First Conviction under the Universal Jurisdiction Provisions of the UN Convention against Torture

NETHERLANDS JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

FIRST CONVICTION UNDER THE UNIVERSAL JURISDICTION PROVISIONS OF THE UN CONVENTION AGAINST TORTURE

Rotterdam District Court, 7 April 2004, *Sebastien N.*

On 7 April 2004, the Rotterdam District Court (court of first instance) convicted the Congolese national Sebastien N.[1] of complicity in acts of torture committed in the former Republic of Zaire (currently known as the Democratic Republic of the Congo) in 1996.[2] He was sentenced to 30 months imprisonment.

The perpetrator and the victim are both Congolese citizens and the crime was committed on the territory of the former Zaire. Sebastien N.'s only nexus with the Netherlands was that he happened to be residing there. The Rotterdam Court therefore based its competence to try Sebastien N. on the universal jurisdiction provisions of the Dutch Torture Convention Implementation Act.[3] The Act implements the universal jurisdiction provisions of the UN Convention against Torture.[4]

The judgment is noteworthy for several reasons. It is the first conviction based on universal jurisdiction by a Dutch court. It also appears to be the first conviction anywhere under the universal jurisdiction provisions of the UN Convention against Torture.[5]

Facts of the case

In 1996, under the Government of the then President Mobutu Sese Seko, Sebastien N. was Commander of the *Garde Civile* in the harbor town of Matadi.

---

1. In order to protect their privacy, in the Netherlands it is customary not to reveal the full names of defendants.

2. Rechtbank Rotterdam, 7 April 2004, LJN-number AO7178, available at <www.rechtspraak.nl/default.htm>. An English translation of the judgment provided by the court is appended to this note.

3. Art. 5, *Uitvoeringswet folteringsverdrag*, 29 September 1988, *Stb.* 1988, No. 478.

4. Arts. 5-7, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

5. Other court cases based on the universal jurisdiction provisions of the UN Convention against Torture are currently pending, *inter alia*, in France and the United Kingdom.

Netherlands International Law Review, LI: 439-449, 2004

DOI: 10.1017/S0165070X04004395

Because of his bestial behavior towards the population he was known locally as *Roi des bêtes*. The Rotterdam Court accepted the prosecution's charge that subordinates of the accused had arrested and ill-treated a man who was in charge of clearing goods through customs. For several days the victim was used as a punching bag by Sebastien N.'s subordinates while the accused watched from the balcony of his residence. Purpose of the ill-treatment was to force the victim to release an imported car of a friend of the accused without payment of seaborne cargo expenses.

In 1998, after the fall of the Mobutu regime, Sebastien N. fled to the Netherlands and applied for asylum there. His application was rejected under the provisions of Article 1F of the UN Convention on the Status of Refugees.[6] While awaiting the results of his appeal against this decision he resided in the Netherlands.

The case was first brought to the attention of Dutch police by a person who claimed to have been tortured by Sebastien N.[7] Subsequent investigations were carried out under the responsibility of a special Public Prosecutor's Office team for the investigation of international crimes. The team was established initially in 1994 to investigate war crimes committed in the former Yugoslavia, but its mandate has subsequently been widened. It consists of some 20 detectives and forensic experts and is headed by two prosecutors. Members of the team twice visited Congo in order to take testimonies from witnesses. There is no treaty on legal co-operation between Congo and the Netherlands but both are parties to the UN Convention against Torture.[8] Article 9 of that Convention provides that states parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of cases of torture and ill-treatment. No doubt the forthcoming attitude of the Congolese authorities *vis-à-vis* their Dutch colleagues was not unconnected with the fact that the alleged crimes had been committed under the former regime.

Other universal jurisdiction cases in the Netherlands

The Netherlands has traditionally been sceptical about universal jurisdiction both on principled and on practical grounds. During the drafting of the UN Convention against Torture, the Netherlands, together with states such

---

6. Art. 1F, UN Convention Relating to the Status of Refugees (1951) provides in part: 'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. …'

7. L. Maat, 'De verdachte had duidelijk misbruik gemaakt van macht', interview with Tea Polescuk, prosecutor in charge of the case, in *Opportuun*, magazine of the Public Prosecutor's Office, vol. 10, issue 9, May 2004, available at <www.openbaarministerie.nl>.

