

**'DIVISION OF JURISDICTION BETWEEN NATIONAL AND INTERNATIONAL COURTS' –  
WHAT ROLE SHOULD THE EUROPEAN HUMAN RIGHTS COURT PLAY?'<sup>1</sup>**

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1.

The title of our session 'Division of jurisdiction between national and international courts' suggests a discussion primarily on the issue of how to distribute the power of prosecuting international crimes when both national and international courts may legitimately claim jurisdiction. First, the question can be discussed on the level of law-making: what principles should law-makers follow when distributing the competencies between national and international courts? As we know, this question has been answered differently by the drafters of the Nuremberg Charter, the ICTY and the ICC Statutes.

The issue of how to distribute jurisdiction between national and international courts can also be raised after the adoption of principles on the abstract level when it comes to implementation. To take the example of the ICTY the Statute of the Tribunal opts for concurring jurisdiction with the ICTY having primary jurisdiction.<sup>2</sup> The decision, however, of under what conditions the Tribunal should exercise its primary jurisdiction and request national courts to transfer the proceedings ought also be made on the basis of principled rules.

Moreover, when speaking about the division of jurisdiction between national and international courts, there is a third actor that may enter the scene, namely an international human rights body, such as the European Court of Human Rights (ECtHR). In this context the question of the division of jurisdiction is of course formulated differently than in the relation between national and international criminal courts. In this case we do not speak about a national and an international court both having legitimate claims to prosecute and try international crimes. It is clearly within the exclusive competence of national courts to examine and assess the evidence and with this to ascertain the facts of the case and to apply and interpret the relevant laws. What the ECtHR is expected to do is to review whether Convention rights have been observed. Though in this respect, too, the subsidiarity principle applies in the sense as laid down in the preamble to the Convention: 'governments (...) take the first steps for the *collective en-*

<sup>1</sup> This article constitutes a somewhat modified version of K. Bárd: The difficulties of Writing the Past through Law – Historical Trials Revisited at the European Court of Human Right, 81 *International Review of Penal Law* (2009), pp. 27–45.

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<sup>2</sup> Article 9 (2) of the Statute of the International Criminal Tribunal for the former Yugoslavia, Security Council Resolution 827, 25 May 1993.

forcement of certain rights' meaning that is primarily for them to oversee the observance of human rights. This is also the explanation for the margin of appreciation doctrine understood in a broad sense. The margin of appreciation, on the one hand, is a methodological tool by which the appropriate depth of the review to be exercised by the ECtHR is defined, and which varies – among other things – according to the Convention right and the question involved. But in addition to serving as a technical device, the margin of appreciation is a substantive concept linked closely to the subsidiarity principle and the doctrine according to which the ECtHR is not a 'fourth instance': it lies primarily in the competence of the national authorities to establish the facts of the case and assess them under their national law. It is not for the ECtHR to review the fact-finding activity of national agencies, nor is it authorized to rule on alleged errors of law. Thus the ECtHR, as a general rule, accepts the findings of fact as they were determined in the national arena and its jurisdiction is further limited by the fact that as a principle it does not extend to the interpretation of national law, nor to the examination of its application. Citing the case law of the ECtHR *Herbert Petzold* observes that '(i)t is (...) in the first place for the national authorities (...) to interpret and apply the domestic law, the national authorities being in the nature of things particularly qualified to settle the issues arising in this connection'.<sup>3</sup> Formulated from the perspective of the ECtHR the subsidiarity principle calls for self-constraint: the ECtHR cannot assume the functions of national courts, its judgments cannot serve to replace the decisions rendered by domestic courts. In this sense the Court is not an additional instance in the appeals process that stands above the national legal fora. It therefore follows from the subsidiarity principle that the interpretation of national law – as a principal rule – is not the Strasbourg Court's responsibility, and neither is it to uncover potential factual or legal errors committed by the national authorities. The states that are party to the Convention did not assume any responsibility to render materially just decisions, that is to accurately determine the facts of a case and to apply the law correctly.

