Bosnian Serb forces in July 1995 with the aim of separating Muslim women, children and the elderly from the remaining male population. As a result of the plan, approximately 8,000 Bosnian Muslims from the enclave were rounded up, executed and buried in mass graves. Later, in order to conceal the evidence of the crimes committed, many bodies were excavated and reburied in remote locations.

The Drina Corps, commanded by Radislav Krstić from July 1995, were present in the area and involved in the implementation of the plan concerning the Muslim population. Krstić's troops were responsible for bombarding Srebrenica; obtaining means of transportation, including the buses later used for the transportation of Bosnian Muslims to the execution sites; monitoring the evacuation of women and children from the area; and attacking the Bosnian Muslim column trying to reunite with the Muslim-controlled territory. Additionally, the Drina Corps' assets and personnel were engaged in facilitating the executions and mass burials at Orahovac, Nezuk, Kozluk, Branjevo Farm and the Pilica Cultural Centre.

In an indictment of 2 November 1998, amended on 22 November 1999, the ICTY Prosecutor charged Radislav Krstić with genocide, crimes against humanity in form of extermination, murder, persecutions, deportations and inhuman acts, as well with violation of the laws or customs of war in form of murder. All alleged acts were committed by Krstić in his capacity as the Commander of the Drina Corps of the Bosnian Serb Army between July and November 1995 in connection with the siege and fall of Srebrenica. He was detained by SFOR troops on 2 December 1998 in Bosnia and Herzegovina, and later transferred to the ICTY detention facility.

Radislav Krstić was the first person to be found guilty of genocide by the ICTY, as the Trial Chamber I, presided over by Judge Almiro Rodrigues, rendered its Judgment on 2 August 2001. During the trial, it was established beyond a reasonable doubt that the convict ordered the procurement of the buses and oversaw the transport, assigned additional troops from his command to participate in the Branjevo Farm massacre, monitored subordinated officers directly engaged in killings, had knowledge of the plan to execute the entire remaining Bosnian Muslim male population from the Srebrenica enclave, and was aware of his soldiers' involvement in the exterminations and mistreatments. Additionally, Krstić was convicted for persecution, crimes against humanity, and murder as a war crime. Consequently he was sentenced to 46 years in prison.

Both the Prosecution and the Defense appealed. Although the Appeal Chamber, presided over by Judge Theodor Meron, conceded that genocide had occurred in Srebrenica as determined by the court of first instance, it reduced Krstić's responsibility for genocide from that of direct participation to only aiding and abetting. The Chamber highlighted that no direct evidence establishing the participation of the Drina Corps in the executions was presented. Only the involvement of their personnel and assets in assisting the killings could be proven. It was however determined that Krstić was fully aware of the plan to commit genocide conceived by the Bosnian Serb Army Main Staff in Srebrenica and did not prevent the use of soldiers and resources of the troops under

his command to carry it out. Without adequate proof of the convict's genocidal intent, the Appeal Chamber held he could only be responsible as an aider and abettor. The Trial Chamber's verdict in relation to murder (as a war crime) and persecution (a crime against humanity) was affirmed, but the Appeal Chamber did not share the legal reasoning for excluding the possibility of cumulative convictions, and found Krstić guilty of aiding and abetting the extermination and persecutions (crimes against humanity) and aiding and abetting murder (a war crime). The sentence imposed in the first instance was adjusted accordingly and reduced to 35 years of imprisonment.

On 20 December 2004, the convict was transferred to the United Kingdom to serve his sentence as determined by the Appeal Chamber. During his stay in Wakefield prison, in May 2010 three Muslim inmates attacked him and slit his throat open. Although Krstić survived the assault with serious injuries, the Government of the United Kingdom could not ensure his safety. Thus, he was transferred to the ICTY Detention Unit in order to await the determination of a new location for enforcement of his sentence.

Following preliminary correspondence, the ICTY Registrar, using diplomatic channels, requested on 10 July 2012 the taking over of the enforcement of the remainder of Krstić's sentence on the territory of the Republic of Poland. Thus the Minister of Justice of Poland, on 31 August 2012, filed a motion in the Circuit Court in Warsaw for issuance of a decision concerning the legal permissibility of the takeover. After receiving the court's decision, the Minister of Justice decided on 4 January 2013 to agree to take over the enforcement of the sentence imposed on Radislav Krstić and informed the ICTY accordingly. As of 13 March 2013, the final decision concerning the actual transfer of Krstić is still pending.

