Investigation and Prosecution in Denmark of International Crimes

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1 Introduction

For Denmark, as for many western European countries, the armed conflict in the former Yugoslavia led as did other armed conflicts in the world in the 90s to an increased influx of refugees. In 1994 a refugee arrived from Bosnia and was immediately recognized by former fellow inmates from the Croatian prisoner of war camp, Dretelj, where he had been detained as well but had been acting as a kapo inmate. He had been extremely violent to other inmates and due to the violent acts committed *inter alia* by this person two inmates died. The refugee was sentenced to eight years of imprisonment by the Eastern High Court of Denmark on 22 November 1994, a judgment that was upheld by the Supreme Court of Denmark on 15 August 1995.[1]

In 2000, at the behest of the Chief Prosecutor of the International Criminal Tribunal for Rwanda (ICTR), Innocent Sagahutu was arrested in Denmark and transferred to ICTR for prosecution. He was convicted by the ICTR for his participation in the 1994 Rwandan genocide. On 11 February 2014 his sentence was reduced to 15 years[2] by the ICTR Appeals Chamber.

By December 2001 the Danish Immigration Authorities had identified and reported 16 cases of international crimes to the Director of Public Prosecutions in Denmark. Media reports on the case files indicated that two persons ostensibly suspected of war crimes were present in Denmark. This prompted the Ministry of Justice to set up a specialized unit – the Special International Crimes Office (SAIS). The office commenced its work on 1 June 2002 and was tasked with investigating and – if possible – prosecuting persons residing in or with close ties to Denmark for serious crimes committed abroad, in particular genocide, crimes against humanity, war crimes and acts of terror. The purpose of establishing the office was to ensure that Denmark does not provide a safe haven for persons who have committed serious crimes abroad.[3]

In 2013 SAIS was merged with the State Prosecutor for Serious Economic Crime (SØK) into the State Prosecutor for Serious Economic and International Crime (SØIK). SØIK handles cases concerned with serious economic crime and in addition deals with international criminal proceedings – primarily those of genocide, crimes against humanity, war crimes and other serious crimes committed abroad for which the investigations and criminal prosecutions require:

– special knowledge and insight into conditions in areas outside Denmark, and

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* The views expressed in this paper are those of the author and do not necessarily reflect the views or policies of the Danish Authorities.

1 UfR.1995.838H.

2 *Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu v. The Prosecutor* (Case No. ICTR-00-56-A) ICTR A. Ch. Judgment, 11 February 2014.

3 Vestberg, Birgitte, ”Statsadvokaten for særlige internationale straffesager” in Plum, Lars & Laursen, Andreas (eds.), Enhver Stats pligt ..., 503-516, København: Jurist- og Økonomforbundets Forlag, 2007; Plum, Lars, ”SAIS - Statsadvokaten for Særlige Internationale Straffesager”, in Motzfeldt, Hanne Marie et al., Mod og mening, Hyldestskrift til Frederik Harhoff, København: Jurist- og Økonomforbundets Forlag, 2016, 435-454.

– the establishment of collaboration with authorities, institutions, organisations etc., in other countries.

The merger of the two State Prosecutor offices occurred as part of a general reorganisation of the State Prosecutor offices in Denmark.[4] The reorganisation was prepared by a working group set up by the Ministry of Justice, which in its report, Chapter 9,[5] considered the future structure of SØK and SAIS. The working group proposed that SAIS and SØK be combined and that SØK was given a separate unit to handle the cases previously handled by SAIS. In this regard the report noted that it could be administratively difficult for such small units (e.g. there were only 16 employees in SAIS) to complete their burdensome, resource and cost heavy work satisfactorily. Both SAIS and SØK alike were organised to ensure close cooperation between investigators and prosecutors; thus, it was obvious to merge these two units. The working group noted that one could risk that the subject matter that SAIS was conducting could in fact "drown" in the handling of cases concerning financial crime but did not find this could be considered decisive.[6] The number of new investigations into international crimes have fallen to almost nil after the merger.

The Military Prosecution System

In addition to the civil criminal justice system, the Danish Military Criminal Justice System functions as an integral part of the general criminal justice system with investigative and prosecutorial powers. There are no military courts. The Military Administration of Justice Act and the Danish Military Penal Code define the military criminal jurisdiction.

Persons under military criminal jurisdiction are thus investigated and prosecuted for all offences under Danish Law including the offences that are criminalised in the Danish Military Penal Code. Section 36[7] of the Danish Military Penal Code criminalises the deliberate use of war methods or procedures contrary to international agreements signed by Denmark or international customary law[8] during armed conflicts which is significant in relation to the prosecution of international crimes.

The Danish Military Penal Code holds legal persons criminally liable if the crime is punishable with a penalty of imprisonment of 4 years or more. The rules in the Danish Criminal Code, Sections 25-27 apply in these cases.

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4 Bekendtgørelse nr. 1177 af 6. December 2012 om fordelingen af forretningerne mellem statsadvokaterne.

5 Betænkning om en fremtidig statsadvokatordning (1523/2010), 146-160.

6 ibid. p. 156-158

7 *Militær straffelov, lov nr. 530 af 24. juni 2005, som ændret, senest ved lov nr. 1550 af 19. december 2017*, § 36: "Anybody who during armed conflict deliberately abuses or does not respect characteristics or designations reserved for people, equipment and materials designated to provide help to people who are wounded or ill shall be punished with imprisonment for life. (2) Anybody who deliberately uses war methods or procedures contrary to an international agreement signed by Denmark or international customary law shall be punished similarly".

8 See Laursen, 2011, pp. 156-172 on the Danish Military Penal Code, Section 36 (2).

2 Preconditions for Prosecution in Denmark in Cases of International Crimes

2.1 Criminalisation in Danish Law

Criminal law in Denmark is based on parliamentary legislation[9] *(nulla poena sine lege parlamentaria)* consisting of the Danish Criminal Code[10] and criminal provisions in a large number of other statutory laws, which in relation to criminal law are called *særlove*.

