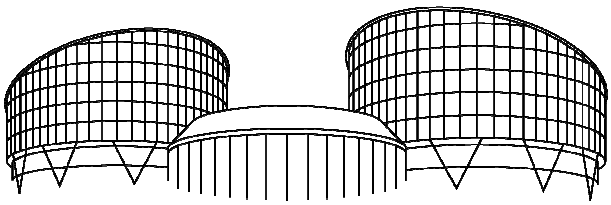

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF KONONOV v. LATVIA

(Application no. 36376/04)

JUDGMENT

STRASBOURG

17 May 2010

This judgment is final but may be subject to editorial revision.

In the case of Kononov v. Latvia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President,*
Christos Rozakis,
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Josep Casadevall,
Ireneu Cabral Barreto,
Dean Spielmann,
Renate Jaeger,
Sverre Erik Jebens,
Dragoljub Popović,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Mihai Poalelungi,
Nebojša Vučinić, *judges,*
Alan Vaughan Lowe, ad hoc *judge,*

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 20 May 2009 and on 24 February 2010,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 36376/04) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of the Russian Federation, Mr Vasiliy Kononov ("the applicant"), on 27 August 2004.

2. The applicant was represented by Mr M. Ioffe, a lawyer practising in Rīga. The Latvian Government ("the respondent Government") were represented by their Agent, Ms I. Reine. The Government of the Russian Federation exercised its right of third-party intervention in accordance with Article 36 § 1 of the Convention and were represented by the representative of the Russian Federation at the Court, Mr G. Matyushkin.

3. The applicant alleged, in particular, that his conviction for war crimes as a result of his participation in a military expedition on 27 May 1944 violated Article 7 of the Convention.

4. The application was allocated to the former Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 20 September 2007, following a hearing on admissibility and the merits of the case (Rule 54 § 3), the application was declared partly admissible by a Chamber of that Section composed of the following judges: Boštjan M. Zupančič, *President*, Corneliu Bîrsan, Elisabet Fura-Sandström, Alvina Gyulumyan, Egbert Myjer, David Thór Björgvinsson and Ineta Ziemele and also of Santiago Quesada, Section Registrar.

5. On 24 July 2008 that Chamber composed as above delivered a judgment in which it found, by four votes to three, that there had been a violation of Article 7 of the Convention and that just satisfaction should be awarded to the applicant.

6. By letter dated 24 October 2008 the respondent Government requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. On 6 January 2009 a panel of the Grand Chamber granted the request (Rule 73 of the Rules of Court).

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. Judge Ineta Ziemele, the judge elected in respect of Latvia, withdrew from sitting in the Grand Chamber (Rule 28) and the respondent Government appointed Mr. Vaughan Lowe, Professor of Public International Law at the University of Oxford, to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1). Judge Boštjan M. Zupančič, President of the former Third Section, also withdrew and Judge Karel Jungwiert, substitute judge, replaced him.

8. By letter dated 6 April 2009 the President of the Grand Chamber granted leave to the Lithuanian Government to make written submissions in the case (Rule 44 § 3(a) of the Rules of Court). The Government of the Russian Federation also exercised its right (rule 44 of the Rules of Court) to intervene before the Grand Chamber

9. The applicant and the respondent Government each filed a memorial on the merits and third-party comments were received from the Governments of the Russian Federation and Lithuania.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 20 May 2009 (Rule 59 § 3).

There appeared before the Court:

(a) *for the respondent Government*
Mrs I. REINE, *Agent*,
Ms K. INKUŠA,
W. SCHABAS, *Counsel*,

(b) *for the applicant*
Mr M. IOFFE, *Counsel*,
Mrs M. ZAKARINA,
Mr Y. LARINE *Advisers*,

(c) *for the Government of the Russian Federation*
Mr G. MATYUSHIN, *Representative of the Government*,
Mr N. MIKHAYLOV,
Mr P. SMIRNOV, *Advisers*.

The Court heard addresses by Mr Ioffe, Ms Reine, Mr Schabas and Mr Matyushin.

11. The President of the Grand Chamber accepted to the file on the day of the hearing additional submissions of the applicant and the respondent Government subsequently responded, as did the Government of the Russian Federation.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant was born in 1923 in the district of Ludza, Latvia. He held Latvian nationality until 2000, when he was granted Russian nationality by special decree.

A. Events prior to 27 May 1944

13. In August 1940 Latvia became part of the Union of Soviet Socialist Republics ("USSR") under the name "Soviet Socialist Republic of Latvia" ("Latvian SSR"). On 22 June 1941 Germany attacked the USSR. The advance of the German forces obliged the USSR forces to leave the Baltic region and withdraw towards Russia.

14. The applicant, who was living near the border at the time, followed. By 5 July 1941 all of Latvia had been overrun by the German forces. Following his arrival in USSR, the applicant was called up as a soldier in the Soviet Army in 1942. He was assigned to the reserve regiment of the Latvian Division. From 1942 to 1943 he received special training in sabotage operations, during which he learnt how to organise and lead commando raids behind enemy lines. On completion of training, he was promoted to the rank of sergeant. In June 1943 he and some twenty soldiers were parachuted into Belarus territory, then under German occupation, near the Latvian border and thus to the area where he was born. The applicant

joined a Soviet commando unit composed of members of the "Red Partisans" **(**a Soviet force which fought a guerrilla war against the German forces). In March 1944 he was put in command of a platoon by his two immediate superiors, whose primary objectives were, according to the applicant, to sabotage military installations, communication lines and German supply points, to derail trains and to spread political propaganda among the local population. He claimed to have derailed 16 military trains and caused 42 German military targets to be blown up.

B. Events of 27 May 1944, as established by the domestic courts

15. In February 1944 the German army had discovered and wiped out a group of Red Partisans led by Major Chugunov who were hiding in the barn of Meikuls Krupniks in the village of Mazie Bati. The German military administration had provided some men in Mazie Bati with a rifle and two grenades each. The applicant and his unit suspected the villagers of having spied for the Germans and of having turned in Chugunov's men to the enemy. They decided to take reprisals against the villagers.

16. On 27 May 1944 the applicant and his unit, armed and wearing *wehrmacht* uniforms to avoid arousing suspicion, entered the village of Mazie Bati. The inhabitants were preparing to celebrate Pentecost. The unit split up into a number of small groups each of which attacked a house on the applicant's orders.

17. Several of the partisans burst into the home of a farmer, Modests Krupniks, seized weapons they found there and ordered him out into the yard. When he pleaded with them not to kill him in front of his children, they ordered him to run towards the forest before opening fire when he did so. Krupniks was left, seriously wounded, on the edge of the forest, where he died the following morning.

18. Two other groups of Red Partisans attacked the homes of two other farmers, Meikuls Krupniks and Ambrozs Buļs. Meikuls Krupniks was seized in his bath and severely beaten. The partisans took the weapons they had found in the two villagers' homes to Meikuls Krupniks' house. There they fired several rounds of bullets at Ambrozs Buļs, Meikuls Krupniks and Krupniks' mother. Meikuls Krupniks and his mother were seriously injured. The partisans then doused the house and all the farm buildings with petrol and set them alight. Krupniks' wife, who was nine months pregnant, managed to escape, but was seized by the partisans and pushed through a window of the house into the flames. The following morning the surviving villagers found the charred remains of the four victims. Mrs Krupniks' body was identified by the burnt skeleton of a baby next to her.

19. A fourth group of partisans burst into Vladislavs Šķirmants' home, where they found him on his bed with his one year-old son. After finding a rifle and two grenades hidden in a cupboard, they ordered Šķirmants to go

out into the yard. They then bolted the door from the outside to prevent his wife following him, took him to a remote corner of the yard and shot him dead. A fifth group attacked the home of Juliāns Šķirmants. After finding and seizing a rifle and two grenades, the partisans took him out to the barn, where they killed him. A sixth group attacked Bernards Šķirmants' home, seizing the weapons they found there. They then proceeded to kill Mr Šķirmants, wound his wife and set all the farm buildings on fire. Mr Šķirmants' wife burnt to death in the fire with her dead husband.

20. While the prosecution also claimed that the partisans pillaged the village (stealing clothes and food), the Criminal Affairs Division of the Supreme Court ("the Criminal Affairs Division") and the Supreme Court Senate made specific findings as regards the seizure of weapons but not as regards the stealing of any other items.

C. The applicant's version of events

21. Before the Chamber, the applicant contested the factual findings of the domestic courts and submitted as follows.

22. He considered that all the deceased villagers were collaborators and traitors who had delivered Major Chugunov's platoon (which included women and a small child) to the Germans in February 1944: three women (Meikuls Krupniks' mother and wife and Bernards Šķirmants' wife) assured Chugunov's platoon that the *wehrmacht* was some distance away, but Šķirmants sent Krupniks to alert the German forces. The German soldiers arrived and machine-gunned the barn (in which Chugunov's platoon was hiding) with incendiary bullets, causing it to catch fire. Any member of Chugunov's group who tried to escape was shot dead. Krupniks' mother removed the coats from the bodies. The German military command rewarded the villagers concerned with firewood, sugar, alcohol and a sum of money. Meikuls Krupniks and Bernards Šķirmants were *Schutzmänner* (German auxiliary police).

23. Approximately a week before the events of 27 May 1944, the applicant and all the men in his platoon had received a summons from their commanding officer. He had informed them that an *ad hoc* military court had delivered judgment against the inhabitants of Mazie Bati implicated in the betrayal of Chugunov's men and that their platoon was required to execute the order. More specifically, they were required to "bring the six *Schutzmänner* from Mazie Bati to stand trial". The applicant maintained that he had refused to lead the operation (the villagers had known him since childhood so he feared for the safety of his parents who lived in the neighbouring village). The commanding officer therefore assigned the mission to another partisan and it was that other partisan who had given the orders during the Mazie Bati operation.

24. On 27 May 1944 the applicant had followed the men from his unit. He did not enter the village, but hid behind a bush from which he could see Modests Krupniks' house. Soon thereafter, he had heard cries and gunfire, and had seen smoke. A quarter of an hour later, the partisans returned alone. One had been wounded in the arm. Another was carrying six rifles, ten grenades and a large quantity of cartridges, all of which had been seized in the villagers' homes. His unit later told him that they had not been able to carry out their mission as the villagers had "fled while firing at them and the Germans had arrived". He denied that his unit had pillaged Mazie Bati. On returning to base, the partisans had been severely reprimanded by the commanding officer for failing to capture the wanted persons.

D. Subsequent events

25. In July 1944 the Red Army entered Latvia and on 8 May 1945 Latvian territory passed into the control of the USSR forces.

26. The applicant remained in Latvia after the war ended. He was decorated for his military activities with the Order of Lenin, the highest distinction awarded in the USSR. In November 1946 he joined the Communist Party of the Soviet Union. In 1957 he graduated from the USSR Interior Ministry Academy. Subsequently, and until his retirement in 1988, he worked as an officer in various branches of the Soviet police force.

27. On 4 May 1990 the Supreme Council of the Latvian SSR adopted the "Declaration of the Restoration of Independence of the Republic of Latvia", which declared Latvia's incorporation into the USSR in 1940 unlawful, null and void and restored force of law to the fundamental provisions of the 1922 Constitution. On the same day, the Supreme Council adopted the "Declaration on the Accession of the Republic of Latvia to Human Rights Instruments". By "accession" was meant a solemn, unilateral acceptance of the values embodied in the instruments concerned: most of the Conventions referred to in the declaration were subsequently signed and ratified by Latvia in accordance with the established procedure.

28. After two unsuccessful *coups d'état*, on 21 August 1991 the Supreme Council passed the Constitutional Law on the Statehood of the Republic of Latvia proclaiming full independence with immediate effect.

29. On 22 August 1996 the Latvian Parliament adopted the "Declaration on the Occupation of Latvia". The Declaration described the annexation of Latvian territory by the USSR in 1940 as a "military occupation" and an "illegal incorporation". The Soviet repossession of the territory at the end of the Second World War was referred to as the "re-establishment of an occupying regime".

E. The applicant's conviction

1. The first preliminary investigation and trial

30. In July 1998 the Centre for the Documentation of the Consequences of Totalitarianism, based in Latvia, forwarded an investigation file (on the events of 27 May 1944) to the Latvian Principal Public Prosecutor's Office. In August 1998 the applicant was charged with war crimes. In October 1998 he was brought before the Riga Central Court of First Instance and his pre-trial detention was ordered. In December 1998 a final bill of indictment was drawn up and the case file was forwarded to the Riga Regional Court.

31. The trial took place before the Riga Regional Court on 21 January 2000. The applicant pleaded not guilty. He repeated his account of the events of 27 May 1944, underlining that all the victims of the attack had been armed *Schutzmänner*. He denied any personal involvement in the events: as to the various documents (including press articles) which attested to the contrary, he explained that he had knowingly allowed the historical facts to be distorted for his own personal glory and benefit at that time.

32. The Regional Court found that the file contained ample evidence of his guilt and that the applicant had perpetrated acts in violation of the rules set out in the Charter of the International Military Tribunal ("IMT") Nuremberg, the Hague Convention (IV) 1907 and the Geneva Convention (IV) 1949. He was found guilty of offences contrary to Article 68-3 of the 1961 Criminal Code and an immediate six-year custodial sentence was imposed. Both the applicant and the prosecution appealed.

33. By judgment of 25 April 2000 the Criminal Affairs Division quashed the latter judgment and returned the case file to the Principal Public Prosecutor's Office with instructions to make additional inquiries. It considered there were lacunae in the Regional Court's reasoning and, in particular, that the Regional Court had failed to resolve decisive questions including whether Mazie Bati was in an "occupied territory", whether the applicant and his victims could be considered "combatants" and "non-combatants", respectively and whether the fact that the German military administration had armed the villagers would make them "prisoners of war" in the event of their arrest. In addition, the prosecution should have consulted specialists on history and international criminal law. It ordered the applicant's immediate release.

34. The Supreme Court Senate dismissed the prosecution's appeal by judgment of 27 June 2000, although it struck out the requirement to obtain specialist advice since questions of law were solely for the courts to decide.

2. The second preliminary investigation and trial

35. Following a fresh investigation, on 17 May 2001 the applicant was again charged under Article 68-3 of the 1961 Criminal Code.

36. The Latgale Regional Court heard the case and delivered judgment on 3 October 2003 acquitting the applicant of war crimes, but finding him guilty of banditry (contrary to Article 72 of the 1961 Criminal Code) carrying a sentence of between three and fifteen years' imprisonment.

Having analysed the situation in which Latvia had found itself as a result of the events in 1940 and the German invasion, the Regional Court concluded that the applicant could not be considered a "representative of the occupying forces". On the contrary, he had fought for the liberation of the country against the occupying forces of Nazi Germany. As Latvia had been incorporated into the USSR, the applicant's conduct had to be considered in the light of Soviet law. In addition, he could not reasonably have foreseen that he would one day be classified as a "representative of the Soviet occupation forces". With regard to the Mazie Bati operation, the Regional Court accepted that the villagers had collaborated with the German military administration and handed over Chugunov's group of Red Partisans to the *wehrmacht* and that the attack on the village had been carried out pursuant to the judgment of the *ad hoc* military court set up within the detachment of Red Partisans. The Regional Court also accepted that the deaths of the six men from Mazie Bati could be regarded as having been necessary and justified by considerations of a military order. However, it found that such justification did not extend to the killing of the three women or the burning down of the village buildings, for which acts as commanding officer, the applicant was responsible. Consequently, as they had acted beyond the authority of the *ad hoc* military court's judgment both the applicant and his men had committed an act of banditry for which they bore full responsibility but which was, however, statute barred.

37. Both parties appealed to the Criminal Affairs Division. Relying, *inter alia*, on Article 7 § 1 of the Convention, the applicant sought a full acquittal, arguing that the law had been applied against him retrospectively. The prosecution submitted that the Regional Court had made a number of serious errors of fact and law: it had neglected the fact that Latvia's incorporation into the USSR was contrary to the Latvian Constitution of 1922 and to international law and was therefore unlawful and that the Republic of Latvia had continued to exist *de jure*. Accordingly, the applicant's conduct in 1944 could and should have been analysed under Latvian and international law, rather than Soviet law. Further, the prosecution criticised the Regional Court's assessment of the evidence in the case. In its view, the court had relied on a series of assertions by the applicant that were not only unsupported by any evidence, but contrary to the tenor of the evidence notably, the applicant's claims that the villagers from Mazie Bati were armed collaborators of the German military administration who had helped the *wehrmacht* to wipe out Chugunov's partisans; that an *ad hoc* Partisan Tribunal had been set up within the

applicant's detachment; and that the purpose of the Mazie Bati operation was not summary execution but the arrest of the villagers.

38. By judgment of 30 April 2004 the Criminal Affairs Division allowed the prosecution's appeal, quashed the judgment of the Latgale Regional Court and found the applicant guilty of offences contrary to Article 68-3 of the 1961 Criminal Code. Having reviewed the evidence, it noted:

> "... Thus, V. Kononov and the Partisans from the special group he commanded stole the weapons that had been delivered to enable the villagers to defend themselves and killed nine civilians from the village, burning six of them – including three women, one in the final stages of pregnancy – alive in the process. They also burnt down two farms.
>
> By attacking those nine civilians from the village of Mazie Bati, who had not taken part in the fighting, by stealing their weapons and killing them, V. Kononov and the Partisans under his command ... committed an appalling violation of the laws and customs of war as set out in:
>
> – point (b) of the first paragraph of Article 23 of the Hague Convention of [18] October 1907 concerning the laws and customs of war on land, which is binding on all civilised nations and forbids the treacherous killing or wounding of members of the civil population; Article 25 [of the Hague Convention (IV) 1907], which prohibits attacks by whatever means of villages, dwellings or buildings which are undefended; and the first paragraph of Article 46 [of the Hague (IV) Convention 1907], which lays down that family honour and rights, and the lives of persons and private property must be respected.
>
> – Article 3 § 1, point (a), of the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War ..., which lays down that persons taking no active part in the hostilities must not be subjected to violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; point (d) [of the same paragraph], which provides ... that the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples is prohibited; Article 32, which prohibits murder, torture and all other brutality against protected persons; and Article 33, which provides that no protected person may be punished for an offence he or she has not personally committed and prohibits collective penalties, and all measures of intimidation, pillage and reprisals against protected persons and their property.
>
> – Article 51 § 2 of the Protocol Additional to the [aforementioned] Convention and relating to the Protection of Victims of International Armed Conflicts adopted on 8 June 1977 ..., which lays down that the civilian population as such, as well as individual civilians, shall not be the object of attack and prohibits acts or threats of violence the primary purpose of which is to spread terror among the civilian population; § 4, point (a), [of the same Article], which prohibits indiscriminate attacks not directed at a specific military objective; § 6 [of the same Article], which prohibits attacks against the civilian population or civilians by way of reprisals; Article 75 § 2, point (a) ..., which prohibits violence to the life, health, or physical or mental well-being of persons, in particular, murder, torture of all kinds, whether physical or mental, and mutilation; and point (d) [of the same paragraph], which prohibits collective punishments.
>
> By acting with particular cruelty and brutality and burning a pregnant villager alive ..., V. Kononov and his Partisans openly flouted the laws and customs of war set out

in the first paragraph of Article 16 of the Geneva Convention ..., which lays down that expectant mothers shall be the object of particular protection and respect.

Likewise, by burning down the [dwelling] houses and other buildings belonging to the villagers ... Meikuls Krupniks and Bernards Šķirmants, V. Kononov and his Partisans contravened the provisions of Article 53 of that Convention, which prohibits the destruction of real property except where such destruction is rendered absolutely necessary by military operations and Article 52 of the first Protocol Additional ... which lays down that civilian property must not be the object of attack or reprisals. ...

In the light of the foregoing, the acts perpetrated by V. Kononov and his men must be classified as war crimes within the meaning of the second paragraph, point (b), of Article 6 of the Charter of the International Military Tribunal for Nuremberg, which lays down that the murder or torture of civilians in occupied territory, the plunder of private property, the wanton destruction of villages, or devastation that is not justified by military necessity constitute violations of the laws or customs of war, that is to say war crimes.

The acts perpetrated by V. Kononov and his Partisans must also be classified as 'grave breaches' within the meaning of Article 147 of the ... Geneva Convention...

Consequently ..., V. Kononov is guilty of the offence under Article 68-3 of the Criminal Code...

The material in the case file shows that after the war, the surviving members of the families of the [people] killed were ruthlessly persecuted and subjected to reprisals. Following the restoration of Latvian independence, all those killed were rehabilitated. It was stated in their rehabilitation certificates that they [had] not committed 'crimes against peace [or] humanity, criminal offences ... or taken part ... in political repression ... by the Nazi regime'...

