

Public Prosecutor

v/

WEILER

17th Chamber

Case No. **0718523043**

Judgment of **March 3, 2011**

No. **3**

By an order entered on June 26, 2009 by one of the investigating judges of these courts, further to a complaint with application to join the proceedings as a civil party filed on July 3, 2007 by Karine Calvo-Goller, Joseph Weiler was referred before this court on the charge of:

- having in Paris, on April 3, 2007, in any event on French national territory and for a time not covered by the statute of limitations, as Editor-in-Chief of the website www.globallawbooks.org, committed the offence of public defamation of an individual, by posting on line the review of a work published by Karine Calvo-Goller containing statements which she considers to be an attack on her honour and reputation, facts provided and sanctioned by Articles 23, 29 paragraph 1, 32 paragraph 1 of the law of July 29, 1881 and Article 93-3 of the law of July 29, 1982.

At the October 2, 2009 hearing, the court established the procedural timetable and referred the case to the hearings of December 11, 2009, March 5, May 21, and June 25, 2010 as the hearing for oral arguments. At this last hearing, at Maître Marembert's request, the case was postponed to the hearings of September 24, 2010, December 16, 2010, and January 20, 2011 as the hearing for oral arguments.

At the hearing of that day, the accused and the civil party were present and assisted by their counsel.

Before any defence of the merits, the accused's counsel raised an objection of lack of jurisdiction of the French courts. After listening to the explanations of the parties and the public prosecutor, who concluded that this objection was well founded, the defence having had the last word, the court decided the consolidation of the incidental plea on the merits pursuant to the provisions of Article 459 of the Criminal Procedure Code.

The Presiding Judge then recalled the statements which were the subject of the accusation and then the court examined the facts, questioned the accused and heard the civil party.

Finally, the Tribunal heard in the order provided by the law:
the civil party's counsel, who presented his pleadings,
the public prosecutor, who considered that the statements in question were not defamatory,
the accused's counsel, who argued the discharge and presented his pleadings,
the accused, who had the last word.

At the end of the proceedings, the case was adjourned for deliberations and, in accordance with the provisions of Article 462 paragraph 2 of the Criminal Procedure Code, the Presiding Judge informed the parties that the judgment would be pronounced on March 3, 2011.

On that date, the following decision was entered:

GROUNDS OF THE DECISION

The statements which are the subject of the accusation (reproduced hereafter in bold type)

Karine Calvo-Goller resides in Israel where she teaches law as a senior lecturer in the Ramat Gan Academic Centre of Law and, in 2006 she had a work published by the publisher Martinus Nijhoff, written in English, about the International Criminal Court, entitled “The Trial Proceedings of the International Criminal Court – ICTY and ICTR Precedents”.

The accused, Joseph Weiler, is an international law professor at New York University, the Editor-in-Chief of the site www.globallawbooks.org, on which the Centre Jean Monnet – a research centre part of New York University – publishes book reviews; one of these reviews, written in English by Professor Thomas Weigend of the University of Cologne in Germany, concerned the above work by Karine Calvo-Goller.

According to the translation, produced by the complainant, of this review, Professor Thomas Weigend, after recalling the specific features of the International Criminal Court and still experimental stage of its proceedings, expressed his satisfaction at the subject addressed by Karine Calvo-Goller, considering that **“a book on ICC “Trial Proceedings” is thus timely and welcome. What the reader – and presumably the judges of the Court as well – would hope to receive is a principled analysis of the Court’s general procedural structure as well as suggestions for the possible resolution of some of the “hard questions” that have been left open by the drafters of the legal instruments pertaining to the Court’s operation.**

Regrettably, Karin Calvo-Goller’s book does not offer either. Instead, in the main part of her book she simply restates the contents of relevant parts of the ICC Statute and the Rules of Procedure and Evidence, augmented by references to the scant English-language literature available at the time of her writing. She meticulously covers all relevant topics: investigation, jurisdiction (including a very brief account of the applicable substantive law), international cooperation, trial procedure, appeals, and enforcement. This exercise in rehashing the existing legal set-up is particularly unproductive since a large part of the volume consists in a reprint of the ICC Statute and its Rules of Procedure and Evidence (the Court’s Regulations are consistently ignored).

The book’s main part on the procedural law of the ICC is preceded by a similarly structured account of the process before the ICTY and ICTR. From time to time, the author draws a connection from the ad hoc tribunals’ jurisprudence on procedural matters to parallel (or non-parallel) provisions of ICC law.

But such analytical nuggets are all too rare. Unfortunately, the book is particularly disappointing with respect to procedural theory. Calvo-Goller realizes that the ICC’s procedural arrangements often represent a compromise between Anglo-American and Continental legal traditions.

But her conceptual grasp of the “inquisitorial” systems seems insufficient for a critical analysis that might go beneath the surface.

An author who maintains that, in an “inquisitorial” system, “the defendant is expected to cooperate with the prosecution” (p. 146 note 635) can hardly be expected to sensibly analyze, e.g., the implications of admitting hearsay evidence, written transcripts and statements of anonymous witnesses on a “mixed” process (cf. pp. 280-286). And a characterization of the criminal process as an “effort to provide a trail [sic] procedure that balances between prosecution of indicted persons, the rights of the victims and the rights of the accused to a fair trial” (p. 217) hardly provides an adequate basis for a sophisticated discourse on the strengths and weaknesses of ICC procedure law.

