

## RECENT DEVELOPMENTS

### *Kononov v. Latvia: A Partisan and a Criminal—The European Court of Human Rights Takes a Controversial Stance on War Crimes*

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#### I. OVERVIEW

Vassiliy Kononov led a unit of Soviet (Red) partisans to conduct an operation in the village of Mazie Bati, Latvia, on May 27th, 1944.<sup>1</sup> Three months earlier, the German army discovered and exterminated a group of Red partisans hiding in a barn belonging to one of the residents, Mr. Krupniks.<sup>2</sup> The operation on May 27th was conducted in reprisal because Kononov suspected the villagers to be collaborators who had handed the partisans over to the Germans.<sup>3</sup> Kononov and his men conducted the operation wearing German uniforms in order to surprise the villagers.<sup>4</sup> The partisans brutally killed nine people, including three women.<sup>5</sup> One woman, Mrs. Krupniks, who was in the late stages of pregnancy, was burned alive.<sup>6</sup> Subsequently, Kononov received awards for his wartime conduct and spent the rest of his career working for the

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1. Kononov v. Latvia, App. No. 36376/04, para. 16 (Eur. Ct. H.R. May 17, 2010), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDUC Database” hyperlink; search Application Number “36376/04”).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* paras. 17-19.

6. *Id.* paras. 18.

Soviet police until 1988.<sup>7</sup> In 1998, he was charged with war crimes by the Latvian Principal Public Prosecutor's Office.<sup>8</sup>

Kononov pled not guilty at the trial.<sup>9</sup> The Riga Regional court found that he was in violation of the Charter of the International Military Tribunal at Nuremberg, the Hague Convention of 1907, and the Geneva Convention of 1949.<sup>10</sup> He was found guilty and sentenced to six years in prison.<sup>11</sup> Two years later, the Criminal Affairs Division overturned his conviction.<sup>12</sup> After a new investigation, Kononov was charged again in 2001 and found guilty.<sup>13</sup> The Supreme Court of Latvia upheld the verdict of the lower court and dismissed Kononov's appeal in 2004.<sup>14</sup> Following the dismissal, he appealed to the European Court of Human Rights (ECHR).<sup>15</sup> In 2008, the Chamber of the ECHR found that Kononov's conviction by the Latvian courts was a violation of article 7 of the European Convention on Human Rights.<sup>16</sup> The government of Latvia appealed.<sup>17</sup> The Grand Chamber of the European Court of Human Rights *held* that Kononov could be punished for violating war regulations, specifically by wearing German uniforms while carrying out the crimes, that the killings of the villagers were in violation of international law of the time, and that his conviction by Latvian courts was not barred by the statute of limitations. *Kononov v. Latvia*, App. No. 36376104, paras. 233, 244 (Eur. Ct. H.R. May 17, 2010), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "36376/04").

## II. BACKGROUND

Since the ancient civilizations, war crime law has existed as custom and practice between nations.<sup>18</sup> As early as 1268, trials for "initiating an unjust war" took place in parts of Medieval Europe, culminating in the 1474 Austrian trial, known as the first international war crime trial, of

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7. *Id.* para. 26.

8. *Id.* para. 30.

9. *Id.* para. 31.

10. *Id.* para. 32.

11. *Id.*

12. *Id.* para. 33.

13. *Id.* paras. 35-36.

14. *Id.* para. 40.

15. *Id.* paras. 1, 3.

16. *Id.* paras. 5, 144-148.

17. *Id.* paras. 6, 149-159.

18. Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 684-89 (1997).

Peter von Hagenbach.<sup>19</sup> Throughout European history, unspoken rules of combat existed between belligerents or states involved in a war, but those rules were not codified by formal statements of law.<sup>20</sup> It was not until the Hague Peace Conferences of 1899 and 1907 “that the modern law of war and war crimes began to take shape.”<sup>21</sup> The Conferences were significant because they directly impacted and normalized the conduct of hostilities between nations, despite the amorphous nature of international law.<sup>22</sup> However, a unified code of modern, secular law of war did not acquire binding force, and international law of warfare and war crimes remained a myriad of Geneva Conventions, laws, customs, cases, and practices related to the rules of war.<sup>23</sup> The development of the law of war crimes applicable to the present case can be analyzed in three sections: laws and state practice before World War II (WWII), war crime prosecutions and laws during WWII, and trials and legal instruments after WWII.

A. *Laws and State Practice Before World War II*

Before World War I (WWI), war crimes were not codified and mostly evidenced by custom, practice, national laws, and military manuals.<sup>24</sup> The earliest example of the international codification is “Geneva law,” the collection of Geneva Conventions that provide an evolving set of concepts and definitions of war crimes from 1864 to 1949.<sup>25</sup> Although the laws of war developed mostly during the twentieth century, a minimum standard of care for wounded or sick combatants was already included in the 1864 Convention.<sup>26</sup> The 1906 Convention required respect and care for the wounded or sick prisoners by those in

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19. *Id.* at 689-92.

20. Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT’L L. 551, 553 (2006).

21. *Id.*

22. McCormack, *supra* note 18, at 697.

23. *See id.* at 693-99.

24. Meron, *supra* note 20, at 553.

25. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 1 Bevans 7 [hereinafter Geneva Convention 1864]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 6, 1906, 35 Stat. 1885, T.S. No. 464, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 233-44 (Dietrich Schindler & Jiri Toman eds., 1981) [hereinafter Geneva Convention 1906]; Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 [hereinafter Geneva Convention 1929]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention (III)]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)].

