THE FIFTH STATE DUMA OF THE FEDERAL ASSEMBLY OF THE RUSSIAN FEDERATION

RESOLUTION
of 21 May 2010 No. 3694-5 GD

ON THE STATEMENT BY THE STATE DUMA OF THE FEDERAL ASSEMBLY OF THE RUSSIAN FEDERATION «AS REGARDS DELIVERY OF THE JUDGMENT BY THE GRAND CHAMBER OF THE EUROPEAN COURT IN THE CASE OF *KONONOV V. LATVIA*»

The State Duma of the Federal Assembly of the Russian Federation hereby resolves:

1. To adopt the Statement by the State Duma of the Federal Assembly of the Russian Federation «As regards delivery of the judgment by the Grand Chamber of the European Court in the case of *Kononov v. Latvia*».

2. To send this Resolution and the above Statement to the President of the Russian Federation Dmitry A. Medvedev, the Government of the Russian Federation, and the Parliamentary Assembly of the Council of Europe.

3. To send this Resolution and the above Statement to the *Parlamentskaya Gazeta* to have them officially published.

4. This Resolution takes legal effect on the day of its adoption.

Chairperson of the State Duma
of the Federal Assembly
of the Russian Federation
BORIS V. GRYZLOV

THE FIFTH STATE DUMA OF THE FEDERAL ASSEMBLY OF THE RUSSIAN FEDERATION

STATEMENT
of 21 May 2010

AS REGARDS DELIVERY OF THE JUDGMENT BY THE GRAND CHAMBER OF THE EUROPEAN COURT IN THE CASE OF *KONONOV V. LATVIA*

On 17 May 2010 the Grand Chamber of the European Court of Human Rights delivered a judgment, which found that the accusation against Mr Vasiliy M. Kononov, a veteran of the Great Patriotic War, a hero of the anti-Hitler partisan war in the territory of Latvia, a national of the Russian Federation, of commission of «war crimes» had been quite legitimate.

This judgment completely reverses the judgment by the Chamber of the European Court of Human Rights of 24 July 2008, which found a violation by the Latvian authorities of Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and established impropriety of criminal prosecution of Mr Vasiliy M. Kononov.

The State Duma of the Federal Assembly of the Russian Federation expresses its deep concern over delivery of this judgment, which may be considered not only as a dangerous court precedent and a change of legal approaches to the assessment of the events of the Second World War, but also as an attempt to initiate revision of judgments rendered by the International Military Tribunal for Nuremberg. The position of the majority of judges of the Grand Chamber of the European Court of Human Rights expressed in its judgment justifies actions of the Latvian authorities pursuing the policy of revanchism and chauvinism and encourages those State leaders who call for revision of the results of the International Military Tribunal for Nuremberg.

One has to be sorry about the fact that a number of politicians in the world increasingly side with those political forces that seek to justify Nazi ideology, demolish established post-war world order and that seek to encourage aggressive nationalism. Such a tendency is dangerous since it leads to revival of fascism, and justifies war crimes committed during the Second World War.

In the opinion of the State Duma, the judgment by the Grand Chamber of the European Court of Human Rights in the case of *Kononov v. Latvia* is of purely political nature and is not based on universally accepted principles and norms of the international law. Members of the State Duma believe that the delivery of this judgment will have serious negative consequences for the participants in the Second World War, who fought on the side of the Allies, which might be manifested in their criminal prosecution for commission of war crimes.

The State Duma was repeatedly adopting statements and resolutions indicating tendency of the authorities of some states to revise results of the International Military Tribunal for Nuremberg and was demanding to discontinue prosecutions of the participants in the Second World War, who fought on the side of the Allies. Members of the State Duma direct the attention of the world community to the need to give an objective assessment of the judgment delivered by the Grand Chamber of the European Court of Human Rights in the case of *Kononov v. Latvia* with a view to prevent the European Court of Human Rights to render such decisions.

Перевод на английский язык.

Translation to English.

STATEMENT BY THE RUSSIAN FOREIGN MINISTRY FOLLOWING THE PRONOUNCEMENT ON MAY 17, 2010 OF THE RULING OF THE GRAND CHAMBER OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CASE OF VASILY KONONOV

Although the ruling of the Grand Chamber of the European Court of Human Rights (ECHR) in the case of Vasily Kononov, pronounced on May 17, is being carefully studied in Russia, we can already, based on our initial assessment, speak about a very dangerous precedent that causes us great concern.

We regard the verdict of the Grand Chamber not just as a revision of the fair ruling the Court Chamber in this case, handed down on July 24, 2008, but as an attempt to cast doubt on several key political and legal principles that emerged following the Second World War and the postwar settlement in Europe, particularly with regard to the prosecution of Nazi war criminals.

The essence of the ruling of the Grand Chamber of the ECHR on May 17 lies in the refusal to satisfy the complaint of the former fighter against fascism, 87-year-old Latvian partisan, who was sentenced on trumped-up charges of «war crimes» on the territory of Latvia in 1944.

By excluding the responsibility of Latvia, previously found in violation of Article 7 of the European Convention on Human Rights under the ruling of July 24, 2008, the ECHR Grand Chamber has actually agreed today with those who seek to revise the outcome of World War II and whitewash the Nazis and their accomplices.

