Korbely against Hungary

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College	Europees Hof voor de Rechten van de Mens
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Rolnummer	9174/02
Rechter(s)	Mr. Costa President Mr. Rozakis Mr. Bratza Mr. Lorenzen Mr. Tulkens Mr. Loucaides Mr. Cabral Barreto Mr. Jungwiert Mr. Butkevych Mr. Baka Mr. Zagrebelsky Mr. Mularoni Mr. Fura-Sandström Mr. Jaeger Mr. Jebens Mr. Popovic Mr. Villiger
Partijen	Korbely tegen Hongarije
Noot	*Van den Herik*
Trefwoorden	Legaliteitsbeginsel, Veroordeling voor daden begaan in 1956, Correcte interpretatie en toepassing van gemeenschappelijk art. 3 van de Geneefse Conventies van 1949, Oorlogsmisdrijven in niet-internationaal gewapend conflict, Misdrijven tegen de menselijkheid
Regelgeving	EVRM - 7; 41

» Samenvatting

In 1956 heeft klager, destijds een jonge officier in Hongarije, tijdens de korte revolutie een opstandelingenleider doodgeschoten. Hierbij werden ook enkele andere opstandelingen en omstanders gedood. Pas na de omwenteling van 1988 werd een strafrechtelijk onderzoek gestart. Op 13 oktober 1993 stelde het Constitutionele Hof dat de Hongaarse constitutionele verjaringstermijn van 25 jaar in principe ook gold voor daden gepleegd tijdens de roerige oktoberdagen in 1956 en dat alleen een uitzondering kon worden gemaakt voor oorlogsmisdrijven en misdrijven tegen de menselijkheid als internationale misdrijven. Op 29 mei 1995 werd de strafzaak tegen klager gestaakt op last van de militaire regionale rechtbank in Boedapest. Volgens de rechtbank was gemeenschappelijk art. 3 van de Geneefse Conventies van 1949 niet van toepassing en kon het misdrijf derhalve niet als internationaal misdrijf worden aangemerkt, maar slecht

als moord waarvoor de verjaringstermijn gold. Deze beslissing werd in hoger beroep ongedaan gemaakt door de Hongaarse Hoge Raad op 6 december 1996 omdat deze onvoldoende gemotiveerd was. De zaak werd teruggestuurd naar de militaire rechtbank. Op 7 mei 1998 kwam deze rechtbank echter weer tot de conclusie dat er geen gewapend conflict bestond in Hongarije in oktober 1956. Deze beslissing werd bevestigd door de Hoge Raad in zijn hoedanigheid als beroepsrechter op 5 november 1998. In navolging van de rechtbank, stelde de Hoge Raad dat de opstandelingen niet zodanig georganiseerd waren dat zij als opstandelingen konden worden aangemerkt, en bovendien hadden zij geen deel van het grondgebied onder controle. De Hoge Raad stelde dat deze eisen die relevant zijn voor toepassing van het Tweede Aanvullende Protocol bij de Geneefse Verdragen ook van belang zijn voor toepassing van gemeenschappelijk art. 3. In herziening kwam de Hoge Raad op 22 januari 1999 tot de conclusie dat het Tweede Aanvullende Protocol van 1977 niet met terugwerkende kracht de toepassing van gemeenschappelijk art. 3 kon beperken. Met het oog op het humanitaire karakter van de Geneefse Verdragen, stelde de Hoge Raad dat gemeenschappelijk art. 3 reeds van toepassing was zodra een staat zijn gewapende krachten inzette tegen een ongewapende burgerbevolking, en dat er in het licht van die criteria wel een gewapend conflict bestond in Hongarije in oktober 1956. Op 18 januari veroordeelde de rechtbank klager op grond van gemeenschappelijk art. 3 voor misdrijven tegen de menselijkheid voor het doden en aanzetten tot doden tijdens het betreffende incident. In hoger beroep op 8 november 2001 werd klager zelfs voor moord als misdrijf tegen de menselijkheid veroordeeld en de gevangenisstraf werd van 3 tot 5 jaar verhoogd.

Klager doet voor het Europese Hof een beroep op art. 7 EVRM, het legaliteitsbeginsel. Hij stelt dat gemeenschappelijk art. 3 verkeerd is toegepast en dat hij niet had kunnen verzien dat geen verjaring zou plaats vinden. Het Hof concludeert dat schending van art. 7 heeft plaatsgevonden omdat klager niet kon voorzien dat hij voor misdrijven tegen de menselijkheid zou worden veroordeeld.

» Uitspraak

The Law

Alleged violation of Article 7 of the Convention I.

The applicant complained that he had been prosecuted for an act which had 54. not constituted any crime at the time of its commission, in breach of Article 7 of the Convention, which reads as follows:

No one shall be held guilty of any criminal offence on account of any act "1. 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.

This article shall not prejudice the trial and punishment of any person 2. 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."

Submissions of those appearing before the Court A.

The applicant's arguments 1.

As to the relationship between Article 3 of the Geneva Convention 55. relative to the Protection of Civilian Persons in Time of War ("common Article 3") and the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts ("Protocol II"), the applicant stressed that the latter "developed and supplemented" the former; therefore, they could be applied only together. Should Article 3 have a wider field of application and include that of Protocol II, the latter would be superfluous. In the interests of defendants, Protocol II should be allowed to have retroactive effect, to restrict the scope of common Article 3. Such an approach did not reduce the level of protection of the civilian population, because in addition to the law of war, several other international instruments prohibited the extermination of civilians.

However, even if common Article 3 were applicable to the applicant's act, 56. it must be concluded, in view of the Commentaries on the Geneva Conventions published by the International Committee of the Red Cross, that its field of application was not unlimited but subject to certain restrictions. In other words, it could not be broader than the scope assigned to the Conventions by their drafters. For example, simple acts of rioting or banditry did not fall within the scope of Article 3: for it to come into play, the intensity of the conflict must have reached a certain level. Whether or not this condition was met in the applicant's case should have been decided by relying on the opinions of the expert historians, which had infelicitously been discarded by the Supreme Court.

It was true, the applicant argued, that according to the Commentaries, 57. the widest possible interpretation was to be pursued. This approach, however, could only be accepted with reservations, since it was set out in an instrument which was not law, but only a recommendation to States and since it served the purposes of the Red Cross, namely to apply the Geneva Conventions to the largest possible number of conflicts, thereby allowing for humanitarian intervention by the Red Cross. 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.

Moreover, in accordance with Article 7 of the Constitution and in view of 58. the Constitutional Court's case-law, war crimes were not subject to statutory limitation. However, this provision had been enacted in Hungary as late as in 1989. Therefore, in 1956 war crimes and crimes against humanity had still been subject to statutory limitation. In any event, the Geneva Conventions did not regulate the issue of statutory limitation; this principle was laid down by the 1968 New York Convention, but without retroactive

effect. At the time of the commission of the act of which the applicant had been accused, neither domestic nor international law had precluded the applicability of statutory limitations to the crime in question. The applicant could not have foreseen that one day the act which he had committed would be characterised as a crime against humanity and would not be statute-barred.

Furthermore, as to the events which had taken place in the yard of the 59. Tata Police Department, the applicant maintained that even if the civilians present, who had been guarding the police officers, had been unarmed, they could not be regarded as "persons taking no active part in the hostilities". To guard captured enemy combatants was to take an active part in the hostilities. The disarmed police officers had been led to believe that their guards might have arms which they would use if they faced resistance. Tamás Kaszás had actually had a gun, which he had drawn after a quarrel; consequently, he could not be characterised as a non-combatant. In view of Tamás Kaszás's conduct, the applicant could not have been certain that the other insurgents present – including János Senkár, who had also been fatally wounded – had not had concealed firearms on them. In other words, the applicant had been convicted as a result of the incorrect classification of the victim as a non-combatant, although the latter had been armed. His conviction had been based on common Article 3 although not all its elements had been present.