## 2.

Following this brief introduction to the subsidiarity principle which will have considerable importance in my further analysis, I wish to come to the subject of my contribution. In what follows I will examine the judgments of the ECtHR that concerned so-called historical trials conducted by national courts. These ECtHR judgments assessed domestic criminal proceedings in the course of which, in addition to national law, also international law, more specifically international

humanitarian law, was to be interpreted and applied. The two cases I selected are *Korbely v. Hungary*<sup>4</sup> and *Kononov v. Latvia*.<sup>5</sup> I note in advance that I will deal more extensively with the Hungarian case.

In *Kononov* the ECtHR pronounced judgment on the trial of the applicant who, as established by the Latvian courts, had been involved in 1944 in the killing of Latvian villagers in retaliation for their collaboration with the Germans. The question was basically whether the applicant's conviction had any basis either in international or national law at the time when the crime was perpetrated. The ECtHR came to the conclusion that there had been no such basis and found *Latvia* in breach of Article 7 (1) of the ECHR.<sup>6</sup>

*Korbely v. Hungary* concerned events during the 1956 Hungarian Revolution. In this case the Hungarian Supreme Court upheld the conviction of the applicant who at the time of the event served as a military commander. One of the central issues in this case was whether the person killed by the applicant or upon his order qualified – due to his surrender – as a person not taking part in the hostilities and therefore falling under the protection of common Article 3 of the Geneva Convention. The ECtHR concluded that the domestic courts had not established that the victim had expressed an intention to surrender and it therefore found Hungary to be in breach of Article 7 of the Convention.

In both *Kononov* and *Korbely* the Court was split and both judgments have already provoked heavy criticism.<sup>7</sup> The minority claimed, among other things, that the majority had gone beyond their competence and while they formally reiterated the doctrine, in reality they had abandoned the 'NO FOURTH INSTANCE' concept. In the following I will try to give an answer to the question whether the Court went beyond its competence and in fact abandoned the doctrine derived from the subsidiarity principle. If the answer is in the affirmative – and let me note in advance, it will be – I will seek to identify the reason for the change in the jurisprudence and how this should be assessed.

As indicated above I agree with the minority that the Court in fact deviated from its earlier approach and in contrast to what it claimed in both judgments, it did in fact overrule the decisions of national courts both as regards the ascertaining of the facts and the interpretation of the law. Before submitting evidence in

<sup>4</sup> *Korbely v. Hungary* [GC] 9174/02 (19/09/2008).

<sup>5</sup> *Kononov v. Latvia* 36376/04 (24/07/2008).

<sup>6</sup> Article 7 (1) of the Convention reads as follows: '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.' The decision is not final as it has been referred to the Grand Chamber.

See e.g. G. Pinzauti: The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law. A Critical Discussion of *Kononov v. Latvia*, 6 *Journal of International Criminal Justice* (2008), pp. 1043-1060; C. Droege: Elective affinities? Human rights and humanitarian law, 90 *International Review of the Red Cross* 871 (2008), p. 546.

<sup>7</sup> H. Petzold: The Convention and the Principle of Subsidiarity, in: R.St.J. Macdonald – F. Matscher – H. Petzold (eds.): *The European System for the Protection of Human Rights*, Martinus Nijhoff Publishers, Dordrecht – Boston – London, 1993, p. 51.

support of my claim let me stress that the ECtHR judgments in *Kononov* and *Korbely* concerned so-called historical trials which, in addition to establishing the liability of individual defendants under national law, are expected to serve further ends, recording and writing history among them. Whether it is opportune to expect any criminal trial to serve ends other than establishing individual criminal responsibility is an open question. *Hannah Arendt's* ambivalent position clearly shows the difficulty of the problem. On the one hand, she seems to insist that criminal trials should be constrained to establishing individual criminal responsibility. That is why in the chapter in *Eichmann in Jerusalem* describing how evidence was presented and witnesses were heard, she expresses some discomfort with the fact that during the trial events that Eichmann had nothing to do with were discussed at length.<sup>8</sup> However, even this woman of fascinating intelligence fails to provide robust arguments against the claim of the victims to have their day in court suggesting that she herself finds it just that survivors are given the opportunity to present their narrative of the Holocaust, irrespective of Eichmann's involvement in the particular events.