This position has its origins in the undisguised rejection by Riga of the postwar arrangements in Europe and of the results of the Nuremberg Tribunal, which are considered worldwide as the fundamental source of contemporary international criminal law, including the acknowledgment of Waffen SS as a criminal organization.

Qualifying the actions of anti-Nazi fighter Kononov as a «war crime» comes into direct contradiction with the universally recognized fundamental principles of law, especially with the principle of non-retroactivity of criminal law. In fact, the ECHR's acceptance of the position of Latvia in this case means a legally baseless and politically detrimental shift in the Court's legal approaches to the assessment of events and outcomes of the Second World War.

As a member of the Council of Europe for more than 14 years, the Russian Federation highly appreciates the results of the multi-faceted cooperation among member states, and the Organization's contribution to the consolidation of the democratic development of Russia. In these circumstances, the decision of a part of the members of the Court in the Kononov case seriously damages the credibility of the Council of Europe in general and may be viewed as an attempt to draw new dividing lines in Europe and to destroy the continent's emerging consensus on pan-European standards and values.

The Russian Federation, which took part in the Kononov case as a third party, after a comprehensive assessment of the ruling and its legal implications will draw the appropriate conclusions, including with regard to the construction of our future relations with both the Court and the Council of Europe as a whole.

Undoubtedly, in the course of the ongoing reform of the crisis-afflicted ECHR it is necessary to seek to ensure that any repetition of such Court decisions is ruled out.

We should also particularly note the serious negative consequences of the ruling in the Kononov case for anti-fascist veterans in all countries that fought against the Nazis and their accomplices during World War II, as well as for their descendants. The verdict of the Court, concurring with the wrongful conviction in a Council of Europe member country of one of the fighters of the Anti-Hitler Coalition, means, in essence, a justification the Nazis and their accomplices and will be conducive to the further growth of the influence in Europe of revanchism and pro-Nazi and extremist/radical nationalist forces.

We are certain that the Russian and international legal community will say its word in qualifying the legal consequences of this ruling.

May 17, 2010

Перевод на английский язык.

http://www.mid.ru/

Translation to English.

http://www.mid.ru/

STATEMENT OF THE MINISTRY OF JUSTICE OF THE RUSSIAN FEDERATION REGARDING THE DELIVERY OF THE JUDGMENT BY THE GRAND CHAMBER OF THE EUROPEAN COURT IN THE CASE OF *KONONOV V. LATVIA*

28 May 2010

On 17 May of this year the Grand Chamber of the European Court of Human Rights delivered a judgment in the case of *Kononov v. Latvia*, which revised the judgment by the Chamber of the European Court delivered in 2008 in favour of Mr Vasiliy M. Kononov, a veteran of the Great Patriotic War.

According to the judgment, Mr Vasiliy M. Kononov's application lodged against the authorities of Latvia, who had unlawfully convicted him for «war crimes» allegedly committed by him in 1944 in the territory of the Republic of Latvia, has been dismissed. In doing so, the European Court exonerated actions of the Latvian authorities, who had been prosecuting Mr Vasiliy M. Kononov in breach of provisions of Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which sets impossibility to convict someone for commission of any act, which did not constitute a criminal offence under national or international law at the time when it was committed.

In fact, the Grand Chamber adhered to the same approach while assessing events that the Latvian courts did, whose decision had been based mainly upon Article 6 § 2 (b) of the Charter of the International Military Tribunal for Nuremberg and the United Nations Convention of 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. The fact that judgments by the Latvian courts were not based either upon national law or international law in effect at the time of commission of impugned act was passed over.

By not seeing violations of the Convention in criminal prosecution of Mr Vasiliy M. Kononov by the Latvian authorities for «war crimes», the European Court, essentially set a possibility of retroactive application of criminal law and accordingly of criminal punishment.

However, the RSFSR Criminal Code of 1926 applicable in the territory of Latvia at the material time, i.e. in 1944, did not contain any provisions regarding «war crimes». Their definition and classification were worded by the International Military Tribunal for Nuremberg only in 1945. Prior to that time neither national law nor international law were sufficiently clear and foreseeable with respect to such category of cases. Prosecution of Mr Vasiliy M. Kononov by the Latvian authorities became possible after introduction of amendments in 1993 to the RSFSR Criminal Code of 1926 applicable in the territory of Latvia; the amendments excluded application of statute of limitations with respect to persons charged with commission of war crimes. Criminal prosecution of Mr Vasiliy M. Kononov was impossible without such legislative novelties as the statute of limitations expired in 1954.

According to the case-law of the European Court, a person may be prosecuted only on the basis of a «foreseeable» law, the wording of which must be sufficiently clear and accessible, allowing any person to foresee consequences of its breach. However, it is evident that in the given circumstances Mr Vasiliy M. Kononov could not reasonably have foreseen in 1944 that his acts would one day be classified international crime. Opposite findings by the Grand Chamber are in contradiction with the case-law of the European Court, which in its judgment in a similar case, *Korbely v. Hungary* of 19 September 2008, established an impossibility to show the applicant's ability to foresee in 1956 criminality of his acts under the international law.

