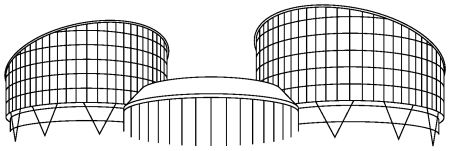

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Applications nos. 45520/04 and 19363/05
Nikolajs LARIONOVS against Latvia
and Nikolay TESS against Latvia

The European Court of Human Rights (Fourth Section), sitting on 25 November 2014 as a Chamber composed of:

Päivi Hirvelä, *President,*
Ineta Ziemele,
George Nicolaou,
Ledi Bianku,
Nona Tsotsoria,
Zdravka Kalaydjieva,
Paul Mahoney, *judges,*

and Françoise Elens-Passos, *Section Registrar,*

Having regard to the above applications lodged on 27 September 2004 and 29 March 2005 respectively,

Having regard to the partial decisions of 4 January 2008,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicant in the first application, Mr Nikolajs Larionovs ("first applicant"), was a Latvian national, who was born in 1921. He died in 2005 after lodging his application. On 11 January 2006 his son, Mr Sergejs Larionovs, informed the Court that he wished to pursue the application on behalf of his father.

2. The applicant in the second application, Mr Nikolay Tess ("second applicant"), was a Russian national. He was born in 1921 and died in 2006. His widow, Mrs Tamara Karlovna Ziyberg, informed the Court that she wished to pursue the application. Following her death in 2011, the second

applicant's brother informed the Court of his wish to pursue the application on behalf of Mr Tess.

3. The applicants were represented before the Court by Mr M. Ioffe, a lawyer practising in Riga.

4. The Latvian Government ("the respondent Government") were represented by their Agents, Mrs I. Reine and, subsequently, Mrs K. Līce.

5. On 4 January 2008 the applications were declared partly inadmissible and the complaints concerning Article 7 and the length of the criminal proceedings were communicated to the respondent Government.

6. The Government of the Russian Federation exercised its right of third-party intervention in relation to the application lodged by Mr Tess in accordance with Article 36 § 1 of the Convention, to which the respondent Government objected. The Russian Government were represented by the representative of the Russian Federation at the Court, Mr G. Matyushkin.

7. The second applicant requested an oral hearing. The Chamber decided that no hearing was required (Rule 59 § 3 *in fine*).

A. The circumstances of the case

1. The Soviet occupation of Latvia and deportations

8. On 23 August 1939 the foreign ministers of Germany and the Union of the Soviet Socialist Republics (USSR) signed a non-aggression treaty (the Molotov-Ribbentrop Pact). The treaty included a secret additional Protocol whereby Germany and the USSR agreed to settle the map of their "spheres of influence" in the event of a future "territorial and political rearrangement" of the territories in Europe including the Baltic States of Estonia, Latvia and Lithuania.

9. Following Germany's invasion of Poland on 1 September 1939 and later the start of the Second World War, the USSR began exerting pressure on the governments of the Baltic States with a view to taking control of those States pursuant to the above-mentioned Pact and Protocol.

10. Following an ultimatum by the Soviet Union to the Baltic States to allow an unlimited number of Soviet troops to be stationed in those States, on 16-17 June 1940 the Soviet army invaded the three Baltic States. The Government of Latvia were removed. The Republic of Latvia was renamed as "Soviet Socialist Republic of Latvia" ("Latvian SSR").

11. The first progress report of the Commission of the Historians of Latvia (established in 1998) recorded that the annexation by the USSR led to "mass deportations" (*masveida deportācijas*) from the Baltic States of their elites in 1941 and of *Kulaks* and members of the national resistance in 1949. For the purposes of the current judgment, the Court uses the word "deportation" to describe an involuntary extra-judicial transfer of an individual from one State to another.

12. As to the deportations of 1941, the respondent Government submitted, and the applicants did not contest, that on 14 June 1941 over 15,000 persons comprising the State's economic, cultural and intellectual elites were deported from Latvia by the USSR to remote areas of Siberia. Similar deportations were carried out by the USSR in Western Ukraine in May 1941 as well as in Lithuania, Estonia, Moldova and in Western Belorussia in June 1941[1].

13. On 22 June 1941 Germany attacked the USSR. The rapid advance of the German forces obliged the USSR forces to leave the Baltic States and withdraw towards Russia. On 10 July 1941 the territory of Latvia was fully occupied by the German forces.

14. In July 1944 the Red Army re-entered Latvia and on 8 May 1945 Latvian territory passed into the control of the USSR forces.

15. On 29 January 1949 the Council of Ministers of the USSR issued Decree no. 390-138ss ("ss" meaning top secret). It was entitled "On the deportation out of the territory of Lithuania, Latvia and Estonia of *Kulaks* and their families, the families of bandits and nationalists who are illegal, who were killed in the course of armed activities or who have been convicted, legalised bandits (*легализованные бандиты*) who continue hostile activities and their families, as well as the families of supporters of repressed bandits" (see paragraph 114 below). The operation was to be known as *Operation Priboi*. The lists of deportees were to be approved by the Council of Ministers of the Lithuanian, Latvian and Estonian SSRs. These groups of people were to be sent into "perpetual exile" (*выселение произвести навечно*) to named (remote) regions of the USSR. The Ministry of Internal Affairs of the USSR had to ensure transportation, security during transportation and settlement in order to prevent escape as well as to ensure the registration of settlers and the assignment of work details on arrival. The Decree foresaw the deportation of a total of 29,000 families (87,000 people), which included 13,000 families (39,000 people) from Latvia. According to the Decree, families would have to be allowed to bring possessions as well as a reserve of food (up to 1,500 kg). Other possessions were to be confiscated. Funds were to be made available for meals and medical services (a doctor and two nurses per train) during transport. Escape would be a serious criminal offence: reference was made to a decree of the Presidium of the Supreme Soviet Council dated 26 November 1948 and entitled "Bringing to criminal account the persons who have been deported to remote areas of the Soviet Union during the Great Patriotic War, but who have escaped from the sites of compulsory exile".

1. For example, D. Bleiere and J. Riekstiņš, *The first mass deportations of the Inhabitants of Latvia June 14, 1941*, Latvian State Archive, Nordik, Riga, 2007, pp. 8-9.

16. Decree no. 390-138ss was implemented in Latvia by Decree no. 282ss, adopted by the Council of Ministers of the Latvian SSR on 17 March 1949. It provided for the deportation of 10,000 *Kulak* families from the Latvian SSR to remote places of the USSR for the special settlement (*выселить в отдаленные места Советского Союза на спецпоселение*). The *Kulak* list, which had been prepared in accordance with an agricultural census of 1939 by the Executive Committees of the Councils of the Deputies of the Working People, was approved. The Ministry of State Security of the Latvian SSR ("MGB") was charged with implementing the deportation.

17. The majority of the 1949 deportations from the Baltic States were carried out in March 1949, with those of 25 March 1949 being the most significant. Families were taken away from their homes involuntarily and loaded in the cargo and cattle trains and sent to remote areas of the USSR.

18. Both the applicants and the respondent Government submitted a Chapter from a book entitled "*The deported: 25 March 1949*" ("*Aizvestie: 1949. gada 25. marts*) (Latvian State Archive, Nordik, Riga, 2007). The Chapter was headed "*Structural analysis of the deportation of 25 March 1949*" from Latvia and was based on data from the Latvian State Archive. The Russian Government (a third party to the application of the second applicant) also relied on statistics drawn from this document.

19. This document analysed data concerning 42,125 persons deported from Latvia from 25 to 30 March 1949 (the vast majority on 25 March 1949). The March deportations comprised two large groups of the Latvian population: the "*Kulaks*" (as defined by Decree no. 761 of the Latvian SSR of 1947, paragraph 113 below) and "nationalists" (families of those convicted for collaboration with the German occupying powers, for membership of a national resistance group or for its support in the post-war period). Of the total number of deportees, 29,030 were deported as *Kulaks* (68.9%) and 13,095 persons were deported as nationalists (31.1%). It also recorded that 2.2% of the Latvian population was deported in March 1949, the deportation of *Kulaks* amounting to 1.5% of the population; 211 babies were born during transportation and on arrival in year 1949; 229 persons died during transportation (fifty-two of the dead were over eighty years of age and thirty-three were under five years of age). Men and women constituted 40% and 60%, respectively, of the 1949 deportations. Over 26% of those deported in March 1949 were under sixteen years of age; 18.5 % of those deported were over sixty years of age. Almost 750 deportees were over eighty years of age. Over 95% of the deportees in March 1949 either originated from Latvia or were ethnic Latvians.

20. The respondent Government also submitted a detailed report, dated 18 May 1949 from General-Major Spasenko to the Deputy Minister of the Interior of the USSR, setting out the results of the deportations, which had exceeded forecasts: from 25 to 30 March 1949 the deportations from the

three Baltic States amounted to approximately 30,000 families (90,000 persons), which included 14,000 families from Latvia (approximately 40,000 persons including 11,000 men, 19,000 women and 10,000 children). The respondent Government also submitted a copy of Decree no. 14 (of 29 March 1949) of the Central Committee of the Communist Party of Latvia, which confirmed the successful completion of the deportation process.