8. The Netherlands has been a party to the Convention against Torture since 21 December 1988, Congo since 30 July 2003.

as Argentina and Uruguay, strongly opposed the inclusion of provisions on universal jurisdiction in the Convention. The government only changed its position under domestic pressure from NGOs and Dutch Parliament.[9] It is therefore a remarkable twist of history that the first criminal conviction based on the universal jurisdiction provisions of the Convention against Torture occurred in the Netherlands.

In the past, attempts to bring torturers to trial in the Netherlands on the basis of universal jurisdiction had always failed on formal grounds. In 1995, three years before General Pinochet was arrested and subjected to legal proceedings in the United Kingdom, an effort to have the General arrested and tried on torture charges while he was on a short visit to Amsterdam was rejected by the Public Prosecutor.[10] The Amsterdam High Court (*Hof Amsterdam*) subsequently agreed that prosecution of General Pinochet would have presented 'so many legal and practical problems that the Public Prosecutor was perfectly within his rights to decide not to prosecute ...'[11] The Dutch legislator has since clarified that a precondition for the exercise of universal jurisdiction in respect of international crimes is that the alleged offender must be present in the Netherlands at the moment his crimes are declared to the authorities.[12]

In 2001, the Netherlands Supreme Court (*Hoge Raad*) found that former Suriname army commander Desi Bouterse could not be brought to justice in the Netherlands for his involvement in the so-called December murders in Suriname in 1982. This was because the Torture Convention Implementation Act on the basis of which he was to be tried could not be applied retroactively.[13]

These legal obstacles did not prevent the trial of Sebastien N. He resided in the Netherlands and the crimes with which he was charged were alleged to have occurred in 1996, eight years after the adoption of the Torture Convention Implementation Act.

Universal jurisdiction cases in other countries

By convicting Sebastien N. the Netherlands has joined a small group of European states in which offenders have actually been convicted of human rights

---

9. P.R. Baehr, 'Nederland en de totstandkoming van de VN-conventie tegen martelingen', 41 *Internationale Spectator* (1987) p. 551.

10. See M.T. Kamminga and M. Tijssen, 'Pinochet, Nederland en het VN-Verdrag tegen Foltering', 20 *NJCM-Bull*. (1995) pp. 986-995 and C. Ingelse and H. van der Wilt, 'De zaak Pinochet: over universele rechtsmacht en Hollandse benepenheid', 71 *NJB* (1996) pp. 280-285.

11. *Hof Amsterdam*, 4 January 1995, excerpted in 28 *NYIL* (1997) p. 365.

12. Art. 2(1)(a), *Wet internationale misdrijven* [International Crimes Law], 19 June 2003, *Stb*. 2003, No. 270.

13. *Hoge Raad*, 18 September 2001, *NJ* 2002, No. 559. See L. Zegveld, 'The Bouterse Case', 32 *NYIL* (2001) pp. 97-118 and R. van Elst, 'Universele rechtsmacht over foltering; Bouterse en de decembermoorden', 27 *NJCM-Bull*. (2002) pp. 208-224.

abuses on the basis of universal jurisdiction.[14] In Denmark, Refik Saric was convicted in 1994 of murder and torture committed in the former Yugoslavia. In Germany, Novislav Djajic, Nikola Jorgic, Djuradi Kusljic and Maksim Sokolovic were convicted in 1997 and 1999 of genocide, murder and torture committed in the former Yugoslavia. In Switzerland, Fulgence Niyonteze was convicted in 1999 of murder committed in Rwanda. In Belgium, Alphonse Higaniro, Vincent Ntezimana, Consolata Mukangango and Julienne Mukabutera were convicted in 2001 of murder and torture committed in Rwanda.