26. Geneva Convention 1864, *supra* note 25, art. 6.

power.<sup>27</sup> Respect is further emphasized in the 1929 Convention, as well as protection and treatment of officers and soldiers with humanity, provision of medical care for the wounded and sick of an army, and special protections for women.<sup>28</sup>

Geneva law also provides a negative definition of civilians, which is a key protective feature in the body of international law of war. The Draft Tokyo Convention defines civilians as persons “not belonging to the land, maritime or air armed forces of the belligerents, as defined by international law.”<sup>29</sup> Over time, other safeguards were added to Geneva law, including protection of those whose status is not easily determinable.<sup>30</sup> Geneva law concerning protection of civilians also expanded to include special protections for pregnant women, protections from ill-treatment, and protections for real or personal property.<sup>31</sup>

Alongside the Geneva Conventions, national law contributed to the development of international law of war and war crimes. One of the most notable sources is the Lieber Code, otherwise known as “Instructions for the Government of Armies of the United States in the Field.”<sup>32</sup> Although only applicable to American forces, the Lieber Code was one of the first attempts to summarize customs and laws of war and became influential in later codification attempts.<sup>33</sup> Some key provisions included general standards of behavior, an emphasis that “[m]ilitary necessity does not admit cruelty,” and prohibitions on the use of poison, wanton devastation, perfidy, and acts of hostility that “make[] the return to peace unnecessarily difficult.”<sup>34</sup> The Lieber Code also included special protection for women and children during wartime operations.<sup>35</sup> A

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27. Geneva Convention 1906, *supra* note 25, arts. 1-2, 6, 9.

28. Geneva Convention 1929, *supra* note 25, arts. 2-3, 14.

29. 1934 Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality Who Are on Territory Belonging to or Occupied by a Belligerent, art. 1, <http://www.icrc.org/ihl.nsf/INTRO/320?OpenDocument> [hereinafter Draft Tokyo Convention 1934].

30. Geneva Convention (III), *supra* note 25.

31. Geneva Convention (IV), *supra* note 25, arts. 16, 53.

32. Instructions for the Government of Armies of the United States in the Field, Apr. 24, 1863, reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS, *supra* note 25, at 3-24 [hereinafter Lieber Code].

33. See generally Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213 (1998).

34. Lieber Code, *supra* note 32, art. 16.

35. *Id.* arts. 19, 37. Additionally, the Code emphasized the necessity to spare unarmed citizens and their “person, property, and honor” and prohibited “wanton violence” committed against civilians of the invaded country. *Id.* arts. 22, 44. Wanton acts included maiming and killing, the destruction of property, theft and pillage, rape, and wounding. *Id.* art. 44. Under the Lieber Code, wanton violence was forbidden with the penalty of death or other punishment, depending on “the gravity of the offense.” *Id.* art. 44.

crucial development in the law of war, “the Lieber Code [was] the final product of the eighteenth-century movement to humanize war through the application of reason.”<sup>36</sup> Its main contribution to modern laws of war and war crimes was the standard of military necessity as a general legal principle to limit violence in time of war.<sup>37</sup>

Shortly after being articulated in the Lieber Code, the St. Petersburg Declaration of 1868 codified the concepts of military necessity and the prohibition of unnecessary violence.<sup>38</sup> The Declaration, signed by major world powers of the day, stated that laws and customs of war do not condone violence against those *hors de combat*.<sup>39</sup> The next international attempt at summarizing and codifying laws of warfare was the Draft Brussels Declaration of 1874.<sup>40</sup> While the Declaration was never adopted, it served as a basis for both the Oxford Manual and the Hague Conventions of 1899 and 1907.<sup>41</sup> The Declaration also contained criteria for distinguishing combatants from civilians and prohibitions on murder by treachery, murder of surrendered enemies, improper use of a flag of truce, and destruction or seizure of enemy property not dictated by the necessity of war.<sup>42</sup>

Following the Declaration, the Institute of International Law drafted the Oxford Manual, designed to assist governments in formulating national legislation on the laws and customs of war.<sup>43</sup> The Institute aimed to codify the accepted ideas and practices so as to eliminate uncertainty and enhance discipline among the armed forces.<sup>44</sup> The Manual drew a distinction between armed forces and other “*ressortissants*” and prohibited “mak[ing] improper use of the national flag, military insignia or uniform of the enemy.”<sup>45</sup> Both the Brussels Declaration and the

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36. Carnahan, *supra* note 33, at 213.

37. *Id.*

38. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight pmbl., Nov. 29, 1868, 18 Martens Nouveau Recueil (ser. 1) 474 [hereinafter St. Petersburg Declaration].

39. *Id.*; *Hors de combat* is a term which designates those not defined as combatants. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 600 (11 ed. 2003).

40. Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS, *supra* note 25, at 25-34 [hereinafter Draft Brussels Declaration].

41. Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT’L L. 683, 696 (2009).

42. Draft Brussels Declaration, *supra* note 40, arts. 9-11, 13.

43. Inst. of Int’l Law, The Laws of War on Land, Sept. 9, 1880, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS, *supra* note 25, at 35-48 [hereinafter Oxford Manual].