International crimes are not criminalised by separate statutes in Denmark except for genocide, which is covered by the Law Concerning Punishment of genocide,[11] which implemented the Genocide Convention by enactment into Danish law. Crimes against humanity, war crimes and torture are not criminalised as such in Danish law.[12] Therefore, except for genocide, the criminalisation of international crimes in Danish law is to be found in the Danish Criminal Code and the Danish Military Penal Code. As mentioned above in the introduction, the Danish Military Penal Code in Section 36 criminalises the deliberate use of war methods and procedures contrary to international agreements signed by Denmark or derogations from international customary law during armed conflicts. The lack of criminalisation of international crimes means that as a consequence, the Geneva Conventions and the Rome Statute of the International Criminal Court (Rome Statute) cannot be said to be fully covered by existing Danish criminal law.

The Danish courts can only convict for crimes, which is covered by Danish criminal law.[13] If an act has been committed outside the Danish realm, adjudication in Denmark (besides the question of jurisdiction) has as a precondition that the Danish law is deemed to cover such acts in the *locus criminis*. It is assumed that the Danish Criminal Code and the Danish Military Penal Code have universal validity, i.e. covers crimes regardless of where these are committed. There may be restrictions to this as some provisions specifically

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9 The Danish Criminal Code, Section 1: "A penalty can only be imposed for acts made criminal by statute, or for fully comparable acts. …" The question of analogy falls outside the scope of this paper. However as questions may arise as to whether a new provision could be understood as covered by a previous provision and therefore allow for convictions based on an analogy it should be noted that the question analogy has been thoroughly researched by Trine Baumbach; Baumbach, Trine, *Det strafferetlige legalitetsprincip - hjemmel og fortolkning*, Jurist- og Økonomforbundets Forlag, 2008, p. 395 ff.

10 The Danish Criminal Code, Lovbekendtgørelse nr. 976 af 17. september 2019.

11 *Lov nr. 132 af 29. april 1955 om straf for folkedrab* enacted in order to implement the Convention on the Prevention and Punishment of the Crime of Genocide in Danish Law.

12 Pursuant to *lov nr. 494 af 17. juni 2008 om ændring af straffeloven og militær straffelov* new provisions were inserted in the Danish Criminal Code and the Danish Military Penal Code, which increased the penalties for public officials and military personnel for crimes committed through torture. Further there is no longer any statutory limitation on crimes committed through torture..

13 The reference in the Danish Military Penal Code in Section 36 to "the deliberate use of war methods or procedures contrary to international agreements signed by Denmark or international customary law" is the Danish Law that criminalises these acts, i.e. without such provision the Danish courts will not be able to adjudicate such acts.

mention that they are only applicable to e.g. Danish Public Officials. Criminal provisions in other laws (called *særlove* in relation to the criminalisation) may or may not be considered to have universal validity depending on the interpretation of the wording, scope and *travaux préparatoires* of the law in question.[14]

2.2 Criminalisation with Retroactive Effect?

There is no provision in Danish law excluding the possibility of criminalisation with retroactive effect. For example, after the German occupation of Denmark during WWII criminal laws were enacted with retroactive effect directed against the Danish collaborators. This happened despite a legal assumption of a fundamental legal principle against such legislation.

Denmark has incorporated the European Convention on Human Rights (ECHR) and today it is assumed that it will only in extraordinary situations coincide with the principle of legality to enact or interpret a criminal provision with retroactive effect.[15] Article 7, paragraph 2 of the ECHR allows under certain conditions for criminal provisions with retroactive effect, however, this provision seems only to cover crimes committed during the Second World War.[16]

Denmark interprets the requirement for double criminality as a requirement that the acts committed abroad should be criminalised in the *locus criminis* and in Denmark[17] when committed if cases are prosecuted under the active personality principle and the representation principle.[18] There is no requirement that there are specific frames for the sentences defined in *locus criminis*. For that reason, it has not been raised as an issue in Denmark that sentencing provisions for genocide were only enacted in Rwanda through *loi organique no °08/96* from 1996,[19] as it was obvious that genocide was a crime in Rwanda in 1994.

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[14] Greve, Vagn, *Straffebestemmelsers interlegale gyldighed*, Tidskrift for Kriminalret, 2010, 502-524. See UfR.2012.2399HK. The Supreme Court of Denmark assessed that the Danish law on genocide, which is a *særlov*, should be interpreted in accordance with the generally accepted international opinion that genocide is a universal crime and as there is no restriction in the Danish law on genocide it should apply with universal validity just as manslaughter in the Danish Criminal Code.

[15] Baumbach 2008, p. 349ff.

[16] Baumbach, Trine, *Strafferet og menneskeret*, København, 2014, p. 167, with references to ECHR, *Maktouf and Damjanović v. Bosnia And Herzegovina*, 18 July 2013, para. 72 and *Kononov v. Latvia*, 17 May 2010, para. 186.

[17] U.2011.1473/2H concerning sexual offences committed in Italy but not punishable under the same type of crime.

[18] In cases of sexual exploitation of children, human trafficking and female circumcision there is no requirement for double criminality. The same goes for cases based on the principle of universal jurisdiction, the protection principle and the passive personality principle or crimes committed outside any recognized territory.

[19] Loi organique n° 08/96 du 30/08/96 sur l'organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l'humanité, commises à partir du 1er octobre 1990.

2.3 Criminal Jurisdiction for Crimes Committed Outside Denmark

Denmark follows a continental European line of jurisdiction. The main principles in Danish Law are the following.

The principle of territoriality, including the *ubiquity*[20] and flag principles, apply (The Danish Criminal Code, Sections 6, 9).

Until recently, the active personality principle was applied almost exclusively on the condition of double criminality when an act is committed within the territory of another state. Besides Danish nationals it also covers persons with their domicile or similar habitual residence[21] within the Danish state at the date of the provisional charge. The active personality principle does not require double criminality in cases of sexual abuse of children, human trafficking or female circumcision; or where the act is aimed at someone having the aforesaid attachment to Denmark when the act was committed (The Danish Criminal Code, Section 7).[22]

The condition of double criminality applies to the passive personality principle for certain aggravated crimes that may carry a sentence under Danish legislation of imprisonment for at least six years for acts committed within the territory of another state (The Danish Criminal Code, Section 7 a).