V. Kononov must be regarded as being subject [to the provision governing] the war crime [in question], in accordance with Article 43 of the First Protocol Additional to the Geneva Convention ..., which provides that combatants, that is to say, those who have the right to participate directly in hostilities, are the members of the armed forces of a Party to a conflict.

During the Second World War, V. Kononov was a member of the armed forces of a belligerent party, [namely] the USSR, and played an active part in military operations it had organised.

V. Kononov was sent on a special mission to Latvia with clear orders to fight behind enemy lines [and] to organise explosions there.

The platoon led by V. Kononov cannot be regarded as a group of volunteers because it was organised and led by the armed forces of one of the belligerent parties (the USSR); this is confirmed by the material in the case file. Similarly, at the time the crime of which he is accused was committed, V. Kononov was also acting as a combatant, leading an armed group which had the right to take part in military operations as an integral part of the armed forces of a belligerent party. ...

V. Kononov fought on Latvian territory occupied by the USSR and neither the fact that there was at that time dual occupation (Germany being the other occupying power), nor the fact that the USSR was part of the anti-Hitler coalition, affects his status as a war criminal...

The Criminal Affairs Division considers that all the villagers killed at Mazie Bati must be regarded as civilians within the meaning of Article 68-3 of the Criminal Code ... and the provisions of international law.

By virtue of Article 50 of the first Protocol Additional to the Geneva Convention ..., a civilian is defined as any person who does not belong to one of the categories of persons referred to in Article 43 of that Protocol or Article 4(A) of the Convention.

The attributes described in the aforementioned Articles, which are specific to [certain] categories of people and exclude them from the definition of civilians, did not apply to the villagers who were killed.

The fact that they had obtained weapons and munitions did not make them combatants and does not attest to any intention on their part to carry out any military operation. ...

It has been established ... that Chugunov's group of Partisans was wiped out by a German military detachment, this is also confirmed by reconnaissance headquarters' records ...

The case file does not contain any evidence to show that the villagers took part in that operation.

The fact that Meikuls Krupniks had informed the Germans of the presence of Partisans in his barn did not exclude him from the category of 'civilians'.

Mr Krupniks lived on territory occupied by Germany and there is no doubt that the presence of Partisans on his farm in wartime constituted a danger to both him and his family. ...

The fact that the villagers had weapons in their homes and [regularly] kept watch at night does not signify that they were taking part in military operations, but attests to a genuine fear of attack.

All citizens, whether in wartime or peacetime, have the right to defend themselves and their families if their lives are in danger.

The case file shows that the Red Partisans, Chugunov's group included, used violence against civilians; thus causing the civilian population to fear for its safety.

The victim [K.] gave evidence that the Red Partisans pillaged houses and often took food supplies.

The criminal conduct of the Partisans was noted in the reports of commanding officers [S.] and [Č.], which indicate that the Red Partisans pillaged and murdered and committed other crimes against the local population. Many people had the impression that they were not really engaged in combat but in foraying. ...

The case file shows that of the villagers who were killed at Mazie Bati in 1943 and 1944 [only] Bernards Šķirmants and [his wife] were members of the Latvian National Guard (*aizsargi*). The archives do not contain any information to show that any of the other victims had participated in the activities of that or any other organisation...

The Criminal Affairs Division considers that the fact that the aforementioned persons participated in the activities of the Latvian National Guard does not enable them to be classified as combatants, as they have not been found ... to have taken part in military operations organised by the armed forces of a belligerent party.

It has been established ... that no German military formation was in the village of Mazie Bati and that the villagers were not performing any military duty, but, [on the contrary], were farmers.

At the time of the events [in issue], they were at home and preparing to celebrate Pentecost. Among the dead were not only men (who were armed) but also women, one of whom was in the final stages of pregnancy and thus entitled to special ... protection under the Geneva Convention.

In classifying those who were killed as civilians, the Criminal Affairs Division is in no doubt about their status; however, even supposing it were, the First Protocol Additional to the Geneva Convention states that in case of doubt everyone shall be considered to be a civilian. ...

Since Latvia has not acceded to the Hague Convention of 1907, the provisions of that instrument cannot serve as a basis for [finding] a violation.

War crimes are prohibited and all countries are required to convict anyone guilty of them because such crimes are an integral part of international law, irrespective of whether the parties to the conflict were parties to international treaties. ..."

39. The Criminal Affairs Division excluded two allegations that had not been proved to the requisite standard namely, alleged murders and torture by the applicant himself. Given the finding of guilt of a serious offence and since he was by then aged, infirm and harmless, the Criminal Affairs Division imposed an immediate custodial sentence of one year and eight months which he was deemed to have served given his pre-trial detention.

40. By judgment of 28 September 2004 the Supreme Court Senate dismissed the applicant's appeal:

"... In finding that V. Kononov was a combatant and had committed the offence in question on the territory occupied by the USSR, the Criminal Affairs Division based its judgment on the decisions of the higher representative bodies of the Republic of Latvia, on the relevant international conventions and on other evidence, taken as a whole, which had been verified and assessed in accordance with the rules of criminal procedure.

In the declaration by the Supreme Council ... on 4 May 1990 on the restoration of the independence of the Republic of Latvia, it was acknowledged that the ultimatum delivered on 16 June 1940 to the Government of the Republic of Latvia by the former Stalinist USSR should be regarded as an international crime, as Latvia was occupied and its sovereign power abolished as a result. [However] the Republic of Latvia continued to exist as a subject of international law, as was recognised by more than fifty States worldwide...

After analysing the merits of the judgment, the Senate ... considers that, to the extent that the Criminal Affairs Division found that V. Kononov came within the scope of Article 68-3 of the Criminal Code, ... his acts were correctly characterised, as, in his capacity as a belligerent and combatant on Latvian territory occupied by the USSR, he has violated the laws and customs of war, in that he planned and directed a military operation aimed at taking reprisals against civilians, namely peaceable inhabitants of the village of Mazie Bati, nine of whom were killed ... [and] whose property was stolen [or] burnt.

As the court of appeal (rightly) noted, neither the fact that Latvian territory was subjected to two successive occupations in the Second World War by two States (one

of which was Germany; a 'dual occupation' in the words of the court of appeal), nor the fact that the USSR was a member of an anti-Hitler coalition, changed V. Kononov's status as a person guilty of a war crime.

As regards the allegation ... that, by finding V. Kononov guilty of the war crime in question the court [of appeal] violated the provisions of Article 6 of the Criminal Code ... concerning the temporal applicability of the criminal law, the [Senate] considers that it must be rejected for the following reasons.

The judgment shows that the court of appeal applied the Conventions, namely the Geneva Convention of 12 August 1949 .., and [its] Protocol Additional of 8 June 1977 ..., to the war crime which V. Kononov was accused of, irrespective of when they entered into force. [This is consistent] with the United Nations Convention of 26 November 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. [The court of appeal stated] that the Republic of Latvia, which had been occupied by the USSR, had not been able to take a decision [to that end] earlier. By referring to the principle of the non-applicability of statutory limitation, the court of appeal complied with the obligations arising under the international treaties and held the persons guilty of committing the offences concerned criminally liable irrespective of the date they were perpetrated.

Since the judgment characterised the violation of the laws and customs of war of which V. Kononov was accused as a war crime within the meaning of the second paragraph, point (b), of Article 6 of the Charter of the International Military Tribunal for Nuremberg ..., and, ... by virtue of the aforesaid United Nations Convention of 26 November 1968 ..., war crimes ... are not subject to statutory limitation, ... the Senate finds that his acts were correctly found to come within Article 68-3 of the Criminal Code...

There is no basis to the argument ... that ... the Declaration by the Supreme Council on 4 May 1990 on the Restoration of Independence of the Republic of Latvia and the Declaration by Parliament on 22 August 1996 on the Occupation of Latvia were mere political pronouncements which the court was precluded from using as a basis for its judgment and which could not be given binding force retrospectively.

The [Senate] finds that both declarations constitute State constitutional acts of indisputable legality.

In its judgment, [delivered after] assessing the evidence examined at the hearing, [the court of appeal] found that, in his capacity as a combatant, V. Kononov organised, commanded and led a Partisan military operation intent on taking reprisals through the massacre of the civilian population of the village of Mazie Bati and the pillage and destruction of the villagers' farms. That being so, the court of appeal rightly found that the acts of individual members of his group ... could not be seen as [mere] excesses on the part of those concerned.

In accordance with the criminal-law principles governing the responsibility of organised groups, members [of a group] are accomplices to the offence, independently of the role they play in its commission.

This principle of responsibility of the members of an organised group is recognised in the third paragraph of Article 6 of the Charter of the International Military Tribunal for Nuremberg, which lays down that leaders, organisers, instigators and accomplices participating in the execution of a common plan are responsible for all acts performed by any persons in the execution of that plan.

Consequently, the argument that the court of appeal had used an 'objective responsibility' test to find, in the absence of any evidence, V. Kononov guilty of acts perpetrated by members of the special group of Partisans he led, without examining his subjective attitude to the consequences, is unfounded. ...”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The 1926 Criminal Code

41. By a decree of 6 November 1940, the Supreme Soviet of the Latvian SSR replaced the existing Latvian Criminal Code with the 1926 Criminal Code of Soviet Russia, which Code thereby became applicable in Latvia (“the 1926 Criminal Code”). The relevant provisions of that Code during the Second World War were as follows:

“Article 2

“This Code shall apply to all citizens of the RSFSR [Russian Soviet Federated Socialist Republic] who commit socially dangerous acts on the territory of the RSFSR, or outside the USSR if they are apprehended on the territory of the RSFSR.

Article 3

The liability of citizens from the other Soviet Federated Socialist Republics shall be determined in accordance with the laws of the RSFSR if they have committed offences either on the territory of the RSFSR or outside the territory of the USSR if they have been apprehended and handed over to a court or investigating authority on the territory of the RSFSR.

The liability of citizens of the Federated Socialist Republics for offences committed on the territory of the Union shall be determined in accordance with the laws of the place where the offence was committed.

Article 4

The liability of aliens for offences committed on the territory of the USSR shall be determined in accordance with the laws of the place where the offence was committed.”

42. Chapter IX of the 1926 Criminal Code was entitled “Military Crimes” and included the following relevant provisions:

“Article 193-1

Military crimes are offences committed by military personnel in the service of the Red Army of Workers and Peasants or the Red Navy of Workers and Peasants, or by persons assigned to maintenance teams or periodically conscripted into territorial detachments, [when such offences] are against the established order of military service and, owing to their nature and meaning, cannot be committed by citizens not serving in the Army or Navy. ...”

“Article 193-3

Any failure by a serviceman to execute a legitimate order issued in combat shall entail the application of measures for the protection of society in the form of at least three years' imprisonment.

Where such a failure has a deleterious effect on combat operations, the ultimate measure for the protection of society [that is, the death penalty] shall apply. ...”

“Article 193-17

Foraying, that is to say divesting civilians of their belongings during combat by threatening them with weapons or on the pretext of requisitioning for military purposes, and removing personal belongings from the dead or injured for personal gain shall entail the application of the ultimate measure for the protection of society accompanied by confiscation of all the offender's belongings.

In the event of mitigating circumstances, [the sentence shall be reduced to] at least three years' imprisonment with strict solitary confinement.”

“Article 193-18

Unlawful acts of violence by servicemen in wartime or during combat shall entail the application of measures for the protection of society in the form of at least three years' imprisonment with strict solitary confinement.

In the event of aggravating circumstances, the ultimate measure for the protection of society [shall be applied].”

43. Article 14 (and the Notes to that Article) of the 1926 Criminal Code provided as follows:

“Criminal proceedings may not be instituted where:

(a) ten years have elapsed since the offence was committed, in the case of offences punishable by more than five years' imprisonment and those for which the law prescribes a minimum term of one year's imprisonment;

(b) five years have elapsed since the offence was committed, in the case of offences punishable by between one and five years' imprisonment and those for which the law prescribes a minimum term of six months' imprisonment;

(c) three years have elapsed since the offence was committed, in the case of all other offences.

The statute of limitations shall apply where no procedural steps or investigative measures have been taken in the case during the entire period and the perpetrator has not, during the period stipulated by this Article, committed any other offence falling into the same category or of at least equivalent seriousness.

Note 1 – In the case of prosecution for counter-revolutionary crimes, application of the statute of limitations in a given case is at the court's discretion. However, if the court finds that the statute of limitations cannot be applied, the sentence of execution by shooting must be commuted either to a declaration that the person concerned is an enemy of the workers, accompanied by withdrawal of his or her citizenship of the USSR and life-long banishment from the territory of the USSR, or to a term of imprisonment of not less than two years.

Note 2 – In the case of persons prosecuted for actively campaigning against the working class and the revolutionary movement in the exercise of high-level or secret duties under the Tsarist regime or in the service of the counter revolutionary governments during the [Russian] Civil War, both the application of the statute of limitations and the commuting of the sentence of execution by shooting are at the discretion of the court.

Note 3 – The limitation periods laid down by this Article do not apply to acts prosecuted under the present Code by means of administrative proceedings. Coercive measures in respect of such acts may only be imposed within one month of the acts being committed."

B. The 1961 Criminal Code

44. On 6 January 1961 the Supreme Soviet of the Latvian SSR replaced the 1926 Code with the 1961 Criminal Code which entered into force on 1 April 1961. The relevant provisions read as follows:

"Article 72 [*amended by Law of 15 January 1998]*

It shall be an offence punishable by between three and fifteen years' imprisonment ... or death ... to organise armed gangs with a view to attacking State undertakings, private undertakings, the authorities, organisations or private individuals or to be a member of such gangs or participate in attacks perpetrated by them."

"Article 226

"The offences set out in this code shall be deemed military crimes where they are committed by military personnel ... against the established order of military service. ..."

"Article 256 [*repealed by Law of 10 September 1991]*

"It shall be an offence punishable by between three and ten years' imprisonment or death to foray, unlawfully destroy property, engage in acts of violence against the population of a region liable to attack or to seize property unlawfully on the pretext of military necessity."

45. Article 45 of the 1961 Criminal Code stated that statutory limitation was not automatically applicable to crimes carrying the death penalty, but was within the discretion of the Court.

46. The 1961 Criminal Code remained in force (with some amendments) after Latvia regained its independence.

47. By a law passed on 6 April 1993, the Supreme Council inserted into the special section of the 1961 Criminal Code a new Chapter 1-a, which contained provisions criminalising acts such as genocide, crimes against humanity or peace, war crimes and racial discrimination.

48. A new Article 68-3 dealt with war crimes, and reads as follows:

"Any person found guilty of a war crime as defined in the relevant legal conventions, that is to say violations of the laws and customs of war through murder, torture, pillaging from the civil population in an occupied territory or from hostages or prisoners of war, the deportation of such people or their subjection to forced labour, or the unjustified destruction of towns and installations, shall be liable to life imprisonment or to imprisonment for between three and fifteen years."

49. The same law also inserted Article 6-1 into the 1961 Criminal Code permitting the retrospective application of the criminal law with respect to crimes against humanity and war crimes:

"Persons guilty of crimes against humanity, genocide, crimes against peace or war crimes may be convicted irrespective of when the crimes were committed."

50. Article 45-1, inserted by the same law into the 1961 Criminal Code, exempted such offences from limitation.

"The statutory limitation of criminal liability shall not apply to persons guilty of crimes against humanity, genocide, crimes against peace or war crimes."

C. The 1998 Criminal Code

51. The 1961 Criminal Code was replaced by the 1998 Criminal Code from 1 April 1999. The substance of Articles 6-1, 45-1 and 68-3 of the 1961 Criminal Code reappeared in the 1998 Criminal Code.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

52. The laws of war were not only to be found in treaties, "but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts"[1].

A. 'Geneva law' (1864-1949) on the treatment of persons and possessions under the control of the enemy

1. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field ("the Geneva Convention 1864")

53. The first Geneva Convention (later superseded) provided for minimum standards for "wounded or sick combatants" so that "**to** whatever nation they may belong" they had to be "collected and cared for".

2. Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field ("the Geneva Convention 1906")

54. This Convention conferred protection and prisoner of war status on wounded and sick combatants in the power of the enemy.

"Art. 1. Officers, soldiers, and other persons officially attached to armies, who are sick or wounded, shall be respected and cared for, without distinction of nationality, by the belligerent in whose power they are.

Art. 2. Subject to the care that must be taken of them under the preceding Article, the sick and wounded of an army who fall into the power of the other belligerent become prisoners of war."

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[1] *Trial of the Major War Criminals*, Nuremberg, 14 November 1945-1 October 1946.

3. Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field ("The Geneva Convention 1929")

55. The Convention (replaced by the Geneva Convention (I) 1949) responded to the experience of the First World War. It did not include a general participation clause:

> "Art. 1. Officers and soldiers and other persons officially attached to the armed forces who are wounded or sick shall be respected and protected in all circumstances; they shall be treated with humanity and cared for medically, without distinction of nationality, by the belligerent in whose power they may be. ...
>
> Art. 2. Except as regards the treatment to be provided for them in virtue of the preceding Article, the wounded and sick of an army who fall into the hands of the enemy shall be prisoners of war, ..."

4. Convention Relative to the Treatment of Prisoners of War ("The Convention on Prisoners of War 1929")

56. This Convention provided a comprehensive set of rules for the treatment of prisoners of war. The First World War revealed deficiencies in the relevant provisions of the Hague Convention and Regulations 1907 (see paragraphs 85-91 below) which were to be supplemented by this Convention. It recognised that the entitlement to prisoner of war status was derived from holding the status of legal combatant under the Hague Regulations 1907. It introduced protections for prisoners of war and ensured that they were treated humanely. Women were the subject of special protection.

> "Article 1. The present Convention shall apply without prejudice to the stipulations of Part VII:
>
> (1) To all persons referred to in Articles 1, 2 and 3 of the Regulations annexed to the Hague Convention (IV) of 18 October 1907, concerning the Laws and Customs of War on Land, who are captured by the enemy.
>
> (2) To all persons belonging to the armed forces of belligerents who are captured by the enemy in the course of operations of maritime or aerial war, subject to such exceptions (derogations) as the conditions of such capture render inevitable. Nevertheless these exceptions shall not infringe the fundamental principles of the present Convention; they shall cease from the moment when the captured persons shall have reached a prisoners of war camp.
>
> Art. 2. Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them. They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity. Measures of reprisal against them are forbidden.
>
> Art. 3. Prisoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex. Prisoners retain their full civil capacity."

"Art. 46. Prisoners of war shall not be subjected by the military authorities or the tribunals of the detaining Power to penalties other than those which are prescribed for similar acts by members of the national forces. ..."

"Art. 51. Attempted escape, even if it is not a first offence, shall not be considered as an aggravation of the offence in the event of the prisoner of war being brought before the courts for crimes or offences against persons or property committed in the course of such attempt.

After an attempted or successful escape, the comrades of the escaped person who aided the escape shall incur only disciplinary punishment therefor."

5. Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality who are on Territory belonging to or occupied by a Belligerent ("Draft Tokyo Convention of 1934")

57. This draft Convention set out to improve the standards of protection of enemy civilians living in occupied territory and on belligerent territory. It was due for discussion at a conference in 1940, but the Second World War intervened. The draft was later influential in the discussions on the Geneva Convention (IV) 1949 and it is notable for its negative definition of civilians (consistent with the Oxford Manual 1880) and for its distinction between combatants and civilians:

"Art. 1. Enemy civilians in the sense of the present Convention are persons fulfilling the two following conditions:

(a) that of not belonging to the land, maritime or air armed forces of the belligerents, as defined by international law, and in particular by Articles 1, 2 and 3 of the Regulations attached to the Fourth Hague Convention, of October 18, 1907, concerning the Laws and Customs of War on Land;

(b) that of being the national of an enemy country in the territory of a belligerent, or in a territory occupied by the latter."

58. Articles 9 and 10 required protection of "enemy civilians" against violence and prohibited measures of reprisals against them.

6. Geneva Convention relative to the Treatment of Prisoners of War ("Geneva Convention (III) 1949").

59. This Convention provided, in so far as relevant as follows:

"Art 5. The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

7. Geneva Convention relative to the Protection of Civilian Persons in Time of War ("Geneva Convention (IV) 1949")

60. Special protection was offered to expectant mothers in Article 16:

> "The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect. As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment."

61. Article 32 includes specific protections from ill-treatment for persons in the power of the enemy and Article 33 recognises a prohibition on collective penalties, pillage and reprisals against protected persons.

62. Article 53 recognises that real or personal private property should not be destroyed unless absolutely necessary.

B. The laws and customs of war prior to the Second World War

1. Instructions for the Government of Armies of the United States ("US") in the Field ("the Lieber Code 1863")

63. The Lieber code is regarded as the first attempt to codify the laws and customs of war. Although only applicable to American forces, it represented a summary of the laws and customs of war existing at the time and was influential in later codifications.