Thus, having revised an earlier delivered judgment in the case and not having found violation of Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms in the actions of the Latvian authorities, the European Court has judicially approved of criminal prosecution of Mr Vasiliy M. Kononov on the basis of the law passed in the Republic of Latvia fifty years after the events at issue and for acts, the terms of punishment for which expired forty years ago according to the national criminal law.

Such an approach of the European Court to the application of universally recognised international norms and principles in the cases of violations in certain Baltic States of rights and freedoms of the participants of the Great Patriotic War, who fought, inter alia, for liberation of Europe from Nazism causes deep regret.

At the same time, even in such version the judgment by the European Court cannot be interpreted as the one that dishonours liberation mission of the Soviet people in the fight against the fascist aggressor in the years of the Great Patriotic War.

FOLLOW-UP TO *KONONOV*

ANATOLY I. KOVLER[1]

Judgment by the Grand Chamber of the European Court of Human Rights[2] of 17 May 2010 in the case of *Kononov v. Latvia*, in which the Grand Chamber had come to conclusions directly opposing the conclusions of the Chamber of the Third Section of the Court in this case (judgment of 24 July 2008[3] finding a violation of Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms[4]), has caused a fiery reaction; it was even more so, since the delivery of the judgment coincided with celebrations of the 65th Day of Victory over Nazism of all days. That reaction had a powerful emotional component («victors are not judged»), an evident political component («revision of the results of the Second World War» and «whitewashing of Nazis and their abettors»), and a legal component proper, which somehow had receded into the background. The purpose of the present analysis is to attempt to give a legal assessment of the judgment by the Grand Chamber.

As to the outline of the circumstances of the case

An outline of the circumstances relevant to the case is a *sine qua non* component of judgments of the European Court. *Bona fides* and completeness of the outline is the essential condition of the objectivity of the Court. In the judgment by the Grand Chamber the outline of the circumstances of the case, especially what related to domestic court proceedings, was given in more detail as compared with the judgment by the Chamber, although facts basically coincide.

At the same time, the text of the judgment by the Grand Chamber has no section entitled «Materials from the historical archives», which the judgment of the Chamber had (§§ 25–28), and the latter had a reference to a written order of 25 February 1944 from the local commanding officer of the Latvian «auxiliary police» to set up and arm a defence unit in the village located not far from the village of Mazie Bati. This fact is important for defining the status of villagers (whether they were «civilians» or «combatants»); with respect to that matter the European Court will suggest quite contradictory «hypotheses».

Events of 25 May 1944 are outlined along two tracks: facts established by Latvian courts and the applicant's version. The European Court does so in cases if outlines of facts (of those that have key significance) by the parties vary substantially. In the course of two-stage examination of the case, by the Chamber and by the Grand Chamber, the parties had all procedural opportunities not only to submit their respective versions but to challenge versions of the opposing party.

Facts related to the conviction of the applicant are outlined with different extent of completeness. Thus, the judgment by the Latgale Regional Court of 3 October 2003, acquitting Mr Vasiliy Kononov of war crimes and making a number of other key findings in favour of Mr Vasiliy Kononov, was given in a hasty outline at paragraph 36 of the judgment by the Grand Chamber; at the same time, decisions of other judicial instances reviewing that judgment are quoted at great length. Such selectivity makes one alerted, as it in itself demonstrates preferences of the European Court. Therewith, judging by statements by lawyer Mikhail Ioffe made for the press after pronouncement of the judgment on 17 May 2010, the Grand Chamber allegedly used incorrect translation of domestic court judgments from the Lettish language to English and French languages; as a result the European Court had indicated facts not established by judgments of Latvian courts and not incriminated to Mr Kononov. Naturally, if this circumstance — which due to its nature is of substantial importance — is confirmed (as a result of a linguistic expert assessment?), it may be considered as a circumstance unknown to the Court while delivering the judgment in the case.

At the same time, it should be reminded that the European Court may not give its own assessment to the facts established by national courts. Due to the subsidiarity principle the Court repeatedly reiterated its position that it cannot substitute national courts. Declaration adopted in February 2010 by the High Level Conference on the Future of the European Court of Human Rights held in Interlaken (Switzerland) once again directed attention to that aspect. The Conference, acknowledging the responsibility shared between the States Parties and the Court, invited the Court (Section E 9 (a) of the Declaration) to:

> «<…> avoid reconsidering questions of fact or national law that have been considered and decided by national authorities, in line with its case-law

[1] Mr Anatoly Ivanovich Kovler is the judge of the European Court of Human Rights elected in respect of the Russian Federation; he is Professor of Law, holds an advanced degree of *Doctor of Juridical Sciences* and was awarded with the title *Distinguished Jurist of the Russian Federation*; we are honoured to have Mr Kovler as a member of the Editorial Board of our journal (*Editor's note*).

[2] Hereinafter, the European Court or the Court.

[3] Russian translation of the judgment by the Chamber of the European Court in the case of *Kononov v. Latvia* (no. 36376/04) of 24 July 2008 was published in issues nos. 11 and 12 of the «Human Rights. Case-Law of the European Court of Human Rights» Journal, 2008.

