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. 23052/04
by August KOLK

Application no. 24018/04
by Petr KISLYIY

against Estonia

The European Court of Human Rights (Fourth Section), sitting on 17 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 applications lodged on 9 June 2004,

Having deliberated, decides as follows:

THE FACTS

The first applicant, Mr August Kolk, is an Estonian national who was born in 1924. The second applicant, Mr Petr Kislyiy, is a Russian national who was born in 1921. Both of the applicants live in Tallinn. They were 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 applicants, may be summarised as follows.

On 10 October 2003 the applicants were convicted of crimes against humanity under Article 61-1 § 1 of the Criminal Code (*Kriminaalkoodeks*) by the Saare County Court (*Saare Maakohus*). They were sentenced to eight years' suspended imprisonment with a probation period of three years. It was stated in the judgment that the applicants had, in March 1949, participated in the deportation of the civilian population from the occupied Republic of Estonia to remote areas of the Soviet Union.

– The first applicant had served at the relevant time as an investigator in the Ministry of National Security of the Estonian Soviet Socialist Republic (SSR). He had participated in the preparation of the deportation operation "Priboi" and drawn up documents concerning the deportation of ten families. He had made proposals for the deportation of 27 persons. After the deportation operation had been carried out on 25 March 1949, he had drawn up further documents concerning the deportation.

– The second applicant had served at the relevant time as an inspector in the Ministry of the Interior of the Estonian SSR. On 25 March 1949 he had participated, in his capacity as head of a task force, in the deportation of a family and had filled out a questionnaire concerning the family and organised the deportation of four persons.

The County Court referred in its judgment to Article 6 § 4 of the Criminal Code and Article 5 § 4 of the Penal Code (*Karistusseadustik*), under which crimes against humanity were punishable irrespective of the time of commission of the offence. It noted that, since crimes against humanity were punishable also under the Penal Code, which had replaced the old Criminal Code as of 1 September 2002, the charges against the applicants had been brought correctly under Article 61-1 § 1 of the Criminal Code. In this context, reference was made to section 3(2) of the Penal Code (Implementing Regulations) Act (*Karistusseadustiku rakendamise seadus*), pursuant to which the Criminal Code had to be applied in such cases. Furthermore, the County Court relied on the Supreme Court's judgment of 21 March 2000 in the *Paulov* case and referred to Article 6 of the Charter of the International Military Tribunal (Nuremberg Tribunal), Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (the "Convention").

The applicants' lawyer lodged appeals against the County Court's judgment with the Tallinn Court of Appeal (*Tallinna Ringkonnakohus*). He alleged, *inter alia*, that at the material time the Criminal Code of 1946 of the Russian Soviet Federative Socialist Republic (SFSR) had been applicable in

the territory of Estonia. That Code had not provided for punishment of crimes against humanity. Criminal responsibility for crimes against humanity had been established only in 1994 by amendments to the Estonian Criminal Code of 1992. With reference to Article 7 of the Convention, the applicants' lawyer argued that the County Court had not established whether the deportation had been a crime against humanity under international and domestic law in 1949 or whether the applicants had had the possibility of foreseeing, at that time, that they were committing an offence.

On 27 January 2004 the Tallinn Court of Appeal upheld the judgment of the County Court. It noted that crimes against humanity were punishable, irrespective of the time of the commission of the offence, pursuant to both the Criminal Code and the Penal Code. It made reference to the Supreme Court's judgment in the *Paulov* case and referred to Article 3 of the Constitution, under which generally recognised principles and rules of international law were an inseparable part of the Estonian legal system. It relied on the same provisions of the Criminal Code and the Penal Code as the County Court. It further noted that Article 7 § 2 of the Convention did not prevent punishment of a person for an act which, at the time of its commission, had been criminal according to the general principles of law recognised by civilised nations. Deportations perpetrated by the applicants had been considered crimes against humanity by civilised nations in 1949. Such acts had been defined as criminal in Article 6 (c) of the Charter of the International Military Tribunal (Nuremberg Tribunal) and affirmed as principles of international law by the General Assembly of the United Nations on 11 December 1946 in its resolution 95. The court was of the opinion that the Charter of the Nuremberg Tribunal and also the Statute of the International Criminal Tribunal for the Former Yugoslavia enshrined norms of customary international law which were binding irrespective of whether a particular State had acceded to an international human rights treaty. The Court of Appeal found that by filling out the documents concerning deportation, removing people from their homes and handing them over to a ship assigned for deportation, the applicants had participated in a widespread attack against the civilian population in the context of the deportation operation "Priboi".

On 21 April 2004 the Supreme Court (*Riigikohus*) refused the applicants leave to appeal.

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

"Crimes against humanity and war crimes (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 with the aim of 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 inflicting of extremely serious or serious bodily or mental harm or acts of torture on a member of such group, the forcible taking of children, 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

"Crimes 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, shall be 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 the event that the said article prescribes a lesser punishment."

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

> "By virtue of 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, pursuant to Article 3 of the Constitution, generally recognised principles and norms of international law are an inseparable part of the Estonian legal system (see, for example, 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 *Paulov* case 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.
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> ...
>
> 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.
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> 8. The Supreme Court subscribes to the latter position and notes that deprivation of a person of his or her right to life and a fair trial may be treated like the 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), provides as follows:

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 95 of the United Nations General Assembly, adopted on 11 December 1946, provides:

"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 formulated the Principles of the Nuremberg Tribunal, including the following:

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 United Nations General Assembly 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 applicants complained under Article 7 of the Convention that they had been punished on the basis of the retrospective application of criminal law.

THE LAW

The applicants complained that their conviction of crimes against humanity had been based on the retrospective application of criminal law. The acts they had committed in 1949 had not been crimes against humanity under international law as it stood at that time. The applicants 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 applicants submitted that the acts in respect of which they were convicted had taken place in 1949 on the territory of the Estonian SSR. At the material time, the Criminal Code of 1946 of the Russian SFSR had been applicable in the Estonian territory. It had not included crimes against humanity. Criminal responsibility for crimes against humanity had been established in Estonia only on 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 applicants argued that the deportation of families from Saaremaa Island in 1949 had not been carried out "before or during war" and that this act had not been an act within the jurisdiction of the Nuremberg Tribunal. Neither had the deportation 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 applicants' acts as crimes against humanity. The deportation of the population had been based on legal acts of the Soviet Union. The applicants had had no possibility of foreseeing that 60 years later their acts would be regarded as crimes against humanity.

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 thereto. 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.[1]

After the German occupation in 1941-44, Estonia remained occupied by the Soviet Union until the restoration of its 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 deportation 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

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/pdf/conclusions_en.pdf) and the Estonian Museum of Occupations (see http://www.okupatsioon.ee/english/overviews/ylev/ylev-PERSECUT.html#Heading431).

concerning crimes against humanity was subsequently confirmed by, *inter alia*, resolution 95 of the United Nations General Assembly (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 this 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, 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 applicants 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 United Nations General Assembly affirmed the principles of international law recognised by the Charter. As the Soviet Union was a member State of the United Nations, it cannot be claimed that these principles were unknown to the Soviet authorities. The Court thus considers groundless the applicants' allegations that their acts had not

constituted crimes against humanity at the time of their commission and that they could not reasonably have been expected to be aware of that.

Furthermore, as the Court has noted above, no statutory limitation applies to crimes against humanity, irrespective of the date on which they were committed. Estonia acceded to the 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 applicants' 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 these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court

unanimously

Decides to join the applications;

by a majority

Declares the applications inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President