There are some interesting similarities between these cases and the case of Sebastien N. They all concern asylum seekers who were long term residents in the prosecuting state and therefore had a clear nexus with that state. There have been no convictions resulting from the exercise of universal jurisdiction *in absentia* so far, although German legislation for example enables prosecutions on this basis. The convicts were all either civilians or relatively minor officials so that no questions of immunity arose. The states where the crimes occurred did not object to the trials being held abroad and in several cases actively co-operated in the gathering of evidence. Finally, it is noteworthy that all trials so far were held in states with a civil law system.

The difference between the cases referred to above and the case of Sebastien N., however, is the legal basis for the convictions. While Sebastien N. was convicted in accordance with a Dutch domestic law implementing the UN Convention against Torture, the persons convicted in other European countries were all convicted under legislation deriving from the 1949 Geneva Conventions on international humanitarian law. Such legal basis is surprising for the torture convictions because Belgium, Denmark, Germany and Switzerland are all bound by the UN Convention against Torture. This Convention offers standards that are applicable to acts of torture at any time, not restricted to armed conflict situations. Bringing people to justice under the Geneva Conventions therefore presents an additional hurdle for the prosecution because it has to prove that the crime occurred during an armed conflict. Prosecutors' preference for the Geneva Conventions may however be explained by the fact that these instruments were adopted earlier and have been more widely and more fully implemented in domestic law.[15] As the Convention against Torture becomes more widely implemented and more familiar to domestic officials it will probably begin to serve more frequently as a legal basis for prosecutions.

---

14. The data presented in this paragraph have been taken from L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford, Oxford University Press 2003) pp. 83-219 and the reports of Redress, available at <www.redress.org>.

15. Compare for example the survey of the domestic implementation of the Convention against Torture in the report by Redress, *Reparation for Torture: A Survey of Law and Practice in Thirty Selected Countries,* April 2003, pp. 49-50, available at <www.redress.org>, with the database of the International Committee of the Red Cross on the domestic implementation of the Geneva Conventions, available at <www.icrc.org/ihl-nat.nsf/WebLAW?OpenView>.

Concluding observations

One of the main underlying reasons – if not the main reason in the eyes of many NGOs – for the adoption of the UN Convention against Torture in 1984 was to provide for a treaty-based regime for bringing torturers to justice on the basis of universal jurisdiction. It is therefore not very encouraging that it took 20 years before the first offender was actually convicted in accordance with these provisions. It is gratifying, however, that this occurred in the Netherlands, one of the chief opponents of the inclusion of universal jurisdiction provisions in the Convention. Moreover, in comparison to other international instruments the Convention against Torture has not done too badly. A first conviction under the universal jurisdiction provisions of the 1949 Geneva Conventions occurred only 45 years after the adoption of these treaties.[16]

Elsewhere, I have tried to identify the main obstacles preventing the prosecution of gross human rights offenders on the basis of universal jurisdiction: lack of adequate implementing legislation, lack of specialised institutions, immunities, amnesties, evidentiary problems and ineffective international supervision.[17] A subsequent study by Dutch scholars suggested that of these difficulties the practical problem of gathering sufficient evidence is perhaps the most prohibitive.[18] Evidence sufficient for a conviction in a universal jurisdiction case is rarely presented to prosecutors on a silver plate. More often than not, such evidence must be actively collected abroad under difficult circumstances. For the universal jurisdiction convictions in Switzerland, Belgium and the Netherlands referred to above, time-consuming and expensive investigations had to be carried out on the spot in Rwanda and Congo, respectively. However, this is the price to be paid for the fight against impunity and states that are prepared to make available the necessary resources for this purpose are to be applauded.

In the light of the demise, under great American and Israeli pressure, of the original, far-reaching Belgian 'genocide law', the impression might be created that the idea of universal jurisdiction is now past its prime.[19] The conviction of Sebastien N. in Rotterdam, under Dutch legislation that is broadly comparable to the new, much more modest Belgian legislation,[20] demonstrates that universal jurisdiction can be made to work even when its exercise is made subject to some restrictions, such as the requirement that the defendant must be present on the territory of the forum state.

---

16. The *Saric* case in Denmark in 1994, referred to above.

17. M.T. Kamminga, 'Lessons Learned form the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses', 23 *HRQ* (2001) pp. 940-974.