21. This Court's decisions record certain relevant statistics. In *Penart v. Estonia* ((dec.), 14685/04, 24 January 2006) and *Kolk and Kislyiy v. Estonia* ((dec.), nos. 23052/04 and 24018/04, ECHR 2006-I), the Court recorded that the USSR conducted large-scale and systematic actions against the Estonian population, including the deportation of about 10,000 persons on 14 June 1941 and of more than 20,000 on 25 March 1949.

2. Independence

22. On 4 May 1990 the Supreme Council of the Latvian SSR, the legislative assembly elected on 18 March in the same year, adopted the "Declaration on the Renewal of Independence of the Republic of Latvia", which declared Latvia's incorporation into the USSR in 1940 unlawful, null and void and restored force of law to the fundamental provisions of the 1922 Constitution. On the same day, the Supreme Council adopted the "Declaration on the Accession of the Republic of Latvia to Human Rights Instruments". By "accession" was meant a solemn, unilateral acceptance of the values embodied in the instruments concerned. Most of the international law instruments referred to in the declaration were subsequently signed and ratified by Latvia in accordance with the domestic and international law.

23. After two unsuccessful *coups d'état* in the USSR, on 21 August 1991 the Supreme Council passed the Constitutional Law on the Statehood of the Republic of Latvia proclaiming full independence with immediate effect.

24. On 22 August 1996 the Latvian Parliament adopted the "Declaration on the Occupation of Latvia". It described the annexation of Latvian territory by the USSR in 1940 as a "military occupation" and an "illegal incorporation". Soviet repossession at the end of the Second World War was referred to as the "re-establishment of an occupying regime".

25. Prior to that, on 2 November 1988 the Council of Ministers of the Latvian SSR issued Decree no. 350 ("*Par pilsoņu nepamatotu administratīvu izsūtīšanu no Latvijas PSR 1949.gadā*") and repealed Decree no. 282ss of 17 March 1949: the deportations carried out thereunder were acknowledged to be without foundation and all deportees were rehabilitated.

3. The first applicant

26. The first applicant, Mr Nikolajs Larionovs, was born in Latvia. Following the occupation of Latvia by the USSR in the summer of 1940, he was admitted to the Academy of the Infantry of the Soviet Army in Riga. When the German forces attacked in June 1941, the first applicant was living in a border area and followed the Red Army in its retreat. Once in Russia, he was mobilised into the Red Army. He was assigned to the 201st Latvian Division. Having been decorated several times and seriously injured, he was promoted to the rank of lieutenant. In August 1944 he was demobilised and assigned to the State security services which was, at the time, subordinated to the People's Commissariat for Internal Affairs ("NKVD") of the Latvian SSR.

27. In 1944 the first applicant was sent to Latvia to serve in the local branch of the NKVD – renamed shortly thereafter the MGB (of the Latvian SSR) – which was responsible for counter-intelligence and espionage. The first applicant worked in the Latvian SSR until the end of his career and retired in 1976 having reached the grade of lieutenant-colonel.

(a) Charges and pre-trial matters

28. On 9 November 1998 the Office of the Prosecutor General opened a preliminary investigation into the first applicant's activities from February to March 1949. It was considered that the first applicant, as an official of the MGB, had issued and signed several orders for the arrest and deportation of many *Kulaks* and their families and reference was made to Article 68^1 of the 1961 Criminal Code, in force when the preliminary investigation had opened. The first applicant submitted that he had been advised of that step at the time.

29. By order of 6 October 1999 a court dismissed the prosecution's request that the first applicant be placed in custody but he was placed under police supervision, a measure which was never lifted.

30. On 8 October 1999 the first applicant was charged with crimes against humanity and genocide. According to the decision to charge:

> "[The prosecutor], having examined criminal case no. 81210298 concerning crimes against humanity and genocide against the inhabitants of Latvia and considering that there is sufficient evidence, [decides to] charge the [first applicant] with deliberate, active participation in [committing] crimes against humanity and genocide against groups of inhabitants of Latvia whose members the totalitarian communist regime (the communist party of the USSR and the Latvian SSR and the repressive State authorities) considered as nationalists and *Kulaks* who were socially dangerous and inimical to the regime. His deliberate action was aimed at destroying, in whole or in part, members of groups, by bringing about their deaths, by causing serious injury to their physical integrity or by causing them psychological illness, by intentionally submitting them to living conditions intended to cause their total or partial physical destruction, and also by depriving them of their economic, political and/or social rights or by restricting the exercise of those rights."

31. The decision to charge also noted that:

> "In August 1944 N. Larionovs demobilised from the Red Army and willingly started working in the Ministry of the State Security of the Latvian SSR ("MGB"). As a representative of the repressive Soviet authorities, working as a senior specially mandated investigator of division no. 2 of the MGB, acting along with other MGB agents, deliberately intending to execute Decree no. 390-138ss ... and Decree no. 282ss ..., and [deliberately intending to] deport the group of inhabitants of Latvia whom the totalitarian communist regime considered as *Kulaks*, in 1949 issued and signed deportation orders, being aware that persons mentioned in those orders, including children and elderly, would forever be deported from Latvia to remote northern areas of the USSR, calculating that this group would be physically destroyed, in whole or in part, due to cold, starvation, illnesses and heavy physical work."

32. There followed a detailed list of the deportation orders issued and signed by the first applicant in respect of 150 families. The list included their names, year of birth, deportation dates and destinations as well as dates of death and/or the date when their deportation ended. The decision to charge concluded that, as a result of the first applicant's conduct, no less than 504 persons had been deported to northern areas of the USSR, of whom at least sixty had died as a result of the severe living conditions in transit and in exile. Most deportees also suffered mental and physical trauma, damage to their health and immeasurable pecuniary damage. The first applicant was charged with a crime contrary to Article 68^1 of the 1961 Criminal Code.

33. On 20 October 1999 the first applicant was hospitalised. On 29 October 1999 the prosecution requested an expert opinion on his age and health.

34. On 16 November 1999 the prosecution reported that the pre-trial investigation had been completed and invited the 132 victims to acquaint themselves with the case file.

35. On 22 November 1999 a committee of experts convened by the prosecution opined that the first applicant's age and health did not allow his involvement in investigative measures that would last longer than one hour per day with several breaks.

36. On 1 December 1999 the prosecution announced the end of the pre-trial investigation and invited the first applicant to acquaint himself with the case file.

37. The first applicant reviewed the case file, mainly by himself from 1 to 15 December 1999 and his legal representative then reviewed it from 13 to 28 December 1999. On 29 December 1999 the prosecution decided to re-commence the criminal proceedings and on 30 December 1999 the prosecution served the final bill of indictment on the first applicant. It was recorded that the applicant was charged with a crime under Article 68^1 of the 1961 Criminal Code. The bill read as follows:

> "Criminal case no. 81210298 was instituted on 9 November 1998 on the basis of the reviewed material concerning genocide against native inhabitants of Latvia .... During

> the preliminary investigation it has been established that the [first applicant] actively participated in [committing] crimes against humanity and genocide against groups of inhabitants of Latvia whose members the totalitarian communist regime (the communist party of the USSR and the Latvian SSR and the repressive State authorities) considered as nationalists and *Kulaks* who were socially dangerous and inimical to the regime. His deliberate action was aimed at destroying, in whole or in part, members of groups, by bringing about their deaths, by causing serious injury to their physical integrity or by causing them psychological illness, by intentionally submitting them to living conditions intended to cause their total or partial physical destruction, and also by depriving them of their economic, political and/or social rights or by restricting the exercise of those rights."

The bill also referred to the first applicant's questioning of 6 and 8 October 1999. It cited the evidence as including a handwriting examination report, other documents and archive materials, including all 150 deportation orders signed by the first applicant and more than 130 statements by victims. It concluded that the first applicant had taken an active part in crimes perpetrated by the totalitarian communist regime – crimes against humanity and genocide. Lastly, reference was made to Latvia's accession to the Convention on the Prevention and Punishment of the Crime of Genocide 1948 ("the 1948 Convention") and to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968 ("the 1968 Convention").

38. On 5 January 2000 the case file was sent to the Riga Regional Court. By order of 7 February 2000 that court transmitted the case file to the Kurzeme Regional Court: the majority (ninety-two) of the 132 victims lived within the latter court's jurisdiction. On 14 March 2000 the Criminal Cases Chamber of the Supreme Court ordered that the case file be sent back to the Riga Regional Court: the first applicant lived in Riga and was too old and infirm to take part in hearings in another city and, in fact, only fifty-four victims lived within the jurisdiction of the Kurzeme Regional Court.