Whatever our assessment as to the desirability of writing and recording history through criminal trials, the fact remains that in proceedings for state-sponsored, state-induced or state-tolerated crimes, which by today have been formulated as international crimes, courts simply cannot avoid making inquiries into events that go beyond the conduct of the individual defendant. The crimes in question are bound within the broader social and political context and it is exactly the context that distinguishes the crimes against mankind from ordinary criminal offences.

Thus we simply have to accept that historical trials, in addition to ruling on individual guilt, are intended 'to produce a reliable historical record of the context of international crime' and to 'provide a venue for giving voice to international crime's many victims'.<sup>9</sup> And if this is the case, then one could argue that the ECtHR should be even more cautious in observing the subsidiarity principle and what follows thereof since it seems to be beyond doubt that domestic instances are much better positioned for collective history making. Thus the ECtHR should exercise maximum self-constraint both as to the reassessment of the facts as ascertained and the interpretation of the laws applied by national courts.

However, if we take a closer look at the rationale that justifies the 'NO FOURTH INSTANCE' doctrine, the claim we made above becomes somewhat uncertain. The rationale behind the principle that the ECtHR should accept the facts as determined in the national arena is that it is the national courts that are

closest both in terms of time and space to the events they have to rule upon and that it is them which may make use of or benefit from the epistemological advantages of the so-called immediacy principle or the principle of directness (*Unmittelbarkeitsprinzip*).

This, by the way, is also a principle accepted in the majority of national appeal systems: the 'higher' judicial fora are generally obliged to respect the facts of the case as determined by the 'lower courts', which enjoy the advantage of the immediacy principle. This is also what the principle of free proof requires: the facts of the case are arrived at by weighing the evidence and the lower court's freedom to evaluate the evidence is virtually worthless if its assessment can be set aside by the appeal court.

However, when courts have to determine what happened 60 or 50 years ago, when witness testimonies become relatively unreliable sources and it is primarily documentary evidence that is used in the course of the trial, then it is far less obvious that national courts are in a superior position for assessing the facts of the case. One could reasonably doubt that national courts are better positioned to determine what is contained in the documents than international fora.

As far as the interpretation of laws is concerned, it is obvious that national courts are better equipped to do this job correctly. This is why the ECtHR adopts an extremely cautious position in interpreting national laws even in cases when it is in fact authorized to do so. This is the case with so-called qualified rights. As a precondition for limiting numerous rights in a manner that is compatible with the Convention, the document itself establishes the rule that such limitations must be undertaken on grounds provided by national law. By referring to domestic law, the Convention observes that these laws are 'an integral part of the engagements undertaken by the state concerned'.<sup>10</sup> If the national authorities disregard the 'incorporated' law, then, in addition to infringing domestic law, they at the same time violate the Convention.<sup>11</sup> However, even in these cases the ECtHR exercises considerable self-restraint since, as noted in the *Winterwerp* judgment, 'even in those fields where the Convention »incorporates« the rules of that law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection'.<sup>12</sup>

However, the 'superiority' of national courts is again much less self-evident when, in addition to national law, also international law is to be applied and interpreted. Again, why should national courts be better positioned when it comes to determining the relevant international law as it stood at the time of the perpetration of the crime?

<sup>8</sup> H. Arendt: *Eichmann in Jerusalem. A Report on the Banality of Evil*, Penguin Books, New York, 1994, pp. 220-233.

<sup>9</sup> M. Damaska: What is the Point of International Criminal Justice?, 83 *Chicago-Kent Law Review* (2008), p. 329, 331.

<sup>10</sup> Petzold, *op.cit.*, p. 50.

<sup>11</sup> See *Winterwerp v. the Netherlands* 6301/73 (24/10/1979), A33, par. 46.

<sup>12</sup> *Ibid.*

From all I have outlined above, we may conclude that in reviewing historical trials the ECtHR may be justified in abandoning the 'NO FOURTH INSTANCE' doctrine. However, the majority in *Kononov* and *Korbely* claimed to have followed the traditional approach. The question is why they thought they had to adhere to the principles they follow in 'ordinary cases'?