44. Rosen, *supra* note 41, at 698.

45. Oxford Manual, *supra* note 43, arts. 1, 8.

Oxford Manual paved the way for the first Hague Convention, which limited the methods of conducting war.<sup>46</sup>

Although the Hague Convention of 1907 shaped the laws of war and war crimes as they exist today, it was not a complete success.<sup>47</sup> There were extensive problems with enforcement and no provisions requiring individual criminal responsibility for those who violated the new laws.<sup>48</sup> The failings of the Convention became apparent after WWI. The International Commission (the Commission), formed after WWI, catalogued thirty-two war crimes including “murders and massacres, torture of civilians, rape, and internment of civilians under inhuman conditions.”<sup>49</sup> The atrocities included crimes committed by German and Turkish soldiers against Turkish subjects (Armenians), and by Austrian soldiers against Austrian citizens.<sup>50</sup> The Commission’s work culminated in the Treaty of Versailles, which contained provisions relating to wartime conduct and addressed individual responsibility of a head of state for initiating and conducting war crimes.<sup>51</sup> The provisions relating to the prosecution of individuals for war crimes resulted in the Leipzig Trials, discussed below.<sup>52</sup> “[T]he Treaty also sowed the seeds for the development of the international criminal law that followed World War II.”<sup>53</sup>

In addition to the laws, codes, and international regulations, state practice prior to WWII also contributed to the development of international law of war crimes. Even before WWII, some states prosecuted their own citizens for war crimes. For example, from 1899 to 1902, the United States courts-martialed U.S. military personnel in the Philippines accused of violating laws of war during a military operation.<sup>54</sup> Although the sentences were light and the fines trivial, the trials were notably impartial.<sup>55</sup> Additionally, the courts-martial were one of the first

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46. Rosen, *supra* note 41, at 699.

47. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention 1907]; Meron, *supra* note 20, at 554.

48. Meron, *supra* note 20, at 554.

49. *Id.* at 554-55.

50. *Id.* at 555.

51. Treaty of Peace Between the Allied and Associated Powers and Germany art. 227, June 28, 1919, 225 Consol. T.S. 482; Meron, *supra* note 20, at 556.

52. *See* Meron, *supra* note 20, at 557-58.

53. *Id.* at 559.

54. Guénaël Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contribution to the National Case Law on War Crimes*, 1 J. INT'L CRIM. JUST. 135, 137, 139, 143 (2003).

55. *Id.* at 148-49.

instances of a tribunal applying the principle of command responsibility and rules regarding the treatment of prisoners of war.<sup>56</sup>

The most famous domestic war crimes trials were cases known as the Leipzig Trials, brought by Germany against their own citizens for war crimes committed during WWI.<sup>57</sup> The trials were only partly successful.<sup>58</sup> Significantly, the convictions relied heavily on customary international law regarding individual criminal and command responsibility.<sup>59</sup> The only other post-WWI national trials took place in Turkey, where Turkish nationals were tried for persecuting Armenians during the war.<sup>60</sup> The prosecutions were as unsuccessful as the later Leipzig Trials.<sup>61</sup> Nevertheless, the trials were examples of attempts to apply international law and prosecute those accused of war crimes.<sup>62</sup> The trials effectively ended with the signing of the Treaty of Lausanne in 1923,<sup>63</sup> but some precedent from the prosecutions remained and became more powerful with time as another world war was on the horizon.<sup>64</sup>

### B. War Crime Trials and Laws During WWII

War crime laws continued to develop and evolve during and after WWII. Drawing on the experience post-WWI, international principles and laws of war developed at a faster pace. During the war, the Allies signed the St. James Declaration of 1942 emphasizing their intent to prosecute those who violated the Hague Convention of 1907 and committed war crimes.<sup>65</sup> The Declaration was followed by the United

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56. *Id.*

57. Gary D. Solis, *Obedience of Orders and the Law of War: Judicial Application in American Forums*, 15 AM. U. INT'L L. REV. 481, 498-99 (2000).

58. Out of the submitted 895 cases, the Allies presented 45 and only 12 were brought to trial and 6 convicted. M. Cherif Bassiouni, *World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System*, 30 DENV. J. INT'L L. & POL'Y 244, 281-82 (2002).

59. *See id.* at 281-85.

60. *Id.* at 286.

61. *Id.* at 287-88. The trials were held with absent defendants, the courts were weak, and the sentences were light. A subsequent change in the political climate made it difficult to continue with the trials. *Id.*

62. *Id.*; Meron, *supra* note 20, at 558-59.

63. Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221, 309-10 (1989).

64. *See* Bassiouni, *supra* note 58, at 290.

65. Elizabeth Borgwardt, *Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 BERKELEY J. INT'L L. 401, 429-30 (2005). The St. James Declaration describes the Allies' goals as "the punishment, through the channel of organized justice, of those guilty and responsible for these [war] crimes, whether they have ordered them, perpetrated them, or in any way participated in them." *Id.* at 430

Nations War Crimes Commission, which began collecting evidence of war crimes using the list of offenses compiled after WWI, but adapting it to the conditions of WWII.<sup>66</sup>

Along with international legal instruments and commissions, state practice of domestic prosecutions continued during WWII as well. Together with German forces, the Soviet Union prosecuted its own citizens for war crimes during and after WWII.<sup>67</sup> Those charged were convicted of murder and treason under the Soviet criminal code as well as counterrevolutionary and military crimes.<sup>68</sup> At this time, the United States also conducted trials for war crimes.<sup>69</sup>

Concurrently, the United Kingdom, the United States, and the Soviet Union signed the Moscow Declaration, which confirmed the validity of national tribunals in prosecuting war criminals and the Allies' intent on doing so after the end of the war.<sup>70</sup> Additionally, the Declaration foresaw the prosecution of criminals whose actions had "no particular geographical localization" by national tribunals.<sup>71</sup> Consequently, by May 27, 1944, the date of the partisan operation led by Kononov, there was a somewhat scattered but well-developed body of international law of war crimes that included the definition of war crimes, the concept of individual responsibility, and the possibility for prosecution by domestic tribunals.