39. On 10 April 2000 the Riga Regional Court committed the first applicant to trial, but did not schedule a trial date. On 30 June 2000 that court agreed to the first applicant spending his summer (July-October) in his son's summer house near Riga: the police supervision measure would continue. In December 2000 and April 2001 the Riga Regional Court informed the first applicant that it could not hear his requests to alter the police supervision measure as it was busy hearing another criminal case. On 4 May 2001 the first applicant's request to move to his son's house (May-October 2001), with the same police supervision, was accepted.

40. On 9 November 2001 the Riga Regional Court requested that the case be transferred, citing a caseload which would exclude a hearing in the first applicant's case before 2003. On 15 November 2001 the Supreme Court assigned the case to the Zemgale Regional Court ("the trial court").

41. On 15 April 2002 the trial court fixed a trial date for 3 June 2002.

42. On 3 June 2002, and further to the first applicant's request, the trial court adjourned the hearing to 10 September 2002.

43. On 13 June 2002 he was again given leave to spend the summer (June to September) in his son's house near Riga.

44. During August and September a number of alleged victims indicated that they could not participate in the scheduled September hearing.

45. On 10 September 2002 the trial court held a preparatory hearing during which it refused certain procedural requests made by the first applicant. In particular, he had asked the trial court to suspend examination of his case and submit a preliminary question to the Constitutional Court for consideration. His question was whether certain legal provisions of the decision of the Supreme Council of the Republic of Latvia of 25 March 1992 on implementation in Latvia of the normative legal provisions in relation to crimes against humanity and Article 68^1 of the 1961 Criminal Code were compatible with Articles 89 and 91 of the Constitution and with the 1948 and 1968 Conventions. He argued that the criminal offence he had been charged with under Article 68^1 of the 1961 Criminal Code and the term "genocide" had been widely construed to his detriment. The trial court held that during the preparatory stage of the proceedings issues pertaining to the applicable legal provision did not need to be examined.

46. The first applicant then attempted to challenge that decision by means of an appeal. However, a judge of the trial court explained that no appeal lay against that type of decision.

(b) Trial and conviction

47. The first applicant's trial took place from September 2002 to September 2003. There were more than fifty hearings, during which the criminal case file (including documents concerning the deportations of 150 families) was examined. The first applicant and 132 victims gave evidence. There were six adjournments because victims were unable to attend and ten adjournments owing to the first applicant's illness.

48. In May 2003 he was again allowed by the trial court, given his ill-health and on his request, to live in his son's house during the summer.

49. The first applicant pleaded not guilty. He argued that in 1949 he had been working in the MGB as a senior specially mandated investigator of division no. 2, the main task of which had been counter-intelligence. In February 1949 a colonel, to whom he was subordinate, ordered all agents in his division to "look after the *Kulak* cases". The files in respect of each *Kulak* family to be deported contained a list of its members and a note on their financial situation. He filled in the necessary information in the deportation order form and verified whether there was a reason for excluding them from deportation (USSR orders or medals, service in the Soviet army/partisan units or other special merit) and signed the order. Many orders had already been prepared (typed) in advance, he verified the

information with that in the file and signed them. He gave the signed orders to his head of division: he was not aware how many of these orders were executed. He and his wife themselves had been descendants of well-off farmers. He did not intend to destroy, in full or in part, persons who were mentioned in the orders and he was not aware of where or how these persons would live and work, the orders indicating only that they would be sent to remote areas of the USSR.

50. By judgment delivered on 25 September 2003, the trial court found the first applicant guilty of a crime contrary to Article 68^1 of the 1961 Criminal Code. The judgment began by stating that the first applicant had "committed genocide, that is, a deliberate action aimed at destroying, as such in whole or in part, a social group, by intentionally submitting [members of that group] to living conditions capable of bringing about their total or partial physical destruction".

51. The judgment went on to quote from Decree no. 390-138ss, from the prior decree of November 1948 about criminal liability for escape and from Decree no. 282ss.

52. The trial court made certain findings of fact:

> "In 1949 [the first applicant] was working as a senior specially mandated investigator of division no. 2 of the Ministry of the State Security of the Latvian SSR. From 28 February to 12 March 1949 [the first applicant] issued and signed or signed administrative deportation orders (*slēdziens par izsūtīšanu*) in respect of the following persons whom the Soviet authorities considered as families of *Kulaks* to be sent to special camps in remote areas of the Soviet Union: ..."

53. The orders were then confirmed by the Head of the relevant MGB Division and the Minister. The trial court examined the evidence in respect of each of the relevant 150 cases of deportation finding that each of the 150 orders to deport a family had been signed by the first applicant, the authenticity of the signatures having been confirmed by a handwriting expert. The trial court found such conduct to amount to a crime proscribed by Article 68^1 of the 1961 Criminal Code.

54. As to the elements of the crime of which the first applicant was accused, the judgment pointed out:

> "...The [1948 Convention] entered into force on 12 January 1951. In Latvia, criminal responsibility for crimes against humanity, genocide (Article 68^1 of the [1961] Criminal Code) has been established by the Law of 6 April 1993.
>
> The State's legal system also includes the principles and rules of international law accepted on 4 May 1990 by the adoption of the Declaration on the Accession of the Republic of Latvia to Human Rights Instruments. The court refers to Article 7 § 2 of the [Convention], the Charter of the United Nations, the Universal Declaration of Human Rights reaffirming faith in fundamental human rights, in the dignity and worth of the human being.
>
> Further development of the principles of international law on humanity and laws of war was recorded in the Charter of the Nuremberg International Military Tribunal, of 8 August 1945. The court refers to Article 1 of the [1968 Convention] and to domestic

law provisions – Article 45[1] of the [1961] Criminal Code and section 57 of the [1999] Criminal Law.

Accordingly, the prevention and punishment of the crime of genocide do not depend either on the date of the entry into force of the [1948 Convention] or on the existence of the corresponding provision in domestic law. Consequently, in this criminal case, one cannot speak of a violation of the principle *nullum crimen sine lege*. ...

Article II of the [1948 Convention] provides that ... genocide means acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. As to Article 68[1] of the [1961] Criminal Code and section 71 of the [1999] Criminal Law, genocide is defined therein as a deliberate act committed with intent to destroy, in whole or in part, a national, ethnic, racial or social group, or a group with specific convictions or beliefs, as such.

The definition of genocide contained in the [1948 Convention] is based on the historical experience which preceded it. However, after the drafting and adoption of the [said] Convention, new experiences arose.

The most important characteristic of a crime against humanity, genocide is the fact that it is perpetrated against a specific group of persons on the basis of certain criteria. ...

Decree [no. 761] ... on the characteristics of *Kulaks'* farms and the manner of taxing them] defined a social group – ... the *Kulaks* and members of their families, on the basis of their property status and the employment of remunerated workers on their farms.

Article 2 of the Universal Declaration of Human Rights of 10 December 1948 provides: '*Everyone is entitled to all the rights and freedoms set forth in this Declaration'* ... In addition, the [Preamble to the 1968 Convention] states that violation of the economic and political rights of the indigenous population is expressly condemned as a crime against humanity.

In consequence, the court sees no legal problem in the fact that, unlike the [1948 Convention] ..., the [1961] Criminal Code also specifies social groups as potential victims of genocide. Since the crime of genocide referred to by the [1948 Convention] does not differ in substance from the crime defined by the [1961] Criminal Code, imprescriptibility may be applied, as is mentioned in Article 45[1] of the [1961] Criminal Code and section 57 of the [1999] Criminal Law.

...

Having compared the penalties laid down in Article 68[1] of the [1961] Criminal Code and section 71 of the [1999] Criminal Law, [the court] finds that the [1961] Criminal Code is more lenient and, in accordance with section 5 of the Criminal Law, it should be applied in the present case.

The charges brought against the accused N. Larionovs during the preliminary investigation include all types of acts proscribed under Article 68[1] of the [1961] Criminal Code, thereby leaving to the court a wide margin of appreciation for specifying the charges.

The following types of acts [constitutive of the *actus reus* of the crime] may be distinguished under Article 68[1] of the [1961] Criminal Code: deliberate action aimed at destroying, in whole or in part, a group of people:

1) bringing about the deaths of its members,

2) causing serious harm to their physical integrity,

3) causing them psychological illness,

4) intentionally submitting them to living conditions intended to cause their total or partial physical destruction,

5) depriving native inhabitants of their economic, political and/or social rights or by restricting the exercise of those rights with the same intent, that is, to cause their total or partial destruction.

At the hearing, the [prosecution] upheld the charges in full, as formulated during the preliminary investigation.

After having analysed the evidence and the charges ..., the court considers that the accused, N. Larionovs, can be accused of a deliberate action aimed at destroying, as such and in whole or in part, a social group, by intentionally submitting members of that group to living conditions capable of bringing about their total or partial physical destruction. Other types of acts have not been substantiated in the charges and there is no evidence in this regard. As regards the [above] mentioned fifth type, [the court notes] that the term 'native inhabitants' has been omitted in the charges, accordingly the court does not have the rights to broaden the charges and to examine whether the conduct of the accused N. Larionovs was constitutive of such acts.

