CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 14685/04
by Vladimir PENART
against Estonia

The European Court of Human Rights (Fourth Section), sitting on 24 January 2006 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr J. BORREGO BORREGO,
Mr J. ŠIKUTA, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 29 March 2004,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Vladimir Penart, is a Russian national who was born in 1925 and lives in Tallinn. He was represented before the Court by Mr A. Kustov, a lawyer practising in Tallinn.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

On 9 April 2003 the applicant was convicted of crimes against humanity under Article 61-1 § 1 of the Criminal Code (*Kriminaalkoodeks*) by the Valga County Court (*Valga Maakohus*).

According to the charges the applicant had in 1953-1954 served as the head of Elva Department of the Ministry of the Interior of the Estonian Soviet Socialist Republic (SSR). In the summer of 1953 he had planned and directed the killing of O.R.R., a person hiding in the woods from the repressions of the occupation authorities. For that purpose, he had hired R.T., who had also been hiding in the woods, as an agent and given him a pistol and ammunition. On 3 August 1953 R.T. had killed O.R.R. with a shot to the nape of his neck.

Moreover, the applicant had instructed R.T. to find out the whereabouts of V.S., who had been hiding in the woods, and to ascertain the persons who had been supporting him. On 17 September 1953, on the basis of information received from R.T., state security agents had shot and killed V.S., who had not resisted. The applicant had been in charge of this operation.

Finally, the applicant had instructed R.T. to find out the whereabouts of P.M., who also had been hiding in the woods. On 17 February 1954 the applicant had led and actively participated in an operation to kill P.M. The applicant had taken part in the shooting whereby P.M. had been killed.

Charges were also brought against R.T.

The County Court found that R.T. was guilty of killing O.R.R. and the applicant of organising the killing. The court established that the guilt of the accused in the remainder of the offences had not been proved. R.T. was convicted of murder for the purpose of personal gain under Article 136 (a) of the Criminal Code of the Russian Soviet Federative Socialist Republic (SFSR), applicable on the territory of Estonia in 1953, and sentenced to eight years' imprisonment. Due to statutory limitation R.T. was exempted from serving his sentence.

In respect of the applicant, the County Court found that he was guilty of a crime against humanity. It referred to Article 6 (c) of the Charter of the International Military Tribunal (Nuremberg Tribunal), noting that the Soviet Union had taken part in drafting the Charter and signed it on 8 August 1945. Furthermore, it found that the extrajudicial killing of O.R.R., a civilian person for the purposes of the Fourth Geneva Convention of 1949, had been in violation of that Convention. It noted that, in substance, the Soviet Union had treated what had happened in Estonia after the Second World War as an armed conflict, as the task of elimination of the resistance had been given to institutions of state security and to military authorities. However, in 1953 O.R.R. had been of no threat to the security of the Soviet Union or to the local authorities. He had been in hiding on his own and had neither actively resisted the authorities nor committed crimes. Nevertheless, the applicant had considered it necessary to kill O.R.R. extrajudicially, as according to his

information O.R.R. could have fought against Soviet rule. Accordingly, O.R.R. had been persecuted and killed because of his political convictions and resistance to Soviet rule. Making a reference to the Supreme Court's judgment of 21 March 2000 in the *Case of Paulov*, the County Court held that the applicant had committed a crime against humanity, since he had organised the killing of a person hiding from the authorities because of his political convictions. Although such a killing had been in violation of both domestic and international law, the applicant had presumed that he would not be punished, as he had been acting in his official capacity and considered his acts justified mainly on ideological grounds. His acts in organising the killing had not been driven by personal motives or objective circumstances. The killing of O.R.R. had not been unavoidable for the applicant; it had to be considered as a murder of the civilian population, i.e. a crime against humanity. The applicant was sentenced to eight years' suspended imprisonment with a probation period of three years.

The applicant appealed against the County Court's judgment. According to the applicant, his conviction had lacked a factual basis. Moreover, he challenged the applicability of Article 61-1 § 1 of the Criminal Code. O.R.R. had been armed and dangerous to the local inhabitants. The purpose of the applicant's acts had been to secure order and to avoid threats to the population.

The prosecutor challenged the partial acquittal of the applicant and his sentence. She also requested that R.T. be convicted of crimes against humanity.