Perhaps the arguments I have given in support of setting aside the 'NO FOURTH INSTANCE' doctrine are not strong enough. I have argued that in historical trials it is primarily documentary evidence that is available. But as we saw in *Korbely* or in *Kononov* also witnesses had been heard even if we may entertain certain doubts concerning their capacity to recall the events with absolute accuracy. But the cognitive advantages of the immediacy principle have still not been abandoned completely. And my argument regarding the interpretation of international law may also appear somewhat weak. One could argue, against my claim, that ascertaining the facts may not be completely separated from their legal characterization and the interpretation of laws, therefore if national courts are better positioned to ascertain the facts then the same applies to the interpretation of laws, be they national or international. And, finally, one could argue that authoritative judgment about the past is the privilege of national fora and international bodies should abstain from interfering with the nation's collective history making through domestic trials.

Without elaborating any further on the particularities of historical trials and on the question whether the 'NO FOURTH INSTANCE' doctrine should be observed by the ECtHR when reviewing domestic historical trials, I simply claim that in both *Kononov* and *Korbely* the ECtHR failed to follow its traditional approach, without however overtly admitting it. The Court in fact made a reassessment of the facts and deviated from the interpretation which municipal courts gave to the provisions of international law. In *Korbely*, for instance, the ECtHR reprimanded the Hungarian courts for not realizing that for common Article 3 to be applicable, in addition to whether at the given time there was an armed conflict of an international character, they should have examined whether 'the particular act committed by the applicant was to be regarded as forming part of [the] State policy, such as to bring it within the sphere of crimes against humanity, as this notion was to be understood in 1956'.<sup>13</sup> The domestic courts, in the view of the ECtHR, also failed to consider 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 manner'.<sup>14</sup>

<sup>13</sup> *Korbely* judgment, par. 84.

<sup>14</sup> *Ibid.*, par. 90.

## 3.

Still we have not answered the question why the ECtHR departed from its traditional approach without openly admitting it. Identifying the tension between the functions that historical trials are expected to perform primarily if the event occurred five or six decades ago and the facts of which now have to be ascertained may bring us closer to the answer. We do accept that historical trials, in addition to ruling on individual guilt, are meant to provide a forum for collective history making. However, the 'professed goals' of historical trials 'do not constitute a harmonious whole; rather they pull in different directions, diminishing each other's power and creating tensions'.<sup>15</sup> There is a real danger that the function of producing history in trials is accomplished at the expense of reliable fact finding in and the fair assessment of the cases in question.

The difficulty in bringing these two functions into harmony was overtly admitted in *Kononov* by the Latvian government which, as we can read in the ECtHR's judgment, 'stressed the importance of such trials in restoring democracy, establishing the historical truth and guaranteeing justice for the victims of crimes against humanity and war crimes' and argued that 'despite all the practical problems with which the Latvian authorities were faced, these trials were very important as they helped to make up for the inadequacies of the Nuremberg trial, a trial that had to a large extent been an example of justice for the victors, punishing crimes perpetrated by the Nazis, while allowing notorious criminal acts by the Allies to go unpunished'.<sup>16</sup>

Thus also the Government admitted the practical problems that the courts in historical trials are faced with. The first problem, of course, is to find a case which is a good candidate for presenting a new narrative. The time factor in this context is crucial. For a trial we need a defendant, a defendant who is obviously still alive. There are not many of them and if the pool is limited the possibility of finding the ideal wrongdoer and the ideal victim for rewriting history is rather slim. *Kononov* and his victims were perhaps not the ideal players for construing a new historical narrative and this applies to those involved in the *Korbely* case, too.

However, the main problem is that if courts stick to the idea that they have to contribute to the emergence of the new narrative, they may be tempted to loosen the requirements of fairness when it comes to ascertaining the facts and interpreting the law. In brief, there is a risk of political justice: history is construed at the expense of the primary function of criminal trials, namely the establishment of individual responsibility in fair proceedings.

For external observers, the ECtHR among them, it must have been certainly disquieting to see that the courts, including the highest court of Hungary, trying

<sup>15</sup> Damaska, *op.cit.*, p. 331.

