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Criminal law

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Göran Sluiter

The Cases of Kouwenhoven and Poch and the Fine Line Between Guilt and Innocence for Assisting in the Commission of War Crimes

Two cases related to war crimes have received quite some attention in the Netherlands over the past few years. These are the cases of Mr. Kouwenhoven and Mr. Poch. They provide an excellent opportunity to offer some thoughts on the fine line between guilt and innocence in the determination of criminal liability for those who have not committed the crimes themselves, but have in some way assisted in their commission.

As background information to these cases the following should be noted.

Guus Kouwenhoven stood trial in the Netherlands for aiding and abetting war crimes committed by the armed forces under the control of former Liberian president Charles Taylor, in villages in Liberia and Guinee during the period of 2000-2002. It was alleged that by selling weapons to these armed forces, Kouwenhoven contributed to the war crimes of murder and rape committed by the soldiers, because he knew or should have known that his deliveries of weapons would be used in these crimes. After a very lengthy and complex trial, Kouwenhoven was convicted to 18 years imprisonment for aiding and abetting war crimes, a verdict which became final with the rejection of his appeal by the Dutch Supreme Court on December 2018 Dutch Supreme Court on December 2018.

Julio Poch was a Dutch-Argentinian pilot who was prosecuted in Argentina for his alleged role in the killings of civilians during the military dictatorship of general Videla in the period of 1976 - 1983

in Argentina. Around 30,000 supposed political opponents were killed; many were thrown out of airplanes in the coastal waters of Argentina. It was alleged that Poch, who was working as a pilot for the Argentinian air force between 1974 and 1980, was one of the pilots involved in this brutal method of killing civilians. After having spent 8 years in pre-trial detention, Poch was acquitted in the first instance by the Argentinian Court for lack of evidence on 29 November 2017. The prosecution service in Argentina has appealed this acquittal, but awaiting further developments in his case, Poch was allowed to return to the Netherlands. At the time of writing, there is no information about the appeals proceedings.

At first glimpse, the two cases do not seem to have much in common and one may wonder if and how they can be compared. The comparison is, I must admit, partly triggered by the (public) reaction to the two cases. Kouwenhoven is forever branded a war criminal, whereas Poch is perceived as an innocent man who has suffered a great injustice. I think that these perceptions of Kouwenhoven and Poch need to be put in perspective, taking into account the complexities that exist in determining guilt or innocence of those who assist in the commission of war crimes.

The big question that emerges when reading the appeals judgement in which Kouwenhoven was convicted to 18 years imprisonment is whether the weapons supplied by Kouwenhoven were in fact used in the crimes as charged. The court ruled that Kouwenhoven assisted in acts of war through deliveries of weapons. However, we do not really know whether or not his weapons were used in the crimes as charged, nor do we know how significant his supply of weapons was in the totality of weapons that were used by the armed forces who committed the various war crimes, including murder and rape. This begs the question as to what evidence of effect of Kouwenhoven's assistance is required. One could take the position that there need not be any effect of Kouwenhoven's assistance on the crimes committed by the principals; in this view, the mere risk that his deliveries could have assisted in the commission of the most heinous crimes would suffice. Especially in the context of commission of widespread mass atrocities, when the precise effect of the assistance of the likes of Kouwenhoven in the commission of (separate acts of) war crimes will be as good as impossible to prove, one might argue that a risk-based approach towards aiding and abetting is not unreasonable. However, the Court of Appeals judgement fails to provide sufficient reasoning for the adoption of such an approach. In addition, if the effect of the assistance does not matter or need not be proven, it could turn aiding and abetting into a separate endangerment crime, with no, or very little, connection to the main crime. This in turn raises the complex question whether this is compatible with the role and place of aiding and abetting liability under the scheme of (Dutch) modes of criminal liability.

All in all, the Kouwenhoven conviction raises essential questions from a criminal assistance-perspective. And while his conviction without exact proof of the effect of his assistance on the charged war crimes can be justifiable, an acquittal would in my view also have been possible.

The case of Julio Poch appears at the outset to be very different. To my knowledge, Poch was not charged with aiding and abetting the commission of war crimes in Argentina; the accusation in his case centered around his alleged direct role as a pilot of the so-called 'death flights', making him an alleged principal author, a co-perpetrator, of these crimes. In light of an Argentinian prosecutorial policy that needs to be highly selective when dealing with many potential suspects, one can understand that the focus lies on those who are considered most responsible. In general,

this category does not include persons suspected of aiding and abetting war crimes.