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(alteration in original) (internal quotation marks omitted). "The signers relied on the sense of justice of the civilized world for their authority." *Id.* (internal quotation marks omitted).

66. Significantly, the U.N. War Crimes Committee, formed in 1943, was neither under Soviet nor U.S. control. *Id.*

67. GEORGE GINSBURGS, *MOSCOW'S ROAD TO NUREMBERG, THE SOVIET BACKGROUND TO THE TRIAL* 40 (1996). The Soviet regime organized commissions and gathered evidence regarding crimes committed by the Nazis and collaborators so well that "already in 1943, [the information] enabled the authorities to instigate proceedings against war criminals in Kharkov and Krasnodar and then in 1945-1946 stage a series of similar trials in Kiev, Minsk, Riga, Leningrad, Smolensk, Briansk, Nikolaev, Velikie Luki, and other cities." *Id.*

68. *Id.* at 41.

69. See, e.g., *Ex parte Quirin*, 317 U.S. 1 (1942). Several Nazi spies were captured in the United States and tried by secret military tribunals on charges of war crimes including wearing civilian clothes, going behind enemy lines to commit sabotage, and others. *Id.* at 21-22. The case went all the way to the United State Supreme Court, which held that "[u]nlawful combatants are likewise subject to capture and detention [and] to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Id.* at 31.

70. Borgwardt, *supra* note 65, at 429; Avalon Project, *The Moscow Conference: Joint-Four Nation Declaration*, YALE L. SCH.(Oct. 1943), <http://avalon.law.yale.edu/wwii/moscow.asp> (last visited Jan. 30, 2011 [hereinafter Moscow Declaration]).

71. Moscow Declaration, *supra* note 70.



C. *War Crime Trials and Legal Instruments After WWII*

After WWII, International Military Tribunal (IMT) trials for acts committed during the war “had an almost incalculable effect on normative international law, and their success went far toward ending the impunity of political and military leaders around the world.”<sup>72</sup> International instruments such as the Potsdam Agreement and the London Agreement contained provisions for the pursuit of war criminals and for the creation of both domestic and international tribunals.<sup>73</sup> Additionally, the IMT Nuremberg Charter, annexed to the London Agreement, provided a nonexhaustive list of violations of laws and customs of war.<sup>74</sup> The principles listed in the Charter were unanimously affirmed by the United Nations General Assembly in 1946.<sup>75</sup>

After the Nuremberg trials, the IMT Judgment relied on the Hague Convention of 1907 and the Geneva Convention of 1929 to convict the major war criminals.<sup>76</sup> The Judgment emphasized that the provisions in the Nuremberg Charter outlining war crimes for which the accused were convicted have become declaratory of the laws and customs of war.<sup>77</sup>

War crimes trials did not stop with the end of WWII. Many cases of former Nazi war criminals have been tried by domestic tribunals.<sup>78</sup> Among the most notable was the “The Hostages Trial,” tried before a U.S. military court, where the accused were charged with war crimes and crimes against humanity for hostage taking, reprisal killings, murder,

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72. Meron, *supra* note 20, at 577.

73. Protocol of Proceedings Approved at Berlin (Potsdam), Aug. 2, 1945, art. III, 3 Bevans 1207 [hereinafter Potsdam Agreement]; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, arts. 1, 14, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS, *supra* note 25, at 823-31 [hereinafter London Agreement].

74. Charter of the International Military Tribunal at Nuremberg art. 6(b)-(c), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter]. The list contains, *inter alia*, “murder, . . . killing of hostages, plunder of public or private property, wanton destruction of cities, towns, and villages, or devastation not justified by military necessity.” *Id.* art. 6(b). The Charter also listed crimes that could be considered as crimes against humanity: “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” *Id.* art. 6(c).

75. G.A. Res. 95 (I), U.N. Doc. A/236 (Dec. 11, 1946).

76. IMT Judgment, 6 F.R.D. 69 (1946), *reprinted in* IMT, TRIAL OF GERMAN MAJOR WAR CRIMINALS 45, 53, 64 (2001) [hereinafter Nuremberg Judgment].

77. Nuremberg Charter, *supra* note 74; Nuremberg Judgment, *supra* note 76, at 38-39.

78. *See generally* George Ginsburgs, *Moscow and International Legal Cooperation in the Pursuit of War Criminals*, 21 REV. CENT. & E. EUR. L. 1 (1995).

pillaging, torture, and sending civilians to concentration camps.<sup>79</sup> The judgment announced that the crimes charged under the Nuremberg Charter were not ex-post-facto applications of the law and were declaratory of the existing laws and customs of war.<sup>80</sup> Other nations conducted trials after the war in both civilian and military tribunals for war crimes committed during WWII.<sup>81</sup> However, domestic convictions for war crimes of former Ally soldiers were unheard of until a court in Latvia convicted Vasiliy Kononov, a former Soviet partisan, and the European Court of Human Rights affirmed the decision in May 2010.