On 2 September 2003 the Tartu Court of Appeal (*Tartu Ringkonnakohus*) quashed the County Court's judgment in part. It found that the applicant's guilt was proved also in respect of organising the killing of V.S. on 17 September 1953 and as concerned the organising of and participating in the killing of P.M. on 17 February 1954. It held that the applicant had organised the killing of the victims according to plans designed for the fight against banditry (*banditism*), the purpose of which had been to deprive nationals of the occupied country of their right to life and fair trial. The applicant's sentence remained unchanged.

As regards R.T., the Court of Appeal held that also he had committed crimes against humanity and sentenced him to eight years' suspended imprisonment with a probation period of three years.

The applicant's lawyer appealed against the Court of Appeal's judgment to the Supreme Court (*Riigikohus*). He was of the opinion that the courts had not motivated why they had considered the victims as civilians. The applicant had not committed crimes against humanity. The principle of *nullum crimen, nulla poena sine lege* had been violated by the lower courts.

By a judgment of 18 December 2003 the Supreme Court upheld the Court of Appeal's judgment. It confirmed that the victims had been civilians within the meaning of the Hague Convention IV (Convention Respecting

the Laws and Customs of War on Land) of 1907. It held that the acts committed by the applicant – organising the killing of civilians under the aegis of the fight against banditry – had constituted a crime against humanity according to the general principles of law recognised by civilised nations in 1953. The Supreme Court referred to Article 6 (c) of the Charter of the International Military Tribunal (Nuremberg Tribunal), Resolution No. 95 of the General Assembly of the United Nations Organisation, adopted on 11 December 1946, and the Principles of the Nuremberg Tribunal, formulated in 1950 by the International Law Commission of the United Nations Organisation.

B. Relevant domestic law and practice

Article 3 § 1 of the Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*) stipulates that generally recognised principles and rules of international law are an inseparable part of the Estonian legal system.

Article 23 § 1 of the Constitution reads as follows:

> "No one shall be convicted of an act which did not constitute a criminal offence under the law in force at the time the act was committed."

The relevant provisions of the Criminal Code (*Kriminaalkoodeks*), as in force at the material time, provided:

Article 6 § 4

> "Crime against humanity and war crime (Articles 61-1 to 61-4) shall be punishable regardless of the time of commission of the crime."

Article 61-1 § 1

> "Crimes against humanity, including genocide, as these offences are defined in international law, that is, the intentional commission of acts directed to the full or partial extermination of a national, ethnic, racial or religious group, a group resisting an occupation regime, or other social group, the murder of, or the causing of extremely serious or serious bodily or mental harm to, a member of such group or the torture of him or her, the forcible taking of children, an armed attack, the deportation or expulsion of the native population in the case of occupation or annexation and the deprivation or restriction of economic, political or social human rights, shall be punished by 8 to 15 years' imprisonment or life imprisonment."

The Penal Code (*Karistusseadustik*), which entered into force on 1 September 2002, provides:

Article 2 § 1

> "No one shall be convicted or punished for an act which was not an offence pursuant to the law applicable at the time of the commission of the act."

Article 5 § 4

"Offences against humanity and war crimes shall be punishable regardless of the time of commission of the offence."

Article 89

"Systematic or large-scale deprivation or restriction of human rights and freedoms, instigated or directed by a state, organisation or group, or the killing, torture, rape, causing of health damage, forced displacement, expulsion, subjection to prostitution, unfounded deprivation of liberty, or other abuse of civilians, is punishable by 8 to 20 years' imprisonment or life imprisonment."

Section 3(2) of the Penal Code (Implementing Regulations) Act (*Karistusseadustiku rakendamise seadus*) reads as follows:

"If, after entry into force of the Penal Code, a punishment is imposed for a criminal offence committed prior to the entry into force of the Penal Code, the punishment shall be based on the punishment provided for in the corresponding Article of the Criminal Code in force at the time of the commission of the offence, in case the said Article prescribes a lesser punishment."

The Constitutional Review Chamber of the Supreme Court held in its judgment of 21 December 1994 (case no. III-4/A-10/94):

"According to the concept of the supremacy of international law, states have an obligation to comply with the norms of international law, including the norms of customary international law."

The Criminal Chamber of the Supreme Court has reiterated in several judgments that, according to Article 3 of the Constitution, generally recognised principles and norms of international law are an inseparable part of the Estonian legal system (e.g. judgment of 7 February 1995 in case no. III-1/3-4/95, judgment of 18 April 1995 in case no. III-1/3-11/95, etc).