Criminal liability of legal persons need not be prescribed by the legislation of the country in which the act was committed in order to meet the requirement for dual criminality (The Danish Criminal Code, Section 7 b).

The protection principle and the principle of representation is covered by a number of provisions in Section 8 of the Danish Criminal Code.

Crimes of the kind described in the Rome Statute may fall under Danish jurisdiction based on a limited principle of universal jurisdiction (The Danish Criminal Code, Section 8 a.):

> "Acts committed outside the Danish state are subject to Danish criminal jurisdiction where acts of the kind described fall within the Statute of the International Criminal Court, provided that any such act was committed by a person who, at the date of the provisional charge

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[20] In some jurisdiction and scholarly literature, the principle of territoriality on one hand and the *ubiquity* and the flag principle on the other hand is described respectively as the subjective territorial principle and objective territorial principle.

[21] Lov om ændring af straffeloven og forskellige andre love. Lov nr. 490 af 17. juni 2008, § 7. According to the *travaux preparatoire* the term 'similar habitual residence' includes, e.g. persons who, without having an actual residence in Denmark, are in the country for a longer stay or for the purpose of a longer stay e.g. in connection with the processing of their application for a residence permit. The term could also include persons residing in Denmark on the basis of 'tolerated residence', under review of an expulsion decision or under consideration of an application for a humanitarian residence permit, *L 16 2007/2, 28. november 2007, Til § 1, (straffeloven), til nr. 1 (§§ 6-12), til § 7.*

[22] UfR.2012.2399HK. The Supreme Court of Denmark ruled that the question of jurisdiction should be dealt with in accordance with the provisions on jurisdiction in the Danish Criminal Code. It was uncontested that genocide was a crime in Rwanda in 1994 and therefore the requirement for double criminality was met and jurisdiction could be exercised as the person at the date of the provisional charge had his abode in Denmark (The Danish Criminal Code, Section 7, (1), (1)).

(i) was a Danish national or had his abode or similar habitual residence in Denmark; or

(ii) was staying in Denmark."

In a case related to the genocide in Rwanda in 1994[23] the Danish Supreme Court did not decide on the prosecution's assertion that jurisdiction could be based on the Danish Penal Code, Section 7 as well as Section 8 a. The Supreme Court expressed the opinion that the condition of double criminality was met in relation to the crime of genocide in Rwanda and Denmark and therefore Danish jurisdiction could be exercised based on the Danish Penal Code, Section 7, (1), (1), (i.e. the active personality principle as the defendant had his permanent residence in Denmark).

It is further worth noting that based on the Danish Criminal Code, Section 8 a, Denmark has criminal jurisdiction for crimes that may not even be criminalised by Danish criminal provisions as Denmark has not incorporated the offences of the Rome Statute nor enacted new legislation to cover all offences in the Statute.[24] In that case the result will be an acquittal.

2.4 Immunity

According to Section 12 of the Danish Criminal Code the exercise of jurisdiction for crimes committed outside the realm according to Sections 6-11 are restricted by the exemptions recognised by international law, which includes immunity. In 2001 it was considered that an ambassador, who was going to take up his position in Denmark, could not be prosecuted for alleged crimes of torture due to diplomatic immunity. In 2014 the then former ambassador returned to Denmark and the question of diplomatic immunity was raised yet again. However, the prosecution of the alleged crimes was barred by statutory limitations.[25]

2.5 Competence to Initiate Prosecution

The Danish police and prosecution in the first instance are under the same authority headed by the Police Commissioner. In Denmark the police have an almost exclusive competence to investigate crimes. The Prosecution in the Police districts decides whether to prosecute or not. Certain crimes may only be prosecuted if the State Prosecutor so decides. This goes for cases in which Denmark claims criminal jurisdiction based on Section 8, (5) (an international obligation to have jurisdiction), Section 8, (6) (where a request for extradition has been denied – *aut dedere aut judicare*) or Section 8 a (acts of the kind described fall within the Rome Statute, as mentioned above).[26]

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[23] UfR.2012.2399HK

[24] Harhoff, Frederik, "Krigsforbrydelser i dansk ret" in Plum, Lars & Laursen, Andreas (eds.), *Enhver Stats pligt…*, pp. 339-356, København: Jurist- og Økonomiforbundets Forlag, 2007, p. 346.

[25] See Udenrigsudvalget 2013-14, URU Alm.del endeligt svar på spørgsmål 119.

[26] Rigsadvokatmeddelelsen, 3.1.4. Forelæggelse af særligt komplicerede sager 2019.

Furthermore, according to the Danish Criminal Code, Section 110 f and Section 118 a, the prosecution of crimes according to the Danish Criminal Code, Chapter 12 (Treason and other offences against state autonomy and security) and Sections 111 – 115 and Section 118 (terrorist crimes etc.), can only be initiated at the order of the Minister of Justice.

3 International Law and Danish Law

Danish law formally follows the dualistic approach to the relation between international law and national law, i.e. international treaties have to go through a formal process of implementation, either by recognition of harmony of law, which normally will be ascertained at the time of ratification of treaties signed by the government on behalf of Denmark, or by transformation into Danish law by enactment of a Danish law, or by incorporation by a Danish law.

However some scholars are of the opinion that it is better to say that Denmark has a tendency to interpret or supplement Danish law in order to avoid any conflict with international obligations stemming from treaties ratified by Denmark or other international obligations following from international law.[27] This leads to the conclusion that Denmark tries to adhere to its international obligations and as long as Danish law does not explicitly go contrary to an international rule, the Danish law is applied in accordance with it. However, as described in the following paragraph, Danish courts can only adjudicate criminal cases in accordance with Danish law.