### III. THE COURT'S DECISION

In the noted case, the Grand Chamber of the ECHR began its analysis by considering the complaint that Vasiliy Kononov suffered a retrospective application of criminal law under article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).<sup>82</sup> Kononov also alleged that his actions were not war crimes in 1944, therefore putting them outside the scope of article 7, section two.<sup>83</sup> The ECHR found that the European Convention on Human Rights does not prohibit retrospective application of a criminal law, but an offence must be clearly defined in order for that law to apply.<sup>84</sup> That rule is supported by the principle of *nullum crimen, nulla poena sine lege*<sup>85</sup> and the principle that criminal law should not be construed to the detriment of the accused.<sup>86</sup> The ECHR highlighted that by “law” article 7 of the European Convention on Human Rights connotes both written and unwritten law, as well as qualitative requirements of accessibility and foreseeability, all of which involve judicial interpretation.<sup>87</sup> Therefore, article 7 does not prohibit judicial interpretation as long as the result is foreseeable and

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79. Trial of Wilhelm List and Others (The Hostages Trial), Case No. 47, VIII L. Rpts. of Trials of War Criminals 34, pt. I(A) (U.N. War Crimes Comm'n 1948), *available at* <http://www.ess.uwe.ac.uk/WCC/List1.htm>.

80. *Id.* pt. III.

81. *See War Crimes Trials*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005140> (last updated Jan. 6, 2011).

82. *Kononov v. Latvia*, App. No. 36376/04, para. 143 (Eur. Ct. H.R. May 17, 2010), <http://www.echr.coe.int/echr/en/hudoc> (follow “[O]nly the law can define a crime and prescribe a penalty.” hyperlink; search Application Number “36376/04”).

83. *Id.*

84. *Id.* para. 185.

85. *Id.* (“[O]nly the law can define a crime and prescribe a penalty.”).

86. *Id.*

87. *Id.*

consistent with the definition of the crime.<sup>88</sup> The ECHR underlined that article 7 must be interpreted as consistent with international war crimes laws passed at the end of WWII.<sup>89</sup>

The ECHR considered Kononov's claim in three major parts. First, it inquired whether there was a sufficiently clear legal basis in 1944 to convict Kononov of war crimes.<sup>90</sup> This led the ECHR to consider the legal status of the villagers, Kononov's individual criminal responsibility, and the specific war crimes charged.<sup>91</sup> Second, the ECHR questioned whether Kononov could have foreseen that his actions would be considered war crimes with potential criminal repercussions.<sup>92</sup> Third, the ECHR analyzed whether the charges of war crimes were barred by the statute of limitations.<sup>93</sup>

The ECHR first considered Kononov's complaint under article 7 of the European Convention on Human Rights, which demands a two-pronged analysis.<sup>94</sup> The first prong is whether there was a sufficiently clear legal basis for Kononov's conviction, given the status of law on the day of the attack in 1944.<sup>95</sup> The second prong is the determination of adequate accessibility and foreseeability of the crimes, so that on the day of the attack Kononov knew that he would be liable and could have regulated his actions as a result.<sup>96</sup>

The ECHR considered the facts in the light most favorable to the defendant.<sup>97</sup> Instead of determining the exact legal status of the villagers, the ECHR assumed they were either combatants or "civilians who had participated in hostilities."<sup>98</sup> The ECHR then addressed the first prong of the analysis and examined the conviction from the perspective of international, not domestic, law because Kononov was convicted under the 1961 Criminal Code, which relied on relevant international conventions to define war crimes.<sup>99</sup> Under article 7, the ECHR must analyze whether the conviction by the domestic court was consistent with the required contemporaneous legal basis for the conviction, even if the

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88. *Id.*

89. *Id.* para. 186.

90. *Id.* paras. 196-227.

91. *Id.*

92. *Id.* paras. 234-244.

93. *Id.* paras. 228-233.

94. *Id.* para. 187.

95. *Id.*

96. *Id.*

97. *Id.* para. 194.

98. *Id.* (internal quotation marks omitted).

99. *Id.* para. 196.

approaches taken by the domestic courts and the ECHR differ.<sup>100</sup> Consequently, given the state of international law in 1944, the domestic conviction must have provided a sufficiently clear legal basis for Kononov's conviction.<sup>101</sup>

The ECHR then considered the significance of the legal status of the applicant and the villagers.<sup>102</sup> The ECHR concluded that Kononov and his unit were combatants, a status which is accompanied by the right to humane treatment and the freedom from ill-treatment and summary executions.<sup>103</sup> Kononov was a combatant because he was in the Soviet military and commanded a partisan unit.<sup>104</sup> He and his unit were combatants even though they wore German *wehrmacht* uniforms during the attack, which had some bearing on the analysis despite the fact that the domestic courts did not charge the applicant with a separate crime.<sup>105</sup> The villagers of Matzie Bati were either combatants, subscribing to the rights discussed above, or "civilians having participated in hostilities," and some protections would have applied to them as well.<sup>106</sup> By 1944, civilians were commonly defined in international law as the opposite of combatants.<sup>107</sup> According to international law, civilians could be attacked only if they directly participated in hostilities.<sup>108</sup> Additionally, even if civilians had participated in hostilities and violated rules of acceptable wartime conduct, they had to be arrested and given fair trial and punishment by a court or a military tribunal.<sup>109</sup> A summary execution in either instance, without trial, would have violated the laws and customs of war.<sup>110</sup>

Next, the ECHR considered Kononov's individual criminal responsibility for war crimes in 1944.<sup>111</sup> The Hague Convention of 1907

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100. *Id.* para. 198.