REASONING OF THE WARSAW COURT:

Before reaching its decision, the Court was confronted with two main legal issues. The first matter which had to be examined was whether all the prerequisites mandatory under international law binding Poland in relation to the enforcement of ICTY judgments were fulfilled. Secondly, all the conditions laid down by Polish law to enforce foreign judgments had to be fulfilled to the Court's satisfaction.

According to Article 27 of the ICTY Statute adopted by the UN Security Council,[2] the imprisonment of convicts shall take place in one of the States that indicates their willingness to accept such persons and shall be carried out in accordance with the applicable law of that State, but subject to the supervision of the ICTY. Poland has expressed its interest in assisting the Tribunal in this regard and this cooperation

[2] *Updated Statute of the International Criminal Tribunal of the former Yugoslavia*, September 2009, adopted on 25 May 1993 by Resolution 827 and amended by Resolutions 1166, 1329, 1411, 1431, 1481, 1597, 1660, 1837 and 1877, available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (15 January 2013).

was formalized. The appropriate arrangement, entitled the Agreement between the Government of the Republic of Poland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia (hereinafter the "Agreement"),[3] was concluded on 18 September 2008 in The Hague. The President of Poland later ratified it[4] on 9 July 2009, with the consent of the Polish Parliament.[5] This procedure has significant legal consequences, as pursuant to Article 91.2 of the Constitution of the Republic of Poland "an international agreement ratified upon prior consent granted by statute shall have precedence over statutes, if such an agreement cannot be reconciled with the provisions of such statutes."[6]

The Agreement sets both the basic legal framework for the procedure relating to cooperation in matters concerning the enforcement of the ICTY sentences as well as the conditions of such enforcement. Generally, all powers of decision remain with the Tribunal. Without the affirmative decision of the ICTY President, undertaken in consultation with the judges, a convict can neither be pardoned, released early, moved to a half-open or an open prison, nor can his sentence be commuted, even if such possibilities were available under Polish law and all the required prerequisites were fulfilled or satisfied. Additionally, the Polish authorities are bound by the duration of the sentence imposed by the Tribunal. Pursuant to Article 3.2 of the Agreement, enforcement is possible even, if a convicted person is neither a Polish national nor permanent resident, and even without his consents to serve the sentence on Polish soil.

The first matter – satisfaction of international legal requirements, did not pose any significant obstacles for the Warsaw Court. The request to the Government of the Republic of Poland to enforce the sentence was issued by the ICTY Registry and approved by the ICTY President, as required by Article 2.1 of the Agreement. All relevant accompanying documents were attached, including:

1) the certified copy of the final and valid judgment of the International Criminal Tribunal for the former Yugoslavia of 19 April 2004;
2) specification indicating how much of the sentence had already been served, including information on pre-trial detention; and
3) a medical report and other data relevant to the enforcement of the sentence.

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[3] In Polish: *Umowa między Rządem Rzeczpospolitej Polskiej a Organizacją Narodów Zjednoczonych o wykonywaniu wyroków Międzynarodowego Trybunału Karnego dla byłej Jugosławii*, 18 September 2008, Dz. U. 2009, No. 137, item 1123.

[4] *Government Statement of 3 August 2009 concerning the binding force of the Agreement between the Government of the Republic of Poland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia, concluded in The Hague on 18 September 2008*, Dz. U. 2009, Nr 137, item 1124.

[5] *Act of 2 April 2009 on ratification of the Agreement between the Government of the Republic of Poland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia, concluded in The Hague on 18 September 2008*, Dz. U. 2009, Nr 79, poz. 661.

[6] *Konstytucja Rzeczypospolitej Polskiej* (The Constitution of the Republic of Poland), 2 April 1997, Dz. U. 1997, No. 78, item 483, as amended.

In relation to point 2, as of 12 December 2012 Radislav Krstić had already served 5,156 days (14+ years) from the day of his arrest. He was kept in the UN Detention Unit until his transfer to a prison in the United Kingdom, and on 15 December 2011 was again in the UN Detention Unit. As far as medical information provided is concerned, despite the fatal attack in 2010, no contraindications exist preventing the further enforcement of the convict's sentence, although the Court took note of the scant nature of the medical documentation.