Lastly, concerning the question of accessibility and in reply to the 60. Government's assertion that the applicant, a training officer, was supposed to be familiar with the Geneva Conventions because they had been made part of the teaching materials used by him, he drew attention to the fact that the relevant instruction of the General Chief of Staff had been issued on 5 September 1956, less than two months before the events.

The Government's arguments 2.

The Government emphasised at the outset that the October 1956 events in 61. Hungary had amounted to a large-scale internal conflict and had not simply been an internal disturbance or tension characterised by isolated or sporadic acts of violence not constituting an armed conflict in the legal sense.

As to the questions of accessibility and foreseeability, the Government 62. shared the position expressed by Judge Zupancic in his concurring opinion in *Streletz, Kessler and Krenz v. Germany* ([GC], nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II):

"The powerful objective guarantees of substantive criminal law entrenched in the principle of legality cannot be reduced to the subjective right to advance notice of what is punishable under positive law. ... [E]xcessive reliance upon the subjective criteria of accessibility and foreseeability would facilitate the applicants' defence based on the principle of legality. ... [S]uch an argument would then introduce the defence of an excusable mistake of law (*error juris*)."

In the Government's view, allowing such a defence would undermine the effective enforcement of criminal law and especially international criminal law, which provided

for protection from the most serious attacks against the basic values of humanity and whose rules were generally less accessible to many individuals than domestic rules of conduct. A narrow interpretation of the subjective criteria of accessibility and foreseeability would undermine any ground for universal jurisdiction over war crimes, genocide and other crimes against humanity and even the legality of the newly established International Criminal Court. The international community had, however, created a presumption that these rules were known to everyone since they protected the basic values of humanity.

Concerning accessibility in particular, the Government submitted that, by 63. the present-day standards of the rule of law, the Geneva Conventions had not been properly made part of Hungarian law until their publication in the Official Gazette in 2000. However, their validity and applicability as international law did not depend on their status in domestic law. In any event, Law-Decree no. 32 of 1954 – which declared the Geneva Conventions to be part of national law – required the Minister of Foreign Affairs to ensure the publication of a translation prior to their entry into force. This had been done in 1955, rendering the Conventions generally accessible in Hungarian. Furthermore, given his position as a commanding military officer in charge of training, the applicant had been under the obligation to take cognisance of the content of the Conventions and to include it in the training programme he taught to junior officers.

The Government also referred to Constitutional Court decision no. 53/1993 64. in which it was stated that common Article 3 was part of customary international law, and that acts in breach thereof were to be regarded as crimes against humanity. Consequently, the offence of which the applicant had been convicted constituted a criminal offence under international law. The Constitutional Court had held that international law alone was a sufficient ground for the punishment of such acts, and its rules would be devoid of any effect if the punishability of war crimes and crimes against humanity were subject to incorporation into domestic law.

As regards the issue of foreseeability and the relationship between 65. common Article 3 and Protocol II, the Government drew attention to the fact that common Article 3 was regarded as a “convention in miniature” within the Geneva Conventions, containing the basic rules of humanity to be observed in all armed conflicts of a non-international character. Protocol II, which further developed and supplemented the “parent provision”, was an additional instrument which was designed to set out more detailed rules and guarantees for a specific type of internal armed conflict, that is, for situations when insurgents exercised control over a territory of the State and were thereby able and expected to have the rules of war observed. It was clear that Protocol II had not been intended to leave the victims of all other types of internal armed conflicts unprotected. It was also evident from its wording and the commentaries on it published by the International Committee of the Red Cross that Protocol II did not affect the scope of application of Article 3. Although they could not identify any international judicial interpretation on the issue, the Hungarian courts had taken those commentaries into account. In view of this, the Supreme Court’s interpretation of common Article 3 –

namely that it had a scope of application which could not be considered to have been retroactively restricted by Protocol II – had been reasonably foreseeable.

66. Concerning the domestic courts' characterisation of the victims as non-combatants although one had had a handgun, the Government pointed out that the offence with which the applicant was charged had not consisted of the shooting of a single person dressed in plain clothes and armed with a handgun, in which case the victim's characterisation as a civilian or combatant would have been highly relevant. On the contrary, the applicant had been charged with having ordered his squad to fire at a group of unarmed civilians, among whom there had been a person with a handgun in his pocket. That person – who at first sight must have appeared to be a civilian, since he had not been pointing his gun but hiding it in his pocket – did not in any case make the group a lawful military target. When applying international humanitarian law, the Hungarian courts had been concerned with the entire group rather than with characterising Tamás Kaszás as a civilian or a combatant.

67. Moreover, the margin of appreciation enjoyed by the Hungarian courts in the case should, in the Government's view, be dealt with in the light of the principles of interpretation enshrined in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, which provided that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of the treaty and in the light of its object and purpose. In the field of international human rights law, it was a generally accepted method of interpretation to choose, in case of doubt, an interpretation which led to the effective protection (effet utile) of the individual rights to be safeguarded. The reasoning of the Supreme Court reflected this approach. Its interpretation of the offence committed by the applicant and defined by international humanitarian law had been aimed at the effective protection of the civilian population. Thus, it had remained within the margin set by Article 3 common to the Geneva Conventions. Since Article 7 of the Convention could not be read as outlawing the clarification of the rules of criminal liability through judicial interpretation – provided that the outcome could reasonably be foreseen – it could not be argued that the interpretation of the scope of application of Article 3 or the characterisation of the victim as a civilian had been arbitrary.

B. The Court's assessment

1. Admissibility

68. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 par. 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

a. General principles

The guarantee enshrined in Article 7, which is an essential element of 69. the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.

Accordingly, Article 7 is not confined to prohibiting the retrospective 70. application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable. The Court has thus indicated that when speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability.

However clearly drafted a legal provision may be, in any system of law, 71. including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *Jorgic v. Germany*, no. 74613/01, par.par. 100-101, 12 July 2007; *Streletz, Kessler and Krenz*, cited above, par. 50; and *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*, judgments of 22 November 1995, Series A no. 335-B, pp. 41-42, par.par. 34-36, and Series A no. 335-C, pp. 68-69, par.par. 32-34, respectively).

Furthermore, the Court would reiterate that, in principle, it is not its 72. task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, par. 54, ECHR 1999-I).

Application of the above principles to the present case b.

In the light of the above principles concerning the scope of its 73. supervision, the Court notes that it is not called upon to rule on the applicant's individual criminal responsibility,

that being primarily a matter for assessment by the domestic courts. Its function is, rather, to consider, from the standpoint of Article 7 par. 1 of the Convention, whether the applicant's act, at the time when it was committed, constituted an offence defined with sufficient accessibility and foreseeability by domestic or international law (see *Streletz, Kessler and Krenz*, cited above, par. 51).

Accessibility (i)

The Court observes that the applicant was convicted of multiple homicide, 74. an offence considered by the Hungarian courts to constitute "a crime against humanity punishable under Article 3(1) of the Geneva Convention". It follows that the applicant's conviction was based exclusively on international law. Therefore, the Court's task is to ascertain, first, whether the Geneva Conventions were accessible to the applicant.

The Geneva Conventions were proclaimed in Hungary by Law-Decree no. 32 of 75. 1954. It is true that the Law-Decree itself did not contain the text of the Geneva Conventions and its section 3 required the Minister of Foreign Affairs to ensure the publication of the official translation of the Geneva Conventions prior to their entry into force. However, in 1955 the Ministry of Foreign Affairs arranged for the official publication of a brochure containing the text. It is also to be noted that an order of the General Chief of Staff was published in the Military Gazette on 5 September 1956 on the teaching of the Conventions and was accompanied by a synopsis of them. In these circumstances, the Court is satisfied that the Geneva Conventions were sufficiently accessible to the applicant.