101. *Id.* para. 199.

102. *Id.* paras. 200-204.

103. *Id.* paras. 201-202.

104. *Id.* para. 200.

105. *Id.* para. 201.

106. *Id.* paras. 200, 203-204.

107. *Id.* para. 203.

108. *Id.* (citing *Ex Parte Milligan*, 71 U.S. 2 (1866)).

109. *Id.* para. 204.

110. *Id.* (citing *The Hostages Case*, Case No. 47, VIII L. Rpts. of Trials of War Criminals 34 (U.N. War Crimes Comm'n 1948), available at <http://www.ess.vwe.ac.uk/WCC/List1.htm>; Geneva Convention 1929, *supra* note 25; Draft Brussels Declaration, *supra* note 40; Oxford Manual, *supra* note 43; Hague Convention 1907, *supra* note 47; WAR DEP'T, WAR DEPARTMENT FIELD MANUAL FM 27-10: RULES OF LAND WARFARE 59-60 (1947); *Ex parte Quirin*, 317 U.S. 1 (1942)).

111. *Id.* paras. 205-213.

defined war crimes as offences against the laws and customs of war.<sup>112</sup> Along with that definition, the ECHR took into account the codification of war crimes law and the development of individual criminal responsibility up to and during WWII.<sup>113</sup> The ECHR found that by the time the IMT Nuremberg Charter was created in 1945, “There was agreement in contemporary doctrine that international law had already defined war crimes and required individuals to be prosecuted.”<sup>114</sup> Throughout this period, domestic prosecution was common while international military tribunals were the exception.<sup>115</sup> Notably, the IMT Judgment recognized the important role of domestic courts.<sup>116</sup> Therefore, states had a responsibility to prosecute individuals for war crimes with international law serving as a foundation for domestic prosecution, and a domestic court could rely on international law in trying war crimes cases without violating international principles.<sup>117</sup> Although only a few states prosecuted their own citizens for war crimes, some notable examples were the U.S. courts-martial in the Philippines, the Leipzig Trials, and the Turkish trials after WWI.<sup>118</sup> Instances of domestic war crimes trials only increased with the end of WWII. The United States and the Soviet Union tried individuals during and shortly after the war.<sup>119</sup> Therefore, by 1944 the principle of individual criminal responsibility was both codified and present in practice.<sup>120</sup> Moreover, individual responsibility also included command responsibility because it was a standard consideration in customary international law by this time.<sup>121</sup> The ECHR concluded that by 1944 war crimes were sufficiently defined and described in international law and that states were allowed to, and took steps to, prosecute and punish offenders, including prosecution on the basis of individual and command responsibility.<sup>122</sup>

The next step in the ECHR’s analysis was the assessment of whether there was a sufficiently clear and contemporary legal basis to convict Kononov of specific war crimes.<sup>123</sup> The ECHR emphasized that its

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112. *Id.* para. 205 (citing Hague Convention 1907, *supra* note 47).

113. *Id.* para. 206.

114. *Id.* para. 207 (citing Hans Kelsen, *The Rule Against Ex Post Facto Laws and the Prosecution of the Axis War Criminals*, JUDGE ADVOC. J., Fall-Winter 1945, at 8, 10).

115. *Id.* para. 208.

116. *Id.*; Nuremberg Judgment, *supra* note 76.

117. *Kononov*, App. No. 36376/04, para. 208.

118. *Id.* para. 209 (citing Mettraux, *supra* note 54).

119. *Id.*

120. *Id.* para. 213.

121. *Id.* para. 211.

122. *Id.* para. 213.

123. *Id.* paras. 214-227.

assessment was guided by general principles of humanitarian law, including “elementary considerations of humanity,” “the principle of distinction,” and the “obligation to avoid unnecessary suffering to combatants.”<sup>124</sup> Even if the villagers were combatants or civilians who had participated in hostilities, Kononov’s actions would still have been war crimes under *jus in bello* because of the circumstances and manner of the murders.<sup>125</sup> Therefore, the ill-treatment, wounding, and killing of the villagers were war crimes.<sup>126</sup>

Moreover, the ECHR found that the Latvian court reasonably relied on article 23 of the Hague Convention of 1907 to arrive at separate convictions for treacherous wounding, killing, and murder.<sup>127</sup> An unlawful killing is treacherous if those killed were made to believe they were not under threat.<sup>128</sup> Victims could be misled if those attacking were wearing enemy uniforms.<sup>129</sup> Kononov and the rest of the unit wore German uniforms during the attack.<sup>130</sup> Article 23 applied to the facts because the Hague Regulations refer to a treacherous wounding or killing of “*individuals belonging to the hostile nation or army*,” which would include both combatants and civilians who had participated in hostilities.<sup>131</sup> There was also a plausible legal basis to convict Kononov for the death of the pregnant victim, Mrs. Krupniks.<sup>132</sup> Customs and laws of war provide special protections for pregnant women that have been codified in numerous conventions including article 16 of the Geneva Convention (IV), under which the Latvian court convicted Kononov.<sup>133</sup> Additionally, the domestic courts correctly relied on article 25 of the Hague Convention of 1907 to find that the destruction of the buildings in the village was unlawful because there was no evidence presented that destroying the buildings in the village was “imperatively demanded by the necessities of war” and fell under the exceptions in international law.<sup>134</sup> To conclude, the ECHR emphasized that under international law, the villagers would have been entitled to an arrest and a fair trial even if they had committed war crimes, regardless of their legal status.<sup>135</sup>

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124. *Id.* para. 215 (internal quotation marks omitted).