3.1 The Principle of Legality

Denmark follows the principle of legality in that criminal provisions should be based on statutory law (The Danish Criminal Code, Section 1); and that retroactive criminal provisions are prohibited.[28] Further if the law has been changed after the crime was committed and before adjudication the more lenient penalty applies.[29]

The Danish Criminal Code, Section 1 has the following wording: "A penalty can only be imposed for acts made criminal by statute, or for fully comparable acts. …" This entails the prohibition against uncodified, i.e. unwritten, or judge-

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[27] Spiermann, Ole, Moderne Folkeret, 3. ed. København: Jurist- og Økonomforbundets Forlag, 2006, p. 152 f.

[28] See above in section 2.2.

[29] The Danish Criminal Code, § 3 states: "If the criminal legislation in force at the adjudication of an act differs from the legislation in force when the act was committed, the issues of criminality and penalty must be decided under the most recent statute, provided always that the decision may not result in a more severe sentence than the sentence imposable under the former statute. …".

The Danish Criminal Code, Section 3 is an ordinary law and as such this rule may be changed by an ordinary law as it happened after the occupation of Denmark during WWII. Such law has to be specific as the principle of non-retroactivity not only then but even more today in the light of Human Rights Law, e.g. the ECHR Article 7 is considered a fundamental principle of law.

made criminal provisions *(nullum crimen, nulla poena sine lege scripta).* Further it is to be understood as a ban of analogy *(nullum crimen sine lege stricta)* although it gives a narrow possibility of interpretation in accordance with the wording. The principle of certainty *(nullum crimen, nulla poena sine lege certa)* is today to be interpreted into this paragraph as well.

3.2 The Use of General Rules of the Danish Penal Code or General Principles in International Criminal Law in Prosecution in Denmark of International Criminal Cases

In order to convict a person for a certain crime this person has to have committed the crime, *actus reus*, with the necessary intention, *mens rea*, and no excuses or mental issues should exonerate the suspect.

The first condition in criminal law is in general a pure domestic issue – each country has the right to criminalise a certain behaviour or not to, unless there is an international obligation to criminalise certain acts based on treaty obligations or peremptory norms of international criminal law like slavery, torture, genocide and crimes against humanity.

However, it suffices not only to have committed the criminal act. The aforementioned conditions have to be fulfilled in order to convict a person of a certain crime. Before dealing with the crimes, the use of the general rules or principles for criminal responsibility should be dealt with.

In most countries there is no doubt that criminal justice is exercised in accordance with the national law of the forum state, *locus fori.* Only a few exceptions have been accepted to this principle, see e.g. the European Convention on the Punishment of Road Traffic Offences.[30] This is contrary to civil cases where it is possible to decide which legislation applies to a certain contract etc.[31]

The aforementioned use of national law based on *locus fori* is often exercised under the condition of double criminality. Without going into the different varieties of this principle the precondition is that another criminal system exists and can be described. This precondition is not at hand in international criminal law or only to some extent in that some general principles may be deduced from treaties, decisions from international criminal courts, ad hoc tribunals, judgments, scholarly writings etc. This means in practice that Danish courts, in relation to general principles or rules concerning for instance the criminal liability, co-perpetration, mens rea, attempt, preparation and planning, should rely on the general rules of the Danish Penal Code and not the general principles enshrined in international criminal law.[32]

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[30] ETS 052 - European Convention on the Punishment of Road Traffic Offences from 1964, which has only been ratified by three states and has never entered into force.

[31] Cornils, Karin, *The Use of Foreign Law in Domestic Adjudication*, Nordisk Tidsskrift for Kriminalret 1989, vol. 76, no. 5, 70-83.

[32] An example thereof can be found in the Danish Law Concerning Punishment of Genocide, see footnote 11, where co-perpetration and attempt is punished in accordance with the principles in the Danish Criminal Code according to § 2 of the law.

3.3 Perpetrator and Co-perpetrator

The Danish Criminal Code, Section 23, Subsection 1, commences with the following provision:

> "The penalty provided for an offence applies to everybody who is complicit in the act by incitement or aiding and abetting. …"

This rule which covers both the perpetrator and the co-perpetrator underlines that the Danish criminal system does not distinguish between the different accomplices in an act although Section 23 goes on stating that those who have an inferior role in the commission of a crime should be sentenced more leniently. The Danish theory on accomplices is not based on accessorial principles, i.e. it is possible to find the accomplice guilty without even knowing the identity of the principal perpetrator. Likewise, it is possible to give a more lenient sentence to the person who carries out the act that fulfils the crime compared to the person who despite "only aiding" had the cruel intention to get the crime committed through the perpetrator.[33]

Theories on command responsibility and joint criminal enterprises are hardly developed in Denmark in relation to international crimes.[34] This is both due to the broad concept of co-perpetration and to the fact that only a low number of international crimes have been adjudicated in Denmark.

3.4 Mens Rea

Mens Rea is considered in Danish criminal law in two different forms: intention and negligence.

According to the Danish Criminal Code, Section 19 offences mentioned in the Danish Criminal Code and committed due to negligence are not punished, unless specifically provided for. The relevant criminal provisions are applicable to other offences, even where an offence is committed due to negligence, unless otherwise specifically provided for.

The Danish Law Concerning Punishment of Genocide implements the Genocide Convention into Danish law. It follows from § 1 of the said law that the crime of genocide can only be punished if committed with *mens rea* in the form of intention.

As Denmark does not have an international criminal lawbook or laws covering crimes against humanity, war crimes or torture or the offences covered by the Rome Statute, prosecution and conviction for these crimes has to follow charges for violations of the Danish Criminal Code. The *mens rea* therefore has to be intention.

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[33] Waaben, Knud, *Det kriminelle forsæt,* København 1957, 313-322 and Hurwitz, Stephan, *Den Danske Kriminalret, alm. del,* 4th. ed., København 1971, 347-353.

[34] See Orth, Flemming, "Kommandoansvar i dansk ret" in Plum, Lars & Laursen, Andreas (eds.), *Enhver Stats pligt ...*, 431-438, København: Jurist- og Økonomforbundets Forlag, 2007; Orth, Flemming, "Joint criminal enterprise i dansk ret(?)" in Plum & Laursen, 2007

Intention exists

1) when the person aims at the criminalised result, the *actus reus* or has knowledge about the circumstances that form the necessary part of the crime. The same goes for situations where the person may not aim at the result but knows that the result will follow the act performed. This may be called direct intention.