64. Articles 15 and 38 included the rule that life or property could be seized or destroyed when required by military necessity (see also Article 16 of the same Code below):

> "Art. 15. Military necessity admits of all direct destruction of life or limb of 'armed' enemies, and of other persons whose destruction is incidentally 'unavoidable' in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God."

> "Art. 38. Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the army or of the United States."

65. Article 16 contained a general standard of behaviour in armed conflict and a prohibition on perfidy:

> "Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor

of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult."

66. Articles 19 and 37 contained measures of special protection for women in the context of armed conflict:

"Art. 19. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed."

"Art. 37. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women: and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished."

67. Article 22 contained the principle of distinction between combatants and civilians:

"Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit."

68. Article 44 contained a catalogue of offences and of severe punishments for a guilty soldier:

"All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior."

69. Article 47 referred to punishment under domestic penal codes:

"Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred."

70. The Code illustrated the two main rights of a "combatant": prisoner of war status (Article 49) and protection from prosecution for certain acts which would be criminal for a civilian (Article 57):

"Art. 49. A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers, of whatever species of arms; all men who belong to the rising en masse of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war."

"Art. 57. So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, colour, or condition, when properly organized as soldiers, will not be treated by him as public enemies."

71. The notion of *levée en masse* was covered in Article 51:

"If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy 'en masse' to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war."

72. Article 59 indicated individual criminal responsibility for violations of the laws and customs of war:

"A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities. All prisoners of war are liable to the infliction of retaliatory measures."

73. Articles 63-65 asserted that the use of enemy uniforms was outlawed as an act of perfidy, removing the protections of the laws and customs of war from persons who engaged in such conduct:

"Art. 63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

Art. 64. If American troops capture a train containing uniforms of the enemy, and the commander considers it advisable to distribute them for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy.

Art. 65. The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war."

74. Together with Article 49, Article 71 described a particular status later referred to as *hors de combat* under international law:

"Art. 71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed."

75. Articles 76 and 77 created obligations to treat prisoners of war with humanity and proportionately in the event of an escape attempt.

"Art. 76. Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity.

Art. 77. A prisoner of war who escapes may be shot or otherwise killed in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape."

76. Article 101 contained a prohibition of treacherous wounding (at the time understood to be the same as perfidious wounding):

"While deception in war is admitted as a just and necessary means of hostility, and is consistent with honourable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them."

77. Articles 88 and 104 contained provisions for punishing spies:

"Art. 88. A spy is a person who secretly, in disguise or under false pretence, seeks information with the intention of communicating it to the enemy. The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy."

"Art. 104. A successful spy or war-traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a person individually dangerous."

2. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight ("the St Petersburg Declaration 1868")

78. This Declaration was the first formal agreement prohibiting the use of certain weapons in war. The Preamble recalled three principles of the laws and customs of war: the only legitimate object during war is to weaken the military forces of the enemy; there is a limit to the means which can be employed against enemy forces; and the laws and customs of war do not condone violence against those *hors de combat*.

3. Project of an International Declaration concerning the Laws and Customs of War ("the Draft Brussels Declaration 1874)

79. This Declaration was never adopted at the Diplomatic Conference in Brussels in 1874, although it was another influential codification exercise. The relevant Articles of the Declaration read as follows:

"Who should be recognized as belligerents combatants and non-combatants

Art. 9. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. That they be commanded by a person responsible for his subordinates;

2. That they have a fixed distinctive emblem recognizable at a distance;

3. That they carry arms openly; and

4. That they conduct their operations in accordance with the laws and customs of war. In countries where militia constitute the army, or form part of it, they are included under the denomination 'army'. ...

Art. 10. The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war.

Art. 12. The laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy.

Art. 13. According to this principle are especially 'forbidden': ...

(b) Murder by treachery of individuals belonging to the hostile nation or army;

(c) Murder of an enemy who, having laid down his arms or having no longer means of defense, has surrendered at discretion; ...

(e) The employment of arms, projectiles or material calculated to cause unnecessary suffering, as well as the use of projectiles prohibited by the Declaration of St. Petersburg of 1868;

(f) Making improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

(g) Any destruction or seizure of the enemy's property that is not imperatively demanded by the necessity of war. ...”

“Art. 20. A spy taken in the act shall be tried and treated according to the laws in force in the army which captures him.”

“Art. 23. Prisoners of war are lawful and disarmed enemies. They are in the power of the hostile Government, but not in that of the individuals or corps who captured them. They must be humanely treated. Any act of insubordination justifies the adoption of such measures of severity as may be necessary. All their personal belongings except arms shall remain their property.”

“Art. 28. Prisoners of war are subject to the laws and regulations in force in the army in whose power they are. Arms may be used, after summoning, against a prisoner of war attempting to escape. If recaptured he is liable to disciplinary punishment or subject to a stricter surveillance.

If, after succeeding in escaping, he is again taken prisoner, he is not liable to punishment for his previous acts.”

4. The Laws of War on Land 1880 (“the Oxford Manual 1880”)

80. The Oxford Manual 1880, influenced by the draft Brussels Declaration 1874 and drafted by the Institute of International Law, was designed to assist Governments in formulating national legislation on the laws and customs of war. The relevant Articles read as follows:

“Art. 1. The state of war does not admit of acts of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts. This rule implies a distinction between the individuals who compose the “armed force” of a State and its other 'ressortissants'. A definition of the term “armed force” is, therefore, necessary.

Art. 2. The armed force of a State includes:

1. The army properly so called, including the militia;

2. The national guards, landsturm, free corps, and other bodies which fulfil the three following conditions:

(a) That they are under the direction of a responsible chief;

(b) That they must have a uniform, or a fixed distinctive emblem recognizable at a distance, and worn by individuals composing such corps;

(c) That they carry arms openly;

3. The crews of men-of-war and other military boats;

4. The inhabitants of non-occupied territory, who, on the approach of the enemy, take up arms spontaneously and openly to resist the invading troops, even if they have not had time to organize themselves.

Art. 3. Every belligerent armed force is bound to conform to the laws of war.

Art. 4. The laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy. They are to abstain especially from all needless severity, as well as from all perfidious, unjust, or tyrannical acts."

"Art. 8. It is forbidden: ...

(b) To make treacherous attempts upon the life of an enemy; as, for example, by keeping assassins in pay or by feigning to surrender;

(c) To attack an enemy while concealing the distinctive signs of an armed force;

(d) To make improper use of the national flag, military insignia or uniform of the enemy, of the flag of truce and of the protective signs prescribed by the 'Geneva Convention'.

Art. 9. It is forbidden: ...

(b) To injure or kill an enemy who has surrendered at discretion or is disabled, and to declare in advance that quarter will not be given, even by those who do not ask it for themselves. ...

Art. 20. ...

(e) Who may be made prisoners of war.

Art. 21. Individuals who form a part of the belligerent armed force, if they fall into the hands of the enemy, are to be treated as prisoners of war, in conformity with Articles 61 et seq. ..."

81. The section containing Articles 23-26 was entitled "Spies" and dealt with their treatment:

"Art. 23. Individuals captured as spies cannot demand to be treated as prisoners of war. But:

Art. 24. Individuals may not be regarded as spies, who, belonging to the armed force of either belligerent, have penetrated, without disguise, into the zone of operations of the enemy, -- nor bearers of official dispatches, carrying out their mission openly, nor aeronauts (Article 21).

In order to avoid the abuses to which accusations of espionage too often give rise in war it is important to assert emphatically that:

Art. 25. No person charged with espionage shall be punished until the judicial authority shall have pronounced judgment.

Moreover, it is admitted that:

Art. 26. A spy who succeeds in quitting the territory occupied by the enemy incurs no responsibility for his previous acts, should he afterwards fall into the hands of that enemy."

82. Article 32(b) prohibited, *inter alia*, the destruction of public or private property, if this destruction was "not demanded by an imperative necessity of war".

83. Chapter III outlined the rules for captivity of prisoners of war. It described the legal basis for their detention (it was not a punishment or vengeance), it provided that they must be treated humanely (Article 63) and that arms could be used only if the prisoner attempted to flee (Article 68).

84. Part III of the Manual provided for punishments for violations of the rules in the Manual and, in the event that the alleged offender could not be detained, the Manual outlined the limited circumstances for legitimate belligerent reprisals:

"If any of the foregoing rules be violated, the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are. Therefore:

Art. 84. Offenders against the laws of war are liable to the punishments specified in the penal law.

This mode of repression, however, is only applicable when the person of the offender can be secured. In the contrary case, the criminal law is powerless, and, if the injured party deem the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, no other recourse than a resort to reprisals remains. Reprisals are an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty. They are also at variance with the rule that each belligerent should conform to the rules of war, without reciprocity on the part of the enemy. This necessary rigour, however, is modified to some extent by the following restrictions:

Art. 85. Reprisals are formally prohibited in case the injury complained of has been repaired.

Art. 86. In grave cases in which reprisals appear to be absolutely necessary, their nature and scope shall never exceed the measure of the infraction of the laws of war committed by the enemy. They can only be resorted to with the authorization of the commander in chief. They must conform in all cases to the laws of humanity and morality.

If any of the foregoing rules be violated, the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are."

5. Hague Convention (IV) respecting the Laws and Customs of War on Land 1907 and the annexed Regulations

85. The international peace conference in the Hague in 1899 resulted in the adoption of four Conventions including the Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annexed Regulations. These instruments were replaced, following the second Hague International Peace Conference in 1907, by the Hague Convention (IV)

respecting the Laws and Customs of War on Land 1907 and the annexed Regulations ("The Hague Convention and Regulations 1907"**).** They were based on the Draft Brussels Declaration 1874 and the Oxford Manual 1880.

86. The Preamble to the Hague Convention 1907 reads as follows:

> "Seeing that while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert;
>
> Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;
>
> Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible;
>
> Have deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land.
>
> According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.
>
> It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice;
>
> On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.
>
> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.
>
> They declare that it is in this sense especially that Articles I and 2 of the Regulations adopted must be understood."

87. The eighth paragraph of the Preamble cited above, is known as the "Martens Clause". An almost identical clause had already been included in the preamble to the Hague Convention (II) of 1899 and it was in substance repeated in each of the Geneva Conventions (I-IV) 1949 as well as in the Protocol Additional 1977 (paragraph 134-142 below).

88. Article 2 of the Hague Convention 1907 contained a "*si omnes*" solidarity clause to the effect that the Hague Convention and Regulations 1907 only applied between the Contracting States and then only if all the belligerents were Contracting States. However, the IMT Nuremberg judgment later confirmed that by 1939 the Hague Convention and Regulations 1907 were regarded as being declaratory of the laws and customs of war (paragraphs 118 and 207 below).

89. The other relevant provisions of the Hague Convention 1907 are as follows:

> "Art. 1. The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention. ...
>
> Art. 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

90. Articles 1 and 2 of the Hague Regulations 1907 read as follows:

> "Art. 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
>
> 2. To have a fixed distinctive emblem recognizable at a distance;
>
> 3. To carry arms openly; and
>
> 4. To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'.
>
> Art. 2. The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war."

91. Chapter II (Articles 4-20) of the Hague Regulations 1907 included the rules identifying prisoners of war, the requirement to treat prisoners of war humanely (Article 4) and the limitation of any measures taken for insubordination to those necessary (Article 8). The Regulations continued:

> "Art. 22. The right of belligerents to adopt means of injuring the enemy is not unlimited.
>
> Art. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden.
>
> (a) ...
>
> (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
>
> (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
>
> (d) ...
>
> (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering;
>
> (f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

(h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

(i) ..."

"Art. 29. A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. ...

Art. 30. A spy taken in the act shall not be punished without previous trial.

Art. 31. A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."

6. Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties ("International Commission Report 1919")

92. This Commission was charged by the Paris Peace Conference to prepare a Report, *inter alia*, on facts concerning breaches of the laws and customs of war by the forces of the German Empire and allies (including Turkish officials), on the degree of responsibility for such offences attaching to members of the enemy forces as well as on the constitution and procedure of a tribunal appropriate for the trial of such offences. The Report was completed in 1919 and it drew up a list of approximately 900 alleged war criminals and proposed charges against Turkish officials and others for "crimes against the laws of humanity", relying on the Martens Clause of the Hague Convention 1907. It also drew up a non-exhaustive list of 32 offences committed during the war regarded as contrary to existing conventions and customs including: murders and massacres; torture of civilians; the imposition of collective penalties; wanton devastation and destruction of property; as well as the ill-treatment of wounded and prisoners of war.

93. As regards individual criminal liability, the Commission stated:

"All persons belonging to enemy countries, however their position may have been, without distinction of rank, including Chiefs of State, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."

7. The Treaty of Versailles 1919

94. The Treaty of Versailles 1919 contained a number of provisions providing for the international trial and punishment of war criminals including the German Emperor. The prosecution provisions were never applied: the Emperor's extradition was refused and an international trial of other alleged war criminals was dropped in favour of a trial by Germany

itself. Article 229 also retained the possibility of bringing persons guilty of criminal acts, against the nationals of one of the allied and associated Powers, before the military tribunals of that power.

8. Treaty of Sèvres 1920

95. The Treaty of Sèvres (the peace agreement between the Allied Powers and Turkey following the First World War), contains similar provisions (Articles 226-230) to those outlined in the Treaty of Versailles as regards the pursuit before military tribunals by the Allied Powers of Turkish officials accused of acts violating the laws and customs of war. This treaty was never ratified and it was superseded by a Declaration of Amnesty (signed on the same date as the Treaty of Lausanne 1923) by France, the United Kingdom ("UK"), Greece, Italy, Japan, Romania and Turkey. The Declaration provided that Greece and Turkey granted "full and complete amnesty ... for all crimes or offences committed during the same period which were evidently connected with the political events which have taken place during that period" (the relevant period being 1 August 1914 to the 20 November 1922).

9. Draft Convention for the Protection of Civilian Populations Against New Engines of War ("Draft Amsterdam Convention 1938")

96. This Convention was prepared by the International Law Association but never adopted by States. Its negative definition of a civilian population was consistent with the definition in the Oxford Manual 1880:

> "Art. 1. The civilian population of a State shall not form the object of an act of war. The phrase "civilian population" within the meaning of this Convention shall include all those not enlisted in any branch of the combatant services nor for the time being employed or occupied in any belligerent establishment as defined in Article 2."

C. Practice prior to the Second World War

1. U.S. courts-martial 1899-1902, Philippines[2]

97. In 1901 and 1902 US courts-martial tried a number of US military personnel accused of, *inter alia*, violations of the laws of war during the US counter-insurgency campaign in the Philippines and, notably, of extra-judicial executions. Few in number, the submissions of the Judges-Advocate General and the reviewing authorities contained comments on the laws and customs of war on matters including the responsibility of commanding

[2] G. Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contribution to the National Case Law on War Crimes, Journal of International Criminal Justice* 1 (2003), pp. 135-150, with case citations therein.

officers and the treatment of prisoners of war. These comments were influential in later codifications. These trials constituted an early example of prosecutions at a national level of national military personnel accused of crimes against the enemy contrary to the laws of war.

98. In the trial of *Major Waller*, the reviewing authority observed:

> "the laws of war do not sanction, and the spirit of the age will not suffer that any officer may, upon the dictates of his own will, inflict death upon helpless prisoners committed to his care. Any other view looks to the method of the savage and away from the reasonable demand of civilised nations that war shall be prosecuted with the least possible cruelty and injustice."

99. In *Major Glenn*'s case, the Judge Advocate pointed out that, even if US soldiers were operating in a difficult situation against isolated bands of insurgents acting as guerrillas in flagrant disregard of the rules of civilised war, they were not relieved of "their obligation to adhere to the rules of war in the efforts put forth by them ... to suppress the insurrection and restore public order."

100. At the trial of *Lieutenant Brown* for the murder of a prisoner of war, the Judge Advocate noted that there existed a 'state of public war' in the Philippines and that the culpability of the accused should therefore have been determined not by the *lex loci* but from the standpoint of international law which, in that case, meant the rules and customs of war.

2. "The Leipzig Trials"

101. Further to the Treaty of Versailles, Germany brought proceedings against persons before the Supreme Court in Leipzig. The Allies presented 45 cases (out of the almost 900 files included in the International Commission Report 1919) concerning the treatment of prisoners of war and the wounded as well as an order to torpedo a British hospital ship. The trials took place in 1921. Twelve trials took place in 1921 resulting in 6 acquittals and six convictions (the sentences imposed being symbolic). The Allies decided to refer no more cases to the German courts.

102. The convictions relied mainly on German military law but there were some express references to international law notably, in the *Llandovery Castle* decision:

> "The firing on the boats was an offence against the law of nations. In war on land the killing of unarmed enemies is not allowed [Hague Regulations 1907], para. 23 (c)), similarly in war at sea, the killing of shipwrecked people, who have taken refuge in life-boats, is forbidden. .... Any violation of the law of nations in warfare is, as the Senate has already pointed out, a punishable offence, so far as in general, a penalty is attached to the deed. The killing of enemies in war is in accordance with the will of the State that makes war (whose laws as to the legality or illegality on the question of killing are decisive), only in so far as such killing is in accordance with the conditions and limitations imposed by the law of nations. .... The rule of international law, which is here involved, is simple and universally known. No possible doubt can exist with

> regard to the question of its applicability. The court must in this instance affirm Patzig's guilt of killing contrary to international law." [3]

3. The prosecutions of agents of Turkey.

103. The UK made considerable efforts to prosecute Turkish officers for ill-treating prisoners of war and for other crimes during the First World War. The UK was in favour of the crimes being prosecuted by British courts-martial in the occupied territories since the crimes were not "within the sphere of municipal law" but were governed by "the customs of war and rules of international law"[4]. A number of courts-martial were launched in 1919, but intervening domestic considerations in Turkey prevented them being pursued. Turkish courts-martial were also held and, while they were charged on the basis of the Turkish Criminal Code, certain convictions were based on "humanity and civilisation". As noted above, the Treaty of Lausanne 1923 put an end to these prosecutions.

D. Prosecuting war crimes during the Second World War

1. Declaration on German War Crimes signed by Representatives of Nine Occupied Countries ("St James' Declaration 1942")

104. In November 1940 the representatives of the exiled Governments of Poland and Czechoslovakia made allegations of violations of the laws of war against German troops. For the British Prime Minister, the prosecution of war crimes was part of the war effort: indeed, it was so for all States occupied by Germany and for China as regards Japanese occupying troops[5]. In London in 1942 representatives from territories occupied by Axis forces adopted the St James' Declaration on war crimes and punishment. Its Preamble recalled that international law and, in particular the Hague Convention 1907, did not permit belligerents in occupied countries to perpetrate acts of violence against civilians, to bring into disrepute laws in force or to overthrow national institutions. The Declaration went on:

> "1. Affirm that acts of violence thus perpetrated against civilian populations are at variance with accepted ideas concerning acts of war and political offenses as these are understood by civilized nations; ...
>
> 3. Place amongst their principal war aims punishment through the channel of organized justice of those guilty and responsible for these crimes, whether they have ordered them, perpetrated them or in any way participated in them;

---

[3] Judgment in the case of *Lieutenants Dithmar and Boldt, Hospital ship "Llandovery Castle"*, July 16, 1921.

[4] Dadrian, Vahakn N., "*Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*", 14 Yale Journal of International Law, 1989, pp. 221-334.

[5] *History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty's Stationery, London 1948, p. 91.

4. Determine in the spirit of international solidarity to see to it that (A) those guilty and responsible, whatever their nationality, are sought for, handed over to justice and judged; (B) that sentences pronounced are carried out."

105. Following this Declaration, the United Nations ("UN") War Crimes Commission ("UNWCC") was established (1943). It was to compile evidence of war crimes which files served as warrants for prosecution by military authorities of those accused[6]. By the end of its mandate it had succeeded in compiling 8178 files concerning persons suspected of war crimes. The Commission adopted in full the list of offences in the International Commission Report of 1919 (paragraph 92 above) to be adapted where appropriate to the conditions of the Second World War.

2. Prosecution of war crimes by the USSR

106. As early as November 1941 the USSR informed all countries with which it had maintained diplomatic relations of the war crimes committed by, in particular, Nazi Germany in the occupied territories[7]. In order to record the crimes allegedly committed by the German forces and to establish the identity of those guilty so as to bring them to justice, a Decree dated 2 November 1942 established the "*Extraordinary State Commission for ascertaining and investigating crimes perpetrated by the Germano-Fascist invaders and their accomplices, and the damage inflicted by them on citizens, collective farms, social organizations, State enterprises and institutions of the USSR*". The Commission's work was used in the later "Krasnodar" and "Kharkov" trials (below).