125. *Id.* para. 216.

126. *Id.*

127. *Id.* para. 217; Hague Convention 1907, *supra* note 47.

128. *Kononov*, App. No. 36376/04, para. 217.

129. *Id.*

130. *Id.*

131. *Id.*; Hague Convention 1907, *supra* note 47.

132. *Kononov*, App. No. 36376/04, para. 218.

133. *Id.*

134. *Id.* para. 219 (internal quotation marks omitted).

135. *Id.* para. 221.

Therefore, under contemporary international law, the ECHR found that in 1944 there was a sufficient legal basis for a domestic court to convict Kononov as a commander of the partisan unit for carrying out the attack.<sup>136</sup>

The ECHR then arrived at the second prong of the article 7 analysis by inquiring whether Kononov could have foreseen that his actions constituted war crimes and that he could be prosecuted.<sup>137</sup> The ECHR noted that by 1944, international law was powerful enough to entail individual criminal responsibility, which spoke to its accessibility.<sup>138</sup> Furthermore, international laws and customs of war were laws specifically targeted at armed forces and especially at those in command.<sup>139</sup> Professionals have a duty to act with caution and to take special care in addressing risks.<sup>140</sup> As a commanding officer, Kononov should have been aware that his actions constituted war crimes.<sup>141</sup> The ECHR stressed that even though Kononov was a young soldier, a “most cursory reflection” could have indicated that the impending attack on the village carried risk and that the actions planned could constitute war crimes.<sup>142</sup> Moreover, contrary to the applicant’s argument, his prosecution was foreseeable under international law because Latvia had a right and an obligation to bring a claim for a crime committed under the previous Soviet regime after its independence.<sup>143</sup>

Separate from the analysis required by article 7 of the European Convention on Human Rights, the ECHR considered whether the charges against Kononov were barred by the statute of limitations.<sup>144</sup> Both the provision under which Kononov was convicted and the article that precluded time limitations on charges for war crimes were added into the Latvian Criminal Code in 1993.<sup>145</sup> The Russian government, who was a third party to the suit, argued that the conviction amounted to a retroactive extension of a limitation period.<sup>146</sup> Together with the applicant, the Russian government contended that the charges against Kononov could not have been brought after 1954 because that was the time limit established by article 14 of the 1926 Criminal Code, which

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136. *Id.* para. 227.

137. *Id.* paras. 234-244.

138. *Id.* paras. 236-237.

139. *Id.* para. 238.

140. *Id.* para. 235.

141. *Id.* para. 238.

142. *Id.* paras. 234-238.

143. *Id.* paras. 240-243.

144. *Id.* paras. 228-233.

145. *Id.* para. 229.

146. *Id.* paras. 2, 228.

would have applied if Kononov had been charged in 1944.<sup>147</sup> The government of Latvia disagreed and argued that Kononov's prosecution had not been barred by any statute.<sup>148</sup>

The ECHR considered that if Kononov had been prosecuted in Latvia in 1944, the domestic tribunal would have relied on international law because the 1926 Criminal Code did not mention war crimes or any relevant limitation periods for bringing charges.<sup>149</sup> However, international law was silent on time limitations for war crimes.<sup>150</sup> The ECHR found that because there was neither a domestic nor an international time limit on prosecuting war crimes in 1944 Kononov's prosecution did not become barred before his actual trial.<sup>151</sup> Developments in international law have not imposed any limitations since the domestic trial and therefore Latvia was correct in bringing charges.<sup>152</sup> The ECHR held that because at the time they were committed Kononov's actions were sufficiently defined, accessible, and foreseeable in the laws and customs of war, the Latvian courts could convict him for war crimes, including wearing German uniforms and murdering a pregnant woman, and that the charges were not barred by the statute of limitations.<sup>153</sup>

#### IV. ANALYSIS

The ECHR's decision is both controversial and well-supported by international law. The decision is controversial because it goes against the unstated assumption stemming from Nuremberg that only Nazis committed war crimes during WWII.<sup>154</sup> Even though there are many examples of Allied war crimes, the Allied forces have enjoyed relative impunity.<sup>155</sup> Some scholars have criticized the Nuremberg approach as legitimizing Allied conduct while condemning and criminalizing the Nazis' actions.<sup>156</sup> The noted case is a watershed decision because no Allied soldiers had previously been convicted of war crimes. However,

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147. *Id.* para. 228.

148. *Id.*

149. *Id.* para. 230.

150. *Id.* para. 231.

151. *Id.* para. 233.

152. *Id.* para. 232.

153. *See id.* para. 245.

154. *See* Carla de Ycaza, *Victor's Justice in War Crimes Tribunals: A Study of the International Criminal Tribunal in Rwanda*, 23 N.Y. INT'L L. REV. 53, 77-78 (2010).