Foreseeability (ii)

In order to verify whether Article 7 was complied with in the present 76. case, the Court must determine whether it was foreseeable that the act for which the applicant was convicted would be qualified as a crime against humanity. In this respect, the Court notes that the applicant was convicted of multiple homicide constituting a crime against humanity and was sentenced to five years' imprisonment (see paragraphs 37, 38, 45 and 75 above). In convicting the applicant, the courts essentially relied on common Article 3, which – in the view of the Hungarian Constitutional Court – characterised the conduct referred to in that provision as "crimes against humanity". In the opinion of those courts, such crimes were "punishable irrespective of whether they were committed in breach of domestic law". Thus, it was "immaterial whether the Geneva Conventions were properly promulgated or whether the Hungarian State fulfilled its obligation to implement them prior to ... 23 October 1956. Independently of these questions, the responsibility of the perpetrators existed under international law" (see paragraph 18 above). Consequently, the crime at issue was considered not to be subject to statutory limitation.

Thus, the Court will examine (1) whether this act was capable of 77. amounting to "a crime against humanity" as that concept was understood in 1956 and (2) whether it can reasonably be said that, at the relevant time, Tamás Kaszás (see paragraphs 11 *et seq.*

above) was a person who was "taking no active part in the hostilities" within the meaning of common Article 3.

The meaning of crime against humanity in 1956 a.

It follows that the Court must satisfy itself that the act in respect of 78. which the applicant was convicted was capable of constituting, at the time when it was committed, a crime against humanity under international law. The Court is aware that it is not its role to seek to establish authoritatively the meaning of the concept of "crime against humanity" as it stood in 1956. It must nevertheless examine whether there was a sufficiently clear basis, having regard to the state of international law as regards this question at the relevant time, for the applicant's conviction on the basis of this offence (see, *mutatis mutandis, Behrami and Behrami v. France* (dec.) [GC], no. 71412/01, and *Saramati v. France, Germany and Norway* (dec.) [GC], no. 78166/01 (joined), par. 122, ECHR 2007-...).

The Court notes that according to the Constitutional Court, "acts defined 79. in Article 3 common to the Geneva Conventions constitute crimes against humanity". In that court's opinion, this provision contained "those minimum requirements which all the conflicting Parties must observe, at any time and in any place whatsoever".

The Constitutional Court furthermore relied on the judgment of the International Court of Justice in the case of *Nicaragua v. United States of America* and on a reference made to common Article 3 in the report by the Secretary-General of the United Nations on the Statute of the International Criminal Tribunal for the former Yugoslavia (see paragraph 18 above). The Court observes however that these authorities post-date the incriminated events. Moreover, no further legal arguments were adduced by the domestic courts dealing with the case against the applicant in support of their conclusion that the impugned act amounted to "a crime against humanity within the meaning of common Article 3".

In addition, it is to be noted that none of the sources cited by the 80. Constitutional Court characterises any of the actions enumerated in common Article 3 as constituting, as such, a crime against humanity. However, even if it could be argued that they contained some indications pointing in this direction, neither the Constitutional Court nor the courts trying the applicant appear to have explored their relevance as regards the legal situation in 1956. Instead, the criminal courts focused on the question whether common Article 3 was to be applied alone or in conjunction with Protocol II. Yet this issue concerns only the definition of the categories of persons who are protected by common Article 3 and/or Protocol II and the question whether the victim of the applicant's shooting belonged to one of them; it has no bearing on whether the prohibited actions set out in common Article 3 are to be considered to constitute, as such, crimes against humanity.

On the latter issue, the Court observes that the four primary 81. formulations of crimes against humanity are to be found in Article 6(c) of the Charter of the International Military Tribunal annexed to the London Agreement (8 August 1945), Article 5 of the

ICTY Statute (1993), Article 3 of the ICTR Statute (1994) and Article 7 of the ICC Statute (1998) (see paragraph 51 above). All of them refer to murder as one of the offences capable of amounting to a crime against humanity. Thus, murder within the meaning of common Article 3 par. 1 (a) could provide a basis for a conviction for crimes against humanity committed in 1956. However other elements also need to be present.

Such additional requirements to be fulfilled, not contained in common 82. Article 3, are connected to the international-law elements inherent in the notion of crime against humanity at that time. In Article 6(c) of the Charter, which contains the primary formulation in force in 1956, crimes against humanity are referred to in connection with war. Moreover, according to some scholars, the presence of an element of discrimination against, and "persecution" of, an identifiable group of persons was required for such a crime to exist, the latter notion implying some form of State action or policy (see Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International 1999, p. 256). In the Court's view, one of these criteria – a link or nexus with an armed conflict – may no longer have been relevant by 1956 (see, Schwelb, 'Crimes against Humanity', *British Yearbook of International Law*, vol. 23, 1946, p. 211; Graven, 'Les crimes contre l'humanité', 76 *Recueil des Cours de La Haye* (1950), Académie de droit international, p. 467; and the Draft Code of Offences against the Peace and Security of Mankind, *Yearbook of the International Law Commission, 1954*, vol. I, p. 151).

However, it would appear that others still were relevant, notably the 83. requirement 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 (see, Berry, Keenan and Brown, *Crimes against international law*, Washington, DC, Public Affairs Press, 1950, pp. 113-122).

The Court notes that the national courts confined their examination to 84. the question whether Tamás Kaszás and János Senkár came under the protection of common Article 3 and did not examine the further question whether the killing of the two insurgents met the additional criteria necessary to constitute a crime against humanity and, in particular, whether it was to be seen as forming part of a widespread and systematic attack on the civilian population. Admittedly, the Supreme Court's review bench held that it was common knowledge that "the central power of the dictatorship made use of its armed forces against the unarmed population engaged in peaceful demonstrations and against armed revolutionary groups whose organisation was in progress... In practical terms, they waged war against the overwhelming majority of the population" (see paragraph 34 above). However, the Supreme Court did not address the question whether the particular act committed by the applicant was to be regarded as forming part of this State policy, such as to bring it within the sphere of crimes against humanity, as this notion was to be understood in 1956.

In the Court's opinion it is thus open to question whether the 85. constituent elements of a crime against humanity were satisfied in the present case.

Was Tamás Kaszás a person "taking no active part in the hostilities" b. within the meaning of common Article 3 according to prevailing international standards?"

In this respect the Court recalls that the applicant's conviction was 86. based on the finding that Tamás Kaszás was a non-combatant for purposes of common Article 3 of the Geneva Convention (see paragraph 48 above).

When applying common Article 3 to the applicant's case, the various 87. domestic courts took divergent views on the impact of Protocol II on this provision. In particular, in their respective decisions of 7 May and 5 November 1998, the Regional Court and the Supreme Court's appeal bench took the view that common Article 3 and Article 1 of Protocol II were to be interpreted in conjunction with each other. The decision of the Supreme Court's review bench of 28 June 1999 and the ensuing judgments reflected another approach, according to which Article 3 of the Geneva Conventions had an original scope of application which could not be considered to have been retroactively restricted by Protocol II. Consequently, any civilian participating in an armed conflict of a non-international character, irrespective of the level of intensity of the conflict or of the manner in which the insurgents were organised, enjoyed the protection of Article 3 of the Geneva Conventions. The Court will proceed on the basis that the above interpretation by the Supreme Court is correct from the standpoint of international law (see Bothe, 'Conflits armés internes et droit international humanitaire', *Revue générale de droit international public*, 1978, p. 90; Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff Publishers, Geneva 1986, par.par. 4424-4426; and *Prosecutor v. Jean-Paul Akayesu*, judgment of 2 September 1998, ICTR (Chamber I), par. 607).

In his submissions to the Court the applicant has questioned whether 88. Tamás Kaszás could be considered to be protected by common Article 3 which affords protection to "persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause". He argued that Tamás Kaszás could not be regarded as a non-combatant since he had a gun (see paragraph 59 above).