[4] Hereinafter, the Convention.

according to which it is not a fourth instance court <…>»[1].

There is another interesting observation. While outlining «subsequent events» in its judgment of 24 July 2008 the Chamber notes:

> «29. In July 1944 the Red Army entered Latvia. On 13 October 1944 it laid siege to and took Riga. On 8 May 1945 **the last German divisions surrendered** and the entire Latvian territory **passed into the control of the Red Army**».

While the judgment by the Grand Chamber suggests:

> «25. In July 1944 the Red Army entered Latvia and on 8 May 1945 Latvian territory **passed into the control of the USSR forces**» (*in both quotations emphasis added — A.K.*).

Is it a linguistic trifle? Unlikely it is.

Under the international law, if a territory passes into the control of some state's forces it may be considered as an occupation; in case when a state liberates a territory of the presence of foreign armed forces and reinstates sovereignty over such territory it is quite another story. But this is a side note only. At paragraph 210 of the judgment by the Grand Chamber we read though:

> «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 and, in any event in the present case, it is not necessary to do so».

The international humanitarian law in the case-law of the European Court

The judgment by the Grand Chamber provides an impressive picture of development of the international humanitarian law as a system of principles and norms aimed at protection of life, health, human dignity and other rights of war victims during armed conflicts and acts of war[2]. Such excursus worth to be a study manual was undertaken by the European Court with a view to answer the questions posed by it and first of all to the question whether in 1944 there was a sufficiently clear basis for classifying actions the applicant had been convicted for as war crimes?

It should be noted that until lately the European Court tried to avoid applying directly the international humanitarian law in the cases connected with armed conflicts; manifesting robust conservatism it has never preferred the international humanitarian law as *lex specialis* placed above the standards of the Convention. Their strict application was more important for it[3].

This «restraint» is explained first of all by the fact that the Convention adopted in 1950 in its Article 2 «Right to life» envisaged an exception to that right.

Moreover, Article 15 § 2 of the Convention provides member States with a theoretical possibility to take measures derogating from its obligations under this provision to the extent required by the exigencies of the situation including «deaths resulting from lawful acts of war». Let it be reminded that even in the first «Chechen» case the European Court noted that «no martial law and no state of emergency had been declared in Chechnya, and no derogation had been made under Article 15 of the Convention» (judgment of 24 February 2005 in the case of *Isayeva v. Russia*, no. 57950/00, § 191). However, that «gentle hint» fell on deaf ears and very soon Russia will be paying off for the two-hundredth judgment against it related to Chechnya…

The European Court did not apply provisions of the international humanitarian law either in the case of *Cyprus v. Turkey*, or in multiple «Chechen» cases, or in other cases related to violent deprivation of life or disappearance of people. It is also true that the Court never slammed doors for the international humanitarian law willing to apply it as a corpus of complementary standards of human rights. Thus, in the judgment by the Grand Chamber of 18 September 2009 in the case of *Varnava and Others v. Turkey* related to disappearance of people during the armed conflict in Cyprus in 1974 the Court noted (§ 185):

> «Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict».

An example of gaining momentum «judicial activism» on the part of the European Court was application of the international humanitarian law in the context of Article 7 of the Convention in the case of *Korbely v. Hungary* with a view to find whether the national courts, while convicting the applicant, correctly applied general Article 3 of the Geneva Conventions of 1949 (see judgment by the Grand Chamber of 19 September 2008 in the case of *Korbely v. Hungary*[4] (no. 9174/02, §§ 18, 31, 32, 34, 45, 49–52 *et seq*.) in order to conclude that in the case it has not been shown that in 1956 it was foreseeable that the applicant's acts constituted a crime against humanity under international law (§ 95 of the judgment). But even in this case (we shall return to it below) the Court did not prefer the international humanitarian law over standards of «its own» Convention. It seems that the Court heeded arguments of the applicant, who insisted upon impermissibility of extensive interpretation of the Geneva Conventions of 1949. The Court wrote down in paragraph 57 of its judgment:

> «In the applicant's view, this approach — laudable as it might be in the context of humanitarian law — could not be accepted as being applicable in the field of individual criminal liability, where no extensive interpretation of the law was allowed».

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[1] On the Interlaken Conference please see more in detail the material published in issue no. 3 of the «Human Rights. Case-Law of the European Court of Human Rights» Journal, 2010.

[2] This is exactly a definition given by Russian legal scholar, Mme Irina Andreevna Ledyakh. See: *Ледях И.А.* Международное гуманитарное право и защите прав человека. М., 2008, с. 7

[3] See *e.g*: *Рейди А.* Подход Европейской Комиссии и Суда по правам человека к международному гуманитарному праву // Международный журнал Красного Креста, 1998, № 22, с. 624–626; *Byron C.* A Blurring of the Boundaries: the Application of International Humanitarian Law by Human Rights Bodies // Virginia Journal of International Law, 2007, no. 47.

[4] Russian translation of the judgment by by the Grand Chamber of the European Court in the case of *Korbely v. Hungary* was published in issue no. 6 of the «Human Rights. Case-Law of the European Court of Human Rights» Journal, 2009.