In addition to the need to conform to international regulations, the Polish authorities and courts are also bound by Polish law governing the matter of enforcement of foreign judgments. This is also affirmed by the Agreement itself, which stipulates in Article 2.4 that "the competent national authorities of the requested State shall promptly decide upon the request of the Registrar, in accordance with national law".

Polish rules pertaining to the enforcement of foreign judgments are primarily included in the Code of Criminal Proceedings (hereinafter the "Code").[7] Although the Code provides a complex legal framework for cooperation with the International Criminal Court,[8] there is a lack of special rules pertaining to *ad hoc* international criminal tribunals. Only Article 615 § 1 of the Code states that "[with respect] to relations with international criminal tribunals and their organs functioning on the basis of international agreements to which the Republic of Poland is a party, or established by the international organizations formed by international agreements ratified by the Republic of Poland, the provisions of this Part[9] shall be applied accordingly." Furthermore, Article 615 § 2 sets forth the principle of the subsidiarity of Polish statutory norms in relation to international obligations,[10] which has been affirmed by the Polish Supreme Court.[11] This article is of a key importance in the Krstić case, as it provides the Court with the competence to: firstly, not take into account those national provisions that are in direct conflict with the Agreement concluded with the United Nations through the ICTY; and secondly, to refer accordingly to those rules of municipal law regulating judicial

[7] *Kodeks postępowania karnego* (Code of Criminal Proceedings), 6 June 1997, Dz. U. 1997, No. 89, item 555, as amended.

[8] Articles 611g to 611s.

[9] The Code is divided into fifteen Parts, and each Part consists of Chapters. Part XIII is titled "Proceedings in criminal cases in international relations." This is the Part to which the cited article refers.

[10] "The provisions of this Part shall not be applicable, if an international agreement to which the Republic of Poland is a party, or a legal act governing the functioning of an international criminal tribunal resolves the matter differently."

[11] *Postanowienie Sądu Najwyższego* (Decision of the Supreme Court), dated 8 June 2009, IV KK 461/08: "the regulated in the Code of Criminal Proceedings a system of cooperation in criminal cases in international relations (…) is subsidiary with respect to international agreements. Application of municipal provisions is not fully excluded, but concerns a narrow scope of cases, being situations when an international agreement does not regulate a key issue for the cooperation. If lacunae exist and the regulations included in an international agreement are not complete, the Polish court is obliged to apply those provisions of national law which deal with the issue. Whereas with certainty an international agreement can exclude the application of municipal law in its entirety, if a given type of cooperation is regulated in a comprehensive manner."

cooperation with foreign authorities, but not necessarily literally with international criminal tribunals, in criminal cases, including the enforcement of criminal judgments. From this perspective, it is rather puzzling, why the Circuit Court in Warsaw did not indicate Article 615 as a main and predominant basis of its decision, but rather specified concrete articles of the Code that can only be applicable by the virtue of Article 615 and in relation to it.

Both on the basis of the above-mentioned subsidiary rule and relevant provisions of the Agreement, Polish statutory rules inscribed in the Code governing the jurisdiction and venue of a court (Art. 611 § 4), the role of the Minister of Justice as a moving party before municipal courts (Art. 609 § 1), the obligatory defense of a convict if he/she is not available to appear before the court (Art. 611a § 1), and the permissibility to order preventive measures (Art. 611a § 6) shall be especially applied by Polish courts confronted with a request concerning the enforcement of ICTY judgments. Furthermore, the Polish courts shall scrutinize, whether the conditions set forth in Article 611b § 1, excluding the permissibility of enforcement of foreign judgments in Poland, are relevant in a particular case. As explained above, some of those conditions may be countermanded by the Agreement.

These conditions set forth in Polish legislation are rather substantive in nature. As the Court stressed: "[p]rovision of Art. 611b § 1 points 1-6 of the Code of Criminal Proceedings defines the prerequisites, which exclude the permissibility of taking over the execution of a foreign judgment in Poland. They are mandatory and therefore a court shall issue a ruling on the impermissibility of taking over the execution of a judgment if they occur". Pursuant to the article mentioned, a judgment shall not be taken over to be executed in Poland, if: 1) it is neither final, legally valid, nor enforceable; 2) a convict does not agree to be transferred for the execution of incarceration;[12] 3) a judgment's execution could infringe the sovereignty, security or legal order of the Republic of Poland; 4) its execution would be contrary to Polish law; 5) the act indicated in a request does not constitute a criminal act under Polish law; 6) an act does not fulfill all elements of an offence or a statute declares that an act is not an offence or a perpetrator has not committed the alleged crime or cannot be punished; or 7) any statute of limitations is applicable.