Karin Calvo-Goller has undoubtedly invested much time and effort into this book, which – but for regrettably sloppy editing – might well serve as a first systematic introduction to the procedural issues confronting the ICC. What is still missing is a book that might help to resolve these issues.”

It should be noted that Karine Calvo-Goller complained about the terms of this review in a letter sent from Israel on June 12, 2007 to Joseph Weiler, asking him – according to the translation not contested by him – “*to remove Professor Weigen’s review from the Global Law Books site, and from any other related site under your direction or control without delay*”; in a letter dated June 14, 2007, Joseph Weiler responded at length to Karine Calvo-Goller, explaining the reasons why he could not defer to her request but he suggested publishing a reply to the review, a suggestion which she refused.

The objection of lack of jurisdiction

The accused’s counsel raised *in limine litis* the lack of territorial jurisdiction of the French criminal courts.

The territorial jurisdiction of the French criminal courts, which is linked to the territorial scope of criminal law, supposes in principle that the offence is committed or deemed to have been committed on French national territory, in other words one of its constituent facts took place in France; when the offence is committed abroad, French criminal law is only supposed to sanction offences in the cases strictly defined in the second section of Chapter III of the Criminal Code, dependent on the French nationality of the perpetrator or victim of the offence, the kind of offence and its seriousness.

The constituent element of the offence of public defamation which determines the place where it was committed is the publication; this offence is therefore deemed to have been committed in any place where the written statements were broadcast, the message was read or heard; more specifically, when the text is posted on line on a website, the pursuing party has to establish that it was actually published in France, in the jurisdiction of the court such party intends to apply to, before the end of a three-month statute of limitations from being posted on line.

In the present case, it is not disputed that the text in issue was posted on line on the American site globallawbooks.org on April 3, 2007; nevertheless the complainant does not establish that this text was accessible from France or was actually consulted in France before July 27, 2007, the date of the only bailiff’s report which has been produced; in these circumstances, as it has not been established that the text in issue was consulted on French territory before the end of the statute of limitations period, the Criminal Court does not have jurisdiction to rule on the accusations made against the accused in the referral order of the investigating judge, namely of having “*in Paris, on April 3, 2007, in any event on French national territory and for a time not covered by the statute of limitations, as Editor-in-Chief of the website www.globallawbooks.org, committed the offence of public defamation of an individual, by posting on line*” the above statements.

In addition, none of the conditions for the applicability of French law when the offence is committed abroad are met in this case.

The objection of lack of jurisdiction raised by the accused will therefore be accepted.

The abuse of process

Joseph Weiler is requesting EUR 10,000 on the basis of Article 472 of the Criminal Procedure Code to compensate the harm caused to him by the abusive proceeding brought by Karine Calvo-Goller; his claim is founded on both the completely unfounded nature of this action and the choice of the French criminal court, which has forced him to undertake costly travel.

As regards the complainant's choice of a French criminal court to apply to whereas, although she has dual French and Israeli nationality, she lives and works in Israel, the book which was the subject of the review was written in English, like the review published on an American site linked to an American university where Joseph Weiler works, and she explained to the Court that she chose the French courts rather than the American or Israeli courts for economic reasons – the cost of the procedure would have been higher for her – and also for reasons of preference, as she considered that only French law offered her a chance of being successful.

Karine Calvo-Goller has thus acknowledged that she practised what is called forum shopping, in other words looking around the world for the judicial system which seems to be the most favourable to the claim made by the person taking the initiative of applying to a court, and placing such person's adversary, for legal and also practical reasons due to the geographic or cultural distance, in the more disadvantageous situation; the choice, which was artificial in this case, of the French court, added to the choice of a criminal procedure by filing a complaint with an investigating judge resulting in dishonour and considerable expense for the accused, denotes this abuse of process.

In addition, Karine Calvo-Goller misjudged the scope of the French law of the press when she states that the review in issue could be held to be defamatory; in fact, the review of her book does not contain anything prejudicial to her honour and reputation and merely expresses, in terms which are in fact restrained, a scientific opinion of a work which never goes beyond the limits of free criticism to which any author of an intellectual work is exposed.

The bad faith of the complainant– who is a jurist familiar with French law since she indicates that she studied law in France – is therefore unquestionably established.

Joseph Weiler therefore rightly considers that the civil party has abused her right to bring legal action, on the one hand by accusing as defamatory statements which do not exceed the limits of academic criticism, an essential component of the freedom of research and expression, and on the other by artificially applying to a French criminal court.

The harm suffered by the accused as a result of the above will be fairly compensated by ordering the civil party to pay him EUR 8,000.

ON THESE GROUNDS

The Court, ruling publicly in criminal matters subject to appeal and in a judgement after adversarial proceedings as regards Joseph Weiler, the accused, and Karine Calvo-Goller, the civil party, and after deliberating in accordance with the law,

DECLINES JURISDICTION to rule on the libel action brought by Karine Calvo-Goller;

Ruling on the claim of Joseph Weiler,

ORDERS Karine Calvo-Goller to pay to Joseph Weiler the **EIGHT THOUSAND EUROS (EUR 8,000)** to compensate the harm caused by her abuse of process.