107. The first trials of USSR citizens (accomplices and active assistants of the German forces) took place at Krasnodar in July 1943. The accused were charged and convicted by USSR criminal courts of murder and treason under the Soviet criminal code.[8]

108. The later Moscow Declaration 1943 of the UK, US and USSR was one of the most significant declarations of the Second World War concerning the prosecution of war criminals. It confirmed the legitimate role of national courts in punishing war criminals and the intention to pursue such prosecutions after the war. It read, in so far as relevant, as follows:

"... the aforesaid three Allied powers, speaking in the interest of the thirty-two United Nations, hereby solemnly declare and give full warning of their declaration as follows:

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[6] Bassiouni, Cherif, « *L'expérience des premières juridictions pénales internationales* », in Ascensio Hervé, Decaux Emmanuel et Pellet Alain, *Droit international pénal*, Pedone Paris 2000, pp. 635-659, at p. 640 et seq.

[7] *Inter alia*, Diplomatic Notes of 7 November 1941, 6 January 1942 and 27 April 1942.

[8] Ginsburgs George, *"The Nuremberg Trial: Background"*, in Ginsburgs George & Kudriavtsev V. N., *The Nuremberg Trial and International Law*, Martinus Nijhoff Publishers, Dordrecht 1990, pp. 9-37., at p. 20 et seq.

> At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. [...]
>
> Thus, Germans who take part in wholesale shooting of Polish officers or in the execution of French, Dutch, Belgian or Norwegian hostages or Cretan peasants, or who have shared in slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged.
>
> Let those who have hitherto not imbued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusors in order that justice may be done.
>
> The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies."

109. This latter provision envisaged the prosecution of German war criminals by the USSR and the first trial took place at Kharkov in December 1943[9]. The Presidium of the Supreme Soviet had issued a Decree in 1943 laying down the punishments to be applied. The indictment alleged that they were responsible for having gassed thousands of inhabitants of Kharkov and its region, of committing brutal atrocities against civilians, of having burnt villages and exterminated women, old people and children as well as of having executed, burnt alive and tortured the wounded and prisoners of war. The prosecution relied on the rules of war laid down by international conventions (Hague Convention and Regulations 1907 and Geneva Convention 1929, noting that Germany had ratified both) and universally accepted provisions of international law. The indictment not only referred to the responsibility of the German Government and Command, but to the individual responsibility of the accused (referring to the *Leipzig trials*). After admitting their own and their hierarchical superiors' guilt, the three accused were sentenced to death by hanging. The fairness of the trials may have been called into question later, but they were widely reported. The USSR awaited the end of the war before resuming such trials: trials were also held in Kiev, Minsk, Riga, Leningrad, Smolensk, Briansk, Velikie Luki and Nikolaev[10].

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[9] See Kladov, I.F., "*The People's Verdict: A Full Report of the Proceedings at the Krasnodar and Kharkov German Atrocity Trials*", London, New York [etc.] Hutchinson & Co., Ltd. (1944), at p. 113 et seq.

[10] Ginsburgs G. (1990), op. cit., p. 28 et seq.

110. As soon as the territories of Bulgaria were liberated from German forces, the Bulgarian People's Court in December 1944 convicted 11 Bulgarians of war crimes in application of the Moscow Declaration 1943[11].

3. Prosecution of war crimes by the US

(a) US Field Manual: Rules of Land Warfare, 1 October 1940

111. This comprehensive manual was compiled by the U.S. War Department in 1940 and issued to forces in the field. It contains both customary rules of war and rules arising from treaties to which the U.S. was party and interprets rules of armed conflict applicable to US military forces at that time. It described the "Basic principles" as follows:

> "Among the so-called unwritten rules or laws of war are three interdependent basic principles that underlie all of the other rules or laws of civilized warfare, both written and unwritten, and form the general guide for conduct where no more specific rule applies, to wit :
>
> (a) The principle of military necessity, under which, subject to the principles of humanity and chivalry, a belligerent is justified in applying any amount and any kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money;
>
> (b) The principle of humanity, prohibiting employment of any such kind or degree of violence as is not actually necessary for the purpose of the war; and
>
> (c) The principle of chivalry which denounces and forbids resort to dishonorable means, expedients, or conduct.

112. Paragraph 8 of the Manual provided that:

> "Genera1 division of enemy population - The enemy population is divided in war into two general classes, known as the armed forces and the peaceful population. Both classes have distinct rights, duties, and disabilities, and no person can belong to both classes at one and the same time."

113. The Manual continued:

> "Determination of status of captured troops - The determination of the status of captured troops is to be left to higher military authority or to military tribunals. Summary executions are no longer contemplated under the laws of war. The officer's duty is to hold the persons of those captured and leave the question of their being regulars, irregulars, deserters, etc., to the determination of competent authority. ...
>
> Hostilities committed by individuals not of the armed forces - Persons who take up arms and commit hostilities without having complied with the conditions prescribed by the laws of war for recognition as belligerents are, when captured by the injured party, liable to punishment as war criminals. ...

[11] Ginsburgs G., *"Moscow and International Legal Cooperation in the Pursuit of War Criminals"*, 21 Review of Central and East European Law (1995), No. 1, pp. 1-40, at p. 10.

> Right of trial - No individual should be punished for an offense against the laws of war unless pursuant to a sentence imposed after trial and conviction by a military court or commission or some other tribunal of competent jurisdiction designated by the belligerent."

(b) *ex parte Quirin* (1942) 317 U.S. 1

114. In 1942 eight undercover Nazi saboteurs travelled to the US, were captured and tried by a secret military commission on, *inter alia*, charges of offences contrary to the law of war (including wearing of civilian clothes to move by deception behind enemy lines to commit acts of sabotage, espionage "*and other hostile acts*"). Their lawyers took a writ of *habeas corpus* to the Supreme Court, which court stated as follows:

> "By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."

E. Trials by the IMTs after the Second World War, for acts committed during that war.

1. The Potsdam Agreement 1945

115. The Potsdam Agreement concerned the occupation and reconstruction of Germany and other nations following the German surrender of May 1945. It was drafted and adopted by the USSR, US and UK at the Potsdam Conference between 17 July and 2 August 1945. As regards the pursuit of war criminals, the Agreement provided as follows:

> "The Three Governments have taken note of the discussions which have been proceeding in recent weeks in London between British, United States, Soviet and French representatives with a view to reaching agreement on the methods of trial of those major war criminals whose crimes under the Moscow Declaration of October, 1943 have no particular geographical localization. The Three Governments reaffirm their intention to bring these criminals to swift and sure justice. They hope that the negotiations in London will result in speedy agreement being reached for this purpose, and they regard it as a matter of great importance that the trial of these major criminals should begin at the earliest possible date. The first list of defendants will be published before 1st September."

2. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement 1945")

116. Following the unconditional surrender of Germany, the Allied Powers signed the London Agreement 1945:

> "Whereas the United Nations have from time to time made declarations of their intention that War Criminals shall be brought to justice;
>
> And whereas the Moscow Declaration of the 30th October 1943 on German atrocities in Occupied Europe stated that those German Officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein;
>
> And whereas this Declaration was stated to be without prejudice to the case of major criminals whose offenses have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies; ...
>
> Article 1: There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of the organizations or groups or in both capacities.
>
> Article 2: The constitution, jurisdiction and functions of the International Military Tribunal shall be those set in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement. ...
>
> Article 4: Nothing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes. ...
>
> Article 6: Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals."

3. Charter of the IMT (Nuremberg)

117. The Charter was annexed to the London Agreement 1945. It provided, *inter alia*, a non-exhaustive list of violations of the laws and customs of war for which "Leaders, organizers, instigators and accomplices" were liable and it prescribed the penalties:

> "Article 1: In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis. ..."
>
> "Article 6: The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries

shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: ...

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; ...

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. ..."

"Art. 8: The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires. ..."

"Art. 27: The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.

Art. 28: In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany."

4. Judgment of the IMT Nuremberg[12]

118. The judgment, referred extensively to the customary nature of the Hague Convention and Regulations 1907:

"The Tribunal is ... bound by the Charter, in the definition which it gives both of war crimes and crimes against humanity. With respect to war crimes, the crimes defined by Article 6, section (b), of the Charter were already recognised as war crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.

But it is argued that the Hague Convention does not apply in this case, because of the 'general participation' clause in [its] Article 2. ...

Several of the belligerents in the recent war were not parties to this Convention.

In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being

[12] *Trial of the Major War Criminals*, Nuremberg, judgment delivered on 30 September and 1 October 1946.

declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter."

119. In the section dealing with "the Law of the Charter" and in dealing with the crime against peace, the judgment noted:

"The Hague Convention 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. ... In interpreting the words of the [Kellogg-Briand Pact], it must be remembered that international law is not the product of an international legislature, and that such international agreements as the [Kellogg-Briand Pact] have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."

5. Charter of the IMT Tokyo 1946

120. This Charter was approved by unilateral declaration of the Supreme Commander of the Allied Forces on 19 January 1946. The relevant part of Article 5 of the Charter provides as follows:

"The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

...

(b) *Conventional War Crimes*: Namely, violations of the laws or customs of war;

(c) ... Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."

6. Judgment of the IMT Tokyo 1948

121. As to the status of the Hague Convention 1907, the judgment of the Tokyo War Crimes Tribunal of 12 November 1948 stated as follows:

"... The effectiveness of some of the Conventions signed at The Hague on 18 October 1907 as direct treaty obligations was considerably impaired by the incorporation of a so-called 'general participation clause' in them, providing that the

Convention would be binding only if all the Belligerents were parties to it. The effect of this clause, is, in strict law, to deprive some of the Conventions of their binding force as direct treaty obligations, either from the very beginning of a war or in the course of it as soon as a non-signatory Power, however insignificant, joins the ranks of the Belligerents. Although the obligation to observe the provisions of the Convention as a binding treaty may be swept away by operation of the 'general participation clause', or otherwise, the Convention remains as good evidence of the customary law of nations, to be considered by the Tribunal along with all other available evidence in determining the customary law to be applied in any given situation. ..."

7. The Nuremberg Principles

122. In mid-1950 the International Law Commission adopted the seven "Nuremberg Principles" summarising the "principles of international law recognized" in the Charter and judgment of the IMT Nuremberg:

"Principle I: Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law. ...

Principle IV: The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V: Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI: The crimes hereinafter set out are punishable as crimes under international law: ...

(b) War crimes: Violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity. ...

Principle VII: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."

F. National prosecutions for war crimes, after the Second World War, for acts committed during that war

1. Allied Control Council Law No. 10 - Punishment of War Crimes, Crimes against Peace and against Humanity ("Control Council Law No. 10") and "the Hostages Case"

123. The Control Council Law No.10 was issued in December 1945 by the Allied Council in control of Germany to establish a uniform legal basis for the prosecution in Germany of war criminals (other than those on trial at the IMT Nuremberg). Article 1 made the Moscow Declaration 1943 and the London Agreement 1945 integral parts of the law. Article II (5) provided:

> "In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in relation to the period 30 January 1933 to 1 July 1945 ..."

124. This Law also recognised acts, almost identical to Articles 6(b) of the Charter of the IMT Nuremberg, as constituting war crimes and provided that any person committed a war crime whether he was a principal, an accessory, if he ordered or abetted or took a consenting part in the crime or was connected with plans or enterprises concerning the commission of the crime or was a member of any organization or group connected with its commission. Punishments were also specified.

125. In the *Hostages* (*Wilhelm List*) case[13], the accused were charged with war crimes and crimes against humanity committed during the Second World War relating mainly to the institution of a scheme of reprisal killings in occupied territory and to the summary execution of Italian troops after they surrendered. The judgment noted that the crimes in the Charter of the IMT Nuremberg and in the Control Council Law No. 10 were declaratory of the existing laws and customs of war.

126. The judgment noted that *List* was:

> "authorised to pacify the country with military force; he was entitled to punish those who attacked his troops or sabotaged his transportation and communication lines as *francs tireurs*; ... This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being *franc-tireurs*."

127. As regards military necessity, the judgment noted as follows:

> "Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of International Law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces."

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[13] *The United States of America vs. Wilhelm List, et al.,* UNWCC Law Reports of Trials of War Criminals ("LRTWC"), Volume VIII, 1949 ("the Hostages case").

128. While the tribunal had to admit that the absence of a formal declaration of war between Germany and Italy created grave doubts as to whether the executed Italian officers would have been entitled to prisoners of war status, it looked beyond this fact to find that their summary execution was "unlawful and wholly unjustified".

2. Other national trials

129. Following the Second World War various national tribunals pursued war crimes prosecutions for acts committed during the Second World War. These included prosecutions before Australian, British, Canadian, Chinese, French, and Norwegian military and civilian courts[14]. All concerned breaches of the laws and customs of war and many concerned the necessity of fair trials prior to the punishment of those suspected of war crimes. Certain judgments stressed the legitimate referral of a domestic tribunal to the international laws and customs of war and referred to rules concerning the unnecessary destruction of civilian property, the unlawful wearing of an enemy uniform and individual command responsibility.

G. Subsequent Conventions

1. The Convention on the Non-Applicability of Statutory Limitations to War Crimes ("The 1968 Convention")

130. In November 1968 the UN General Assembly adopted this Convention in response to fears expressed that alleged war criminals (Second World War) not yet apprehended might escape prosecution with the passage of time.

131. The 1968 Convention entered into force on 11 November 1970. It was ratified by the Soviet Union in 1969 and by Latvia on 14 April 1992. It reads, in so far as relevant, as follows:

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[14] *Trial of Shigeru Ohashi and Ors*, Australian Military Court 1946, LRTWC, Volume V; *Trial of Yamamoto Chusaburo*, British Military Court, 1946 LRTWC, Volume III; *Trial of Eikichi Kato*, Australian Military Court 1946, LRTWC, Volume I; *Trial of Eitaro Shinohara and Ors*, Australian Military Court 1946, LRTWC, Volume V; *Re Yamashita* 327 U.S. 1 (1946); *Trial of Karl-Hans Hermann Klinge*, Supreme Court of Norway 1946, LRTWC, Volume III; *Trial of Franz Holstein and Ors*, French Military Tribunal 1947, LRTWC, Volume VIII; *Trial of Otto Skorzeny and Others*, American Military Tribunal 1947, LRTWC, Volume IX; *The Dostler Case*, US Military Commission 1945, LRTWC Volume I; *The Almelo Trial*, British Military Court 1945, LRTWC Volume I; *The Dreierwalde case*, British Military Court 1946, LRTWC Volume I; *The Abbaye Ardenne case*, Canadian Military Court 1945, LRTWC Volume IV; *Trial of Bauer, Schrameck and Falten*, French Military Tribunal 1945, LRTWC Volume VIII; *Trial of Takashi Sakai*, Chinese Military Tribunal 1946, LRTWC, Volume III; *Trial of Hans Szabados*, French Permanent Military Tribunal 1946, LRTWC Volume IX; *Trial of Franz Schonfeld et al.*, British Military Court 1946, LRTWC Volume XI (dates are the dates of the trial or judgment).

"Preamble

Noting that none of the solemn declarations, instruments or conventions relating to the prosecution and punishment of war crimes and crimes against humanity made provision for a period of limitation,

Considering that war crimes and crimes against humanity are among the gravest crimes in international law,

Convinced that the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion on international peace and security,

Noting that the application to war crimes and crimes against humanity of the rules of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes,

Recognizing that it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application"

132. Article 1 of the 1968 Convention provides:

"No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Convention of 12 August 1949 for the protection of war victims; ..."

2. European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes ("the 1974 Convention")

133. This Convention applies to crimes committed prior to its adoption only if the relevant crimes have not already been prescribed. Only two States signed the 1974 Convention at its depository stage (France and the Netherlands) and it came into force in 2003 upon its third ratification (by Belgium). Neither the USSR nor Latvia ratified this Convention.

3. Protocol Additional to the Geneva Conventions of 12 August 1949 ("Protocol Additional 1977")

134. This Protocol to the Geneva Conventions was intended to develop and reaffirm many of the laws and customs of war in light of the age of many of the laws on which they were based (notably, the Hague Convention 1907). Many of its provisions are restatements of existing laws and customs of war, while others are provisions constitutive in nature.

135. The first two "Basic Rules" of warfare are described in Article 35:

"1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. ..."

136. Article 39 provides as follows:

"Art 39. Emblems of nationality

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.

2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations."

137. Article 41 confirms the protection of those combatants who were *hors de combat:*

"1. A person who is recognized or who, in the circumstances, should be recognized to be ' hors de combat ' shall not be made the object of attack.

2. A person is 'hors de combat' if:

(a) he is in the power of an adverse Party;

(b) he clearly expresses an intention to surrender; or

(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape."

138. Article 48 recognises the principle of distinction:

"In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

139. Article 50 recognises civilians as being defined by non-membership of the armed forces.

"1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol[15]. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."

[15] These referenced provisions concern entitlement to prisoner of war status and define armed forces.

140. Article 51 concerned the protection to be accorded to civilians:

> "1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
>
> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
>
> 3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

141. Article 52 reiterated the customary norm that a civilian object (no military objectives) should not be the subject of attack. Article 52(3) notes:

> "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."

142. Article 75 offers protection to persons in the power of a belligerent party who do not qualify for superior protections (such as prisoner of war status) under the laws and customs of war.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

143. The applicant complained under Article 7 of the Convention that he had been the victim of the retrospective application of criminal law. He maintained that the acts for which he was convicted did not, at the time of their commission in 1944, constitute an offence and that Article 7 § 2 did not apply because the alleged offences did not come within its scope. Article 7 reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. The Judgment of the Chamber

144. The Chamber examined the applicant's complaint under Article 7 § 1 of the Convention. It considered that Article 68-3 of the 1961 Criminal Code was based on international rather than domestic law and that the relevant international instruments were the Hague Convention and Regulations 1907. The Geneva Convention (IV) 1949 and the Protocol Additional 1977 were adopted after the impugned acts of May 1944 and they could not have retroactive effect. The principles of the Hague Convention 1907 were widely recognised, universal in nature and constituted fundamental customary rules of *jus in bello* by 1944 and applied to the impugned acts of the applicant.

145. In determining whether a plausible legal basis existed on which to convict the applicant of war crimes and whether the applicant could reasonably have foreseen that the conduct of his unit on 27 May 1944 would render him guilty of such offences, the Chamber noted that the area of Mazie Bati was subject to hostile engagement including from Latvian auxiliary forces with the German administration.

146. It went on to consider the legal status of the villagers and it distinguished between the deceased men and women. The Chamber found that the applicant had legitimate grounds for considering the male villagers to be collaborators with the German forces and, even if they did not satisfy all of the elements of the definition of combatant, *jus in bello* did not *a contrario* automatically consider them to be "civilians". On the basis of this legal status of the villagers and the applicant being a "combatant", the Chamber found that it had not been demonstrated that the attack on 27 May 1944 was *per se* contrary to the laws and customs of war as codified by the Hague Regulations 1907, or, consequently, a basis for convicting the applicant as the commander of the unit.

147. As regards the women killed, if they had also assisted the German administration, the above conclusion applied. Alternatively, had they been killed as a result of an abuse of authority, this could not be regarded as a violation of *jus in bello* and any pursuit as regards the actions against them under domestic law would have been definitively statute barred from 1954. It would be contrary to the principle of foreseeability to punish the applicant almost half a century after the expiry of that limitation period.

148. Finally, the Chamber considered that there was no need to go on to examine the case under Article 7 § 2. Even if Article 7 § 2 was applicable, the operation on 27 May 1944 could not be regarded as "criminal according to the general principles of law recognised by civilised nations".

B. The observations of the parties and third parties to the Grand Chamber

1. The respondent Government

149. The respondent Government disagreed with the Chamber's reasoning and conclusion.

150. They considered that the case fell to be examined under Article 7 § 1 of the Convention, since the applicant's acts were criminal under international and national law at the time of their commission. The Court's role under that provision was to establish whether there was a legal provision defining certain acts as a crime formulated with sufficient clarity and accessibility and, in particular, whether the Latvian courts had the right to rely on Article 68-3 of the 1961 Criminal Code and, in doing so, to rely on the relevant elements of international law. In this respect, the offence could be defined in written and unwritten, domestic or international law and Article 7 did not outlaw gradual clarification of the rules of criminal liability through judicial interpretation so long as the resultant development was consistent with the essence of the offence. Such development of the criminal law was all the more important when a democratic State governed by the rule of law succeeded a totalitarian regime and pursued obligations to bring criminal proceedings against members of the former regime.