18. A. Beijer, et al., *Opsporing van oorlogsmisdrijven. Evaluatie van het Nationaal Opsporingsteam voor Oorlogsmisdrijven: 1998-2001* (Deventer, Kluwer 2002) p. 67.

19. See, for example, S. Ratner, 'Belgium's War Crimes Statute: A Postmortem', 97 *AJIL* (2003) pp. 888-897.

20. Belgian law on grave breaches of international humanitarian law, as amended on 5 August 2003, 42 *ILM* (2003) p. 1258.

At the time of writing, the judgment of the Rotterdam District Court, which is reproduced below in its official English translation, is still under appeal. Whatever the outcome of the appeal, the judgment at first instance must be regarded as a minor landmark. The matter of fact way in which the Court agreed that it is competent to try Sebastien N. indicates that in its view at least the exercise of universal jurisdiction is not something to get too excited about. And that is how it should be.

Menno T. Kamminga
Board of Editors

ANNEX

JUDGMENT of the ROTTERDAM DISTRICT COURT, three-judge section for criminal cases, against:

S. N, born in … (Congo) in 1952,
registered in the municipal personal records database at the address …,
at the time of the hearing held in pre-trial detention in the penitentiaries Rijnmond, remand prison 'De Schie', in Rotterdam.

This judgment was rendered further to the hearing of 24 March 2004.

CHARGES

The accused is charged with what is stated in the demand 'further description of the charges', under Public Prosecutor's office no 10/000050-03. Copy of this demand is attached to this judgment (pages 1A through 1H).

THE DEMAND OF THE PUBLIC PROSECUTOR

The Public Prosecutor, Mr. Polescuk, demands – in brief:
– acquittal of the charges mentioned under 2;
– judicial finding of fact regarding the principal charge mentioned under 1 and the charge mentioned under 3;
– that the accused be sentenced to a five-year term in prison less the period spent in pre-trial detention .

PUBLIC PROSECUTOR ALLOWED TO PROSECUTE

It was put forward on behalf of the accused that the Public Prosecutor is not allowed to prosecute because the right to bring criminal proceedings has lapsed. Counsel for the defence submitted in this regard that on 6 May 1997 the accused was sentenced in Congo to ten years imprisonment, for abuse of authority, extortion, other embezzlement of government funds, customs fraud, threats to kill and random arrests, which punishable offences arose from the charges formulated by J.M. N. Counsel argued that other reported crimes, including those with respect to extortion and rape, formed part of the

case file, as part of the evidence, and that these no doubt had had an impact on the severity of the punishment imposed on the accused,

The Court rejects this defence, on the basis of the following considerations.

Neither from the underlying documents, nor from the statement of the accused during trial has it appeared that he was previously tried for the facts that were committed towards X, Y and Z, or that the facts that were submitted to the Court formed part of the facts for which the accused was sentenced in the Democratic Republic of Congo, formerly Zaire, in 1997. The persons who reported the crimes in the case in suite, X, Y, and Z, apparently decided at the time, although they were aware of the call on the public to report crimes, no to do so. The argument, as the Court understands it, that by refraining from doing so, they forfeited their rights to still report crimes against the accused at a later stage, finds no support in law.

Counsel for the defence furthermore argued that with respect to fact 3, the public prosecutor's office must be barred from prosecution. The Torture Convention Implementation Act was revoked as per 1 October 2003 and replaced by the International Crimes Act (W.i.m.). In the W.i.m., the legislator dropped the link with the term of grievous bodily harm in the (Dutch) Criminal Code. The W.i.m. lists several crimes against humanity separately, including the crime of rape. In fact 3 of the charge, the Public Prosecutor decided on a description of the offence, but although it would seem to fit with the Torture Convention Implementation Act, the imputed acts as mentioned in the description of the offence form part of the crime of rape, and not of grievous bodily harm within the meaning of the Criminal Code, with which the legislator sought harmonization at the time.