In the court's opinion, the forced and violent transfer of persons from their habitual residence to a completely alien location, remote and unknown to them, amounts, as such, to the creation of living conditions giving rise to the partial or total physical destruction of those persons ...

... [A]rticle 68^1 of the [1961] Criminal Code does not require that the consequences – namely partial or total physical destruction – actually occur. At the hearing, the victims ... provided evidence about the inhuman conditions of the deportation ... about the possibilities for living, and surviving, which did not correspond to the universally recognised and accepted minimum, about hunger, the lack of medical care ...

The charges brought against N. Larionovs during the preliminary investigation concurrently include the terms 'sending into exile' (*izsūtīšana*) and 'deportation' (*deportācija*), which have different legal meanings. Taking into account that the charges do not contain any references to international laws of war, N. Larionovs can be incriminated only with sending into exile and not deportation. Also, sending into exile is the term used in the orders issued and signed by the applicant."

55. As to the first applicant's *mens rea*, the trial court found as follows:

"N. Larionovs was born on 6 May 1921; it follows that by 1949 he had already seen something of life. He had lived in Latvia. The documents drawn up about him before 1949 ... show that N. Larionovs' career was constantly advancing, that he was ideologically stable, politically sophisticated and loyal to the party of Lenin and Stalin; that he was an agitator in a party group, [and] that he himself had even undertaken to carry out any task assigned to him. This proves that the defendant ... was aware of the historical, political and social processes that were taking place. He was also aware of the repression and deportations that had taken place in 1940 and 1941. It is clear from the [deportation] orders which were drawn up and signed by N. Larionovs that the persons concerned were going to be deported from Latvian territory to remote regions of the Soviet Union ... The defendant ... was therefore aware of the dangerous nature of his acts, foresaw their consequences and wished them to occur; in other words, his conduct indicated a direct intent to destroy, in

whole or in part, the group of people that the authorities then in power considered to be *Kulaks*.

At the time that the crime of which he is accused was committed, N. Larionovs was twenty-seven years old. [He] was a specially mandated investigator of the [MGB], and thus a representative of the authorities. In consequence, the court finds that N. Larionovs comes within the personal scope of Article 68^1 of the [1961] Criminal Code. ...

Article 68^1 of the [1961] Criminal Code is included in the Chapter 'Crimes against humanity, genocide, war crimes'. This chapter ... includes also Article 68^2 'Crimes against peace' and Article 68^3 'War crimes'. It follows from the structure of this Chapter and also from [the wording of Article 68^1] 'crimes against humanity, including genocide' that the legislator has enlisted the crime of genocide as a special category of the crimes against humanity. The [1968 Convention] has included crimes against humanity and genocide in the same provision ... The court considers that the direct object of the crime of genocide is the right for groups to exist as a whole and that the actions of the accused, N. Larionovs, were directed against these rights."

56. The trial court found the first applicant guilty of a crime punishable by Article 68^1 of the 1961 Criminal Code and sentenced him to five years' imprisonment, suspended until the conviction became final.

(c) Appeal and application to the Constitutional Court

57. On 4 October 2003 the first applicant appealed to the Criminal Cases Chamber of the Supreme Court, repeating his arguments made at first instance. He also alleged that the trial court had failed to distinguish between, on the one hand, the imprescriptibility of an offence and, on the other, the retrospective nature of a criminal provision. There was, he argued, nothing to justify a retrospective application of Article 68^1 of the 1961 Criminal Code in his case. He contested the trial court's reference to "extermination" or "total or partial destruction" of the victims when there was no evidence about the death of any deportee.

58. On 15 November 2003 the first applicant also lodged a complaint with the Constitutional Court claiming, *inter alia*, that certain legal provisions of the decision of the Supreme Council of the Republic of Latvia of 25 March 1992 on the implementation in Latvia of the normative legal provisions in relation to crimes against humanity and Article 68^1 of the 1961 Criminal Code were incompatible with Articles 89, 91 and 94 of the Constitution and with the 1948 and 1968 Conventions. He argued that he was not guilty because "in accordance with the applicable national and international law at the time [his acts] did not constitute a criminal offence, also because nowadays they are not considered criminal according to the general principles of law recognised by civilised nations". He further argued that the scope of the definition of genocide was wider under Article 68^1 of the 1961 Criminal Code than the one in the 1948 Convention and that the charges against him were contrary to international law. Lastly, he argued that the provision a retrospective application clause (Article 6^1 of the 1961

Criminal Code) to a criminal-law provision which was wider in its scope than the internationally recognised notion was in breach of Article 7 of the Convention. He acknowledged that his application did not satisfy the criteria of section 19^2(2) of the Law on the Constitutional Court (requiring that ordinary remedies be exhausted before applying to that court). However, since ordinary remedies were not capable of remedying his complaint, he asked the Constitutional Court to accept a derogation pursuant to paragraph 3 of the same section.

59. By decision of 16 December 2003 the Constitutional Court declared his application inadmissible for failure to exhaust ordinary remedies (the trial court judgment was still under appeal).

60. On 10 February 2004 the appeal court set the hearing date (8-11 June 2004). Given the deterioration in the first applicant's health and his request of 12 May 2004 for an expert medical report, on 8 June 2004 the appeal court suspended the case pending a medical report on his capacity (physical and psychological) to take part in the appeal and, as relevant, to serve any prison sentence. The medical examinations took place in August 2004. The expert report confirmed that the first applicant's health had deteriorated since the last expert report of 1999, that he could participate in the hearing for not more than thirty minutes per day with breaks and that he could serve a prison sentence with the appropriate medication and medical care.

61. On 18 February 2005 the appeal court scheduled a hearing for 13 April 2005. The hearing was adjourned owing to the illness of one of the prosecutors. In May 2005 the appeal court allowed the first applicant to spend the summer in his son's residence. In 14 June 2005 the appeal court asked the prison authorities whether they could provide the first applicant with the necessary medical care for his conditions. On 22 June 2005 the prison authorities confirmed that they could not.

62. On 21 July 2005 the hearing was scheduled for 12 December 2005.

63. On 9 November 2005 the first applicant died. His son maintained his appeal. The appeal was heard on 12 December 2005. Judgment was delivered on 13 December 2005. The appeal court dismissed the appeal and endorsed the reasoning of the trial court. It clarified that the continued examination of the first applicant's appeal after his death was in accordance with the new criminal procedure law. The appeal court found:

> "... [I]nternational criminal law cannot be envisaged solely from a positivist perspective.
>
> The first-instance court analysed the prohibition of genocide arising from the principles of international law and the scope of that prohibition. The Criminal Cases Chamber indicates its agreement with the reasons given by the first-instance court; it emphasises that the treaty provisions are not intended to limit the scope of the legal principles, but to explain the general principles existing in the international community. Customary and treaty norms may co-exist – whether their content is identical or different – as the International Court of Justice affirmed in the *Nicaragua*

case (*Nicaragua v. United States of America (merits)*, judgment of 27 June 1986 [ICJ Reports 1986, § 188]).

Moreover, it is necessary to take account of the fact that the development of convention norms is also affected by political factors, the influence of which led to the international [crime] in question being codified in narrower terms.

When [the 1948 Convention] was being adopted, in the course of the discussions on the definition of genocide ... the 6th committee of the UN General Assembly received a proposal to include in it 'a social and economic group'; however, this was rejected under pressure from the USSR. In the following years, there were several attempts to widen the definition of genocide to include political, economic and social groups; however, those attempts were unsuccessful. ...

Consequently, the Criminal Cases Chamber concludes that, in the international community, the concept of genocide is not limited to an act directed against a national, ethnic, racial or religious group, and that [the list of] criteria mentioned in [the 1948 Convention] cannot be described as exhaustive. Even if it does not take a tangible form as set out in Article II of [the 1948 Convention], genocide is considered as an international crime. The Criminal Cases Chamber considers that, in domestic legislation, the crime of genocide may be defined in a different manner from that in [the 1948 Convention], if, in substance, it corresponds to all of the characteristics of a crime against humanity.

Having regard to the foregoing, there is no reason to find that Article 68^1 of the [1961] Criminal Code is contrary to [the 1948 Convention] ..."

64. The appeal court noted that Article 6 of the Charter of the International Military Tribunal ("the IMT"), Nuremberg, applied to leaders as well as to organisers and accomplices. Article 8 of the Charter provided that acting pursuant to orders of a Government or superior did not free an accused from responsibility, although it could mitigate punishment. The appeal court endorsed the findings of the trial court as to the first applicant's psychological attitude to his acts.