And «suddenly» we witness such a swing towards «judicial activism»[1] in the case of *Kononov v. Latvia*, where the European Court did quite the opposite thing… What was the purpose of it? Was it done in order to formulate arguments in favour of legal grounds of culpability of the partisan? Let us limit ourselves to a finding: in the case of *Kononov v. Latvia* the Court drew back too far from its own methodology having substituted Amnesty International or the International Committee of the Red Cross … Perhaps, it is a new trend in the case-law of other international courts?

The United Nations International Court of Justice does allow itself to refer to provisions of the international humanitarian law, but it does so very rarely and in any case it does not make its legal positions directly dependent of the international humanitarian law[2]. It did so while examining issues related to building by Israel of the Separation Barrier[3] and in the case of *Democratic Republic of Congo v. Uganda*[4]. On the contrary, specialised international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, more often refer to the international humanitarian law due to special nature of *ratione materiae* of the cases before them: war crimes, crimes against humanity, and genocide. However, the same International Criminal Tribunal for the Former Yugoslavia acts in such cases cautiously enough, choosing, for instance, to talk about influence of norms of the international human rights law upon the international humanitarian law, drawing clear distinction between the two:

> «Notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law»[5].

Unbiased observers explain such restraint of the international courts in application of norms and principles of the international humanitarian law by a possibility of a conflict of provisions of almost boundless international humanitarian law and strict prescriptions of the status regime of these courts, first of all, as regards the limits of their jurisdiction[6].

In the case of *Kononov v. Latvia*, the European Court, despite of its own case-law and the case-law of other international courts, for the first time has built its findings almost exclusively upon provisions of the international humanitarian law, «for its convenience» having named it in its conclusion as «international law» (§ 243 of the judgment by the Grand Chamber). Such activism gives birth to a questionable precedent considering the fact that the Court deals with quite «sensitive» cases connected with armed conflicts, unless, of course, the precedent was set up specially «for Kononov».

Questions that were left unanswered (analysis of the judgment by the Grand Chamber)

Starting to form its position regarding the complaint by the applicant about violation of Article 7[7] of the Convention, which is always a central part of any judgment, the European Court defines its «twofold function» (§ 187 of the judgment by the Grand Chamber):

> «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 <…>».

While posing such questions, the European Court in no way violated the principle of subsidiarity and used a method of interpretation of Article 7 of the Convention, which had been tested by it in other cases examined by the Grand Chamber (see *Streletz, Kessler and Krenz v. Germany*, ECHR 2001-II § 51; *K.-H.W. v. Germany*, ECHR 2001-II, § 46; *Korbely v. Hungary*, ECHR 2008-…, § 73). However, as different from the above cases, the Court did not give clear answers to the posed questions.

The European Court began its analysis by determining the status of deceased villagers, having suggested in paragraph 194 of its judgment two mutually exclusive hypotheses: either they were «civilians who had participated in hostilities» (by passing on information to the German administration on the Major Chugunov's group, an act, which may be considered as «war treason»), or that they had the legal status of «combatants» (on the basis of one of the alleged auxiliary roles), with a reference (without quotation though) to such authoritative author as Professor Lassa Oppenheim. However, reference to the above source provides quite a different «hypothesis»:

> «Private individuals who take up arms and commit hostilities against the enemy do not enjoy the privileges of armed forces, and the enemy has, according to a customary rule of International Law, the right to treat such individuals as war criminals. But they cease to be private individuals if they organise themselves in a manner which

[1] The phenomenon of «judicial activism» in the case-law of the European Court is the subject-matter of a fundamental treatise: *Delzangles B.* Activisme et autolimitation de la Cour européenne des droits de l'homme. Paris, 2009.

[2] *Chetail V.* The Contribution of the International Court of Justice to international humanitarian law // IRCC, 2003, no. 85, pp. 235—269.

[3] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion of 9 July 2004.

[4] Case Concerning the Armed Activities on the Territory of the Congo [*Democratic Republic of Congo v. Uganda*], judgment of 19 December 2005.

[5] *Kunarač*, IT-96-23-T, judgment of 22 February 2001, § 471.

[6] See *e.g.*: *Krieger H.* A Conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study // Journal of Conflicts and Security Law, 2006; *Hampson F.J.* The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body // International Review of the Red Cross, vol. 90, no. 871, September 2008, pp. 549–572.

[7] Let us recall its text:
«Article 7. No punishment without law
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».

according to the Hague Convention, confers upon them the status of members of regular forces»[1].

Let us put it straightforward: «civilians who had participated in hostilities» are not at all the category of persons, whom the Geneva Convention relative to the Treatment of Prisoners of War of 1949 equals to prisoners of war, but namely those inhabitants, who on the approach of the enemy spontaneously take up arms to resist the invading forces (Article 4 A § 6). Although, if one assumes that the villagers spontaneously took up arms to fight «Soviet occupiers», then the sense of such a «hypothesis» becomes clear. As regards war treason by civilian villagers, Professor Lassa Oppenheim here too is quite clear in defining this notion: war treason may constitute «information of any kind given to the enemy», «any voluntary assistance to military operations of the enemy, be it by serving as guide in the country, by opening the door of a depended habitation etc.» Then the eminent author concludes: «war treason <…> gives a right to belligerents to consider them, when committed by enemy soldiers or enemy private individuals within their lines, as acts of illegitimate warfare, and consequently punishable as war crimes».