2) when the person does not aim at the criminalised result but knows that the result more probably than not will occur if the act is committed, the so-called *probability intent.*

3) A rare form of intention is *dolus eventualis*, which comes close to aggravated negligence – and which should not be described further here – as it is not likely that this form of intention will ever lead to conviction in international crimes.

In this article there will be no further elaboration on negligence, as it is of no practical importance for international crimes.

As Denmark has not made either an international criminal law or provisions for international crimes that takes the development in the recent decades into account and above all that Denmark is a state party to the International Criminal Court (ICC) leaves a number of questions unsolved, e.g. how should *mens rea* be understood for international crimes that involve perpetrators in new and different situations. This does not necessarily lead to impunity, but uncertainty cannot be avoided by this approach. Furthermore, the situation is not satisfying for proponents of the view that the most outrageous international crimes should not be prosecuted as ordinary crimes.[35]

3.5 Criminal Liability for Legal Persons

Companies and other incorporated bodies (legal persons) are liable for crimes covered by the Danish Criminal Code or where so provided by or pursuant to a relevant statute[36] under the rules of the Danish Criminal Code, Sections 25-27.

According to the Danish Criminal Code, Section 27 (1) it "… is a condition precedent to the criminal liability of a legal person that an offence has been committed in the course of its activities and that the offence was caused by one or more natural persons connected to the legal person or by the legal person as such. Section 21 (3) on punishment for attempts applies correspondingly."

The sanctions encompass fines in addition to confiscation.

As no statute covering international crimes (except genocide) as such exists, no criminal liability can be attributed to legal persons in relation to these crimes. The Danish Law Concerning Punishment of Genocide does not have a provision on the criminal liability for legal persons. Therefore, criminal liability for legal persons is dependent on whether the acts attributable to the legal person may be prosecuted as ordinary crimes under the Danish Criminal Code. For all crimes falling under the Danish Criminal Code legal persons may, according to Section 306, be held responsible.

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35 *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-S; Plum 2007, p. 271-274.

36 The Danish Criminal Code, Section 306

3.6 Attempt, Preparation and Planning

Section 21, Subsection 1 of the Danish Criminal Code rather laconically states:

> "Acts aimed at inciting or assisting the commission of an offence are punishable as attempts if the offence is not completed."

As short as it is, the wording in this provision: "… acts aimed … at the commission…", "… acts inciting … the commission…" and "… acts … assisting the commission …" covers the whole range of theories on all kind of acts aimed at the commission of a crime which for whatever reason is not completed. The only requirement for an "*actus reus"* is an act that brings the criminal result closer to being completed with the necessary requirement of the intention (*mens rea*).

The Danish theory dates back to the early 19th century and vaguely corresponds to today's more detailed theories, which has led to vast theories among academics, especially covering issues in relation to international crimes.

So far, the Danish approach on one hand does not exclude convictions and on the other ensures that the Prosecution and the Courts may assure that no one is indicted or convicted for acts that are so far from the realization of a certain crime that it would be unreasonable to indict or convict someone for it.

However, this approach does not cut off the concern that the ICC or *ad hoc* tribunals compared to the Danish Courts may have different approaches to these incomplete offences. Denmark has a firm position that we want to prosecute our own military personnel in order not to surrender them to the ICC. This may lead to a situation where the Danish position may be stricter than the liability before the ICC or where the standards of the ICC have to be applied in the Danish courts. It is possible to argue for such lenient views in the Danish courts as the principle of legality does not prohibit any decision in favour of the defendant. On the other hand, in case the Danish position leads to impunity in situations where the ICC would convict this could lead to the conclusion that Denmark *"is unwilling or unable genuinely to carry out the investigation or prosecution"*.[37]

3.7 Ne Bis in Idem and Double Jeopardy

"Ne bis in idem" and "double jeopardy" tend to be used in different ways by different legal traditions.

In Denmark, *"Ne bis in idem"* is understood in that a person can only be prosecuted for an act once. To this should be added that this does not prevent another trial at a later stage if the extraordinary conditions for reopening of the case according to the Danish Administration of Justice Act, Section 975 or Section 976, are met. These conditions are either that significant new evidence has emerged or that it is later realized that the crime was of a significantly more aggravated nature compared to what was understood when the case was prosecuted.

In Danish criminal law it is considered possible that a person may commit several crimes in only one act. Thus, it is possible to rape and assault the victim

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[37] Rome Statute of the International Criminal Court, Article 17, (1), (a)

in a particularly offensive, brutal or dangerous manner and be convicted according to both Section 216 and Section 245 of the Danish Criminal Code under one count in the indictment. In all judgments there will be measured out one sentence within the most severe frame for penalties for the crimes of which the person is found guilty. Therefore, there is no possibility for the consecutive serving of sentences.

The principle of "*Ne bis in idem*" has the derived consequence that extradition for prosecution shall not be granted if a final judgment or acquittal has been passed in Denmark, the Nordic Countries or in an EU member state or the person has been pardoned in Denmark.[38] Extradition may be refused if a final judgment or acquittal has been passed in third countries upon the person claimed in respect of the offence for which extradition is requested.[39]

If the competent Danish authorities have decided to terminate proceedings in respect of the offence for which extradition is requested, extradition shall not be granted unless the conditions for reopening the case are met. Extradition may be refused if the competent Danish authorities have decided not to initiate proceedings in respect of the offence for which extradition is requested and if the conditions for reopening of the case are not met.[40]

3.8 Justifications and Excuses

It is not possible to identify rules for justifications and excuses, which differ from ordinary Danish law based on the special character of international crimes. However, it may be expected that international decisions on e.g. necessity and duress and superior orders will influence the interpretation of Danish law in the light of the lack of provisions specifically shaped for international crimes.

4 International Crimes and Issues Related Thereto which have been Tried Before the Danish Courts

The changes in the world order in the 90s led to the need for the investigation and prosecution of international crimes in a new setting different from the post WWII prosecutions. As mentioned in the introduction the first case of

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38 Lov om udlevering til og fra Danmark (udleveringsloven). Lov nr. 117 af 11. februar 2020, § 3, stk. 1 og 2.