65. The first applicant's son authorised the lodging of a cassation appeal. He reiterated that the actions of the first applicant were not constitutive of the alleged crime, since Article 68^1 had not been applicable at the time of the events and since the impugned actions were not, in any event, constitutive of the crime of genocide. Nor were those acts proscribed by the 1948 Convention. By decision of 16 February 2006 the Senate of the Supreme Court dismissed the appeal, upholding the decision of the appeal court. The Senate considered that Article 7 of the Convention had not been breached:

"The [Senate] finds that the notion of genocide contained in Article 68^1 of the [former] Criminal Code is wider than that in [the 1948 Convention]. However, this does not exclude the application of the above-mentioned provision and the qualification of the conduct of N. Larionovs. The crime of genocide may be defined in a different manner in national law than [the definition contained] in [the 1948 Convention], because, in substance, [it] corresponds to all of the characteristics of a crime against humanity; the crime of genocide is only one category of crime against humanity, to which no statutory limitations apply in accordance with international law. Therefore, the application of Article 6^1 of the [former] Criminal Code is lawful

> and justified. Article 7 § 2 of the Convention provides ... At the time when N. Larionovs committed the incriminated offences [the general principles of law recognised by civilised nations] did exist and had been formulated in Article 6 (c) of the Charter of the Nuremberg International Military Tribunal of 8 August 1945 and in [the UN GA Resolutions A/RES/95(I) and A/RES/96(I)] (see more detailed reasoning of the application of Articles 68^1 and 6^1 of the [former] Criminal Code in case SKK 162/05, charges against N. Tess).
>
> The [Senate] considers that the prosecution and punishment of individuals under Article 68^1 of the [former] Criminal Code is not affected by the fact that no international court has been established with a view to condemning the Soviet regime or the crimes against humanity perpetrated by supporters of this regime."

4. The second applicant

66. The second applicant, Mr Nikolay Tess, was born in 1921 in Russia. In 1939 he was enlisted into the Soviet army. He took part in the Soviet-Finnish War and the Second World War. He was seriously injured and assigned to the reserves.

67. In May 1945 he joined the NKVD of the Latvian SSR, later renamed the MGB (of the Latvian SSR) in 1946. In January 1946 he was recalled to Moscow to study Swedish at the USSR MGB Academy. In 1947 he graduated at the rank of lieutenant. In December 1947 he was sent to Latvia to serve in the second division (responsible for counter-intelligence and espionage) of the MGB. In February 1949 he was asked to assist other divisions on *Operation Priboi*. He submitted that the deportation lists had already been pre-prepared and his job had been to check whether any families should be taken off the list. He stated that he had worked in the MGB as a Swedish interpreter and that the first-instance court had described him as a specially mandated investigator in connection with his work on *Operation Priboi*.

68. The second applicant worked for the successor of the MGB (the KGB) until he retired, at the rank of major, in 1955. In 1977 he was granted category 2 war-disabled status and retired.

(a) Charges and pre-trial matters

69. On 19 March 1998 the prosecution opened a file into the second applicant's activities in February/March 1949. It was said that, as an official of the MGB, he had issued and signed administrative orders for the arrest and deportation of many *Kulak* families. The second applicant claimed that he had been advised of that step at the time. On 3 June 1998 the second applicant was questioned as a witness, when he explained how the lists of victims were prepared and signed.

70. By a decision of 21 March 2001 the prosecution charged the second applicant with crimes against humanity and genocide and imposed police supervision on him as a security measure. According to the decision to charge:

> "[The prosecutor], having examined criminal case no. 81203098 concerning crimes against humanity and genocide against the inhabitants of Latvia and considering that there is sufficient evidence, [decides to] charge the [second applicant] with crimes against humanity and genocide as defined by the respective normative treaty legislation with regard to their subject-matter and the relevant charge, that is (to say) with deliberate action against a group of inhabitants of Latvia whose members the totalitarian communist regime (the communist party of the USSR and the Latvian SSR and the repressive State authorities) considered as *Kulaks* who were socially dangerous and inimical to the regime. His [action] was aimed at destroying, in whole or in part, members of the group, by bringing about their deaths, by causing serious injury to their physical integrity or by causing them psychological illness, by intentionally submitting them to living conditions intended to cause their total or partial physical destruction, and also by depriving them of their economic, political and/or social rights or by restricting the exercise of those rights. It is punishable under the Charter of the Nuremberg International Military Tribunal of 8 August 1945 ..., and [the 1948 Convention], which is binding on Latvia following [the Declaration on the Accession of the Republic of Latvia to Human Rights Instruments of 4 May 1990]."

According to that decision, the second applicant had played an active role in *Operation Priboi* by drawing up and signing forty-two orders to arrest and deport forty-two *Kulak* families, being a total of 152 persons (including fifty-seven women and forty-eight children). Those orders were enforced by agents of the Soviet security services and by Communist Party activists, who went to the victims' homes, arrested them and took them to "collection points" set up at railway stations. The raids were organised hastily so that the agents arrested only those persons who were actually present in their homes: fourteen individuals on the list escaped deportation. In certain cases, the father of the family was absent so that only his wife and children were taken. The victims were locked in cattle wagons and transported to Siberia where they were obliged to live for years in inhuman conditions. Eleven of those deportees died at their destination from hunger, cold and illness. The decision concluded that the second applicant's acts amounted to the crime of genocide as defined by Articles 2 and 3 of the 1948 Convention and by Article 6 of the Charter of the International Military Tribunal, Nuremberg. The second applicant was charged with a crime contrary to Article 68^1 of the 1961 Criminal Code.

71. On 6 April 2001 the prosecution announced that the pre-trial investigation had been completed. The twenty-seven victims (survivors of the forty-two families) were invited to acquaint themselves with the case file. The respondent Government submitted that the case file had comprised five volumes; the second applicant claimed that there had been eight volumes in total.

72. On 30 April 2001 the prosecution informed the second applicant that, other participants having consulted the case-file, he could also do so. He began with an interpreter who was later found to have been a Latvian SSR KGB officer and discharged by the prosecution on 2 May 2001.

73. On 2 May 2001 the second applicant informed the prosecution that he was ill, submitting medical certificates. The prosecution therefore applied, on 17 May 2001, for an extension of time to pursue the criminal proceedings until 21 June 2001. On 6 June 2001 the second applicant did not attend a scheduled consultation of the case file owing to illness, submitting medical certificates on 12 June 2001. On 21 June 2001 the prosecution obtained an extension of time for the criminal proceedings. On 21 August 2001 the second applicant finished his consultation of the criminal file

74. On 5 September 2001 a bill of indictment was served on the second applicant. On 6 September 2001 the second applicant's case file was sent to the Riga Regional Court. On 10 September 2001 the Riga Regional Court decided to commit the second applicant for trial. A date for the hearing was not scheduled.

75. The Riga Regional Court's workload was such that, on 5 December 2001, it asked the Supreme Court to evaluate whether its competence could be transferred to the Kurzeme Regional Court where ten of the twenty-seven victims lived. On 12 December 2001 the Criminal Cases Chamber of the Supreme Court accepted the request and sent the file to the Kurzeme Regional Court ("the trial court"), which is 200 km from Riga.

(b) Trial

76. On 11 January 2002 the applicant requested the trial court to send the case file back to the prosecution for further investigation. By order of 14 January 2002 the trial court committed the second applicant for trial, maintained the security measure – police supervision – and fixed a hearing date for 11 February 2002.

77. Between 24 January and 8 February 2002 certain victims informed the trial court that they could not attend hearings because of their age, ill-health and other such factors. One victim had also died.

78. On 8 February 2002 the second applicant applied to the Constitutional Court arguing that Articles 6^1 and 68^1 of the 1961 Criminal Code were incompatible with national and international law. He submitted that by charging him with "crimes against humanity – genocide" the prosecution had breached Article 89 of the Constitution. He argued that his case was in the public interest and that the ordinary remedies were not capable of remedying his complaint; he should therefore be accorded an exception to the requirement to exhaust those remedies. He also submitted that the definition of genocide in national law was wider, and that Article 68^1 and its retrospective application on the basis of Article 6^1 of the 1961 Criminal Code was contrary to Article 7 of the Convention. He admitted that had Article 68^1 of the 1961 Criminal Code corresponded to the internationally recognised notion of genocide, its retrospective application would have been legal under the 1968 Convention. However, he

had been charged with a wider notion of genocide, which the international community had never defined as constituting a crime. On 11 February 20002 the trial court adjourned the trial pending the constitutional action. On 1 March 2002 the Constitutional Court rejected the request as insufficiently motivated. The Constitutional Court ruled as follows:

> "Article 89 of the Constitution, referred to in the application, does not provide for specific human rights, but rather for the principle of protection of human rights. In turn, [the second applicant] has not specified in the application which specific human right guaranteed by the Constitution has been infringed by the contested legal provisions."

79. From 12 March to 26 March 2002 several victims informed the trial court that they could not attend because of, *inter alia*, their age and ill-health.

80. On 26 March 2002 the trial court resumed the trial but it was adjourned when the second applicant's representative submitted a document confirming the second applicant's hospitalisation.