The question arises whether the position of Poch in the Argentinian air force at the time could have been the basis for a conviction based on an accusation of criminal assistance. In other words: what if the Argentinian prosecution service would have charged him with criminal liability based on some form of assistance in the crimes committed by others?

This is first and foremost a matter of Argentinian law. However, the history of international criminal law offers examples in which the active membership of an organization or group that is considered criminal suffices for finding criminal liability, even if the contributive acts to the organization are in themselves not criminal. The idea behind this basis for liability is that the contribution to the organization, under the condition of knowledge of its criminal purposes, has benefited the organization as a whole and the contribution has enabled others to commit their crimes.

Reference to this basis of liability can first be found in the Nuremberg judgement, in which a number of Nazi-organizations, such as the SS, were ruled to be criminal, as well as individual membership thereof ('who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by (...) the Charter'). Criminal liability on account of membership of the SS and other criminal Nazi organizations could only be avoided for 'those who were drafted into membership by the State in such a way as to give them no choice in the matter, and who had committed no such crimes'.

Clearly, membership as such as a basis for criminal liability can attract criticism: guilty by association. Nevertheless, following the IMT's footsteps, this has not prevented the ICTY from widely using joint criminal enterprise (JCE) as a mode of (membership) liability for those who share a same criminal purpose, but carry out different acts – including non-criminal acts - to further the criminal purpose of the group. The elements of the individual role in a JCE are as follows under the case law of the ICTY:

An accused must have participated in furthering the common purpose at the core of the JCE by assisting in or contributing to the execution of the common plan or purpose, but need not have performed any part of the actus reus of the crime charged. The accused's contribution need not be sine qua non, without which the crime would not have been committed, nor must it necessarily be a substantial contribution to the JCE. However, the accused must "contribut[e] to the common purpose in a way that lends a significant contribution to the crimes" (Karadzic Trial Judgement, para. 564).

It is beyond the limited scope of this blog post to deal with all the complexities of liability based on common purpose or membership of a criminal organization. It deals with scenarios in which individuals are 'cogs' in a far bigger machine. When that machine is obviously criminal, as can be said about the military dictatorship in Argentina in the late 1970s, and when an individual becomes or remains a member, or cog, in this machine, knowing of its criminal purposes, there is something to be said in favor of criminal liability. Such criminal liability could be construed as aiding and abetting, but when dealing with a high plurality of potential aiders and abettors a legal construct by means of membership of a criminal organization appears more suitable.

The bottom line appears to be that members of armed forces who know that their colleagues

commit war crimes, structurally and on a widespread basis, should be seriously cautious about remaining within the military and thereby contributing to the commission of these crimes in some way. Looking at the JCE requirements, the question is whether such contribution – the mere fact of continuing to serve in the military, even when the soldier was engaged in benign activity- can be regarded as significant enough to incur liability. In case of enormous harm, resulting in deaths of many innocent civilians, this threshold of significance is in my view subject to a more relaxed interpretation. In addition, how to define ‘benign activity’ in the context of a criminal organization? The role played by Poch, and other pilots in his position, arguably has freed his colleagues to fly the death flights. In this context, it does appear reasonable to focus as good as exclusively on the state of mind of those who remain in a criminal military machinery; if they serve with full knowledge of the crimes committed, they intentionally contribute to the criminal purpose as a whole.

I cannot infer from publicly available information what Poch’s degree of knowledge of the crimes committed by the Argentinian army was while he served; and his service as an air force pilot -as he claims- outside of the unit responsible for the ‘death flights’ may not be regarded as a significant enough contribution to the JCE by everyone. That being said, it would be worthwhile to look at his situation more critically than has been done until now and recognize the role of the various ‘cogs in the machine’, who all have contributed to situations of mass atrocities. Whereas an acquittal for Kouwenhoven would have been a possible alternative outcome in his case, a different result in the trial against Poch might also have been possible, in the event a different case theory, based on membership of a criminal organization, had been used.

Criminal law

Aiding and abetting

JCE

Criminal membership

