

KONONOV V. LATVIA (APPLICATION N° 36376/04) GRAND CHAMBER JUDGMENT¹

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VASILII KONONOV'S CONVICTION OF WAR CRIMES DURING SECOND WORLD WAR FOUND NOT TO HAVE VIOLATED ARTICLE 7 (NO PUNISHMENT WITHOUT LAW) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

PRINCIPAL FACTS

Vasiliy Kononov was born in Latvia in 1923. He was a Latvian national until 12 April 2000, when he was granted Russian nationality. In 1942 he was called up as a soldier in the Soviet Army. In 1943 he was dropped into Belarus territory (under German occupation at the time) near the Latvian border, where he joined a Soviet commando unit composed of members of the "Red Partisans".

According to the facts as established by the competent Latvian courts, on 27 May 1944 the applicant led a unit of Red Partisans wearing German uniforms on an expedition on the village of Mazie Bati, certain of whose inhabitants were suspected of having betrayed to the Germans another group of Red Partisans. The applicant's unit searched six farm buildings in the village. After finding rifles and grenades supplied by the Germans in each of the houses, the Partisans shot the six heads of family concerned. They also wounded two women. They then set fire to two houses and

¹ Grand Chamber judgments are final (Article 44 of the Convention).

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four people (three of whom were women) perished in the flames. In all, nine villagers were killed: six men – five executed and one killed in the burning buildings – and three women – one in the final stages of pregnancy. The villagers killed were unarmed; none attempted to escape or offered any form of resistance.

According to the applicant, the victims of the attack were collaborators who had delivered a group of 12 Partisans into the hands of the Germans some three months earlier. The applicant said that his unit had been instructed to capture those responsible so that they could be brought to trial. He further claimed that he had not personally led the operation or entered the village.

In July 1998 the Centre for the Documentation of the Consequences of Totalitarianism (*Totalitārisma seku dokumentēšanas centrs*), based in Latvia, forwarded an investigation file concerning the events of 27 May 1944 to the Latvian Principal Public Prosecutor. Subsequently, Mr Kononov was charged with war crimes.

On 30 April 2004 the Criminal Affairs Division of the Supreme Court ultimately found the applicant guilty of war crimes under Article 68-3 of the 1961 Criminal Code of the Soviet Socialist Republic of Latvia (the “1961 Latvian Criminal Code”)². Relying mainly on the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (“Geneva Convention (IV) 1949”), it convicted the applicant for the ill-treatment, wounding and killing of the villagers, finding in particular that burning a pregnant woman to death violated the special protection afforded to women during war. Furthermore, the applicant and his unit had violated Article 25 of the Hague Regulations 1907 which forbade attacks against undefended localities, such as the villagers’ farm buildings. Under Article 23(b) of the same Regulations, the applicant was also convicted separately of treacherous wounding and killing, as he and his unit had worn German uniforms during the Mazie Bati operation. Noting that he was aged, infirm and harmless, the Latvian courts imposed an immediate custodial sentence of one year and eight months.

The applicant lodged an unsuccessful appeal on points of law.

COMPLAINTS, PROCEDURE AND COMPOSITION OF THE COURT

The applicant complained, in particular, that the acts of which he had been accused had not, at the time of their commission, constituted an offence under either domestic or international law. He maintained that, in 1944 as a young soldier in a combat situation behind enemy lines, he could

² The 1961 Criminal Code replaced the existing 1926 Criminal Code of Soviet Russia which had been introduced by decree in 1940 when Latvia became part of the Union of Soviet Socialist Republics (“USSR”).

not have foreseen that those acts could have constituted war crimes, or have anticipated that he would subsequently be prosecuted. He also argued that his conviction following the independence of Latvia in 1991 had been a political exercise by the Latvian State rather than any real wish to fulfil international obligations to prosecute war criminals. He relied on Article 7 § 1 (no punishment without law) of the European Convention.

The application was lodged with the European Court of Human Rights on 27 August 2004.