155. *Id.* at 78-79. Some examples of Allied war crimes are the rapes of Italian women near Cassino, crimes of Soviet forces in East Prussia, Danzig, and Silesia, U.S. involvement in the Canicatti slaughter, the Biscari massacre, the massacre of concentration camp guards in the Dachau, as well as the Katyn Forest massacre of Polish prisoners of war by the Soviets. *Id.*

156. *See, e.g.,* McCormack, *supra* note 18, at 718-20.



perhaps because of the weighty historical precedent of Nuremberg, the ECHR's affirmation of Latvia's conviction has been perceived as "rehabilitating" Nazis while reviling righteous fighters of fascism.<sup>157</sup>

The ECHR's decision is controversial in another way because it concerns a topic that is extremely politically sensitive for Russia, as evidenced by Russia's heavy involvement in the case.<sup>158</sup> Russia's outrage at the decision may be because the government is afraid that other former Soviet republics will follow in Latvia's footsteps to try and convict former Soviet soldiers now residing in their territory for crimes committed during WWII. That fear could be the impetus behind President Medvedev's "'historic truth' commission," a political organization aimed at preserving the facts of Russia's involvement in WWII because they are being challenged by "falsifiers," namely Russia's neighboring states.<sup>159</sup>

On the other hand, the ECHR's decision is not controversial because it reaffirms the custom and principle in international law that war crimes will not be subject to statutory limitations. This principle has been codified by treaties and international legal instruments created after WWII. Among the first is the 1968 U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which asserts retroactive applicability and proscribes statutory limits on war crimes defined by the IMT Nuremberg Charter.<sup>160</sup> Adopted

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157. Ian Traynor, *Where Nazis Are Heroes*, GUARDIAN, Mar. 13, 2000, <http://www.guardian.co.uk/theguardian/2000/mar/13/features11.g23>. Although this article was written ten years before the ECHR decision, the sentiment of outrage, especially on Russian blogs, has remained the same. See, e.g., *Strasbourg Sides with Nazis*, VOICE OF RUSSIA, May 17, 2010, <http://english.ruvr.ru/2010/05/17/7994664.html>.

158. The Russian government joined the case as a third party and granted Kononov Russian citizenship, as well as provided financial backing for the suit. *Kononov*, App. No. 36376/04, paras. 2, 12; see Antoine Buyse, *Kononov Revisited: No Violation of ECHR*, ECHR BLOG (May 18, 2010), <http://echrblog.blogspot.com/2010/05/kononov-revisited-no-violation-of-echr.html>. "Russia intervened twice on his behalf during the proceeding in Strasbourg." *Id.* Moreover, the Russian president has expressed his outrage at the result and accused the ECHR of having been "politically motivated." *Soviet WWII Veteran To Appeal EU Court Ruling*, RIANOVOSTI, Aug. 5, 2010, <http://en.rian.ru/russia/20100805/160080980.html>.

159. Pavel Felgenhauer, *Medvedev Forms a Commission To Protect Russian History*, JAMESTOWN FOUNDATION, May 21, 2009, [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=35018](http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=35018); *The Kremlin's Commission Will Look into Kononov's Case* (in Russian: Кремлевская комиссия займется делом Кононова), DELFI, May 20, 2009, <http://rus.delfi.lv/news/daily/politics/kremlivskaya-komissiya-zajmetsya-delom-kononova.d?id=24659049> (Author's Translation).

160. United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 6, 1968, 754 U.N.T.S. 73, 8 I.L.M. 68 (entered into force Nov. 11, 1970) [hereinafter 1968 Convention], available at <http://www2.ohchr.org/english/law/warcrimes.htm>; Vahakn N. Dadrian, *The Armenian Genocide as a Dual Problem of National and International Law*, 4 U. ST. THOMAS J. L. & PUB. POL'Y 60, 72-73 (2010).

by the U.N. General Assembly, this convention was a response to growing concerns that criminals could escape prosecution with the passage of time and was ratified by both the Soviet Union and Latvia.<sup>161</sup> Additionally, the ECHR's decision is supported by the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, which although not ratified by the Soviet Union or Latvia, is evidence of the general tendency in international law to proscribe statutory limits for war crimes and crimes against humanity.<sup>162</sup> Finally, the ECHR's decision is buttressed by the Protocol Additional to the Geneva Convention of 1949.<sup>163</sup> However, for states that have not ratified the conventions above, the ECHR's decision is a reminder that war crimes cannot be barred by statutes of limitation, even with a contemporaneous application of international law as far back as 1944.

#### V. CONCLUSION

The ECHR decision in the noted case is a big step forward in the continuing efforts to incentivize those working to bring war criminals to justice. The ECHR's holding that Latvia's conviction of Kononov was not barred by the statute of limitations is a testament to the powerful principle that war crimes charges are not subject to time limits in international law. The ECHR's affirmation of Latvia's conviction of Kononov, a former Allied soldier, is perhaps also evidence that the ECHR is ready to branch out from the one-sided approach of Nuremberg. It is difficult to predict whether more cases like Kononov's will be brought as an aftermath to the noted case given Russia's heavy involvement and its tendency to put political pressure on its neighbors. However, the ECHR took a strong stance in applying contemporaneous law to the facts without regard to Kononov's status as a former Allied soldier, a stance that serves to depoliticize the not-so-distant past of WWII.

Mariya S. Volzhskaya\*

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161. *Kononov*, App. No. 36376/04, para. 131.

162. European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, Jan. 25, 1974, 82 E.T.S. 211, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/082.htm>.

163. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *available at* <http://www2.ohchr.org/english/law/protocol2.htm>.

\* © 2011 Mariya S. Volzhskaya. J.D. candidate 2012, Tulane University Law School; B.A. 2005, *magna cum laude*, Georgia State University.