<sup>16</sup> *Kononov* judgment, par. 92.

the case of *Korbely* at different times came to completely opposite conclusions as to the applicability of the Geneva law to the events in 1956.<sup>17</sup> Similar discomfort must have been provoked by the fact that in 1993 the Constitutional Court, though pointing to the technical imperfections of the law adopted by Parliament that served as the basis for the conviction of the applicant, refrained from abrogating that law as unconstitutional,<sup>18</sup> and then subsequently changed its position in 1996: it held that due to incorrect references to various provisions of the 1949 Geneva Conventions the law was unconstitutional.<sup>19</sup>

The zealous effort of the Hungarian courts to convict the applicant sometimes resulted in a slip of the tongue, or rather the pen, thereby revealing their bias. As indicated earlier, one of the key issues in *Korbely* was whether the victim whom the applicant had killed had surrendered or whether he intended to use his gun. In its guilty verdict the Military Bench of the Regional Court held: 'On the basis of the testimonies, it has not been possible to determine beyond reasonable doubt that Tamás Kaszás (the victim) was already holding the pistol in his hand in the course of the argument.'<sup>20</sup> From this it follows that the opposite, i.e. that the victim was holding the pistol in his hand, may not be ruled out either. And it is a fundamental principle of fair criminal justice that it is the defendant who benefits from any doubt. The judgment of the Regional Court also stated that 'the defendant – presumably misunderstanding the motion of Tamás Kaszás or because of fear or shock – gave a resolute order to fire.'<sup>21</sup> However, if the court assumed that the applicant was mistaken or acted in a state of mental disorganization then it should have applied the relevant sections of the Penal Code on mistake in facts or diminished mental capacity resulting in an acquittal or the mitigation of the sentence which it failed to do. The Supreme Court was sufficiently observant to discover what would have followed from the quoted finding of the Regional Court and omitted it by stating that from the facts ascertained by the Regional Court the correct conclusion was 'that [the applicant] knew that the victim intended to hand over the gun, rather than attack with it.'<sup>22</sup>

#### 4.

I do not list the disquieting irregularities of the trial in *Korbely's* case. Without further elaborating on the issue I claim the following: *Korbely* and *Kononov* should have been dealt with under Article 6 rather than under Article 7. This is

also the view taken by the minority in *Korbely*: '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.'<sup>23</sup> In fact, in *Korbely* the applicant, in addition to claiming a violation of Article 7, also complained of the unfairness of the proceedings.<sup>24</sup> The ECtHR considered this complaint to be also admissible; however, in the light of finding a violation of Article 7 it found that it was unnecessary to examine the complaint under Article 6.

The question now is why the ECtHR gave preference to examining the case under Article 7 and refrained from entertaining the complaint under Article 6. One plausible explanation is that the applicant did not specify the violation of any component of the right to fair trial as set forth in Article 6; instead he submitted, in rather general terms, that the proceedings had not been fair.<sup>25</sup> Therefore the ECtHR would have been forced to assess the fairness of the overall proceedings. Had the ECtHR found in this particular case a violation of Article 6 due to the unfairness of the overall proceedings, this – given the delicate nature of the trial – could also have been interpreted as a serious criticism of the entire judicial system and an expression of concerns as to the integrity of the national administration of justice.

Examining the complaint under Article 7 therefore seemed to be safer. The principle of legality embodied in Article 7 prohibits a conviction in the absence of legislation to that effect at the time of the commission of the crime (the prohibition of retrospective legislation). In addition, the legality principle also requires that the legislation be accessible and formulated with sufficient precision. All these components are meant to guarantee that individuals can foresee for what type of acts they may be held criminally liable. Under 'ordinary' conditions, by finding a violation of Article 7 the ECtHR simply proclaims that at the time of perpetration there was no law under which the individual's conduct could be subsumed, i.e. a law was applied retroactively or that the law in question was not accessible or was formulated with insufficient precision. The judgment, except when the ECtHR concludes that the law was given an extensive interpretation by analogy, makes an assessment of the law but not of the manner in which it was applied by the

<sup>17</sup> Also in *Kononov* the Latvian courts trying the case came to different conclusions. See par. 37-46 of the judgment.