What would be the punishment for that? The suggested answer is: «all war crimes may be punished with death»[2]. The European Court, getting enmeshed in its own «hypotheses» (see §§ 201 and 216 of the judgment by the Grand Chamber), gives a curtain line: after all, the status of the villagers is not so important, since «if the villagers had been considered "civilians", *a fortiori* they would have been entitled to even greater protection» (§ 227 of the judgment by the Grand Chamber). In other words, nuances like status of participants of acts of war worked out by the international humanitarian law do not count? And yet it seems that those do count because at the «interim» paragraph 203 of the judgment we read:

> «<…> 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 <…>».

Comprend qui peut, a French proverb consoles, i.e. «understand it the way you understand».

In our humble opinion, even such a «protection» of the international humanitarian law as «non-defended locality» did not extend to inhabitants of the village of Mazie Bati, since rifles, grenades and a lot of ammunition were confiscated from the menfolk of the village. But at the same time the European Court did not even recall the judgment of a US tribunal of 10 April 1948 in the case of *US v. Otto Ollendorff*[3], when the tribunal based a departure from the rule of protection of civilian population **by requirements of military necessity**. One has to be sorry about it. And there were acts of firebombing of Dresden, Hiroshima, Belgrade and Bagdad…

Having examined in such a peculiar way the status of villagers, the European Court proceeds to answer the question, whether in 1944 there was individual criminal responsibility for commission of war crimes? It would be logical to assume that from the vantage point of ninety (!) paragraphs of the outline of the entire corpus of the international humanitarian law and practice of its application the Court would answer positively, otherwise why making all this fuss? But let us give the Court its due — as soon as it is clear even to students that the individual responsibility for commission of international crimes emerged in the times of the Nuremberg trial, with respect to war criminals from Axis countries[4] — the Court suggested its own «hypothesis»: «individual command responsibility»! (§ 211 of the judgment by the Grand Chamber) substituting by this notion the notion of «individual responsibility».

However, the European Court does not explain the meaning of its another «hypothesis», once again referring to the Instructions for US Servicemen… References to individual cases of prosecutions of military commanders after the First World War (the Leipzig mock trials in 1919, see § 101 of the judgment by the Grand Chamber) speak for themselves: actually no responsibility was established then. (However, one might recall a story how the Netherlands refused to extradite Kaiser Wilhelm II to the Allies.). The Lieber Code of 1863 made during the Civil War in the United States[5] was not an attempt to establish principle of individual responsibility for violation of laws and customs of war but rather an attempt to apply the principle of universal jurisdiction (in the own territory and beyond its boundaries). References to Professor Theodor Meron[6] are also unconvincing.

Again, I have to decipher the encoded reference to Mr Meron in paragraph 209 of the judgment by the Grand Chamber. In fact, Mr Meron wrote:

> «The Fourth Hague convention of 1907 made no allowance for the imposition of individual criminal responsibility upon persons responsible for violations of either its provisions or those of its annexed regulations. Instead, the Convention specified as the chief form of punishment the payment of compensation by states»[7].

Let us note, apropos, that prior to 1948, the year of adoption of the Universal Declaration of Human Rights, an individual was not vested with international legal standing even in a reduced form; so, the exception was made in 1945 for Nazi war criminals. It is quite unlikely that in 1944 one could imagine that such an exception would have been made for 21-year old Sergeant Vasiliy Kononov: Joseph Stalin, the only actual subject of the international law, was responsible for everyone and for all in his country but Stalin was not going to be accountable to anyone.

It is a pity that the European Court passed over in silence (was it done deliberately?) such an issue as culpability without guilt: current Criminal Code of the Federal Republic of Germany was amended in 2002 by a new section «Code of Crimes against International Law» which had to do with *corpora* of international crimes. There is a provision in it (Article 1 § 3) which reads:

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[1] *Oppenheim L., Lauterpacht H.* Oppenheim's International Law. Vol. II. Disputes, War and Neutrality. London. 1944, p. 454.

[2] *Ibid.*, p. 456.

[3] See: *Давид Э.* Принципы права международных конфликтов. М., 2000. С. 194.

[4] See: *Лисицын-Светланов А.Г., Ледях И.А.* Нюренбергский процесс и защита прав человека // Нюренбергский процесс: уроки истории. М., 2007. С. 23.

[5] The Lieber Code of April 24, 1863, also known as Instructions for the Government of Armies of the United States in the Field, General Order № 100, or Lieber Instructions, was an instruction signed by President Abraham Lincoln to the Union Forces of the United States during the American Civil War that dictated how soldiers should conduct themselves in war time. It was named after the German-American jurist Francis Lieber.