At the outset, the Court observes that according to the facts as 89. established by the domestic courts, Tamás Kaszás was the leader of an armed group of insurgents, who – after committing other violent acts – took control of a police building and confiscated the police officers' arms. In such circumstances he must be seen as having taken an active part in the hostilities (see paragraph 42 above).

The question therefore arises whether Tamás Kaszás was a member of the 90. insurgent forces who had "laid down his arms" thereby taking no further part in the fighting. In this connection the Court finds it to be crucial that, according to the domestic court's finding, Tamás Kaszás was secretly carrying a handgun, a fact which he did not reveal when facing the applicant. When this circumstance became known, he did not seek to surrender in a clear manner. The Court notes that it is widely accepted in international legal opinion that in order to produce legal effects such as the protection of common Article 3, any

intention to surrender in circumstances such as those in issue in the present case needs to be signalled in a clear and unequivocal way, namely by laying down arms and raising hands or at the very least by raising hands only (cf., for example, the Commentaries on Additional Protocol I to the Geneva Conventions, published by the International Committee of the Red Cross – see paragraph 50 above; the proposed Rule 47 of the ICRC's study on customary international humanitarian law (2005) – see paragraph 51 above; and the UN Secretary-General's report on respect for human rights in armed conflict, UN Doc. A8052, 18 September 1970, par. 107). For the Court, it is reasonable to assume that the same principles were valid in 1956.

However there is no element in the findings of fact established by the 91. domestic courts which could lead to the conclusion that Tamás Kaszás expressed in such a manner any intention to surrender. Instead, he embarked on an animated quarrel with the applicant, at the end of which he drew his gun with unknown intentions. It was precisely in the course of this act that he was shot. In these circumstances the Court is not convinced that in the light of the commonly accepted international law standards applicable at the time, Tamás Kaszás could be said to have laid down his arms within the meaning of common Article 3.

The Court is aware of the Government's assertion (see paragraph 66 above) 92. that the applicant's conviction was not based solely on his having shot Tamás Kaszás but on his having fired, and ordered others to fire, at a group of civilians, resulting in several casualties.

The Court observes, however, that the domestic courts did not 93. specifically address the issue of the applicant's guilt in respect of the other fatality, János Senkár; rather, they focused on his conflict with Tamás Kaszás. Nor did those courts regard the injuries inflicted on István Balázs and Sándor Fasing as a constitutive element of the crime; instead, they characterised their occurrence as a mere aggravating factor (see paragraph 40 above). That being so, the Government's argument that the applicant's conviction was not primarily based on his reaction to Tamás Kaszás's drawing his handgun, but on his having shot, and ordered others to shoot, at a group of civilians, cannot be sustained.

The Court therefore is of the opinion that Tamás Kaszás did not fall 94. within any of the categories of non-combatants protected by common Article 3. Consequently, no conviction for crimes against humanity could reasonably be based on this provision in the present case in the light of relevant international standards at the time.

Conclusion c.

In the light of all the circumstances, the Court concludes that it has 95. 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.

Alleged violation of Article 6 par. 1 of the Convention on account of II. the unfairness of the proceedings

The applicant also complained in general terms that his conviction had 96. been politically motivated and as such, unfair, in breach of Article 6 par. 1 of the Convention, which reads as relevant:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal..."

The Government argued that the domestic courts had given appropriate 97. reasons for the applicant's conviction for crimes against humanity. The applicant contested this view.

The Court considers that t 98.his complaint is also admissible. However, in the light of its finding of a violation of Article 7 of the Convention (see paragraph 95 above), it concludes that in the circumstances of the present case it is unnecessary to examine the applicant's complaint under Article 6 par. 1 of the Convention (fairness of the proceedings).

Alleged violation of Article 6 par. 1 of the Convention on account III. of the length of the proceedings

Lastly, the applicant complained that the criminal proceedings against 99. him had lasted an unreasonably long time, in breach of Article 6 par. 1 of the Convention.

The Government argued that the authorities had acted with the requisite 100. diligence, given the complexity of the case. In any event, since the Budapest Regional Court had assessed the protracted nature of the proceedings as a mitigating factor and this consideration had been endorsed by the Supreme Court (see paragraphs 40 and 45 above), the applicant had, in the Government's view, already been afforded adequate redress and could not claim to be a victim of a violation of his Convention rights in this connection. The applicant contested these views.

The Court considers that it is not necessary to examine the applicant's 101. victim status in respect of this issue, because this complaint is in any event manifestly ill-founded for the following reasons. The Court observes that the proceedings commenced on 20 April 1994 and ended on 22 September 2003. The period to be taken into consideration thus lasted approximately nine years and five months. It reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, par. 67, ECHR 1999-II).

The Court notes that the applicant's petition for review was dismissed 102. as inadmissible, without being examined on the merits, since it was incompatible *ratione materiae* with the relevant provisions of the Code of Criminal Procedure in that it

essentially challenged the findings of fact. Since the related proceedings were futile, the corresponding period of over one year and ten months (8 November 2001 to 22 September 2003) is entirely imputable to the applicant. During the remaining seven years and seven months, the case was initially examined at one level of jurisdiction, and this was followed by the Constitutional Court's scrutiny of the underlying laws. However, that process halted the proceedings for only nine months.

Subsequently, the case was remitted to the first-instance court. In the 103. ensuing proceedings, the case was dealt with at three levels of jurisdiction, in the course of which several hearings were held and the opinion of an expert military historian was obtained. The final decision having been quashed in review proceedings, the case was again remitted to the first-instance court, whose judgment was amended in the final decision of 8 November 2001.

In the Court's view, the fact that the case had to be examined 104. repeatedly at several levels of jurisdiction is essentially due to the complexity of the legal issues in question and to the inevitable difficulties the domestic courts faced when establishing facts which had occurred more than 40 years earlier. Having regard to the absence of any particular period of inactivity attributable to the authorities, the Court is satisfied that the overall length of the proceedings did not exceed a reasonable time within the meaning of Article 6 par. 1 of the Convention.

It follows that this complaint is manifestly ill-founded within the 105. meaning of Article 35 par. 3 and must be rejected, pursuant to Article 35 par. 4 of the Convention.

Application of Article 41 of the Convention IV.

Article 41 of the Convention provides: 106.

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

Damage A.

The applicant did not submit a claim for damages. 107.

In these circumstances, the Court makes no award under this 108. head.

Costs and expenses B.

The applicant stated that the amount which his representatives had 109. received from the Council of Europe's legal-aid scheme – altogether, 3,716.06 euros (EUR) – would cover all his claims under this head.

The Government made no comment in this connection. 110.

In these circumstances, the Court considers the applicant's claim for 111. costs to have been satisfied.

For these reasons, the Court

1.*Declares* unanimously the complaints under Article 7 and Article 6 par. 1 (fairness of the proceedings) admissible and the remainder of the application inadmissible;

2.*Holds*, by eleven votes to six, that there has been a violation of Article 7 of the Convention;

3.*Holds*, by twelve votes to five, that it is not necessary to examine separately the applicant's complaint concerning the alleged unfairness of the proceedings (Article 6 par. 1 of the Convention).

Joint dissenting opinion of Judges Lorenzen, Tulkens, Zagrebelsky, Fura-Sandström and Popovic

(Translation)

We do not subscribe to either the reasoning or the conclusions of the majority as to the violation of Article 7 of the Convention in the present case.