<sup>18</sup> Constitutional Court Decision no. 53/1993 (X. 13.).

<sup>19</sup> Constitutional Court Decision no. 36/1996 (IX. 4.).

<sup>20</sup> See *Korbely* judgment, par. 42.

<sup>21</sup> *Ibid.*, par. 42.

<sup>22</sup> *Ibid.*, par. 44.

<sup>23</sup> *Ibid.*, Joint dissenting opinion of Judges Lorenzen, Tulkens, Zagrebelsky, Fura-Sandström and Popović, par. 2.

<sup>24</sup> Also *Kononov's* complaint alleged a violation of Article 6 (1). However, this part of the application was declared inadmissible. See the admissibility decision of 20 September 20, 2007.

<sup>25</sup> The judgment also states that the applicant complained in general terms that Article 6(1) had been breached. The Court noted that this complaint was also admissible but concluded that in the light of finding a breach of Article 7 it was unnecessary to examine the complaint under 6(1). See *Korbely* judgment, par. 96-98.

national courts. That is why the 'NO FOURTH INSTANCE' doctrine can be easily observed at least as concerns the establishment of the facts: the ECtHR can accept the facts as ascertained by the national fora.

However, it turned out that in *Korbely* the standard methodology review only works if Article 7 is given an extremely narrow interpretation, thereby providing almost no protection. The 'NO FOURTH INSTANCE' doctrine could only have been observed if the question was put in a very simple formulation: at the time of the fatal event (October 26, 1956) was there a rule in force which was accessible to the applicant and informed him that the killing of an insurgent who had laid down his arms was illegal and may have entailed consequences under criminal law? It seems to me that the question once formulated in such a simple manner would have been answered in the affirmative by the ECtHR. The Hungarian Penal Code which was effective at the time of the event prohibited the killing of a person who had ceased to be an attacker. Further, the ECtHR shared the Government's position that since a brochure containing the text of the Convention was officially published in 1955, the relevant Geneva law was sufficiently accessible to the applicant.<sup>26</sup> There remains, of course, the additional question as to the statute of limitations: is the prosecution of the individual who at the time of the commission was properly instructed on the unlawfulness of his/her action acceptable after the expiration of the prescription period? The answer depends on how the fair warning principle is interpreted. Clearly, the principle formulates each individual's right to know 'what the law' is at the time that they supposedly violate it.<sup>27</sup> But the question is 'how much of the law' is included in this principle?<sup>28</sup> The ECtHR could have adopted the view held by *George P. Fletcher*, who claims that according to the proper reading of the principle 'individuals have a right to know that which could make a moral difference in their choosing to engage in the action or not.'<sup>29</sup> And since the statute of limitations is certainly not meant to provide guidance as to the individual's moral choice, it is not covered by the *nullum crimen* principle.

In sum, had the ECtHR limited its review to the question whether there was a rule in October 1956 warning the applicant that the killing of a person who was no longer an attacker may have entailed a sanction under penal law, it could have easily exercised self-constraint as required by the subsidiarity principle. It could have relied on the facts as established by the Hungarian courts and it would not therefore have been forced to review the manner in which they applied the relevant laws.

<sup>26</sup> *Ibid.*, par. 75.

<sup>27</sup> G.P. Fletcher: *Basic Concepts of Criminal Law*, Oxford University Press, New York – Oxford, 1999, p. 12.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, p. 14.

However, it is exactly the statute of limitations mentioned above that may bring us closer to identifying the reason why the 'NO FOURTH INSTANCE' doctrine could not be followed in *Korbely*. Let us recall that the applicant was convicted of murder constituting a crime against humanity.<sup>30</sup> Crimes against humanity make up one category of international crimes. Through the formulation of international crimes it is intended to protect values 'considered important by the whole international community'.<sup>31</sup> This is the explanation for the particular jurisdictional rules, the establishment of *ad-hoc* tribunals by the Security Council and the setting up of the International Criminal Court as well as for the fact that, at least as far as genocide, crimes against humanity and torture are concerned, international custom renders statutes of limitations inapplicable.<sup>32</sup>

Due to the particular nature of international crimes, due to the specific values that these crimes are intended to protect, the ECtHR was simply not in a position to constrain the review to the question whether there had been a rule of whatever type warning the applicant that what he did was punishable.