81. On 2 April 2002 the second applicant's trial resumed. He did not attend, but submitted a certificate of hospitalisation. The hearing was adjourned. His request for an expert medical report was accepted on the same day with a view to scheduling the subsequent hearings. On the same day the trial court refused the second applicant's request to suspend his trial and to request a preliminary ruling from the Constitutional Court. He argued that certain legal provisions of the decision of the Supreme Council of the Republic of Latvia of 25 March 1992 on the implementation in Latvia of the normative legal provisions in relation to crimes against humanity and Article 68^1 of the 1961 Criminal Code were incompatible with Articles 89 and 91 of the Constitution and with the 1948 and 1968 Conventions. The court held that when deciding on the elements and factual basis of the criminal offence and the applicant's guilt, it had to provide grounds and reasons for its judgment, which also had to comply with international legislation. The second applicant attempted to appeal against that rejection to the Supreme Court. On 14 May 2002 a judge of the Criminal Cases Chamber of the Supreme Court explained that no appeal lay against decisions adopted during trial.

82. On 30 April 2002 the second applicant submitted another complaint to the Constitutional Court arguing that certain legal provisions of the decision of the Supreme Council of the Republic of Latvia of 25 March 1992 on the implementation in Latvia of the normative legal provisions in relation to crimes against humanity and Article 68^1 of the 1961 Criminal Code were not in conformity with Articles 89 and 91 of the Constitution or with the 1948 and 1968 Conventions. He again asked for his claim to be declared a matter of general interest and for it to be examined before he exhausted domestic remedies. He noted that the courts in Latvia had already examined several similar cases and convicted individuals of crimes contrary

to Article 68^1 of the 1961 Criminal Code. Their appeals and appeals on points of law had been dismissed, the wider definition of the crime against humanity, genocide having been disregarded. He argued that he was not guilty because "at the time his acts did not constitute a criminal offence, and because nowadays the international community does not consider them a criminal offence". The retrospective application of the wider criminal law was contrary to Article 7 of the Convention, Article 91 of the Constitution and international law. On 19 June 2002 the Constitutional Court rejected his request on the grounds of failure to exhaust ordinary remedies (his trial was not over and a trial court judgment was also open to appeal). It considered that the refusal by the trial court to submit a request for a preliminary ruling did not affect in any way the effectiveness of the ordinary judicial proceedings. In addition, whether or not it was necessary to apply for such a ruling was a matter for the trial court's exclusive discretion.

83. In the meantime, in May 2002, medical experts had reported that, while the second applicant could take part in hearings lasting one and a half to two hours each day, travelling to court was not advisable. His health was compatible with imprisonment under the right conditions. Since the trial court considered the second applicant's presence essential, it adjourned the trial until his health improved.

84. On 12 December 2002 this Court declared inadmissible as premature the second applicant's complaint under Article 7 of the Convention (see *Tess v. Latvia* (dec.), no. 34854/02, 12 December 2002).

85. On 9 and 17 December 2002 and on 4 May 2003 the trial court resumed the trial but adjourned it, because the second applicant did not appear owing to his certified hospitalisation. On 4 May 2003 the trial court requested a detailed medical report so that the trial court could ascertain whether the second applicant was avoiding trial.

86. On 24 November 2003 the trial resumed. The second applicant pleaded not guilty. He admitted that he had known that a deportation campaign was being prepared but claimed that the list of relevant persons had been drawn up and approved by his hierarchical superiors so that his only duty had been to verify the names and to draw up and sign a deportation order targeting each of the families in question. His role had therefore been formal and non-voluntary. He also acknowledged that the operation had been carried out in great haste and that innocent people may have been affected by it. On the same day the trial court refused another request by the second applicant for a preliminary ruling from the Constitutional Court. He again argued that Article 68^1 of the 1961 Criminal Code was incompatible with the 1948 Convention, and that his conviction would be a grave violation of human rights. The court reiterated the terms of its previous refusal.

87. During the hearing the second applicant referred to a prior decision of the Court concerning him (paragraph 84 above), suggesting that it had

found a violation of Article 7 of the Convention. The trial court adjourned the trial in order to acquaint itself with that decision.

(c) Judgment of the trial court

88. The trial resumed on 16 December 2003. On that date the trial court also found the second applicant guilty of a crime contrary to Article 68^1 of the 1961 Criminal Code. The trial court's judgment stated:

> "Nikolay Tess has committed the crime of genocide – as defined by the respective normative treaty legislation with regard to their subject-matter and the relevant charge, that is, a deliberate action aimed at destroying, as such and in whole or in part, a social group, by intentionally submitting members of that group to living conditions capable of bringing about their total or partial physical destruction.
>
> The crime of genocide is punishable under: the [1948 Convention]; the Charter of the Nuremberg [IMT] of 8 August 1945; and the [1968] Convention.
>
> As a representative of the repressive Soviet authorities, working as a specially mandated investigator ... of division no. 2 of the [the MGB], Nikolay Tess, acting along with other MGB agents ..., issued and signed orders which resulted in the mass illegal administrative deportation of families of *Kulaks* included in the lists to remote and sparsely populated regions of the USSR; [this deportation] was carried out on 25 March 1949, in accordance with Decree no. 390-138ss of the Council of Ministers of the USSR and Decree no. 282ss on the deportation of the *Kulak* families from the territory of the Latvian SSR, adopted by the Council of Ministers of the Latvian SSR on 17 March 1949; under [the latter decree], the deportation of the *Kulak* families was to be carried out by [the MGB].
>
> Nikolay Tess issued and signed the administrative deportation orders in respect of 42 ... *Kulak* families; in so doing, he intentionally acted against a group of inhabitants ... of Latvia whom the totalitarian communist regime ... had classified as socially dangerous *Kulaks* and who were inimical to the regime...
>
> With such conduct Nikolay Tess has committed a crime proscribed by Article 68^1 of the [1961] Criminal Code."

89. The trial court judgment analysed the evidence in respect of each of the forty-two cases of deportation of which the second applicant was accused. It found that there existed a copy of the deportation order for each family signed by the second applicant. The signatures had been authenticated by a handwriting expert.

90. The trial court continued:

> "The deportation of inhabitants of Latvia on 25 March 1949 and the conduct of Nikolay Tess must be classified as a crime of genocide within the meaning of the criminal law and of international law.
>
> The deportation was carefully planned and prepared in advance; the main role was played by the Soviet punitive bodies, [specifically the MGB]. The secret operation was named "*Priboi*". The instructions on the mass deportations from Latvia, Estonia and Lithuania ... had been prepared in Moscow; it was there, on 29 January 1949, that the Council of Ministers of the USSR adopted Decree no. 390-138ss, providing for the deportation from Latvia of 13,000 families (or a total number of 39,000 persons); the same was true in respect of Lithuania and Estonia. As stated in the Decree, they

were to be sent for perpetual exile to the Yakutsk Autonomous SSR, the territories of Krasnojarsk [and Khabarovsk], the regions of Omsk, Tomsk, Novosibirsk and Irkutsk ... In execution of that Decree, the Council of Ministers of the Latvian SSR adopted ... Decree no. 282ss on the deportation of the families of *Kulaks* from the territory of the Latvian SSR. Under [the latter decree], it was necessary to deport 10,000 *Kulak* families ... to remote regions of the Soviet Union; the lists of ... the *Kulaks* to be deported were provided by the executive committees of the workers' [councils] in each district and had to be confirmed; the deportation ... was to be carried out by the [MGB] ...

In accordance with Decree no. 297ss of the Council of Ministers of the Latvian SSR of 24 March 1949, the property of the deported persons was to be confiscated ..., which was done.

It appears from the top-secret decree of the Central Committee of the Communist (Bolshevik) Party of Latvia of 29 March 1949 on 'the results of the operation to deport the *Kulaks*, their families and the families of bandits and nationalists', that the [MGB] of the Latvian SSR, assisted by the MGB of the USSR, prepared and carried out the operation ... successfully ...

In order to include Latvian country dwellers in the lists of *Kulaks* to be deported, the occupying power used documents from the census of farmers carried out in 1939 in the free Latvian State, and the files of the Farmers' Union. In this way, people who, working in the free Latvian State, had created their own farms or who had become rich by receiving an inheritance from their parents, were included in the lists of *Kulaks*, in spite of the fact that subsequently, during the war, many farms had been destroyed or illegally expropriated by the Soviet authorities. During the preliminary investigation, the defendant himself gave evidence to that effect, stating that many innocent persons had suffered as a result ...

The people [concerned], escorted by the armed individuals conducting the operation, were placed in wagons and deported for life to the most remote, least developed and, climatically, most hostile regions of the USSR (Siberia). There, in the locations to which the deportees had been assigned, special command units were created, which managed [the influx of] exiled populations and decided on their place of residence. Each adult had a monitoring card, on which the obligatory monthly registration was noted. In addition, every [person] had to certify, by their signature, [that they consented] to deportation for life, with no right to return to their former home; if they breached that condition, they could be held criminally liable and could be sentenced to twenty years' forced labour ...