In a judgment of 24 July 2008 the Court held, by four votes to three, that there had been a violation of Article 7 and, under Article 41 (just satisfaction), awarded the applicant 30,000 euros (EUR) in respect of non-pecuniary damage.

On 6 January 2009 the case was referred to the Grand Chamber under Article 43 at the Government's request.

Third-party comments were received from the Government of the Russian Federation and from the Lithuanian Government.

On 20 May 2009 a hearing was held in public in the Human Rights Building in Strasbourg.

Judgment was given by the Grand Chamber of 17, composed as follows:

Jean-Paul **Costa** (France), **President**,
 Christos **Rozakis** (Greece),
 Nicolas **Bratza** (the United Kingdom),
 Peer **Lorenzen** (Denmark),
 Françoise **Tulkens** (Belgium),
 Josep **Casadevall** (Andorra),
 Ireneu **Cabral Barreto** (Portugal),
 Dean **Spielmann** (Luxembourg),
 Renate **Jaeger** (Germany),
 Sverre Erik **Jebens** (Norway),
 Dragoljub **Popović** (Serbia),
 Päivi **Hirvelä** (Finland),
 Ledi **Bianku** (Albania),
 Zdravka **Kalaydjieva** (Bulgaria),
 Mihai **Poalelungi** (Moldova),
 Nebojša **Vučinić** (Montenegro), **judges**,
 Alan Vaughan **Lowe** (Latvia), **ad hoc judge**,
 and also Michael **O'Boyle**, **Deputy Registrar**

DECISION OF THE COURT

Had there been a sufficiently clear legal basis in 1944 for the crimes of which the applicant had been convicted?

Mr Kononov had been convicted under Article 68-3 of the 1961 Latvian Criminal Code, a provision introduced by the Supreme Council on 6 April 1993, which used the “relevant legal conventions” (such as the Geneva Convention (IV) 1949) as the basis for a precise definition of war crimes. The Latvian courts’ conviction of the applicant had, therefore, been based on international rather than domestic law.

By May 1944 the prevailing definition of a war crime had been an act contrary to the laws and customs of war; and international law had defined the basic principles underlying those crimes. States had been permitted (if not required) to take steps to punish individuals for such crimes, including on the basis of command responsibility. Consequently, during and after the Second World War, international and national tribunals had prosecuted soldiers for war crimes committed during the Second World War.

As to whether there had been a sufficiently clear and contemporary legal basis for the specific war crimes for which the applicant had been convicted, the Court began its assessment on the basis of a hypothesis that the deceased villagers could be considered to be “combatants” or “civilians who had participated in hostilities” (rather than “civilians”). The Court also recalled the “two cardinal principles” relied on by the International Court of Justice as applicable to armed conflict which constituted “the fabric of humanitarian law”, namely “protection of the civilian population and objects” and “the obligation to avoid unnecessary suffering to combatants”.

In that connection, and having regard notably to Article 23(c) of the Hague Regulations 1907, the villagers’ murder and ill-treatment had violated a fundamental rule of the laws and customs of war by which an enemy rendered *hors combat* – in this case not carrying arms – was protected. Nor was a person required to have a particular legal status or to formally surrender. As combatants, the villagers would also have been entitled to protection as prisoners of war under the control of the applicant and his unit and their subsequent ill-treatment and summary execution would have been contrary to the numerous rules and customs of war protecting prisoners of war. Therefore, like the Latvian courts, the Court considered that the ill-treatment, wounding and killing of the villagers had constituted a war crime.

Furthermore, the domestic courts had reasonably relied on Article 23(b) of the Hague Regulations 1907 to separately convict Mr Kononov of treacherous wounding and killing. At the relevant time wounding or killing had been considered treacherous if it had been carried out while unlawfully inducing the enemy to believe they had not been under threat of attack by, for example, making improper use of an enemy uniform, which the applicant and his unit indeed had done. Equally, there was a plausible legal basis for convicting Mr Kononov of a separate war crime as regards the burning to death of the expectant mother, given the special protection for women during war es-

tablished well before 1944 (ie Lieber Code 1863) in the laws and customs of war and confirmed immediately after the Second World War by numerous specific and special protections in the Geneva Conventions. Nor had there been evidence domestically, and it had not been argued before the Court, that it had been “imperatively demanded by the necessities of war” to burn down the farm buildings in Mazie Bati, the only exception under the Hague Regulations 1907 for the destruction of private property.