There is agreement that, unlike war crimes, 'crimes against humanity require a context of widespread or systematic commission'.<sup>33</sup> True, the Nuremberg Charter or the 1968 New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity did not explicitly mention the 'widespread or systematic' threshold. However, we may reasonably assume that the drafters thought that this feature is a 'necessary ingredient of the objective element of the crimes'<sup>34</sup> and therefore simply did not find it necessary to specifically refer to the systematic nature of these crimes. Thus the 'widespread or systematic attack' formulation emerging in the case law of international tribunals in the 1990s is to be interpreted as an authentic recording and clarification of one of the definitional elements of crimes against humanity. From this it follows that in the absence of 'a widespread or systematic attack' the author may not be held liable for a crime against humanity: the killing, if an isolated act, may eventually constitute a war crime, but not a crime against humanity.<sup>35</sup> But even if it can be established that at the time of the perpetration of the individual offence

<sup>30</sup> In fact *Korbely* was convicted of a crime against mankind (*emberiség elleni bűntett/Verbrechen gegen die Menschheit*) as formulated in the Hungarian Penal Code. Crimes against mankind cover two separate groups: crimes against the peace (such as incitement to war, genocide or apartheid) and war crimes. The term crimes against humanity is unknown.

<sup>31</sup> A. Cassese: *International Criminal Law*, Oxford University Press, Oxford – New York, 2003, p.23.

<sup>32</sup> *Ibid.*, p. 319. The UN Convention of 1968 and the 1974 European Convention extend the non-applicability of the statutes of limitation also to war crimes, but these treaties have been ratified by relatively few states. See Cassese, *op.cit.*, p. 317.

<sup>33</sup> R. Cryer, H. Friman, D. Robinson, E. Wilmschurst: *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2007, p. 190.

<sup>34</sup> Cassese, *op.cit.*, p. 65.

<sup>35</sup> Cryer, *op.cit.*, p. 190.

inhumane acts were being committed on a wide scale or systematically for holding an individual liable for a crime against humanity, it must be proven that the agent was 'cognisant of the link between his misconduct and a policy or systematic practice'.<sup>36</sup>

In the ECtHR's view the Hungarian courts confined their inquiry to determining the level of intensity of conflicts that make the Geneva Conventions applicable without, however, examining the existence of further 'international law elements inherent in the notion of crimes against humanity', among them 'the requirement that the crime 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'.<sup>37</sup> In other words the ECtHR's position is that the Hungarian courts erroneously believed that for establishing criminal liability for a crime against humanity under common Article 3 it is sufficient if it is proven that the intensity of the hostilities in October 1956 had reached the level of an armed conflict.

The 'NO FOURTH INSTANCE' doctrine states that it is not the task of the ECtHR to substitute itself for domestic jurisdictions, i.e. it is for national courts to ascertain the facts as well as to resolve problems arising in the course of interpreting legislation. The Court's role is confined to assessing if the way national courts established the facts and interpreted the law was compatible with the Convention. The Court's task is to listen to the music played by the national orchestra, reading the score and deciding if the performance was above the acceptable level. What it should not do is to play the piece itself and then compare its own performance with that of the national orchestra. However, in order for the Court to ascertain whether the national court's performance was satisfactory, they both have to read the same music. If the national orchestra plays a Vivaldi concerto whereas it is expected to play a Beethoven symphony then the ECtHR has no other choice than to grade the performance sub-standard. And in order to convince the audience of the correctness of its decision it must play the piece which the national orchestra was expected to perform. It seems that this was what has happened in *Korbely*. The domestic courts promised that they would ascertain that the applicant had committed a crime against humanity, but failed to extend their inquiry to those elements that make up a crime against humanity. And the ECtHR explained what the national courts should have done.