39 Lov om udlevering til og fra Danmark (udleveringsloven). Lov nr. 117 af 11. februar 2020, § 3, stk. 3.

40 Lov om udlevering til og fra Danmark (udleveringsloven). Lov nr. 117 af 11. februar 2020, § 4.

If the investigation has been thorough and the decision not to institute proceedings is based on the assessment of the evidence in the case equivalent to the situation where formal charges have been filed and it is decided to terminate proceedings, then extradition shall only be granted in case the conditions for reopening of the case are met. See the *travaux preparatoire* for the Danish law on extradition to and from Denmark, *L 78 2019/1, 27 November 2019, no. 3.2.2.1.1.*

international crimes in recent time was investigated and tried before the Danish courts in the 90s.[41]

In the two decades succeeding the 90s approximately 250 cases were investigated. A few of those cases have been tried before the courts and some suspects have been extradited for prosecution.[42]

One of the early cases prosecuted by SAIS concerned a Ugandan national who formed his own rebel "army" in 1994 for the purpose of ousting president Museweni and his government and introducing a federal government. During a 6-month period the rebel group carried out a series of robberies, among these an attack on a local prison and a nearby police station. According to the investigation the group most likely never exceeded a number of persons higher "than what could gather under a tree" and they were never in genuine armed conflict with government troops. In February 1995 the group hijacked a regional police commander and his vehicle and drove him and his chauffeur to a forest where they were executed. In March/April 1995 the group kidnapped a Minister and two other persons and held them prisoner in the bush for a couple of days. As there was no international armed conflict, the Ugandan national was not charged with war crimes but charged with manslaughter, kidnapping and aggravated robbery. The court in Aalborg in its judgment of 27 May 2004 acquitted him of the charge of manslaughter. For the other offences he was sentenced to psychiatric treatment.[43]

In January 2006 SAIS initiated an investigation related to the genocide in Rwanda 1994 of a Rwandan citizen who was held on remand for more than one year before he was released, and it was decided by the Prosecution to terminate the proceedings in September 2007 due to the lack of evidence. In this case there was at the time no question of extradition.

In July 2008 the same person was arrested in Stockholm, Sweden. The Swedish Supreme Court decided on 26 May 2009 that there were no hindrances for extradition.[44] However, an application was filed with the ECHR, which rendered its judgment on 27 October 2011.[45] By that time the person was no longer kept on remand in Sweden and had returned to Denmark.

Another case also related to the genocide in Rwanda 1994 was investigated and a Rwandan citizen was arrested in December 2010. In September 2011 an indictment was issued. In early 2012, before the hearing on merits had begun, the Rwandan Authorities requested the extradition of the person. On 29 July 2012 the Ministry of Justice decided to grant the extradition to Rwanda. This decision was brought before the courts and the Supreme Court of Denmark rendered its decision on 6 November 2013 confirming the decision of the previous instances that the decision by the Ministry of Justice to extradite was

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41 UfR.1995.838H.

42 For a further description of the number of cases handled by SAIS, see Plum, Lars, "SAIS - Statsadvokaten for Særlige Internationale Straffesager", in Motzfeldt, Hanne Marie et al., *Mod og mening, Hyldestskrift til Frederik Harhoff*, København: Jurist- og Økonomforbundets Forlag, 2016, 435-454, p. 450 f.

43 Retten i Aalborgs sag SS-8.01549/3.

44 Framställning om utlämning till Republiken Rwanda av SA, HD:s beslut 2009-05-26, mål Ö 1082-09.

45 ECHR, *Ahorugeze v. Sweden*, 27 October 2011.

legal.[46] In July 2014 the person was transferred to Rwanda and in December of 2017 he was sentenced in Rwanda to life imprisonment.

During this case two questions were raised on which the Danish Supreme Court decided on 26 April 2012.[47] The decision in the Supreme Court is discussed in the sections above on Criminalisation in Danish Law and Criminal Jurisdiction for Crimes Committed Outside Denmark.

In a third case related to the 1994 genocide in Rwanda, the Director of Public Prosecutions decided on 10 October 2017 and on 16 November 2017 that a person of Rwandan origin, who was naturalized as a Danish citizen in 2014, should be extradited to Rwanda for prosecution. The decision has as a condition for the extradition for prosecution that the person, if convicted, shall serve his sentence in Denmark. This decision was brought before the courts and appealed to the High Court of Eastern Denmark, which 21 September 2018 confirmed the legality of the decision to extradite.[48]

5 Characterisation of the Conflict

The same acts may qualify very differently depending on whether they are carried out in the waging of the hostilities or without connection to the conflict, e.g. for the sake of personal revenge. If the criminal act has no connection to the armed conflict it may not be covered by universal jurisdiction but other forms of jurisdiction with or without a requirement for double criminality. Therefore, the identification of the nature of the act and the possible armed conflict is of utmost importance at an early stage of the investigation. And distinctions have to be drawn between international and non-international armed conflicts. The Danish Military Penal Code criminalises broadly,[49] and the Danish Military Prosecution Service has jurisdiction *vis-à-vis* any one violation of Sections 28-34 and 36-38 of the Danish Military Penal Code during armed conflict.[50]

It is well known that characterisation of conflicts for several reasons is a very delicate issue and only rarely international bodies will be outspoken on this and certainly not at the time of the events.

In the case mentioned in the beginning of this article, concerning extreme violence, UfR.1995.838H, Danish jurisdiction could only be based on universal jurisdiction if the crimes would fall under the Geneva Conventions.[51] In relation to this, the Danish Ministry of Foreign Affairs made a report stating that the

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46 UfR.2014.423H

47 UfR.2012.2399HK

48 *Anklagemyndigheden mod T*, Østre Landsrets 17. afdelings kendelse af 21. september 2018, S-623-18.