[6] Professor of International Law Theodor Meron was the President of the International Criminal Tribunal for the former Yugoslavia until 2005, and now serves as a judge on the International Criminal Tribunal for Rwanda. He also serves as Honorary President of the American Society of International Law.

[7] *Meron I.* Reflexions on the Prosecution of War Crimes by International Tribunals // American Journal of International Law, 2006, no. 100. p. 551.

> «Whoever commits an offence <…> in execution of a military order or of an order comparable in its actual binding effect shall have acted without guilt so far as the perpetrator does not realise that the order is unlawful and so far as it is also not manifestly unlawful»[1].

The debate over execution of unlawful orders, which was started at Nuremberg, is quite known. One of the Nuremberg Principles (Principle IV) referred to in the text of the judgment by the Grand Chamber (§ 122) reads:

> «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».

Alas, neither Latvian courts, nor the Strasbourg Court posed a question whether Mr Vasiliy Kononov had had that «moral choice»? Instead, paragraph 223 of the judgment by the Grand Chamber asserts:

> «Given the purpose of the mission established domestically, he had the required *mens rea*».

Now let us touch upon the issue of existence, in 1944, of the legal basis to convict Mr Vasiliy Kononov for commission of war crimes.

The European Court concludes that since the guilt of Mr Vasiliy Kononov had been established, then accordingly (!) the Court considers that by May 1944 war crimes, as it turns out, were already defined as acts contrary to the laws and customs of war and that by that time the international law had defined the basic principles underlying prosecution for their commission and had provided an extensive range of acts constituting war crimes (§ 213 of the judgment by the Grand Chamber). Such a finding, putting it mildly, tries to pass the desirable for reality.

Chronologically, it was only Article 6 Charter of the International Military Tribunal, which for the first time rather completely defined *ratione materiae* of war crimes as violations of the laws and customs of war. Such violations included 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 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, and other crimes. Later, Article 8 of the Statute of the International Criminal Court will establish jurisdiction of this court with respect to more extensive list of war crimes, including crimes prosecuted under the Hague and Geneva Conventions as well as other conventions and treaties, over 40 *corpora delicti*.

In other words, both the international law in its entirety, and the international humanitarian law and the international criminal law contain today rather exhaustive list of *corpora* of war crimes. But there was none in distant 1944, however the European Court, unlike the Latgale Regional Court, classifies, following the Latvian courts, such fact as incriminated to Mr Vasiliy Kononov burning a pregnant woman to death as a war crime referring to Article 16 of the Geneva Convention (IV) of 1949 (§ 218 of the judgment by the Grand Chamber). Why then there is in general the need to have Article 7 of the Convention if by way of biased interpretation it is possible to classify any act as a criminally punishable one proceeding from legal provisions that saw the light of the day after its commission? References to the Martens Clause and the Hague Convention of 1907, which contained basic principles but not the norms defining *ratione materiae* of a war crime, for the commission of which Mr Vasiliy Kononov was convicted, are not persuasive. However, in the text of its judgment, the Grand Chamber states bluntly (§ 215):

> «Those **principles**, including the Martens Clause, constituted **legal norms** against which conduct in the context of war was to be measured by courts» (*emphasis added — A.K.*).

Was not it easier to come back to earth, as the Latgale Regional Court did, and, without further ado, to classify the act incriminated to Mr Kononov proceeding from the provisions of the criminal law in force? This is indicated by President of the European Court Jean-Paul Costa and his colleagues in their joint dissenting opinion (§ 6 of the dissenting opinion).

Indeed, the principle of non-applicability of the statute of limitation has an utmost importance for criminal prosecution of violations of principles and norms of the international humanitarian law, notably such «serious offences» as war crimes, crimes against humanity and genocide. However, as the European Court rightfully suggests, in the times of Nuremberg the matter of the statute of limitation as regarded actions of Nazis was worded in Article II § 5 of the Law No. 10 of the Allied Control Council for Germany. Let us recall it, since the Court failed to do so:

> «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 respect to the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment»[2].

The fact that the Nuremberg Tribunal prosecuted the defendants *ex post facto* does not mean that it was possible to attach retroactivity to war crimes as regarded all participants of hostilities during the Second World War. It was for that reason that no subsequent instrument of the international humanitarian law mentioned the statute of limitation with respect to war crimes.

This gap was filled by the UN General Assembly, which on 26 November 1968 adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. However, the Chamber of the European Court, in its judgment of 24 July 2008, clearly defined (§ 142 of the judgment of the Chamber) that the above Convention

> «<…> only applies to the specific offences defined in Article 1 of that Convention and not to offences under the general law, which remain subject to statutory limitation».

The Grand Chamber did not do it for an obvious (for itself) reason having acknowledged in paragraph 230 of its judgment that the Criminal Code of 1926 had not been extended to war crimes incriminated to Mr Vasiliy Kononov under the international law the way it was interpreted by the national courts. Then the Grand Chamber admits (§ 231 of the judgment):

> «However, international law in 1944 was silent on the subject. Previous international declarations on the responsibility for,

[1] See the entire text of the English translation of the German Code of Crimes against International Law: http://www.iuscomp.org/gla/statutes/VoeStGB.pdf

[2] See the entire English text: http://avalon.law.yale.edu/imt/imt10.asp

> and obligation to prosecute and punish, war crimes did not refer to any applicable limitation periods».