The Court initially sets out to determine whether the act in respect of 1. which the applicant was convicted could have amounted to a crime against humanity as that concept was understood in 1956 (see paragraph 77 of the judgment). In that connection, it rightly observes that the definition of the categories of persons who are protected by common Article 3 of the Geneva Conventions and/or Protocol II and the question whether the victim of the applicant's shooting belonged to one of those categories have no bearing on whether the actions prohibited by common Article 3 are to be considered *per se* to constitute crimes against humanity (see paragraph 80). Referring to the four primary formulations of crimes against humanity (Article 6(c) of the Charter of the International Military Tribunal annexed to the London Agreement August 1945; Article 5 of the 1993 ICTY Statute; Article 3 of the 1994 ICTR of 8 Statute; and Article 7 of the 1998 ICC Statute), the Court concludes that murder within the meaning of common Article 3 par. 1 (a) could have provided a basis for a conviction for crimes against humanity. However, it considers that "other elements also need to be present" for an offence to qualify as a crime against humanity (see paragraph 81), namely international-law elements.

Referring in turn to the presence of discrimination against, and persecution of, an identifiable group of persons and a link or nexus with an armed conflict – elements which have been posited by legal experts but are the subject of much debate [noot:1] – the Court concludes that a more relevant constituent element of crimes against humanity is that they should "form part of 'State action or policy' or of a widespread and systematic

attack on the civilian population" (see paragraph 83). On that point, it is incorrect in our view to maintain, as the judgment does, that the domestic courts did not examine whether in 1956 there had been a widespread and systematic attack on the civilian population, seeing that the Supreme Court's review bench held that it was common knowledge that the central power of the dictatorship had employed troops against the population engaged in demonstrations and against the armed revolutionary groups that were forming (see paragraph 84). As to the contention that the Supreme Court "did not address the question whether the particular act committed by the applicant was to be regarded as forming part of this State policy", it is quite simply at odds with the evidence in the case file and with the historical reality of the events in Tata on 26 October 1956.

Be that as it may, the restraint or caution evident in the conclusion of the judgment leaves open the initial question whether the act in respect of which the applicant was convicted could indeed have amounted to a crime against humanity. The Court thus considers that it is "*open to question* whether the constituent elements of a crime against humanity were satisfied in the present case" (see paragraph 85), which indicates that it cannot find a violation of Article 7 of the Convention on that basis.

The reasoning and grounds put forward by the majority thus focus 2. essentially on the second question: could Tamás Kaszás be regarded as a person taking no active part in the hostilities within the meaning of common Article 3 of the Geneva Conventions? More specifically, was he a member of the insurgent forces who had "laid down his arms"? The answer to this question requires an interpretation of the victim's actions at the time of the confrontation and shooting in the Tata Police Department building, where the insurgents were to be found on 26 October 1956. In this instance the Court concludes that "there is no element in the findings of fact established by the domestic courts which could lead to the conclusion that Tamás Kaszás expressed in such a manner any intention to surrender" (see paragraph 91 of the judgment). It therefore considers that he did not fall within any of the categories of non-combatants protected by common Article 3 and that that provision could not reasonably have served as a basis for a conviction for crimes against humanity (see paragraph 94).

In its recapitulation of general principles, the judgment reiterates that it is not normally the Court's task to substitute itself for the domestic courts and that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. It rightly points out that this also applies where domestic law refers to rules of general international law or international agreements, the Court's role being confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see paragraph 72). Nevertheless, the majority, without any explanation, head off in a different direction and, on a flimsy, uncertain basis, quite simply substitute their own findings of fact for those of the Hungarian judicial authorities.

In view of the complexity of the task of reconstructing the facts of the case more than fifty years after they occurred, we see no reason to place more reliance on the conclusions reached by the Court than on those of the domestic courts. On the contrary, we consider

that the national courts were in a better position to assess all the available facts and evidence.

Admittedly, the domestic courts' decisions may have left certain questions unanswered regarding the victim's conduct and the applicant's interpretation of it. However, the possible insufficiency of the reasoning of the Supreme Court's judgment could have raised an issue under Article 6 of the Convention but not, in the circumstances of the case, under Article 7.

Those are the main reasons which have led us to conclude that there was no violation of Article 7 of the Convention in the present case.

Dissenting opinion of Judge Loucaides

am unable to agree with the conclusions of the majority in this case. I

accept the approach of the majority in respect of the concept of crimes I against humanity. I consider it useful, however, to add the following thoughts regarding this issue. In its definition of "crimes against humanity" the Charter of the Nuremberg Tribunal included "murder ... committed against civilian populations before or during the war...". The Nuremberg Trials applied the Charter and attributed criminal responsibility to individuals for "crimes against humanity". However, those crimes were linked to the conduct of war. At that time it was not clearly established that such crimes were part of customary international law, especially where they were not linked to acts of war. Gradually, however, this was indeed established. Resolution 95 (I) of the United Nations General Assembly of 11 December 1946 expressly affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal". This resolution was evidence of the prevailing views of States and of state practice with regard to the principles in question and, additionally, provided solid legal support to the claim that these principles were part of customary international law (see, *inter alia*, Daillier and Pellet, *Droit international public*, 6th edition, p. 677). A connection between crimes against humanity and war activities was not considered a requirement for the establishment of such crimes (see "Question of the punishment of war criminals and of persons who have committed crimes against humanity: Note by the Secretary-General", UN GAOR, 22nd session, Annex Agenda Item 60, pp. 6-7, UN DOC A/6813 (1967); see also International Criminal Tribunal for the former Yugoslavia, Tadic case IT-94-1, par. 623). As rightly observed by Lord Millett in the Pinochet (3) judgment of the House of Lords ([1999] 2 Weekly Law Reports 909 *et seq.*),

"[t]he Nuremberg Tribunal ruled that crimes against humanity fell within its jurisdiction only if they were committed in the execution of or in connection with war crimes or crimes against peace. But this appears to have been a jurisdictional restriction based on the language of the Charter. There is no reason to suppose that it was considered to be a substantive requirement of international law. The need to establish such a connection was natural in the immediate aftermath of the Second World War. As memory of the war receded, it was abandoned."

The view that the Nuremberg principles were customary international law became indisputable after Resolution 3074 (XXVIII) of the United Nations General Assembly of 3 December 1973, which proclaimed the need for international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. One may add here that it has also been maintained and adopted by judgments of international *ad hoc* criminal tribunals that:

"[s]ince the Nuremberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned" (Tadic case, op. cit.).

As regards the elements of crimes against humanity, one may take the recent Rome Statute of the International Criminal Court as declaratory of the definition in international law of this crime. In Article 7 of the Statute, we find the following:

... 'crime against humanity' means any of the following acts when "1. committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

Murder; (a)

...

For the purpose of paragraph 1: 2.

'Attack directed against any civilian population' means a course of (a) conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; ..."

Yet even if one is guided only by the concept of "crimes against humanity" that emerges from the Charter of the International Military Tribunal of Nuremberg – the principles of which were affirmed by the United Nations resolutions mentioned above – and even if the present case is examined only by reference to the minimum requirements of such a concept, there is no difficulty in concluding that the activity for which the applicant was convicted did undoubtedly qualify as a "crime against humanity". The minimum elements of the offence in question appear to be the following:

murder; (a)

committed against a civilian population; and (b)

systematic or organised conduct in furtherance of a certain policy. (c)

The last element is implied from the combination of elements (a) and (b).

The majority found that the domestic courts had focused their attention in the relevant criminal case on the conduct of the applicant *vis-à-vis* Tamás Kaszás and they disagreed with those courts that the individual in question could be considered as having "laid down his arms thereby taking no further part in the fighting". According to the majority:

"... there is no element in the findings of fact established by the domestic courts which could lead to the conclusion that Tamás Kaszás expressed in such a manner any intention to surrender. Instead, he embarked on an animated quarrel with the applicant, at the end of which he drew his gun with unknown intentions. It was precisely in the course of this act that he was shot. In these circumstances the Court is not convinced that in the light of the commonly accepted international law standards applicable at the time, Tamás Kaszás could be said to have laid down his arms within the meaning of common Article 3." (paragraph 91 of the judgment).