49 The Danish Military Penal Code, Section 36, Subsection 2: ”Anybody who deliberately uses war methods or procedures contrary to an international agreement signed by Denmark or international customary law shall be punished …”

50 The Danish Military Penal Code, Section 2, No. 3.

51 The Danish Supreme Court found that the acts, taken as a whole, felt under the 3rd Geneva Convention Art. 129 and 130 and the 4th Geneva Convention Art. 146 and 147 and that Denmark had an international obligation based on the treaties to prosecute this case.

conflict in the former Yugoslavia at the time of the commission of the relevant acts were of an international character.[52]

In 2005 a former foreign general visiting Denmark was reported to SAIS for war crimes allegedly committed during an armed conflict in his country of origin. In this case Denmark would only have jurisdiction if it had been an international armed conflict. As the conflict was non-international Denmark had no jurisdiction in relation to the general.[53]

Nexus to an Armed Conflict

Besides the formal requirement of a *nexus* to an armed conflict in several of the cases investigated by SAIS the following issues came up: 1) was the act perpetrated following the laws of war and therefore not punishable or was it possibly a war crime falling under universal jurisdiction; or 2) were the acts committed without any *nexus* to the armed conflict, i.e. private crimes, punishable if the suspected perpetrator fell under Danish jurisdiction.[54]

6 Issues Pertaining to Investigation and Prosecution of International Crimes

6.1 Procedural Challenges During the Investigation Abroad

The first challenge in the investigation of international crimes is to identify the crime. Contrary to ordinary investigations where the crime is typically reported, it is very often the case that the suspect details the crime during for instance an asylum procedure or under a witness report. However, the issue about such crimes is that they were committed far away and often a long time ago and thus leaves the authorities without much conclusive evidence to substantiate the reporting.

The ways to corroborate the report of the crime may be very different but often there is a need to contact the country where the alleged crime has been committed. This may be not only difficult, but also dangerous, not the least to witnesses. Therefore, it is important to understand the conflict in which the crime occurred in order assess with whom contact should be established. Further, the understanding of the conflict is of the utmost importance when the police investigators are interviewing witnesses in another country.

Interpreters should be impartial and unconnected to either part in the conflict nor should they be linked to an oppressive regime. The challenge is: how do you find out?

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[52] Spiermann 2006, p. 309. The assessment from the Ministry of Foreign Affairs of Denmark was not known by the ICTY when referring to the Danish case in ICTY Case No. IT-94-1-AR72 - *Prosecutor v. Dusko Tadic* AKA "Dule", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 83.

[53] See Udkast til brug for Justitsministerens besvarelse af samrådsspørgsmål E (Alm. del) i retsudvalget den 5. april 2005 and Justitsministerens besvarelse af 12. april 2005 af spørgsmål nr. 100 fra Folketingets Retsudvalg (Alm. del).

[54] Statsadvokaten for Særlige Internationale Straffesager, Årsberetning 2004, p. 17; Årsberetning 2005, p. 3 and 7, Årsberetning 2006, p. 6, Årsberetning 2007, p. 7.

In most conflict areas the population do not have much confidence in authorities, not even those arriving from abroad with the permission of the local national authorities. This may lead witnesses to try to give the answers they believe will be acceptable to the authorities.

Cultural differences and linguistic subtleties may complicate the witness questioning process for foreign police investigators.[55] The cognitive interview has proven useful – as it changes the roles of the investigator interviewing the witness into the witness being the host of the investigator. Thereby, the witness is in control of the situation vis-à-vis the investigator and so to say "invites" the investigator into his or her life and experiences at the time the crime occurred.

Witness protection is very difficult not only when we have to protect witnesses in Denmark. For that we do have procedures in place. But abroad we cannot protect the witnesses beyond our presence in the country – the witness protection must be dealt with by the local authorities. If the witness is not confident in that solution or if a program is not available in the country, then it may not be possible to interview the witness. The general security situation in a country may also be so dangerous that the witness cannot travel to be interviewed in a city which is safe.

6.2 Procedural Challenges During the Investigation in Denmark

Many of the challenges concerning culture, language and fear are of the same nature regardless of whether the investigation takes place abroad or in Denmark.

SAIS realized that offenders, victims and witnesses tend to flee their country of origin through the same routes and more or less at the same time due to the development of the conflict. Offenders, victims and witnesses for that reason may end up in the same country or neighbouring countries. In Denmark the Immigration Authorities had the right to report to the police any person whom the authorities believed could be an offender of serious international crimes. However, the authorities could not "report" victims and witnesses. At the initiative of SAIS, the Aliens Act was amended to introduce a possibility for the police and prosecution to request access to immigration files. Access may be given to the files of persons possibly suspected of having committed serious international crimes. Access can also be given for screenings of groups of people arriving in a given period from a specific area of conflict if it is reasonable to suspect that offenders may be found in that group. Further, it is possible to make such screenings if an investigation has been opened in order to identify possible victims and witnesses.[56] These possibilities have not been used after 2012 when

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[55] A Norwegian police officer once said to me: "It is strange to realise after 21 years as an investigator that I do not know how to interview witnesses in such a different cultural setting. I am starting over again."

[56] The change was introduced by Act No. 1398 of 27 December 2008. The Aliens (consolidation) Act No. 1022 of 2 October 2019, Section 45c, Subsection 2 and 3 states:

"(2) The authorities referred to in subsection (1) [the Prosecution Service] may furthermore, upon request from the Prosecution Service, disclose information from one or more cases under this Act without the alien's consent to the extent that such disclosure must be assumed to be of importance for the Prosecution Service's identification and prosecution of persons

SAIS was merged into SØIK. No official information is available as to why SØIK has not used the possibilities for screening of immigration files despite the influx and migration of refugees from conflict areas after 2012.

6.3 Victims

The Danish Administration of Justice Act covers the special rights for the victims in Chapter 66 a concerning information to the victims of violence, threats, sexual offences and other crimes endangering personal safety and security. The information covers the entire process and may include the nomination of a contact person within the police. Under certain conditions a lawyer may be assigned to the victim.