The above operation – [namely] a mass deportation of a large number of native inhabitants of Latvia, by removing them from their country, depriving them of their property, installing them in a specially designated territory where the living conditions were inappropriate – must be classified as creating living conditions aimed at their extermination in whole or in part; this amounts to genocide. All the persons who took part in carrying out that operation were perpetrators of the crime of genocide. ...

The accused, Nikolay Tess, drew up and signed the administrative deportation orders for 42 families (two of those orders were written by hand and not typewritten, and the writing was the accused's). This type of order was a document drawn up and signed by agents of the [MGB]; it was one of the documents serving as the basis for the deportation of the family in question. It appears from [the documents in the case-file] that the identity of the persons indicated in the orders did not always correspond to that of the deported individuals. The case-file contains reports explaining why it

had not been possible to deport the persons concerned; the main reason was the person's absence from his or her home ..."

91. The trial court then analysed the relevant domestic and international law. As to the *actus rea* of the offence, it noted:

"The Convention refers to an attack on a national, ethnic, racial or religious group. Article 68[1] of the [1961] Criminal Code and section 71 of the [1999] Criminal Law contain a wider list of objective elements than does the Convention: [they also refer to] a social group of persons, and to a group which has specific convictions or beliefs.

A crime of genocide is committed where a group of inhabitants who correspond to a common denominator is turned against. The explanation given by Article II of the [1948 Convention] in respect of the notion of 'genocide' is generalised, and it is on the basis of this generalised notion that Article 68[1] of the [1961] Criminal Code and section 71 of the [1999] Criminal Law were drawn up. The [court] considers that the list of persons targeted [by genocide] may not be considered exhaustive. This is also shown by historical experience. The legislation of various States widens the list of groups [targeted by genocide]. For example, the Belarus Criminal Code and the French Criminal Code define genocide as a [crime] directed against a given group 'on the basis of any other arbitrary criterion'; the Estonian Criminal Code ... mentions an attack on 'a group having resisted an occupation regime or another social group'; the German Criminal Code speaks of an attack on a 'community characterised by its folk customs'; the Lithuanian Criminal Code describes the endangering of a 'social group'.

Underlying [the classification] of the crime of genocide is not only the [1948 Convention], but also the remainder of the international-law texts concerning the crime in issue. For example, point (c) of Article 6 of the [Nuremberg Charter] defines as genocide persecution for political motives.

In consequence, the legislation of various States contains a list of objective elements [of the crime of genocide] [which is] wider than that defined by the Convention. Thus, for example, Article 357 of the Criminal Code of the Russian Federation specifically mentions the forced transfer of members of the group; the Spanish Civil Code [also mentions] assaults of a sexual nature.

Article 68[1] of the [1961] Criminal Code also makes punishable the removal from native inhabitants of their economic, political and/or social rights, or restriction on the exercise of those rights. This element is provided for by the [1968 Convention], the Preamble to which states that 'violation of the economic and political rights of the indigenous population' must be classified as a crime against humanity. By its nature, genocide also includes the elements of a crime against humanity.

In consequence, [the trial court] perceives no contradiction between the criminal provisions of the Republic of Latvia and those of international law in [the fact of] widening the list of objective elements of the crime of genocide.

Moreover, in the case of genocide, the crime can be committed against a group of people with the features of several groups protected under international and national law, that is (to say), [those groups] may overlap.

Nikolay Tess has been prosecuted for having committed the crime of genocide, its objective element consisting of an action – aimed at destruction of a social group – deliberately directed against a group of inhabitants of Latvia, whom the totalitarian communist regime had classified as *Kulaks* and who were considered socially dangerous and inimical to the regime ...

> Having examined the evidence in the case, [the trial court] also considers that a national group was targeted. It can be seen from the material of the case file that for every deported person in exile a registration card was prepared, on which a remark had to be made at a specific time on a monthly basis. [On this card], only one word 'Latvian' was included in the column indicating the deported person's category, which signifies that in fact people were deported from Latvia also on the grounds of national element ... Nikolay Tess has not been charged with targeting a national group and [the trial court] has no legal grounds to rule on a heavier charge."

92. As to the alleged retroactive application of the law, the trial court found:

> "Article 7 of the [Convention] provides that 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. The accused and his defence lawyers allege a violation of this principle; they consider that the domestic legislation at the time of the [impugned events] did not contain any law by which an attack against a social group was punishable ...
>
> The above-cited article of the Convention also provides for an exception – it is not prohibited to punish a person for an action which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.
>
> The [court] considers that genocide and other international crimes are exceptional in nature. It is specifically to this crime that, in many cases, the principle of retrospective effect of the law is applied, on an exceptional basis. International judicial practice demonstrates that retrospective effect has been given by the international courts of Nuremberg and Tokyo, and by the international criminal courts for the former Yugoslavia and for Rwanda."

93. Having analysed several judgments of some special courts (including the International Criminal Tribunal for the former Yugoslavia ("the ICTY") and the International Criminal Tribunal for Rwanda ("the ICTR")) and certain domestic provisions (including the new criminal law of Estonia), the trial court found that State practice and general principles of international law permitted the retrospective application of the domestic criminal law in exceptional cases, such as the present case, for the punishment of the international crime of genocide. It continued:

> "At the hearing, the [prosecution] upheld the charges in full. In analysing the evidence obtained and the charges brought against Nikolay Tess, the [court] concludes that the accused may be found guilty of a deliberate action aimed at destroying, as such and in whole or in part, a social group, by deliberately subjecting it to living conditions that were intended to lead to its total or partial physical destruction. The forced transfer of persons from their habitual and permanent residence to a hostile and distant location, with difficult climatic conditions and where no living area was assigned to them, without sufficient food and with no medical care, amounts to the creation of living conditions which destroy those persons, in whole or in part. In this respect, the charges have been fully justified and [it has been] proved in the hearing that the deported people were [gradually] exterminated. The victims' evidence indicates that people died *en route* in the cattle wagons, and that in Siberia they were obliged to live in wooden huts, in mud huts, or alongside livestock. They lacked food, clothing [and] shoes. The people suffered from hunger, a feeling of powerlessness,

cold, illness [and] insects. There exists a similar example, recognised at international level, namely the rounding up of the Jews into ghettos, where they were gradually exterminated in comparable conditions.

There is no evidence that the deported persons were deliberately killed, or caused serious physical or psychological harm. In exile people died and fell ill, also with psychological illnesses, but those were the consequences of the living conditions imposed on them, which gradually exterminated them. In this regard, there are only victims' testimonies and [there are] no relevant documents about the cause of deaths or diagnosed illnesses. The crime of genocide, in so far as formulated in the [relevant] part of this judgment, is a formal crime – it is completed upon committing the proscribed actions, irrespective of the consequences. Therefore, the [court] excludes from the charges the following [elements]: 'by bringing about their deaths, by causing serious harm to their physical integrity or by causing them psychological illnesses'. In so far as the charges concerned [the element] 'by depriving them of their economic, political and/or social rights or by restricting the exercise of those rights', the [court] holds that it [also] has to be excluded from the charges, since Article 68^1 [of the 1961 Criminal Code] provides for a wider scope of this element – it concerns native inhabitants – but charges have not been brought in this respect ...

Both terms – 'sending into exile' and 'deportation' – have been used in the charges against Nikolay Tess. Their meaning is in substance the same. The dictionary of legal terms states that 'deportation' means forced sending into exile (*izsūtīšana*), transfer (*pārcelšana*), expulsion (*izraidīšana*) to another place of residence or another State ... The term 'deportation' is a foreign word. Both terms have been used [in the charges] with the common intention of specifying the nature of the committed crime. The [court] does not see any contradiction between the term used in this judgment, 'sending into exile', and the term used in the charges."

94. As to the second applicant's *mens rea*, the trial court found that:

"... immediately after the Second World War, [he] deliberately became involved in the activities of the punitive organs of the occupying regime ... With other MGB agents, Nikolay Tess adopted and signed the deportation orders concerning the families included in the list of *Kulaks*, following which, on 25 March 1949, innocent [persons] ... were transferred to remote and sparsely populated regions. The [court] finds that N. Tess was aware of the dangerous nature of his acts, that he foresaw the consequences and that he wished them to occur. At the hearing, N. Tess denied having been informed of the secret decrees; however, he stated that this was not a secret for anyone; everyone around him was speaking about it, including at the time when he was ordered to check the opinions [about the persons concerned]; that he understood that a deportation of the [civilian] population would be carried out, and that he was aware of that fact. Operational [investigative] work was not part of his duties, since he was an interpreter from Swedish; however, the operation had to be carried out quickly, and, for that reason, all staff members had been mobilised.