151. However, the respondent Government considered that the Chamber exceeded its subsidiary role in altering the factual determinations of domestic courts found to have acted compatibly with Article 6. Indeed, in re-assessing the facts, the Chamber had overlooked certain crucial facts surrounding the events of 27 May 1944 which had been established by the Criminal Affairs Division, upheld by the Supreme Court Senate, notably as regards the existence of a judgment of any Partisan Tribunal as regards the villagers of Mazie Bati. In any event, any such Partisan Tribunal judgment would have been unlawful as it would have been delivered in *absentia* in violation of even the basic tenets of a fair trial. The respondent Government had submitted to the Chamber letters dated February 2008 from the Prosecutor General's Office (about the existence of the Partisan Tribunal, the role of Mazie Bati and its villagers in the German defence and why arms had been issued to the villagers) and re-submitted these to the Grand Chamber.

152. Moreover, and on the basis of detailed submissions, the respondent Government argued that the Court should take into account the broader historical and political events before and after the Second World War and, notably, that the Soviet occupation of Latvia in 1940 had been unlawful and, although interrupted by the equally unlawful German occupation of 1941-1944, it remained in place until independence was restored in the early 1990s. During that Soviet occupation, Latvia was prevented from exercising its sovereign powers, including its international obligations. Apart from the

resultant fear of the local population of the Red Partisans, it was a distortion for the applicant to suggest that the events of 27 May 1944 in Mazie Bati were a civil war incident as opposed to part of the international armed conflict opposing the Axis powers and, *inter alia*, the USSR.

153. While the Court was competent to apply relevant principles of international law, the respondent Government disagreed with the Chamber's application of international law. It had disregarded or misapplied several important sources of international law and certain principles derived therefrom including the criteria for defining civilians and the standard of humane treatment they should be afforded, the principle that the loss of civilian status did not amount to the loss of international humanitarian protection, the limits of military necessity and the prohibition of perfidious acts. On the contrary, the respondent Government argued, referring extensively to contemporary Conventions and declarations as well as to the Charter and judgment of the IMT Nuremberg, that the applicant was clearly guilty of war crimes as understood in 1944.

154. While accepting that the principle of distinction was not an entirely straightforward matter in 1944, they maintained it was clear that the villagers of Mazie Bati were "civilians": indeed, even if persons were armed, even if they sympathised with the Nazi occupation and even if they belonged to a law enforcement organisation, they did not lose their civilian status. In any event, even if they had lost that status and were to be considered "combatants", nothing allowed the summary execution and murder of any person *hors de combat* unless a fair trial had taken place (and there was no proof of this) wherein it was established that they were indeed implicated in a criminal offence. Moreover, these were not lawful acts of "lawful belligerent reprisals" since, *inter alia*, such actions had been prohibited against prisoners of war since the 1929 Geneva Convention and, as regards civilians, it was never suggested that the villagers committed war crimes themselves.

155. Moreover, the applicant's acts constituted in 1944 (and thereafter) criminal offences under national law. Criminal provisions of the 1926 Criminal Code (adopted in 1940 by decree of the Latvian SSR Supreme Council, in force until 1991 and re-introduced in 1993) criminalised and specified punishments for violations of the rules and customs of war and such provisions were sufficiently clear and accessible. The period of ambiguity from September 1991 to April 1993 was of no practical importance since Latvia had an underlying international obligation to prosecute individuals on the basis of existing international law.

156. It was irrelevant whether the applicant was the actual perpetrator as he bore command responsibility.

157. Neither was his conviction statute-barred having regard, *inter alia*, to Article 14 (and the Official Notes) of the 1926 Criminal Code, Article 45

of the 1961 Criminal Code and Article 1 of the 1968 Convention, the retroactive force of which Convention had been recognised by this Court.

158. In light of the above, it was clearly objectively foreseeable in 1944 that the applicant's acts were criminal and it was unnecessary to show that he was aware of each element of the precise legal qualification of his acts. Indeed, his alternative version of the facts (that he was seeking to arrest the villagers following their conviction by a Partisan Tribunal) was revealing in that it suggested an acknowledgement that he was indeed aware at the time that the impugned conduct (killing instead of arresting) was criminal. His conviction was also objectively foreseeable given, *inter alia*, the declarations of certain States during the Second World War and the international and national prosecutions during and immediately after that war, in which processes the Soviet authorities had much involvement. That he was a Soviet war hero for years thereafter was not relevant: the key point was whether the acts could have been reasonably foreseen in 1944 as amounting to war crimes and not that his later fortuitous political situation would have excluded his prosecution. Neither was it a defence to argue that others committed war crimes to avoid criminal liability oneself, unless the departure from principle by other States was sufficient to constitute evidence of a change in international usage and custom.

159. In the alternative, the applicant's crimes constituted crimes under the "general principles of law recognised by civilised nations" within the meaning of Article 7 § 2 of the Convention. This provision was also drafted to eliminate any doubt about the validity of the post-Second World War prosecutions by the IMTs and, since subsequent international and national practice had confirmed the universal validity of the IMTs and their principles, that role of Article 7 § 2 was now defunct. Whether such "general principles" were a primary or secondary source of international law, they were derived from national systems to fill gaps in positive and customary international law. In the absence of any consensus as to the survey of national systems required to establish such principles, the respondent Government reviewed jurisdictions which had, by 1944, already pronounced on the subject of war crimes as well as the criminal codes of Latvia and the USSR. Noting that national courts and tribunals relied on established principles of international law in charging violations of the laws and customs of war, the respondent Government argued that the general principles of law recognised the applicant's acts as criminal so that the present domestic courts could have had recourse to such principles.

2. The applicant

160. The applicant supported the Chamber's reasoning and conclusions, arguing that he was not guilty of a crime under national law, international law or under general principles of law recognised by civilised nations.

161. He disputed the suggestion that the Chamber had exceeded its competence and incorrectly decided certain facts. On the contrary, he maintained that the respondent Government had misrepresented and misquoted to the Grand Chamber the facts as established by the Chamber.

162. Before the Grand Chamber he gave his version of the circumstances surrounding the killing in February 1944 of the members of Major Chugunov's group of partisans. That group had taken refuge in Meikuls Krupniks' barn and the deceased villagers had participated in delivering that partisan group into the hands of the *wehrmacht* by ruse: they had pretended to guard the partisans but sent word to the *wehrmacht* in the vicinity. The next day the German soldiers arrived and, having taken more detailed information from three women in the village, killed each member of Chugunov's group. Certain women, including Meikuls Krupniks' mother, removed clothing from the bodies. The villagers concerned were rewarded by the German military administration with firewood, sugar, alcohol and money. A villager captured by other partisans had later given the names of the relevant villagers who had denounced Major Chugnov's unit.

He reiterated that he acted further to a decision of an *ad hoc* Partisan Tribunal, whose existence was substantiated. That tribunal had investigated, identified the Mazie Bati villagers who had betrayed Major Chugnov's group and had sentenced them to death. His unit had been charged with delivery of the convicted persons to that tribunal. However, he also clarified to the Grand Chamber that, given the combat conditions persisting at that time, his unit would not have been in a position to capture the villagers and keep them as prisoners (they were an obstacle in combat and a mortal danger to the partisans) nor would it have been possible to have brought the villagers to the Partisan Tribunal.

163. The applicant considered that his rights under Article 7 § 1 had been violated. The guarantees under that provision were of central importance and they had to be interpreted and applied in such as way as to ensure effective protection against arbitrary prosecutions and trials. Article 7 § 2 did not apply since the alleged offences did not fall within its scope.

164. As to the definition of a war crime, the applicant essentially relied on the Hague Convention and Regulations 1907 as well as the Charter and judgment of the IMT Nuremberg and he excluded reliance on the Geneva Conventions 1949 or the Protocol Additional 1977 since they post-dated the events. Since a war crime was defined as one committed against a civilian population, by an occupier and on territory occupied, the impugned acts could not be considered war crimes under international law or the general principles of law recognised by civilised nations, for the following reasons.

165. In the first place, the villagers were not civilians. The letters of February 2008 from the Prosecutor General's Office were inaccurate, inadequate and incorrect in that they suggested that he, the accused, had to substantiate his defence whereas it was for the prosecution to prove the

charges. He nevertheless submitted new documents (from the 1940s and from the Latvian State archives) to the Grand Chamber which he considered demonstrated a number of points: a plan of the German defence posts including Mazie Bati; that the Nazi administration prohibited "civilians" carrying arms and, since they gave arms to the villagers of Mazie Bati, that village was clearly taking part in military operations and was a focal point of the German defence; that the deceased villagers (notably members of the family of Bernards Šķirmants, Ambrozs Buls and Meikuls Krupniks) had joined at some point the *aizsargi*, and that the *aizsargi* regularly participated in anti-Semitic and partisan killings in Latvia. He further maintained that Bernards Šķirmants and Meikuls Krupniks were *Schutzmänner*.

In short, the villagers were either *aizargi* or *Schutzmänner*. They were accordingly armed by, and carrying out active service for, the German military administration: their handing over of Major Chugnov's group was not an act of self-defence but of collaboration. They could not be considered part of the civilian population and became a legitimate military target. The applicant's unit, who were combatants, had the right to punish them.

166. Secondly, Latvia was lawfully one of the Republics of the USSR since 1940 and it was contrary to historical fact and common sense to state otherwise. The Declaration of 4 May 1990 and his conviction were designed to achieve a condemnation of the annexation of Latvia in 1940 as illegal, rather than a desire to fulfil international obligations to pursue war criminals. On 27 May 1944 he was a combatant defending his own State's territory against Germany and other USSR citizens who were actively collaborating with Germany (relying on the judgment of Latgale Regional Court). Since the USSR was not an occupying power, the applicant could not be a perpetrator of a war crime. He considered historically inaccurate the positions of the respondent and Lithuanian Governments which equate the lawful incorporation of Latvia in 1940 with the German occupation of 1941. The only two options available to Latvians in 1944 were to be anti-German or anti-USSR: he fought Nazi forces with the USSR to liberate Latvia and the villagers acted against them in concert with the Nazis.

167. Thirdly, there was no war crimes chapter in the 1926 Criminal Code and the respondent Government's reliance on Military Crimes in Chapter IX of that Code was flawed as "military crimes" were violations of the established order of military service and were to be distinguished from "war crimes". Indeed, he remarked that criminal liability was included in the 1926 Criminal Code for a failure to execute an order (Article 193-3).

168. Moreover, it was simply not foreseeable that he would have been prosecuted for war crimes. His trial was unprecedented: it was the first time a soldier, fighting against the Axis powers, found himself indicted almost 50 years later. He was only 19 years of age when, against the background of various international agreements and armed conflicts for which he was not responsible, he fought as a member of the anti-Hitler coalition. On 27 May

1944 he understood (referring to the Latgale Regional Court judgment) that he was defending Latvia as part of the USSR and he could never have imagined that Latvia would decades later consider that it had been unlawfully occupied by the USSR and that his actions would be considered criminal. He supported the Chamber's conclusion that it was not foreseeable that he would have been convicted under domestic law.

169. Finally, he also submitted that the Grand Chamber should re-consider his complaints under Articles 3, 5, 6, 13, 15 and 18 which were declared inadmissible by decision of the Chamber of 20 September 2007.

3. The third party Governments

(a) The Government of the Russian Federation

170. This Government supported the reasoning and conclusion of the Chamber.

171. They maintained that the case was to be examined under Article 7 § 1 and that it was not necessary to examine it under Article 7 § 2. A person could not be found criminally liable under the "general principles" referred to in Article 7 § 2, except in the wholly exceptional circumstances following the Second World War. Such principles could have some relevance in sourcing international criminal law principles, but their relevance had reduced with the increase in treaty law. The development of a body of international law regulating the criminal responsibility of individuals was a relatively recent phenomenon and it was only in the 1990s, with the establishment of international criminal tribunals, that an international criminal law regime could be said to have evolved.

172. The applicant was convicted in violation of Article 7 § 1 as his acts did not constitute a criminal offence under domestic or international law in 1944. The domestic courts had, in fact, made a number of errors.

173. In the first place, they applied incorrect legal norms to the case. Neither the 1961 Criminal Code nor the new Articles introduced in 1993 were in force in 1944 or, given the new criminal code adopted in 1998, in 2000 or 2004. Article 14 of the 1926 Criminal Code, adopted by Latvia after it became part of the USSR, applied a ten-year limitation period on prosecutions and contained no provisions regarding war crimes.

174. Secondly, if the Hague Convention and Regulations 1907 constituted customary international law in 1944, they did not provide a basis for his prosecution. It was only the Charter of the IMT Nuremberg that defined personal responsibility and, even then, it only applied to Axis war criminals.

Even if the IMT Charter was a codification process, the applicant was not guilty of war crimes. This was because he was bound by those instruments only as regards the international armed conflict between Germany and the USSR and not as regards acts between co-citizens of the same State: Latvia

was *de jure* part of the USSR in 1944 and the villagers (although *de facto* under German instruction) were *de jure* Soviet citizens so that he and the villagers had USSR citizenship. Contrary to the submissions of the respondent and Lithuanian Governments, this Court was not competent to re-evaluate history and notably the incorporation of Latvia into the USSR in 1940. They relied on "relevant binding instruments of international law" (in which the sovereignty of the USSR all over its territory was recognised) and to post-Second World War meetings (in which the post-Second World War order was established by agreement with the US and UK). Having regard to the criteria in international law for defining an "occupation", the USSR was not an occupying power in Latvia in 1944.

The Charter of the IMT Nuremberg did not mean that the applicant's acts were war crimes because of the combatant status of the applicant and that of the deceased villagers, and the Government of the Russian Federation disputed the respondent and Lithuanian Governments' submissions as to the legal status of the villagers. Having regard to the principle of distinction and the criteria for defining a combatant (*inter alia*, Article 1 of the Hague Regulations 1907), he was a combatant trained, armed and acting in execution of the ruling of an *ad hoc* Partisan Tribunal on behalf of the Soviet military administration. The villagers were militia, armed and actively collaborating with the German military administration. As willing collaborators, the villagers were taking an active part in hostilities and therefore met all the criteria for being classed as combatants (or, at best, unlawful enemy combatants) and were thus legitimate military targets. Finally, none of the subsequent international instruments (Geneva Conventions 1949 or the Protocol Additional 1977) were applicable as they could not apply retroactively.

175. Thirdly, the general principle of the non-applicability of limitation periods to war crimes was not applicable to the applicant's acts in 1944: war crimes only became 'international crimes' with the creation of the IMTs after the Second World War so the principle applied only after the IMTs (except for Axis war criminals). The 1968 Convention could not apply since, as explained above, the applicant acted against other USSR citizens and his acts could not therefore constitute war crimes.

176. For all of the above reasons, the applicant could not have foreseen that he would be prosecuted for war crimes for his acts on 27 May 1944. In addition, as a citizen of the Soviet Union he could not have foreseen that after 40 years, living on the same territory, he would end up living in another State (Latvia) which would pass a law criminalising acts for which he was not criminally responsible in 1944.

177. Finally, the Government of the Russian Federation contested, *inter alia*, the factual matters raised by the Latvian Government before the Grand Chamber. Even if the Chamber had exceeded its competence (on facts and legal interpretation), this did not change anything. If the Grand Chamber

relied on the facts established by the domestic courts and read, as opposed to interpreted, the relevant international domestic norms, the outcome could be the same as that of the Chamber. Political decisions and interests could not change the legal qualification of applicant's acts.

(b) The Lithuanian Government

178. The Lithuanian Government addressed two issues.

179. The first issue concerned the legal status of the Baltic States during the Second World War and other related issues of international law. Contrary to paragraph 118 of the Chamber judgment, the Lithuanian Government considered this issue had to be taken into account when examining notably the legal status of the belligerent forces in the Baltic States at the time. Indeed this Court had already recognised that all three Baltic States had lost their independence as a result of the Molotov-Ribbentrop Pact (The Treaty of Non-Aggression of 1939 and its secret Protocol, the Treaty on Borders and Friendly Relations 1939 and its secret Protocol as well as the third Nazi-Soviet secret Protocol of 10 January 1941): the Pact was an undisputed historical fact, an illegal agreement to commit aggression against, *inter alia*, the Baltic States and resulted in their illegal occupation by Soviet forces. Indeed the Soviet invasion of the Baltic States in June 1940 was an act of aggression within the meaning of the London Convention for the Definition of Aggression 1933 and the Convention between Lithuania and the USSR for the Definition of Aggression 1933. The involuntary consent of the Baltic States faced with Soviet aggression did not render this act of aggression lawful.

The USSR itself had earlier treated the *anschluss* as an international crime. In addition, in 1989 the USSR recognised (Resolution on the Political and Juridical Appraisal of the Soviet-German Non-Aggression Treaty of 1939) its unlawful aggression against the Baltic States. Two conclusions followed: the USSR had not obtained any sovereign rights to the Baltic States so that under international law the Baltic States were never a legitimate part of the USSR and, additionally, the Baltic States continued to exist as international legal persons after the 1940 aggression by the USSR which aggression resulted in the illegal occupation of the Baltic States.

Applying that to the facts in the present case, the Lithuanian Government argued that the Baltic States suffered aggression from the USSR and Nazi Germany: the judgment of the IMT Nuremberg characterised aggression in such a way as to treat both aggressors in the same manner. The Baltic peoples had no particular reason to feel sympathy with either and, indeed, had rational fears against both aggressors (and in this respect, they take issue with paragraph 130 of the Chamber judgment given the well-established historical fact of USSR crimes in the Baltic States) so that a degree of collaboration with one aggressor in self-defence should not be treated differently. The peoples of the Baltic States could not be considered

to have been Soviet citizens, as they retained under international law their Baltic nationality, but were rather inhabitants of an occupied State who sought safety from both occupying belligerent forces.

180. The second issue concerned the characterisation, under international humanitarian and criminal law, of the punitive acts of the Soviet forces against the local Baltic populations and, in particular, whether those populations could be considered to be "combatants".

A number of instruments were relevant, in addition to the Hague Convention and Regulations 1907, especially the Geneva Convention (IV) 1949 and the Protocol Additional 1977. It was a core principle of international humanitarian law in 1944 that there was a fundamental distinction between armed forces (belligerents) and the peaceful populations (civilians) and the latter enjoyed immunity from military attack (citing the Martens Clause**,** see paragraphs 86-87 above). The villagers did not meet the criteria defining combatants and were not therefore a lawful military target. Even if there had been some degree of collaboration by the villagers with the German forces, they had to retain civilian protection unless they met the combatant criteria: the opposite view would leave a population at the mercy of belligerent commanders who could arbitrarily decide that they were combatants and thus a legitimate military target. The killing of the women, unless they were taking part in hostilities as combatants, was not in any circumstances justified, as it would always have been contrary to the most elementary considerations and laws of humanity and dictates of public conscience and the Government specifically took issue with paragraphs 141 and 142 the Chamber's judgment.

181. This Government therefore argued that the punitive actions of the Soviet forces against the local populations of the occupied Baltic States amounted to war crimes contrary to positive and customary international law and the general principles of law recognised by civilised nations. Their prosecution did not violate Article 7 of the Convention.

C. The Grand Chamber's assessment

1. The applicant's request to re-examine matters declared inadmissible by the Chamber

182. In its decision of 20 September 2007, the Chamber declared admissible the complaint under Article 7 of the Convention and inadmissible those made under Articles 3, 5 (in conjunction with Article 18), 6 § 1, 13 and 15 of the Convention. The applicant argued that the Grand Chamber should re-open and assess those inadmissible complaints.

183. The Grand Chamber observes that the Chamber's decision to declare the above-noted complaints inadmissible was a final decision: this part of the application is not, therefore, before the Grand Chamber (see *K.*

and T. v. Finland, no. 25702/94, § 141, ECHR 2001-VII, and *Šilih v. Slovenia*, no. 71463/01, §§ 119-121, 9 April 2009).

184. Accordingly, the Grand Chamber will proceed to examine that part of the application declared admissible by the Chamber namely, the complaint under Article 7 of the Convention.

2. General Convention Principles

185. The guarantee enshrined in Article 7, an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, so as to provide effective safeguards against arbitrary prosecution, conviction and punishment. Accordingly, Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable.

When speaking of "law", Article 7 alludes to the same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written and unwritten law and which implies qualitative requirements, notably those of accessibility and foreseeability. As regards foreseeability in particular, the Court recalls that however clearly drafted a legal provision may be in any system of law including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in certain Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen **(***Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II; *K.-H.W. v. Germany* [GC], no. 37201/97, § 85, ECHR 2001-II (extracts); *Jorgic v. Germany*, no. 74613/01, §§ 101-109, 12 July 2007; and *Korbely v. Hungary* [GC], no. 9174/02, §§ 69-71, 19 September 2008).