The Criminal Chamber stated in its judgment of 21 March 2000 in the *Case of Paulov* concerning the extrajudicial extermination of persons hiding from the repressions of the Soviet occupation regime (case no. 3-1-1-31-00):

"4. ... In case of a crime against humanity, the offender places himself or herself, for various reasons – first and foremost for religious, national or ideological reasons – outside of the system of values. He or she acts in order to achieve other goals (for example ethnic cleansing) and the attacked values – life, health, physical integrity – are, in a given context, worthless to him or her. Here the attack is not directed against a specific victim; any person can become a victim.

...

7. The appeal proceeds from ... the concept of a crime against humanity and it is submitted that the victims hid in the woods as civilians in order to avoid repression. The occupation authorities, however, decided to deprive them of their right to a fair trial and to murder them. It was found that, therefore, there had been a crime against humanity.

8. The Supreme Court subscribes to the latter position and notes that deprivation of a person of his or her right to life and fair trial may be treated as other inhumane acts

referred to in Article 6 (c) of the Charter of the Nuremberg International Military Tribunal. ...”

C. Relevant provisions of international documents

The Charter of the International Military Tribunal (Nuremberg Tribunal), annexed to the London Agreement of August 8th 1945 (United Nations, Treaty Series, vol. 82), provided:

Article 6

“...

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

...

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”

Resolution No. 95 of the General Assembly of the United Nations Organisation, adopted on 11 December 1946, provided:

“The General Assembly ... [a]ffirms the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal ...”

In 1950 the International Law Commission of the United Nations Organisation formulated the Principles of the Nuremberg Tribunal, stating, *inter alia*:

Principle IV

“The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.”

Principle VI

“The crimes hereinafter set out are punishable as crimes under international law:

...

c. Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.”

On 26 November 1968 the General Assembly of the United Nations Organisation adopted by resolution 2391 (XXIII) the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (United Nations, Treaty Series, vol. 754). The Convention entered into force on 11 November 1970. It was ratified by the Soviet Union on 22 April 1969. Estonia acceded to the Convention on 21 October 1991. The Convention provides, *inter alia*:

Article I

"No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

...

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed."

COMPLAINT

The applicant complained under Article 7 of the Convention that he had been punished on the basis of the retroactive application of criminal law.

THE LAW

The applicant complained that his conviction for crimes against humanity had been based on the retroactive application of criminal law. The acts he had committed in 1953 and 1954 had not been crimes against humanity under international law as it stood at that time. He relied on Article 7 of the Convention, which provides:

"1. 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.

2. 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 recognised by civilised nations."

The applicant submitted that the acts of which he had been convicted had taken place in 1953-1954 on the territory of the Estonian SSR. At the material time, the Criminal Code of 1946 of the Russian SFSR had been applicable on the Estonian territory. It had not included crimes against humanity. Criminal responsibility for crimes against humanity had been established in Estonia only as from 9 November 1994, when the Estonian Criminal Code had been amended by Article 61-1. According to Article 23 of the Estonian Constitution and Article 2 § 1 of the Penal Code no one could be convicted of an act which had not constituted a criminal offence under the law in force at the time of the commission of the act.

The applicant argued that O.R.R. had not been killed "before or during war" and that this act had not been an act within the jurisdiction of the Nuremberg Tribunal. Murder committed in 1953 had been punishable under Article 137 of the Criminal Code of the Russian SFSR, applicable on the territory of Estonia at the material time. Organising the search of armed bandits V.S. and P.M. had not contradicted domestic or international law. The applicant could not know that these acts, committed in 1953, could be criminal or, moreover, considered as crimes against humanity. The killing of O.R.R. and organising the search of V.S. and P.M. by the applicant had not been carried out in execution of or in connection with any crime against peace or any war crime. Accordingly, the domestic courts had wrongly considered the applicant's acts as crimes against humanity. The applicant argued that, in convicting him of offences allegedly committed in 1953, the domestic courts had ignored section 3(2) of the Penal Code (Implementing Regulations) Act. Estonian courts had given, to his detriment, retroactive effect to Article 61-1 of the Criminal Code, thus violating Article 7 of the Convention.