On the other hand, in the relevant findings of fact of the domestic courts on this question we find the following statements:

"The officers were continuously pointing their submachine guns at the civilians. István Balázs informed them that they had no weapons. An unknown policeman standing behind István Balázs said at this point that Tamás Kaszás had a pistol on him. István Balázs asked Tamás Kaszás to hand over the weapon if he had one. ...On the other hand, the defendant should have realised that, because of their weapons, the officers' force was superior to that of the civilians in the inner yard, and that the conflict at hand could have been resolved without the use of firearms against people." (Military Bench of the Budapest Regional Court, paragraph 42 of the judgment).

The judgment of the Supreme Court subsequently found:

"However, the findings of fact in the judgment also state that 'István Balázs asked Tamás Kaszás to hand over the weapon if he had one. At this point the defendant was facing Tamás Kaszás and there was a distance of only a few metres between them' ... From this, it can rightly be deduced that the applicant heard this call. Because it was immediately thereafter that a quarrel broke out between the applicant and the victim and that the victim drew his gun, the correct conclusion concerning what was on the applicant's mind is that he knew that the victim intended to hand over the gun, rather than to attack with it. ..." (paragraph 44 of the judgment).

believe that the findings of the domestic courts to the effect that Tamás I Kaszás's behaviour in respect of his gun amounted to the gesture of a man attempting to hand over the gun, rather than to attack with it, were not unreasonable, bearing in mind in this respect that Mr Kaszás, along with his companions, was facing officers who were continuously pointing their submachine guns at them and that the officers' force was superior to that of the civilians. In the circumstances any attempt on the part of Mr Kaszás to use his gun against the applicant would have amounted to suicide. I do not therefore see any reason to overrule the relevant findings of the domestic courts.

In any event, I disagree with the majority's finding that the applicant's conviction was essentially focused on the reaction of the applicant to Tamás Kaszás. I accept the Government's position that "the applicant's conviction was primarily based on his having shot, and ordered others to shoot, at a group of civilians". The record of the relevant proceedings clearly supports this view. The applicant was charged "with having commanded a military squad in an assignment to regain control of the Police Department building, and with having shot, and ordered his men to shoot at, civilians, causing the deaths of, and injuries to, several persons" (see paragraph 21 of the judgment).

The domestic courts also found, on the basis of the facts, that the applicant was guilty "of multiple homicide constituting a crime against humanity which he had committed as a perpetrator in respect of the killings inside the building and as an inciter in respect of the killing outside" (paragraph 38 of the judgment).

Therefore, even if we disregard the incident between the applicant and Mr Kaszás, I do not see how we can disregard the courts' findings that the case against the applicant and his conviction also concerned other civilians, who did not draw guns and were not in any way armed. In this respect it is very important to underline the fact that as soon as Mr Kaszás drew his handgun,

"the applicant responded by resolutely *ordering his men to fire. Simultaneously, he fired his submachine gun* at Tamás Kaszás, who was shot in his chest and abdomen and died immediately. *One of the shots fired on the applicant's orders hit another person and three hit yet another person. A further insurgent was shot and subsequently died of his injuries. Two individuals ran out on to the street, where the other platoon of the applicant's men started to shoot at them. One of them suffered a non-lethal injury to his head; the other person was hit by numerous shots and died at the scene"* (emphasis added) (paragraphs 15 and 42 of the judgment).

To complete the picture, I should also add that, according to the evidence, the applicant and the members of his group "were armed with PPS-type 7.62-mm submachine guns and TT pistols" (judgment of the Military Bench of the Budapest Regional Court). These random shootings with submachine guns, directed against unarmed civilians other than Mr Kaszás, cannot in my view be regarded as anything other than a crime against humanity.

must add that I also find that there was sufficient evidence to the effect I that the shooting in question formed part of a widespread and systematic attack on the civilian population. In this respect I take into account the Supreme Court's statement that:

"... it is common knowledge that, from 23 October 1956 onwards, the central power of the dictatorship made use of its armed forces against the unarmed population engaged in peaceful demonstrations and against armed revolutionary groups whose organisation was in progress. During this time, the armed forces employed significant military equipment, such as tanks and aircrafts, and their activities against the population opposed to the regime spread over the whole country. In practical terms, they waged war against the

overwhelming majority of the population. The same is confirmed by the orders issued in this period by the dictatorship's Ministers of Defence. Having regard to all this, it can be established that an armed conflict of a non-international character was in progress in the country from 23 October 1956 onwards, for such time as the armed forces of the dictatorship were acting against the population, and until the country was occupied by the army of the Soviet Union on 4 November, from which time the conflict became international" (paragraph 34 of the judgment).

In fact, the armed oppression and attack on the civilian population which resisted the dictatorship in Hungary at that time was internationally known.

cannot agree with the finding of the majority that the Supreme Court I

"did not address the question whether the particular act committed by the applicant was to be regarded as forming part of this State policy, such as to bring it within the sphere of crimes against humanity, as this notion was to be understood in 1956" (paragraph 84 of the judgment).

The Supreme Court's statement was made in relation to the question that was before it, namely the incident for which the applicant was convicted. Where a situation such as that described by the Supreme Court prevailed, it was to be expected that several separate incidents such as that under consideration would inevitably take place as part of the armed forces' organised activities against the population. One should not lose sight of the fact that the applicant, in confronting and shooting Mr Kaszás and the group near him, was acting as an agent of the dictatorial regime which was attempting to suppress by force those civilians, such as the victims of the applicant's attack, who were opposing that regime. In short, the use of force by the applicant was on behalf and for the purposes of that regime. In the circumstances I do not see how we can disassociate the incident for which the applicant was found guilty from the general systematic attack by the military and the relevant state policy against the civilian population.

For all the above reasons I find that the applicant's conviction for a crime against humanity under international law is not in any way inconsistent with the provisions of Article 7 of the Convention and therefore I find that there has been no violation of that Article.

» Noot

Dit is de derde zaak in korte tijd waarin het Europese Hof voor de Rechten 1. van de Mens via een beroep op het legaliteitsbeginsel in aanraking komt met internationaal strafrecht zoals toegepast door nationale rechters. In de zaak *Jorgic t. Duitsland* deed het Hof vorig jaar al uitspraak op de vraag of de veroordeling van Jorgic voor genocide in strijd was met het legaliteitsbeginsel zoals vastgelegd in art. 7 (EHRM 12 juli 2007, nr. 74613/01, *EHRC* 2007/116 m.nt. Van der Wilt), en ook de zaak *Koronov* t. *Letland* die nu bij de Grand Chamber ligt, betreft de vraag hoe een veroordeling voor misdrijven begaan tijdens de Tweede Wereldoorlog zich met het legaliteitsbeginsel verhoudt

(EHRM, Appl. no. 36376/04, 24 juli 2008, *EHRC* 2008/129 m.nt. Van der Wit). In de onderhavige zaak stelt Korbely dat zijn veroordeling door de Hongaarse rechter voor daden begaan tijdens de stormachtige Hongaarse oktoberdagen in 1956 een schending van art. 7 oplevert. Kort gezegd is de casus als volgt: op 23 oktober 1956 begonnen in Hongarije vreedzame demonstraties tegen het bewind van Rákosi in verschillende delen van het land. Op een aantal plekken, vooral in Boedapest, leidde dit tot gewelddadige escalaties en vijandigheden door losse groepen opstandelingen. Korbely was een jonge officier die eropuit werd gestuurd om deze opstandigheden de kop in te drukken. Tijdens één actie doodde hij Tamás Kaszás, de informele leider van een bepaalde opstandelingengroep. Ook een paar anderen werden daarbij gedood en verwond. Aan de revolutionaire dagen kwam een eind met het binnentrekken van het Sovjetleger op 4 november 1956 en de machtsovername van János Kádár die duurde tot 1988. Pas na het herstel van de democratie kwam in de jaren negentig een historisch debat op gang over de aansprakelijkheid van personen voor misdaden begaan tijdens het communistische tijdperk. De veroordeling van Korbely vloeide hieruit voort.