186. Finally, the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner (*Tess v. Latvia* (dec.), no. 34854/02,

12 December 2002). Having regard to the subject matter of the case and the reliance on the laws and customs of war as applied before and during the Second World War, the Court considers it relevant to recall that the *travaux préparatoire*s to the Convention indicate that the purpose of the second paragraph of Article 7 was to specify that Article 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, *inter alia*, war crimes so that Article 7 does not in any way aim to pass legal or moral judgment on those laws (*X. v. Belgium*, no 268/57, Commission decision of 20 July 1957, Yearbook 1, p. 241). In any event, the Court further notes that the definition of war crimes included in Article 6(b) of the IMT Nuremberg Charter was found to be declaratory of international laws and customs of war as understood in 1939 (paragraph 118 above, paragraph 207 below).

187. The Court will first examine the case under Article 7 § 1 of the Convention. It is not therein called upon to rule on the applicant's individual criminal responsibility, that being primarily a matter for assessment by the domestic courts. Rather its function under Article 7 § 1 is twofold: in the first place, to examine whether there was a sufficiently clear legal basis, having regard to the state of the law on 27 May 1944, for the applicant's conviction of war crimes offences; and, secondly, it must examine whether those offences were defined by law with sufficient accessibility and foreseeability so that the applicant could have known on 27 May 1944 what acts and omissions would make him criminally liable for such crimes and regulated his conduct accordingly (*Streletz, Kessler and Krenz*, § 51; *K.-H. W. v. Germany*, § 46; and *Korbely v. Hungary*, § 73, all cited above).

3. The relevant facts

188. Before examining these two questions, the Court will address the factual disputes between the parties and third parties.

189. The Court recalls that, in principle, it should not substitute itself for the domestic jurisdictions. Its duty, in accordance with Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. Given the subsidiary nature of the Convention system, it is not the Court's function to deal with alleged errors of fact committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, *mutatis mutandis*, *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, § 45; *Streletz, Kessler and Krenz*, cited above, § 49; and *Jorgic*, cited above, § 102) and unless that domestic assessment is manifestly arbitrary.

190. The Chamber found the applicant's trial to be compatible with the requirements of Article 6 § 1 of the Convention by final decision (paragraphs 182-184 above). In the context of the complaint under Article 7, and as the Chamber pointed out, the Grand Chamber has no reason to

contest the factual description of the events of 27 May 1944 as set out in the relevant domestic decisions namely, the judgment of the Criminal Affairs Division of 20 April 2004, upheld on appeal by the Supreme Court Senate.

191. The facts established by the domestic courts as regards the events of 27 May 1944 are summarised above (paragraphs 15-20) and the Court extracts the following central elements. When the applicant's unit entered Mazie Bati, the villagers were not engaging in hostilities: they were preparing to celebrate Pentecost and all the deceased villagers were found by the partisans at home (one in his bath and another in bed). While arms and munitions supplied by the German military administration were found in the deceased villagers' homes, none of those villagers were carrying those or any arms. The Chamber (§ 127) found this latter fact to be of no relevance but, for reasons set out below, the Grand Chamber considers this pertinent. While the applicant maintained before the Grand Chamber that no one was burned alive, the domestic courts established that four persons died in the burning farm buildings, three of whom were women. Finally, none of the villagers killed attempted to escape or offered any form of resistance to the partisans so that, prior to being killed, all were unarmed, not resisting and under the control of the applicant's unit.

192. The domestic courts rejected certain factual submissions of the applicant. It was not established that the deceased villagers had handed over Major Chugunov's unit but rather that Meikuls Krupniks had denounced that unit to the German forces, noting that the unit's presence in his barn was a danger to his family. The archives did not show that the deceased villagers were *Schutzmänner* (German Auxiliary Police**)** but only that Bernards Šķirmants and his wife were *aizsargi* (Latvian National Guard). Nor was it established precisely why the villagers had been provided with arms by the German military administration (whether as a reward for information about Major Chugunov's unit or because they were *Schutzmänner, aizsargi* or had another formal auxiliary capacity).

193. The parties, as well as the Government of the Russian Federation, continued to dispute these matters before this Court, the applicant submitting new material from the Latvian State archives to the Grand Chamber. The Court notes that the disputed facts concern the extent to which the deceased villagers participated in hostilities (either by delivering Major Chugunov's unit to the German military administration or as *Schutzmänner, aizsargi* or in another formal auxiliary capacity) and, consequently, their legal status and attendant legal right to protection. The domestic courts found the villagers to be “civilians”, an analysis supported by the Latvian Government. Reviewing certain of the domestic courts' factual conclusions, the Chamber considered the male villagers to be “collaborators”, making alternative assumptions about the female villagers. The applicant, as well as the Government of the Russian Federation, considered the villagers to be “combatants”.

194. Having regard to the above-described dispute, the Grand Chamber, for its part, will begin its analysis on the basis of a hypothesis most favourable to the applicant: that the deceased villagers fall into the category of "civilians who had participated in hostilities" (by passing on information to the German administration as alleged, an act that could be defined as "war treason"[16]) or that they had the legal status of "combatants" (on the basis of one of the alleged auxiliary roles).

195. The Court clarifies that the villagers were not *franc tireurs* given the nature of their alleged activities which led to the attack and since they were not, at the relevant time, participating in any hostilities[17]. The notion of *levée en masse* has no application as Mazie Bati was already under German occupation[18].

4. Was there a sufficiently clear legal basis in 1944 for the crimes of which the applicant was convicted?

196. The applicant was convicted under Article 68-3 of the 1961 Criminal Code, a provision introduced by the Supreme Council on 6 April 1993. Although noting certain acts as examples of violations of the laws and customs of war, it relied on "relevant legal conventions" for a precise definition of war crimes (paragraph 48 above). His conviction for war crimes was, therefore, based on international rather than domestic law and must, in the Court's view, be examined chiefly from that perspective.

197. The Court recalls that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation so that its role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I, and *Korbely*, cited above, § 72).

198. However, the Grand Chamber agrees with the Chamber that the Court's powers of review must be greater when the Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and sentence. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant's conviction and, in particular, it must satisfy itself that the result reached by the relevant domestic courts (a conviction for war crimes pursuant to Article 68-3 of the former Criminal Code) was compatible with Article 7 of the Convention, even if there were differences between the legal approach and reasoning of this Court and the relevant domestic decisions. To accord a

[16] See Oppenheim & Lauterpacht (1944), *Oppenheim's International Law Vol. II: Disputes, War and Neutrality*, 6th ed. Longmans Green and Co.: London, p. 454, cited with approval in *Trial of Shigeru Ohashi and Others*, cited at paragraph 129 above.

[17] See the *Hostages* case, cited in paragraphs 125-128 above.

[18] The Lieber Code (Article 51); the Draft Brussels Declaration 1874 (Article 10); the Oxford Manual 1880 (Article 2.4); and the Hague Regulations 1907 (Article 2).

lesser power of review to this Court would render Article 7 devoid of purpose. The Court will not therefore express an opinion on the different approaches of the lower domestic courts, notably that of the Latgale Regional Court of October 2003 on which the applicant heavily relies but which was quashed by the Criminal Affairs Division. Rather it must determine whether the result reached by the Criminal Affairs Division, as upheld on appeal by the Supreme Court Senate, was compatible with Article 7 (*Streletz, Kessler and Krenz*, cited above, §§ 65-76).

199. In sum, the Court must examine whether there was a sufficiently clear legal basis, having regard to the state of international law in 1944, for the applicant's conviction (see, *mutatis mutandis*, *Korbely v. Hungary*, cited above, at § 78).

(a) The significance of the legal status of the applicant and the villagers

200. The parties, third parties and the Chamber agreed that the applicant could be accorded the legal status of "combatant". Given the applicant's military engagement in the USSR and his command of the Red Partisan Unit that entered Mazie Bati (paragraph 14 above), he was in principle a combatant having regard to the qualifying criteria for combatant status under international law which had crystallised prior to the Hague Regulations 1907[19], which were consolidated by those Regulations[20] and which were solidly part of international law by 1939[21].

201. The Grand Chamber remarks that it was not disputed domestically or before this Court that the applicant and his unit were wearing German *wehrmacht* uniforms during the attack on the villagers, thereby not fulfilling one of the above-noted qualifying criteria. This could mean that the applicant lost combatant status[22] (thereby losing the right to attack[23]) and wearing the enemy uniform during combat could of itself have amounted to an offence[24]. However, the domestic courts did not charge the applicant with a separate war crime on this basis. This factor does have some bearing, nonetheless, on other related war crimes of which he was accused (notably treacherous killing and wounding, see paragraph 217 below). The Court has therefore proceeded on the basis that the applicant and his unit were

[19] The Lieber Code 1863 (Articles 49, 57 and 63-65); the Draft Brussels Declaration 1873 (Article 9); the Oxford Manual 1880 (Article 2).
[20] Article 1 of the Hague Regulations 1907 (paragraph 89 above).
[21] The Hague Regulations 1907 were found to be declaratory of laws and customs of war at least by 1939 in the judgment of the IMT Nuremberg (paragraphs 88, 118 and 207).
[22] The Lieber Code 1863 (Article 65).
[23] The Lieber Code 1863 (Article 57).
[24] *Inter alia*, the Lieber Code 1863 (Articles 16, 63, 65 and 101); the Draft Brussels Declaration 1874 (Article 13(b) and (f)); the Oxford Manual 1880 (Article 8(b) and (d)); and the Hague Regulations 1907 (Article 23(b) and (f)). See also *Trial of Otto Skorzeny and Others*, cited at paragraph 129 above, which court cited with approval Oppenheim & Lauterpacht (1944) at p. 335.

"combatants". One of the hypotheses as regards the deceased villagers is that they could also be considered "combatants" (paragraph 194 above).

202. As to the rights attaching to combatant status, *jus in bello* recognised in 1944 the right to prisoner of war status if combatants were captured, surrendered or were rendered *hors de combat*, and prisoners of war were entitled to humane treatment[25]. It was therefore unlawful under *jus in bello* in 1944 to ill-treat or summarily execute a prisoner of war[26], use of arms being permitted if, for example, prisoners of war attempted to escape or to attack their captors[27].

203. As to the protection attaching to "civilians having participated in hostilities", the other hypothesis made as regards the deceased villagers, the Court notes that in 1944 the distinction between combatants and civilians (and between the attendant protections) was a cornerstone of the laws and customs of war, the International Court of Justice ("ICJ") describing this to be one of the two "cardinal principles contained in the texts constituting the fabric of humanitarian law"[28]. Earlier treaty provisions and declarations would indicate that by 1944 "civilians" were defined *a contrario* to the definition of combatants[29]. It was also a rule of customary international law in 1944 that civilians could only be attacked *for as long as* they took a direct part in hostilities[30].

204. Finally, if it was suspected that the civilians who had participated in hostilities had committed violations of *jus in bello* in doing so (for example, war treason for passing on information to the German military administration, paragraph 194 above), then they remained subject to arrest, fair trial and punishment by military or civilian tribunals for such any acts,

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[25] See "Geneva law" (at paragraphs 53-62 above); the Lieber Code 1863 (Articles 49, 76 and 77); the Draft Brussels Declaration 1874 (Articles 23 and 28); the Oxford Manual 1880 (Article 21 and Chapter III); the Hague Regulations 1907 (Chapter II and, notably, Article 4); the International Commission Report 1919; the Charter of the IMT Nuremberg (Article 6(b)); and Control Council Law No. 10 (Article 2).

[26] *The Hostages case*, *Re Yamashita* and the *Trial of Takashi Sakai*, all cited at paragraph 125-129 above.

[27] The Draft Brussels Declaration 1874 (Article 28); the Oxford Code 1880 (Article 68); and the Hague Regulations 1907 (Article 8).

[28] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ, §§ 74-87.

[29] The Lieber Code 1863 (Article 22); the Oxford Manual 1880 (Article 1); the Draft Brussels Declaration 1874 (Article 9); and the Draft Tokyo and Amsterdam Conventions 1934 and 1938 (Article 1 of both). See also US States Field Manual: Rules of Land Warfare, § 8, 1 October 1940; *ex parte Quirin* 317 U.S. 1(1942).

[30] *Ex Parte Milligan* 71 U.S. 2(1866); Oppenheim & Lauterpacht (1944) at p. 277 ("… in the eighteenth century it became a universally recognised customary rule of the Law of Nations that private enemy individuals should not be killed or attacked. In so far as they do not take part in the fighting, they may not be directly attacked and killed or wounded")

and their summary execution without that trial would be contrary to the laws and customs of war[31].

(b) Was there individual criminal responsibility for war crimes in 1944?

205. The definition of a war crime, prevailing in 1944, was that of an offence contrary to the laws and customs of war ("war crimes")[32].

206. The Court has taken note below of the main steps in the codification of the laws and customs of war and the development of individual criminal responsibility up to and including the Second World War.

207. While the notion of war crimes can be traced back centuries, the mid-nineteenth century saw a period of solid codification of the acts constituting a war crime and for which an individual could be held criminally liable. The Lieber Code 1863 (paragraphs 63-77 above) outlined a multitude of offences against the laws and customs of war and prescribed punishments, and individual criminal responsibility was inherent in numerous of its Articles[33]. While it was an American Code, it was the first modern codification of the laws and customs of war and was influential in later codification conferences notably in Brussels in 1874 (paragraph 79 above). The Oxford Manual of 1880 forbade a multitude of acts as contrary to the laws and customs of war and explicitly provided for "offenders to be liable to punishment specified in the penal law". These earlier codifications, and in particular the Draft Brussels Declaration, in turn inspired the Hague Convention and Regulations 1907. These latter instruments were the most influential of the earlier codifications and were, in 1907, declaratory of the laws and customs of war: they defined, *inter alia*, relevant key notions (combatants, *levée en masse*, *hors de combat*), they listed detailed offences against the laws and customs of war and they provided a residual protection, through the Martens Clause, to inhabitants and belligerents for cases not covered by the specific provisions of the Hague Convention and Regulations 1907. Responsibility therein was on States, which had to issue

[31] As to the right to a trial before punishment for war crimes, see the *Hostages Case*. As to the right to try prisoners of war for war crimes, see the Geneva Convention 1929 (Article 46). As to the right to a trial for those suspected of spying, see the Draft Declaration 1874 (Article 20); the Oxford Manual 1880 (Articles 23-26); the Hague Regulations 1907 (Articles 29-31), and the *US Field Manual: Rules of Land Warfare*, 1940, p. 60 . As to the right to a trial for those accused of war treason, see *US Field Manual: Rules of Land Warfare*, 1940, p. 59. As to contemporary practice, see *Ex parte Quirin*; the *Krasnodar* trials as well as the *Trials of Shigeru Ohashi and Others*, *Yamamoto Chusaburo*, *Eikichi Kato* and *Eitaro Shinohara and Others*, (cited at paragraphs 106-110, 114 and 129 above).

[32] See, in particular, the title of the Hague Convention 1907; Article 6(b) of the Charter of the IMT Nuremberg; Article 5(b) of the Charter of the IMT Tokyo and the judgments of those IMTs. See also Oppenheim & Lauterpacht (1944), at p. 451; and Lachs (1945), *War Crimes – An Attempt to Define the Issues*, Stevens & Sons London, p. 100 et seq.

[33] Notably in Articles 47, 59 and 71.

consistent instructions to their armed forces and pay compensation if their armed forces violated those rules.

The impact on the civilian population of the First World War prompted provisions in the Treaties of Versailles and Sèvres on the responsibility, trial and punishment of alleged war criminals. The work of the International Commission 1919 (after the First World War) and of the UNWCC (during the Second World War) made significant contributions to the principle of individual criminal liability in international law. "Geneva law" (notably the Conventions of 1864, 1906 and 1929, see paragraphs 53-62 above) protected the victims of war and provided safeguards for disabled armed forces personnel and persons not taking part in hostilities. Both the "Hague" and "Geneva" branches of law were closely interrelated, the latter supplementing the former.

The Charter of the IMT Nuremberg provided a non-exhaustive definition of war crimes for which individual criminal responsibility was retained and the judgment of the IMT Nuremberg opined that the humanitarian rules in the Hague Convention and Regulations 1907 were "recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war" by 1939 and that violations of those provisions constituted crimes for which individuals were punishable. There was agreement in contemporary doctrine that international law had already defined war crimes and required individuals to be prosecuted[34]. In consequence, the Charter of the IMT Nuremberg was not *ex post facto* criminal legislation. The later Nuremberg principles, drawn from the Nuremberg Charter and judgment, reiterated the definition of war crimes set out in the Charter and that anyone committing a crime under international law was responsible and liable to punishment[35].

208. Throughout this period of codification, the domestic criminal and military tribunals were the primary mechanism for the enforcement of the laws and customs of war. International prosecution through the IMTs was the exception, the judgment of the IMT Nuremberg explicitly recognising the continuing role of the domestic courts. Accordingly, the international liability of the State based on treaties and conventions[36] did not preclude the customary responsibility of States to prosecute and punish individuals, *via* their criminal courts or military tribunals, for violations of the laws and customs of war. International and national law (the latter including transposition of international norms) served as a basis for domestic prosecutions and liability. In particular, where national law did not provide

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[34] Lauterpacht (1944), "*The Law of Nations and the Punishment of War Crimes*", 21 BYIL, pp. 58-95 at p. 65 et seq. and Kelsen (1945), "*The rule against Ex Post Facto Laws and the Prosecution of the Axis War Criminals*", 2 The Judge Advocate Journal, pp. 8-12, at p. 10.

[35] See also Article 2(b) of the Allied Control Council Law No. 10, and *the Hostages Case*, cited at paragraphs 125-128 above.

[36] See, for example, Article 3 of the Hague Convention 1907.

for the specific characteristics of a war crime, the domestic court could rely on international law as a basis for its reasoning, without infringing the principles of *nullum crimen* and *nulla poena sine lege*[37].

209. Turning to the practice of such domestic tribunals, the Court notes that, while many States prohibited war crimes in their domestic legal systems and military manuals prior to the First World War, very few prosecuted their own war criminals[38], although the US courts-martial in the Philippines were a significant and informative exception[39] as was the occurrence of the Leipzig and Turkish trials after the First World War. Finally, during the Second World War there was a signalled intent from the outset to ensure the prosecution of war criminals[40] and, parallel to international prosecutions, the principle of domestic prosecutions of war criminals was maintained[41]. Accordingly, as well as the important IMT prosecutions, domestic trials took place during the Second World War (notably in the USSR)[42] and immediately after the Second World War,[43] all concerning alleged war crimes committed during that war, certain trials being notable for their comprehensive treatment of relevant principles of the laws and customs of war, particularly as regards the necessity of a fair trial of combatants and civilians suspected of war crimes.

210. The Court has noted the detailed and conflicting submissions of the parties and third parties on the question of the lawfulness of Latvia's incorporation into the USSR in 1940 and, consequently, on whether the acts on 27 May 1944 had any nexus to an international armed conflict and could therefore be considered as war crimes. The Grand Chamber considers (as did the Chamber, at § 112 of its judgment) that it is not its role to pronounce on the question of the lawfulness of Latvia's incorporation into the USSR

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[37] The Treaty of Versailles (Article 229); the Moscow Declaration 1943 and the *Kharkov* trials; the London Agreement 1945 (Article 6); and the Nuremberg Principles (No. II). The US courts-martial in the Philippines, notably *Trial of Lieutenant Brown*; *Llandovery Castle case* and *Trial of Karl Hans Herman Klinge*, all cited at paragraphs 97-100, 102 and 129 above; Lauterpacht (1944), p. 65; Kelsen (1945) p. 10-11; Lachs (1945) p. 8, p. 22, p. 60 et seq.; and G. Manner, *The Legal Nature and Punishment of Criminal Acts of Violence contrary to the Laws of War*, AJIL, vol. 37, no. 3 (Jul., 1943), pp. 407-435.

[38] Meron, T. (2006), *Reflections on the Prosecution of War Crimes by International Tribunals*, AJIL, vol.100, p. 558.

[39] G. Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contribution to the National Case Law on War Crimes*, Journal of International Criminal Justice (2003), 1, pp. 135-150.

[40] St James Declaration 1942 (notably, Article 3); the Diplomatic Notes of the USSR 1941-1942 and the USSR Decree of 2 November 1942; the Moscow Declaration, 1943; and the Potsdam Agreement.

[41] UNWCC established in 1943; the London Agreement 1945 (Article 6), the judgment of the IMT Nuremberg; and the Nuremberg Principles (Principle II).

[42] Paragraphs 106-110 above ("Prosecution of war crimes by the USSR" including the Krasnodar and Kharkov trials) and paragraph 114 above (*ex parte Quirin*).

