

## European Human Rights Law Review

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## Case Comment

## HUNGARIAN REVOLUTION: CRIMES AGAINST HUMANITY - COMMON ART.3 OF THE GENEVA CONVENTIONS

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Case: Korbely v Hungary (9174/02) Unreported September 19, 2008 (ECHR)

Legislation: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 art.3

European Convention on Human Rights 1950 art.6,  
art.7

Subject: HUMAN RIGHTS. Other related subjects: International law

Keywords: **Crimes against humanity; Hungary;** No punishment without law

Abstract: Comments on the European Court of Human Rights decision in Korbely v **Hungary** (9174/02) on whether the applicant, convicted of **crimes against humanity** in relation to his role as a captain in the Hungarian uprising of 1956, had his rights under the European Convention on Human Rights 1950 arts 6 and 7 breached in that he had been convicted of an act that did not constitute a crime at the time, that the proceedings against him had not been fair, and that the proceedings had taken an unreasonably long time. Considers the provisions of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 art.3.

**\*94 Facts**

The applicant was a captain in the Hungarian armed forces at the time of the Hungarian Revolution of 1956. On October 26, 1956 the applicant was ordered to regain control of the Tata police department building, which had been taken over by a small group of insurgents. The insurgents were holding a number of disarmed police officers. The applicant and his men surrounded the insurgents and pointed their sub-machines guns at them. None of the insurgents were holding weapons, but one of the police officers stated that the leader of the insurgents, Tamás Kaszás, had a gun. There was an argument, and Tamás Kaszás pulled out a gun. The applicant ordered his men to fire and himself fired at Tamás Kaszás, killing him. Several other insurgents were also killed or injured by the applicant's men, some as they were running away from the police station.

In December 1994 the applicant was charged with crimes against humanity, in violation of art.3(1) of Geneva Convention (IV) relative to the Protection of

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Civilian Persons in Time of War, in respect of his actions during the 1956 Revolution. However, these charges were dismissed by the Military Bench of the Budapest Regional Court, as it held that the offence with which he was charged constituted homicide, rather than a crime against humanity, and was therefore statute barred.

The prosecution appealed to the Supreme Court, which quashed the decision and remitted the case to the first instance court with guidance as to the matters that needed **\*95** to be established. The key question was whether, at the time of the Revolution, the revolutionary armed forces operated under responsible command, exercised control over a part of the territory and carried out sustained and concerted operations. This was an essential condition of art.3, which deals with humanitarian crimes committed in armed conflicts not of an international character. The first instance court, with the aid of testimony from an expert military historian, established that at the relevant time this condition did not exist, and therefore the applicant's crime could not be defined as a crime against humanity under art.3(1) of the Geneva Convention.

The prosecution again appealed, and although the Supreme Court dismissed the appeal initially, after review the case was remitted to the second instance bench, which established as a finding of fact that during the relevant period the Communist regime made use of the armed forces both to suppress peaceful protest and to quell revolutionary armed groups whose organisation was in process. In effect the regime had waged war against the civilian population. It therefore found that the conditions required by art.3 were found in **Hungary** at the time. In light of this finding of fact, the first instance court in January 2001 found the applicant guilty of **crimes against humanity**. The applicant appealed but the appeal was dismissed.

The applicant complained to the European Court in January 2002, alleging that he had been convicted of an act which did not constitute a crime at the time it had been committed, in breach of art.7. He also complained that the proceedings had not been fair and had taken an unreasonably long time in breach of art.6.

Held

(1) The complaints under art.7 and art.6(1) in relation to the fairness of the proceedings, were admissible, but the remainder of the application was inadmissible.

The Court found the complaint regarding the length of the proceedings manifestly ill-founded. Although the proceedings commenced in April 1994 and concluded in September 2003, given the complexity of the legal issues and the difficulties in establishing facts which had occurred several decades earlier, their length could not be said to be unreasonable.

(2) There had been a violation of art.7 (by 11 votes to 6).

Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage; it also embodies, more gener-

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ally, the principle that only the law can define a crime and prescribe a penalty. As elsewhere in the Convention, the concept of "law" implies qualitative requirements, notably those of accessibility and foreseeability.

The Court found that the Geneva Conventions had been proclaimed in Hungary at the relevant time and were sufficiently accessible to the applicant. It also found that at the relevant time the provision was not subject to statutory limitation.