De belangrijkste rechtsvragen in de 2. *Korbely*-zaak voor het EHRM betreffen verschillende aspecten van het legaliteitsbeginsel. Niet alleen het verbod op terugwerkende kracht is aan de orde, maar ook het aspect dat strafrecht niet ruim geïnterpreteerd mag worden ten nadele van de verdachte. Concreet zijn de rechtsvragen zoals door Korbely naar voren gebracht: (i) de vraag of gemeenschappelijk art. 3 van de Geneefse Conventies van toepassing was op de oktobergebeurtenissen, (ii) de vraag of het slachtoffer aangemerkt kon worden als '*non-combatant*', en (iii) de vraag of de misdrijven verjaard waren, en indien dit niet het geval was, de vraag of Korbely in 1956 had kunnen voorzien dat geen verjaring plaats zou vinden. Opmerkelijk genoeg stelde Korbely niet dat schending van gemeenschappelijk art. 3 van de Geneefse Conventies van 1949 in 1956 nog niet internationaal gecriminaliseerd was en daarom geen internationaal misdrijf opleverde.

Bijzonder opmerkelijk aan de gehele zaak is de verwarring die lijkt te 3. bestaan bij de rechters over het onderscheid tussen oorlogsmisdrijven en misdrijven tegen de menselijkheid. De Hongaarse rechters stellen oorlogsmisdrijven en misdrijven tegen de menselijkheid nagenoeg aan elkaar gelijk, en zij gebruiken de term 'misdrijven tegen de menselijkheid' waar het duidelijk inhoudelijk over oorlogsmisdrijven gaat, en wel om schending van gemeenschappelijk art. 3 van de Geneefse Conventies van 1949. Dit komt waarschijnlijk doordat de huidige Hongaarse strafwet de term 'misdrijven tegen de menselijkheid' niet voor een apart misdrijf gebruikt, maar als overkoepelende titel van een hoofdstuk van de Hongaarse strafwet waar oorlogsmisdrijven en andere internationale misdrijven bijeen zijn gebracht. Misdrijven tegen de menselijkheid zoals we die in het internationale recht kennen zijn niet als zodanig strafbaar gesteld in de Hongaarse rechtsorde, alhoewel dit misdrijf via het internationaal gewoonterecht wel in de Hongaarse rechtsorde kan doorwerken maar dan met een internationaal geaccepteerde definitie. In de *Korbely*-zaak zoals deze voor de Hongaarse rechters speelde gaat de aanklacht over schending van de primaire norm vastgelegd in gemeenschappelijk art. 3 van de Geneefse Conventies van 1949, hetgeen de conclusie wettigt dat de zaak in feite oorlogsmisdrijven betreft en niet misdrijven tegen de menselijkheid ondanks de gebruikte

terminologie. Toch richten de Europese rechters zich nagenoeg geheel op de vraag of het internationale misdrijf 'misdrijven tegen de menselijkheid' zoals dat zich na de Tweede Wereldoorlog ontwikkeld heeft van toepassing is op de Hongaarse gebeurtenissen van 1956. Dit is des te vreemder nu de klachten van Korbely niet direct over misdrijven tegen de menselijkheid gaan. Het had in de lijn der verwachting gelegen dat de Hongaarse EHRM-rechter Baka zijn collegae beter had geïnformeerd over de achtergrond van het Hongaarse gebruik van de term 'misdrijven tegen de menselijkheid'. Eén van de belangrijkste redenen dat een rechter van de nationaliteit van het 'aangeklaagde' land altijd bij zaken tegen 'zijn' land betrokken wordt, is toch juist dat hij toelichting kan geven op het rechtssysteem en de rechtscultuur van dat land.

Ondanks de focus op misdrijven tegen de menselijkheid, gaan de 4. Straatsburgse rechters toch ook in op de vragen met betrekking tot gemeenschappelijk art. 3. Wat betreft de vraag van Korbely naar de toepasselijkheid van gemeenschappelijk art. 3 op de revolutionaire oktoberdagen slaat de Hongaarse jurisprudentie eerst de verkeerde weg in door te stellen dat de eisen voor toepassing van gemeenschappelijk art. 3 van de Geneefse Conventies van 1949 gelijk zijn aan die van het Tweede Aanvullende Protocol van 1977. Uiteindelijk komt de Hongaarse Hoge Raad in herziening tot de correcte conclusie dat gemeenschappelijk art. 3 een breder toepassingsbereik heeft dan het Tweede Aanvullende Protocol. In tegenstelling tot het Protocol is gemeenschappelijk art. 3 ook van toepassing op gewapende conflicten waarbij de niet-statelijke gewapende groep niet een deel van het grondgebied beheerst en niet een hoge mate van organisatiestructuur heeft zoals het Tweede Aanvullende Protocol vereist. De Hongaarse Hoge Raad gaat dan wel weer wat te ver door te stellen dat gemeenschappelijk art. 3 al van toepassing is zodra de gewapende krachten van een staat tegenover de bevolking staan. De Hoge Raad komt tot deze ruime interpretatie met een beroep op het humanitaire karakter van de Geneefse Conventies. Korbely vecht niet alleen deze uitkomst aan, maar ook de manier van interpreteren. Zoals Korbely aangeeft kan een teleologische interpretatie zeer wel op zijn plaats zijn waar het de interpretatie van een internationaal verdrag betreft, en vooral als deze een humanitair doel heeft. Echter een teleologische interpretatie staat op gespannen voet met fundamentele beginselen van het strafrecht, waarbij een strikte interpretatie het uitgangspunt is. De Straatsburgse rechters stappen vrij gemakkelijk over dit punt van Korbely heen en beamen de Hongaarse visie dat de intensiteit van het conflict en de organisatiegraad van de opstandelingen irrelevant zijn. Het is zeer de vraag of dit juist is. Het is bovendien opmerkelijk dat het Straatsburgse Hof wel verwijst naar de *Akayesu*-zaak van het Rwanda-Tribunaal (ICTR, zaaknr. ICTR-96-4-T, 2 september 1998), maar niet naar de veel vaker aangehaalde *Tadic*-standaard, namelijk dat een gewapend conflict bestaat "*whenever there is … protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*." (ICTY, zaaknr. IT-94-1-T, 2 oktober 1995, par. 70). Volgens deze algemeen geaccepteerde standaard zijn een bepaalde organisatiegraad van de opstandelingen en intensiteit van het conflict wel vereist voordat sprake kan zijn van een gewapend conflict en dus mogelijke toepassing van gemeenschappelijk art. 3. Deze kwestie laat goed de spanning zien die leeft binnen het internationale strafrecht tussen de mensenrechtenjuristen en de strafrechtjuristen. Het is niet geheel onverwacht dat de Straatsburgse rechters zich aan de zijde van de mensenrechtenjuristen scharen, maar het is de vraag of zij daarmee

voldoende recht hebben gedaan aan de mensenrechten van Korbely, en vooral ook aan het legaliteitsbeginsel en de eis van een strikte interpretatie van strafrechtnormen.