One could argue that the ECtHR should have left it to the national courts to determine what conduct qualifies as crime against humanity. In fact the ECtHR stated that even if domestic law makes reference to international law, it is for national courts to resolve problems of interpretation.<sup>38</sup> However, as I claimed

earlier, the 'superiority' of national courts in interpreting legislation is much less self-evident when, in addition to national law, also international law is to be applied and interpreted. It is far from obvious why national courts should be better positioned to determine the content of the relevant international law as it stood at the time of the perpetration of the crime.

The judgment of the ECtHR implicitly declares that the national courts were not aware of what transforms an 'ordinary crime' into a crime against humanity. Though the judgment found Hungary to be in breach of Article 7, what the Court established was that the facts as established by the Hungarian Supreme Court did not qualify as a crime against humanity. Therefore it is unfortunate to speak of a violation of Article 7 since this suggests that law adopted subsequent to the commission of the crime was applied retroactively. But as is clear from the sources invoked by the ECtHR, the 'contextual threshold' has not been abandoned today, and similarly the rule that in order to qualify as a person *hors de combat* that person must clearly express an intention to surrender is still valid. Thus we could hardly state that any law was applied *retroactively*. Certainly Article 7 is violated also if the defendant is convicted for conduct that neither at the time of the 'perpetration' nor at the time of the verdict constituted a criminal offence. But this, again, was not the case in *Korbely*: in October 1956 the category of crimes against humanity did of course exist but the conduct with which the applicant was charged did not fit into that category. Thus it was the erroneous legal characterization of the facts that rendered the judgment of the Hungarian Supreme Court deficient.

The ECtHR should not be blamed for substituting its own position for the legal assessment by the Supreme Court; as I argued in the case of interpreting international law the national authorities are certainly not better positioned to make a correct assessment. In addition, respect for the legal characterization made by national fora has its limits: if the assessment is devoid of any reasoning, if it is clearly arbitrary the ECtHR has to overrule it. This was also the case in *Lukanov*<sup>39</sup> where the Court had to determine whether the conduct, which served as the basis of the applicant's detention, constituted a criminal offence. Contrary to what had been found by the domestic authorities the ECtHR concluded that 'there was not even the slightest possibility that [the] conduct could have constituted an offence'<sup>40</sup> and found a breach of Article 5. Whereas in *Lukanov* the incorrect classification of the conduct as a criminal offence was a result of 'a clear abuse of power',<sup>41</sup> in *Korbely* it was the misinterpretation of the concept of crimes

<sup>36</sup> Cassese, *op.cit.*, pp 81-82.

<sup>37</sup> *Korbely* judgment, par. 82-83.

<sup>38</sup> *Ibid.*, par. 72.

<sup>39</sup> *Lukanov v. Bulgaria* 21915/93 (20/03/1997), Reports 1997-II.

<sup>40</sup> S. Trechsel: *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, 2006, p. 426.

<sup>41</sup> *Ibid.*

against humanity that induced the ECtHR to overrule the conclusion drawn by the Hungarian Supreme Court.

Some argue that through its judgment in *Korbely* the ECtHR nullified the efforts of the Hungarian State to punish crimes committed under the communist regime.<sup>42</sup> By this it has unintentionally questioned the official narrative of the 1956 events in Hungary. I would argue that *Korbely* rather shows the difficulties involved in accomplishing multiple functions in so-called historical trials. I am inclined to assume that in the period between October 23 and November 4, 1956, there were atrocities that could qualify as crimes against humanity. There have been cases where the link between a central policy to commit crimes against humanity and the conduct of identifiable individuals could have been established.<sup>43</sup> The ECtHR ruled that *Korbely* did not fall under this category. The judgment of the Court demonstrates once more the difficulties involved in finding a proper candidate for presenting a new account of history through trials conducted five decades after the events have taken place.

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<sup>42</sup> M. Varjú: Transition as a Concept of European Human Rights Law, p. 15. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1329978&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1329978&download=yes) (Last visited: 22 July 2009).

<sup>43</sup> See T. Hoffmann: Individual Criminal Responsibility for Crimes Committed in: Non-international Armed Conflicts - The Hungarian Jurisprudence on the Volley Cases, in: S. Manacorda, A. Nieto (eds.): *Criminal Law Between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions*, Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 2009, pp. 735-753.