The finality of the Krstić judgment is self-evident. Moreover, it is actually being enforced as the convict has already served part of his sentence. As far as the consent of the offender is concerned, this condition is explicitly excluded on the basis of the subsidiarity of Polish law in relation to international agreements regulating cooperation in criminal matters, as "[p]ursuant to Art. 3.2 of the Agreement, the enforcement of judgments rendered by the Court is possible also in situations when a person convicted is not a Polish citizen, has not had a place of permanent residence on the territory of

[12] In relation to convicts penalized by a criminal fine or forfeiture of property and not being a permanent resident of Poland, the taking over of a judgment is possible, only if his or her property is located on territory of Poland.

the Republic of Poland, or does not consent to the enforcement of a judgment in Poland."

The Court dedicated the majority of its opinion to the third and fourth conditions for exclusion. It stated at the beginning that "[t]he execution of the ICTY judgment of 19 April 2004 neither violates the sovereignty, security, nor the legal order of the Republic of Poland, nor is it contrary to Polish law" and provided a well-balanced reasoning focusing not only on the specific circumstances of the case, but also including a more general examination of current international relations, initially concentrating on the most fundamental issue, i.e. sovereignty. In particular it stated that: "Sovereignty means State independence, manifesting itself in the possession of a legal personality constituting the highest authority over a defined territory. A sovereign State is therefore a subject of international law in international relations. State authorities can undertake any actions they deem most beneficial for the State's interests. The notion of sovereignty has remained the foundation of the international law, but its scope has been reshaped. The justice system is a strictly protected instrument of the authority exercised, because it is a fundamental executor of the citizens' law, guardian of social order, and its proper functioning is a pillar of social confidence in the government. Nevertheless, even in this sphere international cooperation is perceived to be necessary in order to achieve greater efficacy and justice. In order to reconcile the two contradictory rights: first – to protect sovereignty, and second – to increase effectiveness, the principle of complementarity has been introduced, namely a mutual complement of municipal and international jurisdictions.

International Criminal Tribunals have grown out of the need to fulfill the idea of justice in the international arena in cases exceeding the particular, individual interests of a single State, thus where the World community has acknowledged that not only has its sense of security been violated, but also certain values and goods underlying its existence. International Tribunals compel civilized conduct in the uncivilized conditions posed by wars. The need to deliver justice with the use of instruments offered by the criminal law (both substantive and procedural) – despite all the imperfections connected with the accomplishment of this goal – has appeared to be so strong that is has been expressed in the form of a categorical imperative: 'there is no peace without justice'.

It needs also to be highlighted that the Tribunal's judgments are characterized by a preventive impact on potential perpetrators. This is a universal and irrefutable basis of the entire justice system. The consequent truth is that it is not the degree of penalty but its inevitability that is the main factor deterring criminal conduct. Lack of jurisdiction would be a consent to, or encouragement of, illegal conduct. It reinforces the principle that the impunity of one crime leads to another crime. Everyone must be aware that killing thousands of people shall not go unpunished, especially in the name of a perverted ideology.

The Tribunal – in the light of international politics – is an effective instrument in conflict and dispute resolution, because it can permanently eliminate chaos and provocateurs from political life. It is a means of intervention in the internal matters of a State, but resting on firm legal and moral foundations.

The establishment of the International Criminal Tribunal for the former Yugoslavia has not only been a homage paid to the victims of the bloody conflict, but above all a victory of justice over political opportunism. The international community, by its act of creating the Tribunal, wished to pay a moral debt to the victims remaining anonymous to it, rather than to their families, in whose memories they live unrevenged. The natural, human reaction is to demand retribution for the wrong and to punish those responsible. This means that the justice delivered can satisfy public consciences and restore confidence in the law. (…)

The limit on the exercise of a sovereign power – not indicating a State's weakness, but on the contrary, its strength – is inter alia its respect for norms assumed as a result of signing different types of international legal obligations".