Turning to the issue of foreseeability the Court noted that there were two issues to consider: first, whether the act of killing Tamás Kaszás was capable of amounting to a crime against humanity as that concept was understood in 1956, and secondly, whether it can reasonably be said that, at the relevant time, Tamás Kaszás was a person who was "taking no active part in the hostilities" within the meaning of common art.3.

The four primary formulations of crimes against humanity are to be found in art.6(c) of the Charter of the International Military Tribunal annexed to the London Agreement \*96 (August 8, 1945), art.5 of the ICTY Statute (1993), art.3 of the ICTR Statute (1994) and art.7 of the ICC Statute (1998). All of them refer to murder as one of the offences capable of amounting to a crime against humanity. However, other elements, connected to the international law elements inherent in the notion of crime against humanity at that time, but not contained in common art.3, also needed to be present. The most notable of these was that the crime in question should not be an isolated or sporadic act but should form part of "state action or policy" or of a widespread and systematic attack on the civilian population.

The domestic courts had not considered these additional criteria. While they held that it was common knowledge that the Hungarian State had engaged in war against the overwhelming majority of the population, they had not considered whether the particular act committed by the applicant should be regarded as forming part of this policy. It was therefore open to question whether the constituent elements of a crime against humanity had been satisfied.

The Court then turned to whether Tamás Kaszás was a person taking no active part in hostilities. It considered that there was no element in the findings of fact established by the domestic court that could lead to the conclusion that Tamás Kaszás had signalled his intention to surrender in a clear and unequivocal way. The Court noted that Tamás Kaszás was secretly carrying a handgun. He embarked on an animated quarrel with the applicant, at the end of which he drew his gun with unknown intentions. He could not be said to be a person taking no active part in hostilities. The Court rejected the Government's assertion that the applicant had also been considered responsible for the killings of the other insurgents, all of whom were unarmed and some of whom were attempting to run away at the time they were shot. The Court noted that the domestic courts did not specifically address this issue.

The Court concluded that Tamás Kaszás did not fall within any of the classes of non-combatant protected by common art.3. Consequently no conviction for

crimes against humanity could reasonably be based on this provision in the light of relevant international standards at the time.

(3) In light of the finding of a violation of art.7 the Court held that it was not necessary to examine the complaint under art.6(1) (by 12 votes to 5).

(4) The applicant did not submit any claim for damages and no award was made.

#### Cases considered

Behrami and Behrami v France and Saramati v France, Germany and Norway (2007) 45 E.H.R.R. SE10

Jorgic v Germany (2007) 47 E.H.R.R. 6

Pelissier and Sassi v France (2000) 30 E.H.R.R. 715

Streletz, Kessler and Krenz v Germany (2001) 33 E.H.R.R. 31

SW and CR v United Kingdom (1996) 21 E.H.R.R. 363

Waite and Kennedy v Germany (2000) 30 E.H.R.R. 261

#### Commentary

In the course of very extensive proceedings lasting nearly 10 years and reaching the highest levels of the Hungarian judicial system, the domestic courts found that at the \*97 relevant time there had been a state policy of attacking the civilian population; that the applicant, as a member of the armed forces, had been part of that policy, and in furtherance of that policy had killed a number of civilians, some of whom were unarmed and one of whom was armed but had laid down his weapon. If these findings of fact are accepted, then this should clearly have been an act capable of constituting a crime against humanity.

But the Court chose not to accept the findings of fact of the domestic courts and held that it was not clear that the actions of the applicant had been in furtherance of the state policy, and that one of the combatants had not clearly expressed his intentions to lay down his weapon. As the powerful dissenting opinions of Judges Lorenzen, Tulkens, Zagrebelsky, Fura-Sandström and Popovic noted, the domestic courts, who had before them all the available evidence and witnesses and who were much more familiar with the relevant events, were in a much better position to make findings of fact, in particular given the complexity of the task of reconstructing the events that occurred more than 50 years ago.

The trials of individuals alleged to have committed crimes against humanity when acting for a regime which is no longer in power can give rise to serious difficulties. This is particularly so where the individuals are tried not in an international court, but in a domestic court, under the aegis of a new regime that may have its own political motivations for seeking to secure particular

convictions. Nonetheless it should be remembered that one of the primary duties of a state under both human rights and humanitarian law is to safeguard the lives of those within its jurisdiction. The European Court should have been far more reluctant to interfere with the Hungarian courts' findings.

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