Een ander belangrijk punt dat opgebracht wordt door Korbely betreft de 5. status van zijn slachtoffer, Tamás Kaszás. De bescherming van gemeenschappelijk art. 3 strekt zich alleen uit over personen die niet deelnemen aan de strijd, zoals burgers en personen die hors de combat zijn. Een strijder die duidelijk aangeeft zich te willen overgeven is hors de combat. De zeer feitelijke vraag die in de zaak-*Korbely* aan de orde is, is of Korbely's slachtoffer die tot de opstandelingen behoorde, zijn pistool pakte om op Korbely en zijn groep te schieten, of juist om zich over te geven. In verschillende stadia in de Hongaarse procedure kwamen de Hongaarse rechters tot uiteenlopende oordelen op dit punt, maar uiteindelijk stelde de Hongaarse Hoge Raad dat het slachtoffer zich wilde overgeven en dus een persoon 'hors de combat' was. Het Europese Hof verwerpt dit oordeel en stelt dat het slachtoffer juist niet onder bescherming van gemeenschappelijk art. 3 viel omdat hij niet duidelijk had aangegeven zich te willen overgeven. Het Hof gaat hier wel heel dicht op de huid van de Hongaarse rechters zitten en het is de vraag wat er op dit specifieke punt nog van de befaamde 'margin of appreciation' voor de Hongaarse rechters overblijft. Dit is des te meer problematisch nu, zoals de 'dissenting judges' ook aangeven, het om feiten van meer dan vijftig jaar geleden gaat. Is het niet zo dat een nationale rechter in zo'n geval veel beter geplaatst is om de feiten te kwalificeren, en zou het Hof dan niet veel terughoudender moeten zijn met het opleggen van zijn visie?

Wat betreft de status van het slachtoffer is er ook nog een ander 6. merkwaardig aspect aan de uitspraak van het Hof, inclusief de 'dissenting opinions'. Dit betreft het feit dat de Straatsburgse rechters ervan uitgaan dat de zaak draait om misdrijven tegen de menselijkheid en niet om oorlogsmisdrijven. Een constituerend element van misdrijven tegen de menselijkheid is dat er een aanval tegen de burgerbevolking plaats vindt. Er is veel gediscussieerd over de reikwijdte van het begrip 'burgerbevolking'. Omvat dit alleen burgers of ook personen 'hors de combat' of zelfs strijders? Het is opmerkelijk dat deze discussie geheel aan de Straatsburgse rechters voorbij gaat, en dat zij zich alleen richten op de status van het slachtoffer in de context van gemeenschappelijk art. 3, dus in de context van oorlogsmisdrijven. Dit valt moeilijk te rijmen met de keus van het Hof om te beoordelen of de daden van Korbely als misdrijven tegen de menselijkheid kunnen worden aangemerkt. De Kamer van Hoger Beroep van het Joegoslavië Tribunaal heeft recentelijk nogmaals bevestigd in de Martic-zaak dat de term 'burgerbevolking' in de context van misdrijven tegen de menselijkheid niet ziet op personen 'hors de combat' (ICTY, zaaknr. IT-95-11-A, 8 oktober 2008, par. 291-302). Echter de Kamer stelde ook dat individuele slachtoffers wel personen hors de combat kunnen zijn, zolang de algehele aanval zich maar richt op een burgerbevolking (ICTY, zaaknr. IT-95-11-A, 8 oktober 2008, par. 303-314), hetgeen overeenkomt met de uitkomst van het EHRM. Toegegeven, de *Martic*-uitspraak dateert van na de *Korbely*-uitspraak, namelijk van 8 oktober 2008, en het EHRM kon dus eenvoudigweg geen kennis nemen van deze uitspraak. Maar het is zeer de vraag of het dat wel gedaan had als de uitspraak van een eerder tijdstip dateerde. In zijn algemeenheid valt namelijk op dat de Straatsburgse rechters de 'Haagse discussies' en gezaghebbende interpretatie op het gebied van internationaal strafrecht van de Kamers van het Joegoslavië Tribunaal niet of nauwelijks in hun overwegingen

betrekken. Verschillende Kamers van Eerste Aanleg van het Joegoslavië Tribunaal hadden in 2007 gesteld dat de individuele slachtoffers van misdrijven tegen de menselijkheid alleen burgers kunnen zijn, namelijk in de *Martic*-zaak (ICTY, zaaknr. IT-95-11-T, 12 juni 2007, par. 50-56) en in de *Vukovar*-zaak (ICTY, zaaknr. IT-95-13/1-T, 27 september 2007, par. 443-464). Volgens deze, overigens zeer verdedigbare, visie kon het slachtoffer van Korbely, zijnde een opstandeling, nooit een slachtoffer van een misdrijf tegen de menselijkheid zijn ongeacht de vraag of hij zich nu wel of niet wilde overgeven. Als dit de heersende rechtsopvatting was ten tijde van de Korbely-uitspraak dan had het EHRM hier toch notie van dienen te nemen. Het ontbreken van een dialoog tussen internationale tribunalen en de schijnbare onwil van het EHRM om van het Joegoslavië Tribunaal te leren in kwesties van internationaal strafrecht doen zonder meer af aan de kwaliteit van 's Hofs rechtspraak. Zoals ook al bleek in de *Jorgic*-zaak zijn de Straatsburgse rechters niet op hun best in zaken waar internationaal strafrecht aan de orde is. Dit blijkt ook wel uit het gemak waarmee zij een definitie van misdrijven tegen de menselijkheid uit hun hoed toveren zoals deze blijkbaar in hun ogen bestond onder het internationaal gewoonterecht in 1956.

Tot slot een paar woorden over waarom het zo nodig was om de moord begaan 7. door Korbely in 1956 als oorlogsmisdrijf of misdrijf tegen de menselijkheid te kwalificeren en niet gewoon als moord waarmee veel juridische moeilijkheden voorkomen hadden kunnen worden. De reden hiervoor was simpel en bestaat uit één woord: verjaring. Commune misdrijven verjaren na een bepaald aantal jaren. In Hongarije konden de misdrijven begaan tijdens de revolutionaire oktoberdagen van 1956 pas na de grote omwentelingen van 1988-1990 aan de orde worden gesteld. Pogingen van de nieuwe regeringen om de verjaringstermijn van 25 jaar buiten spel te zetten voor misdrijven begaan in de politiek roerige tijden van 1956 werden door het Hongaarse Constitutionele Hof ongedaan gemaakt onder verwijzing naar het grondwettelijk legaliteitsbeginsel. Alleen voor internationale misdrijven maakte het Constitutionele Hof een uitzondering. Korbely vroeg zich af of deze uitzondering juridisch houdbaar was. Een legitieme vraag nu het VN-Verdrag inzake verjaring dateert van 1968. Het kan niet zonder meer gesteld worden dat de regel dat oorlogsmisdrijven en misdrijven tegen de menselijkheid niet verjaren gewoonterecht was in 1956. Met betrekking tot oorlogsmisdrijven bestaat zelfs vandaag de dag nog discussie op dit punt. Zelfs als geaccepteerd wordt dat een gewoonterechtelijke regel ten aanzien van beide misdrijven al bestond in 1956, dan is het nog sterk de vraag of deze regel zich ook uitstrekte over oorlogsmisdrijven begaan in een niet-internationaal gewapend conflict. Het is jammer dat het EHRM niet op deze vragen ingaat, maar in één zin verwijst naar de Hongaarse visie en stelt dat "the crime at issue was considered not to be subject to statutory limitation." Een duidelijkere motivatie had hier voor de hand gelegen. Slachtoffers van internationale misdrijven hebben rechten onder het EVRM, maar daders toch zeker ook. Ondanks de uiteindelijke uitkomst van de zaak ten faveure van Korbely lijkt het wel of het Hof dit enigszins vergat tijdens de behandeling van Korbely's klachten. Dat is onjuist ten opzichte van Korbely en spijtig voor wat betreft de potentiële bijdrage van het EHRM aan de verdere ontwikkeling van het internationale strafrecht.

L.J. van den Herik

» Voetnoten

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According to one approach, persecution is an essential element only for the sub-class "acts of persecution" (ICTY, *Prosecutor v. Kupreskic* et al., IT-95-16, judgment of 14 January 2000, par.par. 616-627). From another standpoint, crimes against humanity may be committed even in peacetime (ICTY, *Prosecutor v. Tadic*, IT-94-1, decision of 2 October 1995 on the defence motion for interlocutory appeal on jurisdiction, par. 141), and some writers maintain that as far back as the early 1950s, customary international law envisaged the notion of crimes against humanity and did not require a link with an internal or international armed conflict (A. Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2nd ed., 2008, pp. 101-09).