Therefore, on the basis of the essential principle of *pacta sunt servanda,* derived from reason and morality as well from the UN Charter (Art. 2.2) and the Vienna Convention on the Law of Treaties (Art. 26), the Agreement concluded to foster cooperation between Poland and ICTY was deemed not to infringe on Poland's sovereignty.

The Court dealt with the issue of security by indicating that the same kind of agreements had been concluded by a majority of the European countries, including those that used to be integral parts of the former Yugoslavia. Moreover, "[t]he jurisprudence accepts that the phrase – the possibility of violating the legal order of the Republic of Poland – should be understood to encompass a situation, when a judgment that is to be taken over for execution has been rendered in breach of material procedural safeguards or norms constituting the essence of the legal order of Poland or shaping defined legal institutions, e.g. breach of evidentiary rules or the right of defense. The documentation attached by the International Criminal Tribunal for the former Yugoslavia proves that the process of Radislav Krstić was conducted in a fair manner, on the basis of legally binding acts, in accordance with standards determined by the European Court of Human Rights."

As to the compatibility with Polish criminal law of those criminal offences for which Krstić had been prosecuted and sentenced, "[p]rovision of Art. 19 § 1 of the Criminal Code[13] stipulates that a court shall sentence for incitement or aiding within the limits provided for perpetration. According to Polish law, the acts indicated in the request may be categorized as crimes against peace, against humanity and war crimes defined in Chapter XVI of the Criminal Code, and additionally the statute of limitations does not apply to crimes against peace, against humanity, and war crimes (Art. 105 § 1 of the Polish Criminal Code)". The crime of genocide is included in Article 118 of the Polish Criminal Code and resembles its conventional equivalent, but extends its protection to political groups and defined philosophies of life, besides national, ethnic, racial and religious groups.

For these reasons, and taking into account that no legal hindrance to taking over the judgment in Krstić case for execution existed, the Court held as described at the outset.

[13] *Kodeks karny* (Criminal Code), 6 June 1997, Dz. U. 1997, No. 88, item 553, as amended.

CONCLUSIONS

The Krstić case undoubtedly has a symbolic meaning. It sanctioned the opinion that the crime of genocide is not a remote and rather historical event, which is unlikely to occur at the end of 20th century, but rather remains a real threat and significant danger to national, ethnic, racial and religious groups throughout the World. The consciousness of Europe, which believed that after World War II and the Holocaust the "Old Continent" was free from such monstrosities as genocide, was shocked by the designation of the Srebrenica massacre as a clear case of the crime of genocide.

This case also has a special meaning for Poland. The Republic of Poland was the first country of the World to issue convictions for the crime of genocide,[14] even before the entrance into force of the Genocide Convention,[15] which was drafted and lobbied for by a Pole – Professor Raphael Lemkin.[16] After more than 60 years, a Polish court was asked again to assist in the suppression of this "odious scourge". Moreover, the case also has a precedential value in the Polish legal regime, as a Polish court for the first time has been confronted with a request from an international criminal tribunal and officially pronounced in favor of international judicial cooperation. This decision shall be looked upon for normative guidance in future cases, particularly those relating to the International Criminal Court cooperation regime.

[14] The term "genocide" was used in the judgments rendered by the Supreme National Tribunal of Poland, which tried Nazi perpetrators: *Poland v. Greiser*, (1948) 13 LRTWC 70, [1946] 13 ILR 387; *Poland v. Goeth*, (1946) 7 LRTWC 1, [1946] 13 ILR 268 ("the wholesale extermination of Jews and also of Poles had all the characteristics of genocide in the biological meaning of this term, and embraced in addition the destruction of the cultural life of these nations") and *Poland v. Hoess*, (1948) 7 LRTWC 11.

[15] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

[16] The term "genocide" appeared originally in R. Lemkin, *Axis Rule in Occupied Europe*, *Laws of Occupation – Analysis of Government Proposals for Redress*, Carnegie Endowment for International Peace, Washington, D.C.: 1944; although Lemkin's concept can easily be tracked back to a paper he presented at the 5th Conference for the Unification of Penal Law in Madrid in 1933. On the involvement of Lemkin in passing the Convention, *see* J. Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, Palgrave Macmillan, New York: 2008.