[43] Paragraph 123-129 above.

and, in any event in the present case, it is not necessary to do so. While in 1944 a nexus with an international armed conflict was required to prosecute acts as war crimes, that did not mean that only armed forces personnel or nationals of a belligerent State could be so accused. The relevant nexus was a direct connection between the alleged crime and the international armed conflict so that the alleged crime had to be an act in furtherance of war objectives[44]. The domestic courts found that the operation on 27 May 1944 was mounted given the suspicion that certain villagers had co-operated with the German administration so that it is evident that the impugned events had a direct connection to the USSR/German international armed conflict and were ostensibly carried out in furtherance of the Soviet war objectives.

211. The Court understands individual command responsibility to be a mode of criminal liability for dereliction of a superior's duty to control, rather than one based on vicarious liability for the acts of others. The notion of criminal responsibility for the acts of subordinates is drawn from two long-established customary rules: a combatant, in the first place, must be commanded by a superior and**,** secondly**,** must obey the laws and customs of war (paragraph 200 above)[45]. Individual criminal responsibility for the actions of subordinates was retained in certain trials prior to the Second World War[46], in codifying instruments and State declarations during and immediately after that war[47] and it was retained in (national and international) trials of crimes committed during the Second World War[48]. It has since been confirmed as a principle of customary international law[49] and is a standard provision in the constitutional documents of international tribunals[50].

212. Finally, where international law did not provide for a sanction for war crimes with sufficient clarity, a domestic tribunal could, having found

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[44] Lachs (1945), p. 100 et seq.; the *Hostages case*, cited at paragraphs 125-128 above.
[45] *Re Yamashita and Trial of Takashi Sakai*, cited at paragraph 129 above.
[46] *German War Trials: Judgment in the Case of Emil Müller,* AJIL, vol. 16 (1922) No. 4, pp. 684-696.
[47] The St James Declaration 1942 (Article 3); the Moscow Declaration 1943; the Potsdam Agreement; the London Agreement 1945 (preamble); the Charter of the IMT Nuremberg (Article 6); and the Charter of the IMT Tokyo (Article 5(c)).
[48] *Trial of Takashi Sakai* case, cited at paragraph 129 above; Allied Control Council Law No. 10 (Article 2(2)) applied in the *Hostages case*; and *Re Yamashita,* cited above.
[49] *Prosecutor v. Delalic et al*, IT-96-21-A, judgment of 20 February 2001, § 195, Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"); D. Sarooshi (2001), *Command Responsibility and the Blaskic Case*, International and Comparative Law Quarterly vol. 50, No. 2 p. 460; *Prosecutor v. Blaskic*, IT-95-14-T, judgment of 3 March 2000, § 290, Trial Chamber of the ICTY
[50] Article 7(3) of the Statute of the ICTY; Article 6 of the Statute of the International Tribunal for Rwanda; Article 25 of the Rome Statute of the International Criminal Court; and Article 6 of the Statute of the Special Court for Sierra Leone

an accused guilty, fix the punishment on the basis of domestic criminal law[51].

213. Accordingly, the Court considers that by May 1944 war crimes were defined as acts contrary to the laws and customs of war and that international law had defined the basic principles underlying, and an extensive range of acts constituting, those crimes. States were at least 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 prosecuted soldiers for war crimes committed during the Second World War.

(c) Specific war crimes of which the applicant was convicted

214. The Court will therefore examine whether there was a sufficiently clear and contemporary legal basis for the specific war crimes for which the applicant was convicted, and in so doing it will be guided by the following general principles.

215. The Court recalls the declaration of the ICJ in the *Corfu Channel*[52] case where the obligations to notify the existence of a minefield in territorial waters and to warn approaching warships were based, not on the relevant Hague Convention of 1907 (No. VIII) which applied in time of war, but on "general and well-recognized principles", the first of which was described as "elementary considerations of humanity" which were even more exacting in peace than in war. In its later *Nuclear Weapons* advisory opinion[53], the ICJ referred to the "two cardinal principles contained in the texts constituting the fabric of humanitarian law". The first, referred to above, was the principle of distinction which aimed at the "protection of the civilian population and objects" and the second was the "obligation to avoid unnecessary suffering to combatants"[54]. Relying expressly on the Martens Clause, the ICJ noted that the Hague and Geneva Conventions had become "intransgressible principles of international customary law" as early as the judgment of the IMT Nuremberg. This was because, according to the ICJ, a great many rules of humanitarian law applicable in armed conflict were fundamental to "the respect of the human person" and to "elementary considerations of humanity". Those principles, including the Martens

[51] The Lieber Code (Article 47); the Oxford Manual 1880 (Article 84); Lauterpacht (1944), p. 62; and Lachs (1945), p. 63 et seq.

[52] "*Corfu Channel case*", Judgment of 9 April 1949 I.C.J. Reports 1949, p. 4, at p. 22. See also the US Field Manual (description of the "Basic principles").

[53] *Legality of the Threat or Use of Nuclear Weapons*, cited above, §§ 74-87.

[54] *Legality of the Threat or Use of Nuclear Weapons*, cited above, §§ 74-87. More specifically see the Lieber Code 1863 (Articles 15 and 16); the St Petersburg Declaration 1868 (Preamble); the Oxford Manual 1880 (Preface and Article 4); the Hague Convention 1907 (Preamble).

Clause, constituted legal norms against which conduct in the context of war was to be measured by courts[55].

216. The Court notes, in the first place, that the domestic criminal courts relied mainly on provisions of the Geneva Convention (IV) 1949 (paragraphs 60-62 above) to convict the applicant for the ill-treatment, wounding and killing of the villagers. It considers, having regard notably to Article 23(c) of the Hague Regulations 1907, that, even if the deceased villagers were considered combatants or civilians who had participated in hostilities, *jus in bello* in 1944 considered the circumstances of their murder and ill-treatment a war crime since those acts violated a fundamental rule of the laws and customs of war protecting an enemy rendered *hors de combat.* For this protection to apply a person had to be wounded, disabled or unable for another reason to defend him/herself (including not carrying arms), a person was not required to have a particular legal status and a formal surrender was not required[56]. 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 (noted at paragraph 202 above). Accordingly, the ill-treatment, wounding and killing of the villagers constituted a war crime.

217. Secondly, the Court finds that the domestic courts reasonably relied on Article 23(b) of the Hague Regulations 1907 to found a separate conviction as regards treacherous wounding and killing. The concepts of treachery and perfidy were closely linked at the relevant time so that the wounding or killing was considered treacherous if it was carried out while unlawfully inducing the enemy to believe they were not under threat of attack by, for example, making improper use of an enemy uniform. As noted at paragraphs 16 and 201 above, the applicant and his unit were indeed wearing German uniforms during the operation in Mazie Bati. Article 23(b) clearly applies if the villagers are considered "combatants" and could also apply if they were considered civilians having participated in hostilities. In this latter respect, the text of Article 23(b) referred to killing or wounding treacherously *individuals belonging to the hostile nation or army*, which could have been interpreted as including any persons under some form of

[55] *Legality of the Threat or Use of Nuclear Weapons*, at § 87; *Prosecutor v. Kupreskic and Others*, IT-95-16-T, judgment of 14 January 2000, §§ 521-536, Trial Chamber of the ICTY; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 7 July 2004, ICJ Reports 2004, at § 157.

[56] See *inter alia* the Lieber Code 1863 (Article 71); the St. Petersburg Declaration 1868; the Draft Brussels Declaration (Articles 13(c) and 23); the Oxford Manual 1880 (Article 9(b)); the Hague Regulations 1907 (Article 23(c)). See also *Trial of Major Waller*, cited at paragraph 98 above, and Article 41 of the Protocol Additional 1977.

control of a hostile army including the civilian population of an occupied territory.

218. Thirdly, the Latvian courts relied on Article 16 of the Geneva Convention (IV) 1949 to hold that burning a pregnant woman to death constituted a war crime in breach of the special protection afforded to women. That women, especially pregnant women, should be the object of special protection during war was part of the laws and customs of war as early as the Lieber Code 1863 (Articles 19 and 37). It was further developed through "Geneva" law on prisoners of war (women were considered especially vulnerable in this situation)[57]. The Court considers these expressions of "special protection", understood in conjunction with the protection of the Martens Clause (paragraphs 86-87 and 215 above), sufficient to find that there was a plausible legal basis for convicting the applicant of a separate war crime as regards the burning to death of Mrs Krupniks. The Court finds this view confirmed by the numerous specific and special protections for women included immediately after the Second World War in the Geneva Conventions (I), (II) and (IV) 1949, notably in Article 16 of the last-mentioned Convention.

219. Fourthly, the domestic courts relied on Article 25 of the Hague Regulations 1907 which prohibited attacks against undefended localities. This provision was part of a group of similar provisions in international law (including Article 23(g) of the Hague Regulations 1907) which forbade destruction of private property not "imperatively demanded by the necessities of war"[58]. There was no evidence domestically, and it was not argued before the Court, that burning the farm buildings in Mazie Bati was so imperatively required.

220. Fifthly, although various provisions of the Hague Convention 1907, the Geneva Convention (IV) 1949 and the Protocol Additional 1977 were invoked domestically as regards pillaging (stealing of clothes and food), there was no positive domestic finding that any such stealing had taken place.

221. Finally, the Court would add that, even if it was considered that the villagers had committed war crimes (whichever legal status they retained), the applicant and his unit would have been entitled under customary international law in 1944 only to arrest the villagers, ensure they had a fair trial and only then to carry out any punishment (paragraph 204 above). As the respondent Government remarked, in the applicant's version of events to the Chamber (paragraphs 21-24 above) and repeated to the Grand Chamber

[57] See, in particular, Article 3 of the Geneva Convention of 1929.

[58] The Lieber Code 1863 (Articles 15, 16 and 38); the Draft Brussels Declaration 1874 (Article 13(g)); the Oxford Code 1880 (Article 32(b)); the Hague Regulations 1907 (Article 23(g)); the International Commission Report 1919; Article 6(b) of the Charter of the IMT Nuremberg; and Control Council law No. 10 (Article 2). See also *Trial of Hans Szabados*, cited above**;** Oppenheim & Lauterpacht (1944) at p. 321.

(paragraph 162 above), the applicant in fact describes what he ought to have done (arrested the villagers for trial). In any event, whether or not any partisan trial had taken place (paragraph 132 of the Chamber judgment), a trial with the accused villagers *in absentia*, without their knowledge or participation, followed by their execution, would not qualify as a fair one.

222. Since the Court considers that the above-noted acts of the applicant were capable of amounting to war crimes in 1944 (*Streletz, Kessler and Krenz v. Germany*, § 76, cited above), it is not necessary to comment on the remaining charges retained against him.

223. Moreover, the Supreme Court Senate noted that the Criminal Affairs Division had established on the evidence that the applicant had organised, commanded and led the partisan unit which was intent on, *inter alia*, killing the villagers and destroying farms. That court noted that that was sufficient to result in the command responsibility of the applicant for the acts of the unit, relying on Article 6 of the Charter of the IMT Nuremberg. In particular, those established facts indicated that he was *de jure* and *de facto* in control of the unit. Given the purpose of the mission established domestically, he had the required *mens rea*. Indeed, the applicant's own submission to the Grand Chamber (that his unit could not have arrested the villagers given, *inter alia*, the unit's combat duties and the situation, paragraph 162 above) is entirely consistent with the above-noted facts established by the Criminal Affairs Division. Having regard to the applicant's command responsibility, it is not necessary to address the question of whether the domestic courts could properly have found that the applicant personally committed any of the acts in Mazie Bati on 27 May 1944 (paragraph 141 of the Chamber judgment).

224. Finally, the Court would clarify two final points.

225. The respondent Government argued that the applicant's actions could not be considered lawful belligerent reprisals, to which argument neither the applicant nor the Government of the Russian Federation substantively responded. The domestic courts found that the applicant led the operation in Mazie Bati as a “reprisal”, but they clearly did not accept any such defence. The Court sees no basis to question the domestic courts' rejection of this defence (whether the villagers were considered combatants or civilians who had participated in hostilities)[59].

226. As regards § 134 of the Chamber judgment, the Grand Chamber would agree with the respondent Government that it is not a defence to a charge of war crimes to argue that others also committed war crimes, unless those actions by others were of such nature, breadth and consistency as to constitute evidence of a change in international custom.

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[59] The Oxford Code 1880 (Article 84); the Draft Tokyo Convention 1934 (Articles 9 and 10); the US Field Manual: Rules of Land Warfare 1940; *The Hostages case* and the *Trial of Eikichi Kato*, cited at paragraphs 125-129 above, as well as ICTY, *Kupreškić and Others*, cited above. See also Oppenheim & Lauterpacht (1944), pp. 446-450.

227. In conclusion, even assuming that the deceased villagers could be considered to have been "civilians who had participated in hostilities" or "combatants" (see paragraph 194 above), there was 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 would add that, if the villagers had been considered "civilians", *a fortiori* they would have been entitled to even greater protection.

5. Were the charges of war crimes statute-barred?

228. The Government of the Russian Federation maintained that any prosecution of the applicant was statute-barred at the latest in 1954, having regard to the maximum limitation period for which Article 14 of the 1926 Criminal Code provided. The Latvian Government considered that his prosecution had not been statute-barred and the applicant relied on the Chamber judgment.

229. The applicant was convicted under Article 68-3 of the 1961 Criminal Code, Article 6-1 of that Code stated that there was no limitation period for, *inter alia*, war crimes and both Articles were inserted into the Criminal Code in 1993. The Supreme Court Senate also cited with approval the 1968 Convention (paragraphs 130-132 above). The parties essentially disputed therefore whether the applicant's prosecution (on the basis that there was no limitation period for the relevant offences) amounted to a *ex post facto* extension of a national limitation period which would have applied in 1944 and whether, consequently, that prosecution amounted to a retroactive application of the criminal law (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, ECHR 2000-VII).

230. The Court observes that, had the applicant been pursued for war crimes in Latvia in 1944, Chapter IX on Military Crimes in the 1926 Criminal Code, of itself, would not have covered the above-described relevant war crimes (the applicant and the Government of the Russian Federation agreed): a domestic court would therefore have had to rely upon international law to found the charges of war crimes (see paragraphs 196 and 208 above). Equally, Article 14 of the 1926 Criminal Code, with its limitation periods applicable to crimes foreseen by the 1926 Criminal Code only, could have had no application to war crimes sourced under international law and there was no provision in that Code saying that its prescription provisions could have had any such application. On the contrary, the Court notes that the 1926 Criminal Code was conceived of as a system to pursue "dangerous social acts" which could harm the established

socialist order[60], the terminology in the Official Notes to Article 14 illustrating this. In such circumstances, a domestic prosecution for war crimes in 1944 would have required reference to international law, not only as regards the definition of such crimes, but also as regards the determination of any applicable limitation period.

231. However, international law in 1944 was silent on the subject. Previous international declarations[61] on the responsibility for, and obligation to prosecute and punish, war crimes did not refer to any applicable limitation periods[62]. While Article II(5) of the Control Council Law No. 10 addressed the issue as regards war crimes committed on German territory prior to and during the Second World War, neither the Charters of the IMT Nuremberg/Tokyo, nor the Genocide Convention 1948, the Geneva Conventions 1949 or the Nuremberg Principles contained any provisions concerning the prescriptibility of war crimes (as confirmed by the Preamble to the 1968 Convention).

232. The essential question to be determined by this Court is whether at any point prior to the applicant's prosecution, such action had become statute-barred by international law. It follows from the previous paragraph that in 1944 no limitation period was fixed by international law as regards the prosecution of war crimes. Neither have developments in international law since 1944 imposed any limitation period on the war crimes charges against the applicant[63].

233. In sum, the Court concludes, firstly, that any prescription provisions in domestic law were not applicable (paragraph 230 above) and, secondly, that the charges against the applicant were never prescribed under international law (paragraph 232). It concludes that the prosecution of the applicant had not become statute-barred.

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[60] The USSR Fundamental Principles of Criminal Law and Procedure, 1924; and Ancel M., « *Les Codes pénaux européens* », Tome IV, Paris, CFDC, 1971

[61] Including the St. James' Declaration 1942; the Moscow Declaration of 1943; and the Charters of the IMTs Nuremberg and Tokyo.

[62] Preamble to the 1968 Convention

[63] U.N. Commission on Human Rights (1966) *Question of the non-applicability of Statutory Limitation to War Crimes and Crimes against Humanity: Study submitted by the Secretary General* UN Doc. E/CN.4/906, at p. 104; the 1968 Convention; Robert H. Miller "*The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*", AJIL, vol. 65, No. 3 (Jul., 1971), pp. 476-501, and further references therein; the 1974 Convention; the Statute of the International Criminal Court; and Kok R. (2001) "*Statutory Limitations in International Criminal Law*", TMC Asser Press The Hague, pp. 346-382

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

234. The applicant further maintained that he could not have foreseen that the impugned acts constituted war crimes, or have anticipated that he would be subsequently prosecuted.

In the first place, he underlined that in 1944 he was a young soldier in a combat situation behind enemy lines and detached from the above-described international developments, in which circumstances he could not have foreseen that the acts for which he was convicted could have constituted war crimes. Secondly, he argued that it was politically unforeseeable that he would be prosecuted: his conviction following the independence of Latvia in 1991 was a political exercise by the Latvian State rather than any real wish to fulfil international obligations to prosecute war criminals.

235. As to the first point, the Court considers that, in the context of a commanding officer and the laws and customs of war, the concepts of accessibility and foreseeability must be considered together.

The Court recalls that the scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. Persons carrying on a professional activity must proceed with a high degree of caution when pursuing their occupation and can be expected to take special care in assessing the risks that such activity entails (*Pessino v. France*, no. 40403/02, § 33, 10 October 2006).

236. As to whether the qualification of the impugned acts as war crimes, based as it was on international law exclusively, could be considered to be sufficiently accessible and foreseeable to the applicant in 1944, the Court recalls that it has previously found that the individual criminal responsibility of a private soldier (a border guard) was defined with sufficient accessibility and foreseeability by, *inter alia*, a requirement to comply with international fundamental human rights instruments, which instruments did not, of themselves, give rise to individual criminal responsibility and one of which had not been ratified by the relevant State at the material time (*K.-H.W. v. Germany,* §§ 92-105, cited above). The Court considered that even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only domestic law, but internationally recognised human rights, in particular the right to life, a supreme value in the international hierarchy of human rights (*K.-H.W. v. Germany, at* § 75).

237. It is true that the 1926 Criminal Code did not contain a reference to the international laws and customs of war (as in *K.-H. W v. Germany*) and that those international laws and customs were not formally published in the USSR or in the Latvian SSR (as in *Korbely v. Hungary* [GC], cited above, at §§ 74-75). However, this cannot be decisive. As is clear from the conclusions at paragraphs 213 and 227 above, international laws and

customs of war were in 1944 sufficient, of themselves, to found individual criminal responsibility.

238. Moreover, the Court notes that in 1944 those laws constituted detailed *lex specialis* regulations fixing the parameters of criminal conduct in a time of war, primarily addressed to armed forces and, especially, commanders. The present applicant was a Sergeant in the Soviet Army assigned to the reserve regiment of the Latvian Division: at the material time, he was a member of a commando unit and in command of a platoon whose primary activities were military sabotage and propaganda. Given his position as a commanding military officer, the Court is of the view that he could have been reasonably expected to take such special care in assessing the risks that the operation in Mazie Bati entailed. The Court considers that, having regard to the flagrantly unlawful nature of the ill-treatment and killing of the nine villagers in the established circumstances of the operation on 27 May 1944 (paragraphs 15-20 above), even the most cursory reflection by the applicant, would have indicated that, at the very least, the impugned acts risked being counter to the laws and customs of war as understood at that time and, notably, risked constituting war crimes for which, as commander, he could be held individually and criminally accountable.

239. For these reasons, the Court deems it reasonable to find that the applicant could have foreseen in 1944 that the impugned acts could be qualified as war crimes.

240. As to his second submission, the Court notes the declarations of independence of 1990 and 1991, the immediate accession by the new Republic of Latvia to various human rights instruments (including the 1968 Convention in 1992) and the subsequent insertion of Article 68-3 into the 1961 Criminal Code in 1993.

241. It recalls that it is legitimate and foreseeable for a successor State to bring criminal proceedings against persons who have committed crimes under a former regime and that successor courts cannot be criticised for applying and interpreting the legal provisions in force at the material time during the former regime, but in the light of the principles governing a State subject to the rule of law and having regard to the core principles on which the Convention system is built. It is especially the case when the matter at issue concerns the right to life, a supreme value in the Convention and international hierarchy of human rights and which right Contracting parties have a primary Convention obligation to protect. As well as the obligation on a State to prosecute drawn from the laws and customs of war, Article 2 of the Convention also enjoins the States to take appropriate steps to safeguard the lives of those within their jurisdiction and implies a primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences which endanger life (see *Streletz, Kessler and Krenz*, §§ 72 and 79-86, and *K.-H.W. v. Germany*, cited above, §§ 66 and 82-89). It is sufficient for present purposes to note

that the above-cited principles are applicable to a change of regime of the nature which took place in Latvia following the declarations of independence of 1990 and 1991 (see paragraphs 27-29 and 210 above).