The Court understands this defence of Counsel to be a defence regarding the statement and the particulars of the offence, which may not result, in the event it is considered well-founded, in the public prosecutor's office being barred from prosecution. This means that this is not the place to discuss this defence.

Since no other facts or circumstances are in evidence that would have to lead in the Public Prosecutor being barred from the prosecution, it is decided that the Public Prosecutor is allowed to prosecute.

NOT PROVED

The charges mentioned in 2 and 3 are not legally and convincingly proved, so that the accused will have to be acquitted. With respect to the charge mentioned in 3, the Court remarks that as regards the part of the charge that deals with the rape, the case file contains only one statement, that of the person who reported the crime, and that no other evidence has come forward from either the case documents or the hearing.

PROVED

The Court deems that it is legally and convincingly proved that the accused has committed what he is principally charged with in 1, in the manner as set forth below.

That he, the accused, at some time in or around October 1996, in Matadi, jointly and in conjunction with others, as civil servant, i.e. as member of the Garde Civile (specifically as head of the Garde Civile for the province of Bas-Zaïre) and in the performance of his duties, repeatedly and intentionally inflicted (grievous) bodily harm to someone who was deprived of his freedom, i.e. X, with the object to punish him and to force him to do something, whereas these acts were of such a nature that they were conducive to the intended object, which was that the accused, in the performance of his duties as member of the Garde Civile (specifically as head of the Garde Civile for the province of Bas-Zaïre), jointly and in conjunction with his co-perpetrators, there and then, each time with the said object in mind, intentionally inflicted grievous bodily harm each time on X, who was deprived of his freedom and who was held imprisoned as a civilian on the (fenced off) grounds of the Garde Civile in Matadi, by repeatedly hitting the said X on the body with a closed fist and/or with a cordelette, a kind of closely woven cloth that is used as a belt, and/or by repeatedly kicking against or on the head and/or body and/or repeatedly hitting him against or on the head and/or the body, whereas X suffered injury and severe pain, and intentionally installing a state of extreme fear in X, among other things by making threats, using such terms as: 'The country is ours, we are untouchable' and/or: 'you will suffer'.

What was otherwise charged is not proved. The accused must therefore be acquitted of those charges as well.

Insofar as the charge that is declared proved includes apparent typing errors, they are corrected in the charges proved. According to the proceedings during the hearing, the accused's defence has not been harmed by these errors.

EVIDENCE

The Court bases its conviction that the accused has committed the proved charges on the facts and circumstances that are mentioned in the legal evidence. In those instances in which the law requires an addition to the judgment, the evidence will be included in a supplement to this judgment.

PUNISHABILITY OF THE FACTS

The Court concludes that the facts mentioned under 1 that are declared proved were committed prior to 1 October 2003, which means that the proved facts must be qualified under the Torture Convention Implementation Act.
The charged and proved facts are also punishable facts pursuant to Section 8 of the International Crimes Act as from 1 October 2003. The Court considers that the amendment as per 1 October 2003 does not signify an altered insight of the legislator in the punishability of the facts, on the basis whereof Section 1(2) of the Criminal Code would have to be applied.

The proved facts constitute:

Complicity in torture, repeatedly committed, made punishable by Section 1(1) of the Torture Convention Implementation Act, in conjunction with Section 47 of the Criminal Code.

No facts or circumstances are in evidence that exclude the punishability of the facts. The facts are punishable.

PUNISHABILITY OF THE ACCUSED

No facts or circumstances are in evidence that exclude the punishability of the accused. The accused is punishable.

SUBSTANTIATION OF THE PUNISHMENT

The punishment that is imposed on the accused is based on the seriousness of the facts, the circumstances under which the facts were committed and the person and the personal circumstances of the accused, as they have appeared during the hearing. The following is specifically considered in this regard.