The Court notes, first, that Estonia lost its independence as a result of the Treaty of Non-Aggression between Germany and the Union of Soviet Socialist Republics (also known as "Molotov-Ribbentrop Pact"), concluded on 23 August 1939, and the secret additional protocols to it. Following an ultimatum to set up Soviet military bases in Estonia in 1939, a large-scale entry of the Soviet army into Estonia took place in June 1940. The lawful government of the country was overthrown and Soviet rule was imposed by force. The totalitarian communist regime of the Soviet Union conducted large-scale and systematic actions against the Estonian population, including, for example, the deportation of about 10,000 persons on 14 June 1941 and of more than 20,000 on 25 March 1949. After the Second World War, tens of thousands of persons went into hiding in the forests to avoid repression by the Soviet authorities; part of those in hiding actively resisted the occupation regime. According to the data of the security organs, about

1,500 persons were killed and almost 10,000 arrested in the course of the resistance movement of 1944-1953.[1]

Interrupted by the German occupation in 1941-1944, Estonia remained occupied by the Soviet Union until its restoration of independence in 1991. Accordingly, Estonia as a state was temporarily prevented from fulfilling its international commitments. It acceded to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity only on 21 October 1991; pertinent amendments to the Criminal Code, including Article 61-1, entered into force on 9 December 1994.

The Court notes that murder of the civilian population was expressly recognised as a crime against humanity in the Charter of the Nuremberg Tribunal of 1945 (Article 6 (c)). Although the Nuremberg Tribunal was established for trying the major war criminals of the European Axis countries for the offences they had committed before or during the Second World War, the Court notes that the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, *inter alia*, Resolution No. 95 of the General Assembly of the United Nations Organisation (11 December 1946) and later by the International Law Commission. Accordingly, responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War. In this context the Court would emphasise that it is expressly stated in Article I (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity that no statutory limitations shall apply to crimes against humanity, irrespective of the date of their commission and whether committed in time of war or in time of peace. After accession to the above convention, the Republic of Estonia became bound to implement the said principles.

The Court reiterates that Article 7 § 2 of the Convention expressly provides that that Article shall not prejudice the trial and punishment of a person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations. This is true of crimes against humanity, in respect of which the rule that they cannot be time-barred was laid down by the Charter of the Nuremberg International Tribunal (see *Papon v. France (no. 2)* (dec.), no. 54210/00, ECHR 2001-XII and *Touvier v. France*, no. 29420/95,

1. According to the data of the Estonian State Commission on Examination of the Policies of Repression (see http://www.just.ee/orb.aw/class=file/action=preview/id=12709/TheWhiteBook.pdf), the Estonian International Commission for the Investigation of Crimes against Humanity (see http://www.historycommission.ee/temp/conclusions_frame.htm) and the Estonian Museum of Occupations (see http://www.okupatsioon.ee/english/overviews/ylev/ylev-PERSECUT.html#Heading431).

Commission decision of 13 January 1997, Decisions and Reports 88-B, p. 161).

Moreover, the Court recalls that the interpretation and application of domestic law falls in principle within the jurisdiction of the national courts (see *Papon*, cited above, and *Touvier*, cited above, p. 162). This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see, *mutatis mutandis*, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I).

The Court notes that even if the acts committed by the applicant could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by the Estonian courts to constitute crimes against humanity under international law at the time of their commission. The Court sees no reason to come to a different conclusion. It is noteworthy in this context that the Soviet Union was a party to the London Agreement of 8 August 1945 by which the Nuremberg Charter was enacted. Moreover, on 11 December 1946 the General Assembly of the United Nations Organisation affirmed the principles of international law recognised by the Charter. As the Soviet Union was a member state of the United Nations Organisation, it cannot be claimed that these principles were unknown to the Soviet authorities. Thus, the Court considers groundless the applicant's allegations that his acts had not constituted crimes against humanity at the time of their commission and that he could not reasonably be expected to have been aware of that.

Furthermore, as the Court has noted above, no statutory limitation applies to crimes against humanity, irrespective of the date of their commission. Estonia acceded to this Convention on 21 October 1991. The Court finds no reason to call into question the Estonian courts' interpretation and application of domestic law made in the light of the relevant international law. It is satisfied that the applicant's conviction and sentence had a legal basis in Article 61-1 § 1 of the Criminal Code. Accordingly, the matters complained of disclose no appearance of a failure to respect Article 7 of the Convention.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President