Indeed, the applicant had himself described in his version of events what he ought to have done namely, to have arrested the villagers for trial. Even if a partisan trial had taken place, it would not qualify as fair if it had been carried out without the knowledge or participation of the accused villagers, followed by their execution. Mr Kononov, having organised and been in control of the partisan unit which had been intent on killing the villagers and destroying their farms, had command responsibility for those acts.

In conclusion, even assuming as the applicant maintained that the deceased villagers could be considered to have been “civilians who had participated in hostilities” or “combatants”, there had been a sufficiently clear legal basis, having regard to the state of international law in 1944, for the applicant’s conviction and punishment for war crimes as the commander of the unit responsible for the attack on Mazie Bati on 27 May 1944. The Court added that, if the villagers were to be considered “civilians”, it followed that they would have been entitled to even greater protection.

Had the crimes been statute-barred?

The Court noted that the prescription provisions in domestic law were not applicable: the applicant’s prosecution required reference to international law both as regards the definition of such crimes and determination of any limitation period. The essential question was therefore whether, at any point prior to Mr Kononov’s prosecution, such action had become statute-barred by international law. The Court found that the charges had never been prescribed under international law either in 1944 or in developments in international law since. It therefore concluded that the prosecution of the applicant had not become statute-barred.

Could the applicant have foreseen that the relevant acts had constituted war crimes and that he would be prosecuted?

As to whether the qualification of the acts as war crimes, based as it was on international law only, could be considered to be sufficiently accessible and foreseeable to the applicant in 1944, the Court recalled that it had previously found that the individual criminal responsibility of a private soldier (a border guard) was defined with sufficient accessibility and foreseeability by a requirement to comply with international fundamental human rights instruments, which instruments did not, of themselves, give rise to individual criminal responsibility. While the 1926 Criminal Code did not contain a reference to the international laws and customs of war, this was not decisive since international laws and customs of war were in 1944 sufficient, of themselves, to found individual criminal responsibility.

The Court found that the laws and customs of war constituted particular and detailed regulations fixing the parameters of criminal conduct in a time of war, primarily addressed to armed forces and, especially, commanders. Given his position as a commanding military officer, the Court was of the view that Mr Kononov could have been reasonably expected to take special care in assessing the risks that the operation in Mazie Bati had entailed. Even the most cursory reflection by Mr Kononov, would have indicated that the acts, flagrantly unlawful ill-treatment and killing, had risked not only being counter to the laws and customs of war as understood at that time but also constituting war crimes for which, as commander, he could be held individually and criminally accountable.

As to the applicant's submission that it had been politically unforeseeable that he would be prosecuted, the Court recalled its prior jurisprudence to the effect that it was legitimate and foreseeable for a successor State to bring criminal proceedings against persons who had committed crimes under a former regime. Successor courts could not be criticised for applying and interpreting the legal provisions in force at the relevant time during the former regime, in the light of the principles governing a State subject to the rule of law and having regard to the core principles (such as the right to life) on which the European Convention system is built. Those principles were found to be applicable to a change of regime of the nature which took place in Latvia following the Declarations of Independence of 1990 and 1991.

Accordingly, the Latvian courts' prosecution and conviction of Mr Kononov, based on international law in force at the time of the acts he stood accused of, could not be considered unforeseeable. In conclusion, at the time when they were committed, the applicant's acts had constituted offences defined with sufficient accessibility and foreseeability by the laws and customs of war.

The Court therefore concluded, by 14 votes to three, that there had been no violation of Article 7.

Judge Rozakis expressed a concurring opinion, joined by Judges Tulkens, Spielmann and Jebens. Judge Costa expressed a dissenting opinion, joined by Judges Kalaydjieva and Poalelungi. The texts of these separate opinions are annexed to the judgment.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.