During the reign of president Mobutu , in 1996, the accused was commander of the Garde Civile, stationed in Matadi. Among the population and within the Garde Civile, the accused was known under the alias 'Roi des bêtes' (King of the beasts). As commander of the Garde Civile, the accused had the victim, who was employed as clearer in the port of Matadi, arrested by his subordinates / bodyguards. These bodyguards moved the victim to the premises of the Garde Civile, locked him up in one of the cells and systematically inflicted grievous bodily harm on the victim for a number of days, on the orders of the accused. The victim was beaten, in a state of virtual undress, with a cordelette (a closely woven belt), and was used, in his own words, as a punching bag by the bodyguards. The accused watched all this from his balcony. The purpose of inflicting this grievous bodily harm was to punish the victim because he had refused to clear the car of one of the accused's friends, who did not want to pay the shipping costs due, and to force the victim to release the car as yet. After having been abused for a number of days, the victim was brought before the accused, who ordered him to ensure that the car was cleared within 48 hours as yet. In order to do so, the victim was forced, in the end, to pay the shipping costs himself.

It must have been a terrifying experience for the victim to be at the whims of the accused. It is expected that he will suffer the psychological consequences of these experiences for years to come.

Torture is a very serious offence, which creates widespread indignation and unease, not only in Congo, but internationally as well. The seriousness of the torture is to be found in the fact that it was carried out by the authorities, or by a civil servant, causing the victim to believe, whether or not justified, that there was nothing he could do about it, because if he wanted to file a complaint or report a crime, he would have to turn to those same authorities. In addition to the emotional and physical pain he has suffered, this caused feeling of powerlessness and a feeling that one is completely in the power of his torturer.

The acts that are proved in respect of the accused also touches on the Dutch legal order, since the accused has taken up residence in this country, and especially since he has expressed a desire, by submitting an application for asylum, that he wants to (continue to) be a part of Dutch society.

The acts of the accused, whereby he abused his position, and seriously affected the physical and mental integrity of the victim, acting in violation of the universal respect for human rights and the fundamental freedoms, show a complete lack of respect for the dignity of a fellow human being.
Notwithstanding the amount of time that has passed since the facts were committed, this justifies the imposing of a nonsuspended prison sentence of considerable length.

In determining the length of the punishment, the Court also considers that the alias 'Roi des bêtes' (King of the beasts), under which the accused was generally known in the former Zaire, as well as the fact that the accused was sentenced in that country on 6 May 1997, as previously mentioned, would seem to indicate that the facts that are now proved were not isolated facts.

Taking all this into consideration, the Court deems the below-mentioned punishment as fitting and necessary.

OBJECTS SEIZED

During trial, the Public Prosecutor has limited the list of objects seized to the objects mentioned under 1 and 2 and demanded that the piece of paper and the envelope in the possession of the accused that were seized be returned to the accused.

In this regard, the Court considers the following: Since the piece of paper and the envelope were seized from the accused and since he may reasonably be regarded as an interested party, the Court will order that these objects be returned to him.

APPLICABLE STATUTORY REGULATIONS

The punishment to be imposed is based, in addition to the previously mentioned Sections, on Section 57 of the Criminal Code.

DECISION

The Court:

– rules that the Public Prosecutor is allowed to prosecute;

– rules that it has not been proved that the accused has committed the facts with which he is charged as mentioned under 2 and 3 and acquits the accused of these charges;

– rules that it is proved that the accused has committed the facts with which he is principally charged as mentioned under 1, as described above;

– rules that all other facts with which the accused is charged are not proved, other than those ruled to be proved above, and acquits the accused of these charges as well;

– decides that the proved principal facts mentioned under 1 constitute the previously mentioned punishable facts;

– rules that the accused is punishable with respect to the facts;

– sentences the accused with respect to the proved principal facts mentioned under 1 to a term of imprisonment of two (2) years and six (6) months;

– orders that the time the convicted person has spent in custody and pre-trial detention before the execution of this judgment be deducted from the imposed prison sentence, insofar as this period has not already been deducted from another custodial sentence;

– decides with respect to the objects that are included on the list of seized objects and that have not yet been returned, as follows:
orders that a piece of paper and an envelope be returned to the accused.

This judgment was rendered by:
Mr Buchner, chairman,
and Messrs Pit and Jofriet, judges,
in the presence of Mr Van der Veer, clerk of the Court,
and pronounced in open session of this Court on 7 April 2004.