Here one could put the matter to rest but then the whole «charm» of the national courts' postulate regarding non-applicability of the statute of limitation to the act of Mr Vasiliy Kononov would vanish, since the act was classified by them as a war crime in the meaning of the international law as it exists today.

The European Court puts things together in quite a strange way. Considering that the applicant was convicted under Article 68-3 of the Criminal Code of 1961 as amended in 1993 (which in itself is a flagrant violation of Article 7 § 1 of the Convention), the Court finds: «any prescription provisions in domestic law were not applicable» (§ 233 of the judgment by the Grand Chamber). As regards gaps in the international law (§ 232), the Court, after one paragraph after quoted paragraph 231, makes a second finding on quite a serious note: «the charges against the applicant were never prescribed under international law» (§ 233 of the judgment by the Grand Chamber). Four «majority» judges of the Court, who wrote joint concurring opinion, did not agree with these findings and warned (§ 6 of the opinion):

> «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».

In the opinion of four judges, it would be better to avoid the matter at all, since subsequent development of the international law has gradually formulated such norms. We face here a clear-cut apologetics of *ex post facto law*.

To conclude the piece related to the statute of limitation I submit brief information. If between 1948 and 1949 courts of the West Germany convicted respectively 1819 and 1523 Nazi criminals, in 1955, i.e. ten years later after the end of the war, there were only 21 judgments of conviction[1]. In the opinion of a number of researchers, the reason for that was not only expiration of the statute of limitation and amnesty acts for less serious crimes but mostly «passive attitude of prosecutors towards Nazi crimes»[2].

The European Court is left to answer the last question: could the applicant in the year of 1944 foresee that his acts were war crimes, and he would be subjected to criminal prosecution? Naturally, proceeding from its previous findings the Court gives a positive answer reiterating that gaps in the international law existing in 1944 «cannot be decisive» (§ 237 of the judgment by the Grand Chamber), that given his position as a commanding military officer Mr Vasiliy Kononov could have been reasonably expected «to take such special care in assessing the risks that the operation <…> entailed» (§ 238), that «the applicant could have foreseen in 1944 that the impugned acts could be qualified as war crimes» (§ 239). Then goes refined but «quite irrelevant» piece about the change of legal regimes and Latvia's legal succession following the declarations of independence of 1990 and 1991 and appropriateness of bringing criminal proceedings against persons who have committed crimes under a former regime (§ 241), which piece appears as sort of «singing an encore».

No one argues that the principle *ignorantia legis non excusat*, i.e. ignorance of the law, is no excuse, was ever abolished by someone. But to apply it, one needs just a little thing: that the «law» is worded and worded intelligibly. In the year of 1944 Sergeant Vasiliy Kononov did not have any Oxford degree and did not posses any knowledge of immense body of the international humanitarian law with all its gaps, while Military Service Regulations and the Criminal Code of 1926 contained no references to the international law and customs of war.

So, the European Court did not give clear and, most importantly, unambiguous answers to the posed questions, in strict accordance with its case-law.

In its judgment in the case of *Korbely v. Hungary* the European Court in fact repudiates positions of national courts, including the position of the Constitutional Court of Hungary, and draws an unequivocal conclusion (§ 95):

> «In the light of all the circumstances, the Court concludes that it has not been shown that it was foreseeable that the applicant's acts constituted a crime against humanity under international law. As a result, there has been a violation of Article 7 of the Convention».

It remains an enigma, why five of eleven judges, who agreed with this conclusion, took an opposite position in the case of *Kononov v. Latvia*: events of 1956 in Hungary took place at the background of already adopted Nuremberg Principles, of the Geneva Conventions of 1949, and consequently there were more reasons to believe that Mr Korbely could have been convicted for an act which during its commission could be classified as a criminal offence according to the general principles of law recognised by civilised nations, as provided by Article 7 § 2 of the Convention.

President of the European Court Jean-Paul Costa is right to state in his dissenting opinion (§ 8) that

> «<…> a distinction must be made between international law as in force at the material time and as it subsequently emerged and gradually became established <…>».

To dump to the past the entire modern body of the international humanitarian law appears to be, at least, «somewhat speculative» [*quelque peu spéculatif*], as it was elegantly expressed by Mr Jean-Paul Costa. It means that it was necessary to have a big wish and to sacrifice a part of professionalism.

Judgments by the European Court of Human Rights, especially judgments by its Grand Chamber, which often construes the Convention, are always under close scrutiny. One may assuredly foresee that the legal community will assess positions of the Court in this case in quite varied ways. The third act of this drama, the act «follow-up to *Kononov*», under the laws of dramaturgy promises to be most strained. Meantime, it is tempting to exclaim, as famous Russian theatre director Konstantin Stanislavsky did, when he saw unconvincing performance by an actor: «I do not believe you!»

[1] *Rückerl A.* NS-Verbrechen vor Gericht. Heidelberg. 1984. S. 127.

[2] *Frei N.* Vergangenheitspolitik. München. 1996. S. 29–53.