The victim may also ask the prosecution to claim compensation on their behalf during the prosecution of the case in court. However, the court may decide that these claims must be pursued in civil proceedings apart from the criminal proceedings. In cases of mass atrocities, it is unrealistic to expect the courts to deal with these requirements for damage or compensation. Furthermore, the Danish legislation on State Compensation to Victims of Crime does not cover compensation to victims without ties to Denmark for crimes committed outside the Danish territory.[57]

6.4 Procedural Issues Related to the Hearing on the Merits of the Case

There are logistical issues related to bringing and returning witnesses to the court in Denmark. Danish courts are not allowed to sit outside Danish territory and therefore all court hearings have to take place in Denmark. Witnesses may under certain conditions give depositions before the court during the hearing on the merits of the case through telecommunication, preferably accompanied by video.[58]

Cultural and linguistic challenges are at hand for all participants in the oral hearing on the merits of international crimes where suddenly defendants, victims, witnesses, judges, lay judges, prosecutors, defence attorneys and maybe even international experts convene for a short period of time in a setting, which for some of them is an unfamiliar setting that may even present an uncomfortable environment.

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who may be suspected of offences carrying a maximum penalty of six years' imprisonment or above committed in or outside Denmark.

(3) The authorities referred to in subsection (1) [the Prosecution Service] may furthermore, upon request from the Prosecution Service, disclose information from one or more cases under this Act without the alien's consent to the extent that such disclosure must be assumed to be of importance for the Prosecution Service's identification of victims or witnesses of a specific offence carrying a maximum penalty of six years' imprisonment or above committed in or outside Denmark."

57 *Bekendtgørelse af lov om erstatning fra staten til ofre for forbrydelser*, lovbekendtgørelse nr. 1209 af 18. november 2014, §1.

58 The Administration of Justice Act, Sections 174 and 192.

Despite the fact that criminal cases in Denmark follow Danish law it has turned out that court decisions from foreign jurisdictions and international courts and tribunals play a significant role in enlightening the Danish courts on international law and practice.[59] The professional parties to the procedure have to be well versed and knowledgeable in the field of international criminal and often also humanitarian law.

7 Certain Issues Related to the Assessment of Evidence

Besides from statements from the defendant, victims and witnesses, documents and tangible items may be admitted as evidence in Denmark.[60] Like other continental European countries Denmark has rather flexible rules on admissibility.

The general rule on assessment of evidence in Danish criminal cases is regulated in the Administration of Justice Act, Section 880:

"Only evidence introduced during the hearing on the merits may be taken into account in the determination of whether something should be deemed proven or not. The assessment of the weight of the evidences is not bound by any rule in law."

In UfR.2009.1453H concerning economic support to terrorist organizations, the evidence for the terrorist acts were to a large extent provided through reports from the United Nations (UN) and NGO's.

As Denmark has flexible rules on admissibility, as well as a rule on assessment, there is no Fruit of the Poisonous Tree doctrine.

7.1 Judicial Notice of Notorious Facts

The Administration of Justice Act, Section 880, leaves no room for taking *judicial notice* of facts. However, notorious facts are accepted as long as they are not contested.

7.2 Mutual Legal Assistance

International mutual legal cooperation is scarcely regulated in Denmark. As mutual legal assistance is based on sovereignty, Denmark usually offers and receives assistance based on reciprocity and on the respect of fundamental human rights rules and the respective rules of criminal procedure in the requested and the requesting state. The request for mutual legal assistance is sent in the form of a letter rogatory sent through the relevant channels. Often the letter rogatory will need a personal follow up and here the diplomatic channels are

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[59] ECHR is often referred to in Danish courts. See also U.2009.1453H. In relation to court hearings on extradition to Rwanda, decisions from ICTR, UK as well as France were referred to.

[60] The Administration of Justice Act, Sections 863-875.

very useful until the investigators have established personal contacts in the country of investigation.

Police investigators do not have any executive power outside their own jurisdiction and therefore have to obey the legislation in the country of investigation. The police investigators have to receive permission by the authorities in country visited to be allowed to investigate. At the same time, if the evidence collected is going to be introduced in court hearings in the requesting state, the evidence has to be obtained in a way that is acceptable in the country where it is going to be used. In other words, when conducting investigations abroad, the police investigators and prosecutors have to follow two standards at the same time.[61]

Often there may be some uncertainty as to what may be allowed for the police investigators in the foreign country. These difficulties are mostly solved once the police officers are on the ground and mutual trust can be established based on personal relations and direct communication with the host country's officials. It may also be beneficial to share experiences with investigators from other countries. It is a challenge to find documents and other pieces of evidence not to mention witnesses in a country where the investigators do not know the culture and language. Local authorities may have a different agenda, even a political one, from that of the investigators. NGOs may also have their own agenda. The advice can only be to stay alert and seek as much information as possible and not to be naïve.

7.3 Exclusion from Asylum?

The Immigration Service is the first instance responsible for assessing a claim for asylum and the Refugee Appeals Board is the second instance. The Aliens Act[62] covers the exclusion clauses from the UN Refugee Convention from 28 July 1951 including Article 1F.

Despite the possibilities for the Prosecution Service to request information and screen immigration files the presumption of innocence is upheld, i.e. the Prosecution Service only informs the Immigration Service if a final judgment has been rendered or if the Prosecution Service has decided to terminate proceedings. In case an investigation is not initiated, the question of whether to inform the Immigration Service or not depends on whether it has been informed of the particular individual or not.

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61 U.2005.3108H. The Danish Supreme court concluded that when Danish representatives for the Danish Police and Prosecution as part of the execution of the letter rogatory concerning interview of a witness in that country de facto conducts the interview there, then they shall inform the witness about the relevant Danish rules of procedure and seek to follow these. For that reason, the British officers cautioning of the witness to speak the truth should have been accompanied by an information that the witness is not under an obligation to speak the truth to police, only before the judge this is the case. The same goes for police investigators coming to Denmark from countries, like e.g. Norway, where you may be cautioned to speak the truth to the police; if Norwegian police investigators interviews a witness in Denmark this has to be without the obligation to speak the truth.

62 The Aliens (consolidation) Act No. 1022 of 2 October 2019.

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