242. As to the applicant's reliance on the support of the Soviet authorities since 1944, the Court considers that this argument has no relevance to the legal question of whether it was foreseeable that the impugned acts of 1944 would constitute war crimes.

243. Accordingly, the applicant's prosecution (and later conviction) by the Republic of Latvia, based on international law in force at the time of the impugned acts and applied by its courts, cannot be considered unforeseeable.

244. In the light of all of the above considerations, the Court concludes that, at the time when they were committed, the applicant's acts constituted offences defined with sufficient accessibility and foreseeability by the laws and customs of war.

D. The Court's conclusion

245. For all of the above reasons, the Court considers that the applicant's conviction for war crimes did not constitute a violation of Article 7 § 1 of the Convention.

246. It is not therefore necessary to examine the applicant's conviction under Article 7 § 2 of the Convention.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the applicant's request to consider the complaints declared inadmissible by the Chamber;

2. *Holds* by fourteen votes to three that there has been no violation of Article 7 of the Convention;

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 17 May 2010.

Michael O'Boyle
Deputy Registrar

Jean-Paul Costa
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Rozakis, Tulkens, Spielmann and Jebens;

(b) dissenting opinion of Judge Costa, joined by Judges Kalaydjieva and Poalelungi.

J.-P.C.
M.O'B.

JOINT CONCURRING OPINION OF JUDGE ROZAKIS, TULKENS, SPIELMANN AND JEBENS

1. While we fully agree with the majority in this case that the applicant's complaints cannot lead to a finding of a violation of Article 7 of the Convention, we depart from their reasoning on a specific point, concerning their conclusions on the Russian Federation's claim that the prosecution of the applicant amounted to a retroactive application of the criminal law.

2. Indeed, the Russian Federation, intervening in the present case, maintained that any prosecution of the applicant was statute-barred at the latest in 1954, having regard to the maximum limitation period for which Article 14 of the 1926 Criminal Code provided. According to the Russian Federation, the applicant was convicted under Article 68-3 of the 1961 Criminal Code, and Article 6-1 of that Code stated that there was no limitation period for, inter alia, war crimes. Under these circumstances, the Russian Federation – and the applicant – contended that the latter's prosecution amounted to ex post facto extension of a national limitation period which would have applied in 1944, and, consequently, amounted to a retroactive application of the criminal law (see paragraphs 228 and 229 of the judgment).

3. The answer of the Court is given in paragraphs 230 and 233, which essentially deny that the basis of the applicant's responsibility in 1944 – had the applicant been prosecuted for war crimes in Latvia in 1944 – was the 1926 Criminal Code (with its prescriptibility provision). The Court considered that, having regard to the way in which that Criminal Code was worded, "a domestic prosecution for war crimes in 1944 would have required reference to international law, not only as regards the definition of such crimes, but also as regards the determination of any applicable limitation period". However, the Court continued, "international law in 1944 was silent on the subject. Previous international declarations on the responsibility for, and obligation to prosecute and punish, war crimes did not refer to any applicable limitation periods... [N]either the Charters of the IMT Nuremberg/Tokyo, nor the Genocide Convention 1948, the Geneva Conventions [of] 1949 or the Nuremberg Principles contained any provisions concerning the prescriptibility of war crimes (as confirmed by the Preamble to the 1968 Convention)." The absence of any reference in the post-war instruments to the question of prescriptibility led the Court to the conclusion that international law, by being silent on the matter, recognised that the applicant's crimes were imprescriptible; that in 1944 no limitation period had been fixed by international law as regards the prosecution of war crimes; and that subsequent developments did not indicate that international law since 1944 had imposed any limitation period on the war crimes of which the applicant had been convicted.

4. We believe that the answer given by the Court to this particular claim is not the correct one. The mere silence of international law does not suffice to prove that the consent and the intentions of the international community in 1944 were clear as far as the imprescriptibility of war crimes was concerned, particularly if one takes into account that before Nuremberg and Tokyo, the state of international criminal law concerning individual responsibility for war crimes had not yet attained a degree of sophistication and completeness permitting the conclusion that the technical and procedural issues as to the application of that law had been unequivocally determined. Basically, one could say that up to 1944 general international law – as a combination of existing general international agreements and State practice – had resolved the issue of individual responsibility (and not only State responsibility), and that only the post-war period fine-tuned procedural issues, such as the question of the statute of limitations for war crimes.

5. Yet, it seems to us that the Court incorrectly dealt with the issue of imprescriptibility of the applicant's war crimes in 1944 as a separate aspect of the requirements of Article 7. The Court, in its effort to address an argument raised by the parties, has left the impression that the link made by the latter between the (im)prescriptibility of war crimes and the retroactive nature of the law governing such crimes was correct, and has simply focused its efforts on showing that in the circumstances of the case the crimes in question were already imprescriptible.

6. This is not the right approach. The right approach, to our mind, is that Article 7 of the Convention and the principles it enshrines require that in a rule-of-law system anyone considering carrying out a particular act should be able, by reference to the legal rules defining crimes and the corresponding penalties, to determine whether or not the act in question constitutes a crime and what penalty he or she faces if it is carried out. Hence no one can speak of retroactive application of substantive law, when a person is convicted, even belatedly, on the basis of rules existing at the time of the commission of the act. Considering, as the Court leaves one to believe, that the procedural issue of the statute of limitations is a constituent element of the applicability of Article 7, linked to the question of retroactive application and sitting alongside, with equal force, the conditions of the existence of a crime and a penalty, can lead to unwanted results which could undermine the very spirit of Article 7.

7. There should, of course, be an answer to the parties' arguments concerning the statute of limitations, seen as a purely technical issue more appropriately intertwined with the fairness of proceedings, and Article 6 of the Convention. And this is, to our mind, that while, admittedly, the question of prescriptibility was not necessarily resolved in 1944 – although this did not afford the applicant the possibility of taking advantage of such a lacuna – the ensuing developments, after the Second World War, have

nevertheless clearly demonstrated that the international community not only consolidated its position in strongly condemning heinous war crimes, but also gradually formulated detailed rules – including procedural ones – dealing with the way in which such crimes should be dealt with by international law. These developments constitute an uninterrupted chain of legal productivity, which leaves little room to consider that the international system was not prepared to pursue the condemnation of crimes committed during the war; at that stage, of course, the silence on the issue of prescriptibility was deafening. This can also be established from the adoption of the 1968 Convention, which "affirmed" the imprescriptibility of these crimes. It is exactly this chain of events which has allowed the Latvian Government to prosecute and punish the applicant for the crimes he committed.

DISSENTING OPINION OF JUDGE COSTA JOINED BY JUDGES KALAYDJIEVA AND POALELUNGI

(Translation)

1. We have concluded, like the Chamber but unlike the majority of the Grand Chamber, that Article 7 of the Convention has been breached by the respondent State on account of the applicant's prosecution and conviction for war crimes. We shall attempt to set out our position on this issue.

2. A preliminary observation needs to be made in relation to the very structure of Article 7 of the Convention.

3. As is well known, the first of the two paragraphs of this Article lay down in general terms the principle that offences and penalties must be defined by law, which implies, in particular, that they should not be retroactive; the second paragraph (in a sense, a *lex specialis*) provides for an exception to that principle in cases where the act or omission, at the time when it was committed, was criminal according to "the general principles of law recognised by civilised nations". (This expression is exactly the same as the one used in Article 38 of the Statute of the International Court of Justice, which clearly inspired it.)

4. The Grand Chamber rightly observed in paragraph 186 of the judgment, citing *Tess v. Latvia* ((dec.), no. 34854/02, 12 December 2002), that the two paragraphs of Article 7 must be interpreted in a concordant manner. Similarly, the judgment was correct in our opinion in concluding, in paragraphs 245 and 246, that since the applicant's conviction did not constitute a violation of Article 7 § 1, it was not necessary to examine the conviction under Article 7 § 2. In fact, the lines of reasoning pursued must not only be concordant, but they are closely linked. If we reject the legal basis for the offence under national law, we must have regard to international treaty law or customary international law. And if that does not provide a sufficient basis either, Article 7 as a whole will be breached.

5. With regard to the facts, as our colleague Egbert Myjer observed in his concurring opinion appended to the Chamber judgment finding a violation, it is in principle not the Court's task to substitute its view for that of the domestic courts, except in cases of manifest arbitrariness. The Court is not a fourth-instance body, or indeed an international criminal tribunal. It is not called upon to retry the applicant for the events that occurred on 27 May 1944 in Mazie Bati. A final decision delivered by the Court on 20 September 2007 dismissed the applicant's complaint of a violation of his right to a fair trial under Article 6 of the Convention. The discussion of the merits of the case was therefore limited to Article 7, as the Grand Chamber noted in paragraph 184 of the judgment. That being so, however, the Court must, without taking the place of the domestic courts, review the application of the Convention provisions in question, in other words ensure that the

criminal penalties imposed on the applicant were prescribed by law and were not retroactive. It is, moreover, apparent that in relation to the seriousness of the charges against the applicant, those penalties were not very severe, in view of the fact that he was aged, infirm and harmless (see paragraph 39 of the judgment); however, the clemency shown towards the accused has no direct bearing on the merits of the complaint of a breach of Article 7 of the Convention.

6. The first question to consider is that of national law. At the time of the events, the 1926 Soviet Criminal Code, which became applicable in Latvian territory by a decree of 6 November 1940 (see paragraph 41 of the judgment), did not contain any provisions on war crimes as such. The Code was replaced on 6 January 1961 by the 1961 Criminal Code, after the events in issue, and a law passed on 6 April 1993, after Latvia had regained its independence in 1991, inserted provisions on war crimes into the 1961 Criminal Code, permitting the retrospective application of the criminal law in respect of such crimes and exempting them from limitation (Articles 6-1, 45-1 and 68-3, inserted into the 1961 Code – see paragraphs 48 to 50 of the judgment). In these circumstances it is difficult to find a legal basis existing in national law at the time of the events and, if we are correct in our understanding of the judgment, in particular paragraphs 196 to 227, the majority found such a legal basis only by reference to international law, even after taking into account the enactment of the 1993 law (see paragraph 196 especially). This was also the approach taken by the domestic courts, at least by the Supreme Court Senate in its judgment of 28 September 2004, the final decision in the case at national level. The decision was chiefly based on Article 6 § 2, point (b), of the Charter of the International Military Tribunal at Nuremberg, and on the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (for the reasoning of the Supreme Court Senate's decision, see paragraph 40 of the judgment).

7. The question of the legal basis in international law, however, is much more complex. It raises a large number of problematic issues: whether such a legal basis actually existed, whether, if appropriate, the charges of war crimes against the applicant were statute-barred or not subject to statutory limitation, and lastly, whether the prosecution of the applicant (from 1998 onwards) and his conviction (in the final instance in 2004) were foreseeable, and could have been foreseen by him.

8. In our view, a distinction must be made between international law as in force at the material time and as it subsequently emerged and gradually became established, mainly from the time of the Nuremberg trial, which began in November 1945, and was, and continues to be, of vital importance in many respects.

9. The judgment, to its great credit, contains a lengthy and careful analysis of international humanitarian law, and especially *jus in bello*, prior

to 1944. It is true that both treaty law and customary law in this field developed in particular as a result of the 1863 Lieber Code and subsequently the 1907 Hague Convention and Regulations. Reference may also be made to the declaration, or "Martens clause", inserted into the preamble to the second Hague Convention of 1899 and reproduced in the preamble to the 1907 Hague Convention (see paragraphs 86 and 87 of the judgment).

10. However, we are not persuaded, even when viewing them in 2010 through the prism of the many subsequent positive developments, that those instruments could, in 1944, have formed a sufficiently sound and acknowledged legal basis for war crimes to be regarded as having been precisely defined at that time, and for their definition to have been foreseeable. As Judge Myjer rightly notes in his concurring opinion cited above, not all crimes committed during wars can be considered "war crimes"; the criminal law must be rigorous, and the Court has often observed that it must not be extensively construed to an accused's detriment, for instance by analogy, since this would run counter to the *nullum crimen, nulla poena, sine lege* principle (see, for example, *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A). The applicant was prosecuted, tried and convicted more than half a century after the events in question, on the basis of a criminal law alleged to have existed at that time – a state of affairs that is clearly problematic.

11. Admittedly, paragraphs 97 to 103 of the judgment also refer to practical examples from before the Second World War of prosecutions for violations of the laws of war (United States court-martials for the Philippines, the Leipzig trials, prosecutions of Turkish officers). These isolated and embryonic examples by no means indicate the existence of a sufficiently established body of customary law. We are more inclined to share the view expressed by Professor Georges Abi-Saab and Mrs Rosemary Abi-Saab in their chapter entitled "Les crimes de guerre" in the collective work *Droit international pénal* (Paris, Pedone, 2000), edited by Professors Hervé Ascensio, Emmanuel Decaux and Alain Pellet (p. 269):

> "13. Thus, until the end of the Second World War, the criminalisation of breaches of the rules of *jus in bello*, in other words the definition of war crimes and the penalties attached to them, was left to the belligerent State and its domestic law (although this power could be exercised only by reference to and within the limits of the rules of *jus in bello*, and was sometimes exercised by virtue of a treaty obligation). A leap in quality occurred when international law directly defined war crimes and no longer left the definition to the domestic law of individual States."

(The authors then cite the Nuremberg trial as the starting-point of this "leap in quality".)

12. Before reaching a conclusion on the law and practice prior to the events in issue in the present case, it should be pointed out that unfortunately, the many atrocities committed, particularly during the two world wars, did not generally result in prosecution and punishment, until

Nuremberg, precisely, changed the situation. This bears out the opinion of Mr and Mrs Abi-Saab as quoted above.

13. With regard to "Nuremberg" (the Charter, the trial and the principles), it should be noted at the outset that the whole process began more than a year after the events of the present case. The London Agreement setting up the International Military Tribunal dates from 8 August 1945. The Charter of the Tribunal, annexed to the Agreement, empowered it to try and to punish persons who, acting in the interests of the European Axis countries, had committed certain crimes, including war crimes. Article 6 (b) of the Charter provided the first legal definition of war crimes, and as has been noted in paragraph 6 of this opinion, the national courts took the view that these provisions applied to the applicant. The judgment of the Tribunal asserts that the classification of such crimes does not result solely from Article 6 (b) of the Charter, but also from pre-existing international law (in particular, the 1907 Hague Convention and the 1929 Geneva Convention); however, the question arises whether this declaratory sentence, which is clearly retroactive in effect, should be construed as having *erga omnes* effect for the past or whether its scope should, on the contrary, be limited to the Tribunal's general jurisdiction *ratione personae*, or even to its jurisdiction solely in respect of persons tried by it. This question is crucial, for while the applicant was indeed prosecuted for acts he had allegedly committed or been an accomplice to, he was clearly not acting in the interests of the "European Axis countries" as he was fighting against them. If we rule out the possibility of applying the criminal law extensively and by analogy, it is difficult to accept without some hesitation that the "Nuremberg principles" may serve as a legal basis here.

14. Historically, then, as is again noted by Judge Myjer in his opinion cited above, it was the Nuremberg trial "which for the first time made it clear to the outside world that anyone who might commit similar crimes in future could be held personally responsible". Accordingly, we consider that it was not until after the facts of the present case that international law laid down the rules of *jus in bello* with sufficient precision. The fact that the Nuremberg trial punished *ex post facto* the persons brought before the Tribunal does not mean that all crimes committed during the Second World War could be covered retroactively, for the purposes of Article 7 § 2 of the Convention, by the definition of war crimes and the penalties attached to them. The "general principles of law recognised by civilised nations" were, in our opinion, clearly set forth at Nuremberg, and not before – unless one were to assume on principle that they pre-existed. If so, from what point did they exist? The Second World War? The First? The War of Secession and the Lieber Code? Is it not, with all due respect, somewhat speculative to determine the matter in a judgment delivered at the start of the twenty-first century? This is a question worth asking.

15. *A fortiori*, neither the four Geneva Conventions of 12 August 1949 nor the United Nations Convention of November 1968 on the Non-Applicability of Statutory Limitations to War Crimes, which entered into force on 11 November 1970, appear to provide a legal basis retroactively for the proceedings instituted against the applicant in 1998, especially as under national law, prosecution of the offence had been statute-barred since 1954 (see paragraph 18 below).

16. All these considerations lead us to conclude that, at the material time, neither domestic nor international law was sufficiently clear in relation to war crimes, or the distinction between war crimes and ordinary crimes, however serious such crimes may have been. And the acts carried out on 27 May 1944 (regardless of their perpetrators and/or accomplices) were indeed extremely serious, to judge from the facts as established by the domestic courts.

17. As well as being unclear, was the applicable law also, and perhaps in the alternative, still in force or did a limitation period apply, thus precluding the institution of proceedings against the applicant for war crimes, and *a fortiori* his conviction as a result of such proceedings?

18. In our opinion, the applicant's prosecution had been statute-barred since 1954, under the domestic law in force, because the 1926 Criminal Code provided for a limitation period of ten years from the commission of the offence. Only when the law of 6 April 1993 was passed – almost 50 years after the events – was the (1961) Criminal Code amended so that the statutory limitation of criminal liability did not apply to persons found guilty of war crimes. We therefore consider that the non-applicability of this limitation in the applicant's case entailed retrospective application of the criminal law, which in our view is not normally compatible with Article 7.

19. The majority admittedly conclude (see paragraphs 232 and 233 of the judgment) that in 1944 no limitation period was fixed by international law as regards the prosecution of war crimes. Firstly, though, as stated above, we consider that the acts in issue could not be classified as war crimes in 1944 in the absence of a sufficiently clear and precise legal basis, and secondly, prosecution in respect of those acts was statute-barred from 1954. We are therefore not persuaded by this reasoning, which amounts to finding that non-applicability of statutory limitations to criminal offences is the rule and limitation the exception, whereas in our view, the reverse should be true. Exempting the most serious crimes from limitation is a clear sign of progress, as it curbs impunity and permits punishment. International criminal justice has developed significantly, particularly since the setting up of *ad hoc* international tribunals, followed by the International Criminal Court. However, without a clear basis in law it is difficult to decide *ex post facto* that a statutory limitation should not apply.

20. Lastly, and perhaps most importantly, we need to consider the foreseeability, in 1944, of a prosecution brought in 1998, on the basis of an

instrument dating from 1993, for acts committed in 1944. Could the applicant have foreseen at that time that more than half a century later, those acts could be found by a court to constitute a basis for his conviction, for a crime which, moreover, was not subject to statutory limitation?

21. We do not wish to enter into the debate on the foreseeability of the historical and legal changes occurring after, and sometimes a long time after, the events (the Nuremberg trial, the 1949 Geneva Conventions, the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes, the 1993 law passed following restoration of Latvia's independence in 1991). We would simply recall that the applicant's conviction was based on international law. On that account, the analogy drawn in the judgment (paragraph 236) with the case of *K.-H.W. v. Germany* ([GC], no. 37201/97, ECHR 2001-II) does not seem decisive to us either. That case concerned facts occurring in 1972 which were punishable under the national legislation applicable at that time, and the Court found that they should also be assessed from the standpoint of international law – that is, however, as existing in 1972 and not 1944. Similarly in the case of *Korbely v. Hungary* ([GC], no. 9174/02, ECHR 2008-...), the facts, dating back to 1956, were in any event subsequent to the 1949 Geneva Conventions in particular.

22. All in all, we would emphasise that the aim here is not to retry the applicant, to determine his individual responsibility as perpetrator, instigator or accomplice, or to confirm or refute the national courts' assessment of the facts. Nor is there any question of minimising the seriousness of the acts carried out on 27 May 1944 in Mazie Bati. What is at issue is the interpretation and application of Article 7 of the European Convention on Human Rights. This Article is not inconsequential but is extremely important, as is illustrated in particular by the fact that no derogation from it is permissible under Article 15 of the Convention.

23. In conclusion, we consider that, in respect of Article 7:

(a) the legal basis of the applicant's prosecution and conviction was not sufficiently clear in 1944;

(b) it was not reasonably foreseeable at that time either, particularly by the applicant himself;

(c) prosecution of the offence was, moreover, statute-barred from 1954 under the applicable domestic legislation;

(d) and, as a consequence, the finding that the applicant's acts were not subject to statutory limitation, thus resulting in his conviction, amounted to retrospective application of the criminal law to his detriment.

For all these reasons, we consider that Article 7 has been breached.