At the hearing, the defendant stated that, in his capacity as an MGB agent, he had carried out the orders of his hierarchical superiors. Under the terms of Article 8 of the Charter of the Nuremberg [IMT], the fact that the defendant acted in accordance with instructions from his government or a hierarchical superior does not relieve him from his responsibility ..."

95. For those reasons, the trial court convicted the second applicant of a crime punishable under Article 68^1 of the 1961 Criminal Code. While the second applicant's crime was serious, the trial court noted that he was by

then aged, infirm and harmless, so it imposed a suspended sentence of two years' imprisonment.

(d) Appeal and application to the Constitutional Court

96. On 7 January 2004 the second applicant was provided with a translation into Russian of the judgment. On 10 January 2004 he lodged an appeal in Russian with the Criminal Cases Chamber of the Supreme Court. On 11 February 2004 that court returned the appeal to the trial court as there was no translation into Latvian. On 3 March 2004 the trial court sent the necessary translation.

97. On 27 February 2004 the second applicant again requested the Constitutional Court to examine whether certain legal provisions of the decision of the Supreme Council of the Republic of Latvia of 25 March 1992 on the implementation in Latvia of the normative legal provisions in relation to crimes against humanity and Article 68^1 of the 1961 Criminal Code were compatible with Articles 89, 91 and 94 of the Constitution and with the 1948 and 1968 Conventions. He relied, *inter alia*, on Article 7 of the Convention. By decision of 18 March 2004, the Constitutional Court dismissed the request because the ordinary remedies had not been exhausted.

98. On 4 June 2004 the appeal court found the second applicant's appeal admissible and scheduled a hearing for 9-11 November 2004.

99. The appeal hearing began on 9 November 2004. By decision of 11 November 2004 the appeal court dismissed the appeal, endorsing the reasoning and findings of the trial court as compliant with domestic law, which corresponded, in turn, with the general principles of international and human rights law. It ruled:

> "The [appeal] court endorses the assessment of facts by the trial court and considers that the conviction of N. Tess was justified; the convicting judgment has been adopted on the basis of provisions of domestic criminal law, which correspond to the general principles of international and human rights law.
>
> The [first-instance] judgment contains a detailed analysis of Article 68^1 [of the 1961 Criminal Code] and international legislation related to it; on the basis [of this analysis] a correct conclusion has been drawn that there was no contradiction between Article 68^1 [of the 1961 Criminal Code] and the [1948 Convention].
>
> It has been rightly recognised in the [first-instance] judgment that on 25 March 1949 the deportation of inhabitants of Latvia was carried out and that N. Tess's actions in this connection were considered as the crime of genocide ...
>
> The [appeal] court considers that the inclusion of the social group in Article 68^1 of the [1961 Criminal Code] has been well-founded because it was precisely those belonging to that social group in Latvia who were victims of the genocide. ...
>
> The mass deportation of a large group of native inhabitants of Latvia from their country, depriving [them] of their property, forcefully settling them in a specially designated territory without adequate living conditions, restricting their freedom of movement, has to be considered as subjecting [them] to living conditions that were

intended to lead to their total or partial physical destruction and has to be regarded as genocide. ...

Having regard to these circumstances, the conduct of N. Tess amounted to an act of violence against the population n of an occupied State and there are no grounds to consider that Article 68^1 contradicts the 1948 Genocide Convention. That Article complies with the principle of the rule of law and ...no statutory limitations apply to crimes against humanity ... including genocide. ...

The conduct of N. Tess has to be considered unlawful, not only under criminal law but also under the general principles of international and human rights law."

100. On 28 November 2004 the second applicant lodged an appeal on points of law with the Senate of the Supreme Court. On 23 January 2005 he submitted additional observations. On 24 March 2005 the complaint was found admissible and a hearing was scheduled for 19 April 2005. On that date, the complaint was heard and dismissed. The Supreme Court agreed with the lower courts. It added that the impugned acts were at the time of their commission criminal offences in accordance with the general principles of law recognised by civilised nations. The Senate of the Supreme Court added:

"The offence with which N. Tess has been incriminated – deportation of 42 families from their home to remote areas of the USSR – forms only a part of the mass deportation of the inhabitants of Latvia by the repressive State authorities of the Soviet Union and N. Tess is only one of its many executors. The first-instance court's judgment contains indications of the mass deportation and these facts are incontestable. By its nature and essence the mass deportation of the inhabitants of Latvia, taking into account the large number of violations of human rights and fundamental freedoms which the deportation entailed, is to be considered as a crime against humanity. The notion of a crime against humanity, as defined by Article 6 (c) of the Charter of the Nuremberg IMT ... includes acts such as deportation of civilians. The nature of the conduct with which N. Tess is accused corresponds to the notion of a crime against humanity as defined by the Charter. The Senate further refers to the UN GA Resolutions A/RES/95(I) and A/RES/96(I) and to the [1948 Convention]. Consequently, genocide as one category of crime against humanity, even if not specified in that sense as defined by Article II of the [1948 Convention], was considered as an international crime. Therefore, the punishment of N. Tess in accordance with Article 68^1 of the [1961] Criminal Code for [having committed genocide] of a social group, does not contradict Article 7 § 2 of the [Convention]. [The court] considers that the crime of genocide may be defined in a different way under national law than in the [1948 Convention], provided that by its nature it corresponds to all elements of a crime against humanity. Under international law, including the 1968 Convention, no statutory limits are applicable to crimes against humanity and war crimes. Therefore, the application of Article 6^1 of the [1961] Criminal Code ... in relation to crimes against humanity and genocide is lawful and justified."

101. On 5 December 2006 the second applicant died.

B. Relevant Latvian law and practice

1. Constitution

102. The relevant Articles of the Latvian Constitution (*Satversme*) provide:

Article 85

"In Latvia, there shall be a Constitutional Court [*Satversmes tiesa*], which, within the limits of its jurisdiction as provided for by law, shall review cases concerning the compliance of laws with the Constitution, as well as other matters regarding which jurisdiction is conferred upon it by law. The Constitutional Court shall have the right to declare laws or other enactments or parts thereof invalid..."

Article 89

"The State shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia."

Article 90

"Everyone has the right to know about his or her rights."

Article 92

"Everyone has the right to defend his or her rights and lawful interests in a fair court. Everyone shall be presumed innocent until his or her guilt has been established in accordance with the law. Everyone whose rights are violated without justification has the right to commensurate compensation. Everyone has the right to the assistance of counsel."

2. Criminal law

(a) Relevant Criminal Codes

103. After the renewal of Latvia's independence, the 1961 Criminal Code remained in force. On 6 April 1993 the 1961 Criminal Code was amended, the following articles being inserted:

Article 6^1

"Persons guilty of crimes against humanity, genocide, crimes against peace or war crimes may be convicted irrespective of when the crimes were committed."

Article 45^1

"The statutory limitation of criminal liability shall not apply to persons guilty of crimes against humanity, genocide, crimes against peace or war crimes."

Article 68^1

"Crimes against humanity including genocide, whether committed in time of war or in time of peace and as defined by the respective normative treaty legislation with regard to their subject-matter and the relevant charge, that is, a deliberate action aimed at destroying, as such and in whole or in part, a national, ethnic, racial, social group,

> or a group defined by common convictions or beliefs, by bringing about the death of members of that group, by causing serious injury to their physical integrity or by causing them psychological illness, by intentionally submitting them to living conditions intended to cause their total or partial physical destruction, and also by depriving native inhabitants (*pamatiedzīvotāji*) of their economic, political and/or social rights or by restricting the exercise of those rights, – are punishable by three to fifteen years' imprisonment."

104. On 1 April 1999 the 1961 Criminal Code was replaced by a new criminal law. Whilst Articles 6^1, 45^1 and 68^1 of the 1961 Criminal Code were essentially reproduced in the 1999 Criminal Law, the maximum prison sentence was extended to life. Under the Chapter entitled "Crimes against humanity, peace, war crimes and genocide", however, section 71 was entitled "Genocide" and did not expressly mention crimes against humanity. From 1 July 2009 a new section was included entitled "Crimes against humanity" (section 71^2). Section 34(1) of the 1999 Criminal Law reads as follows:

> "Execution of a criminal command or a criminal order by the person who has executed it is justifiable only in those cases when the person did not know of the criminal nature of the command or the order and it was not manifest. In such cases, criminal liability shall nonetheless apply if crimes against humanity and peace, war crimes or genocide have been committed."

(b) Code of Criminal Procedure (effective until 1 October 2005)

105. Article 242 of this Code was entitled "continuity, directness of and oral hearing during the adjudication". It provided, *inter alia*, that the hearing of each criminal case must proceed without interruption, so that the trial judge could not hear another case until the pending criminal case had ended. Article 388 provided that the criminal proceedings could be reopened where new circumstances had been discovered, including when the legislative provision on which the sentence of the court was based had been declared invalid by the Constitutional Court (Article 388(4)). The prosecutor also had the right to initiate proceedings if there were newly discovered circumstances (Article 390). That decision could be reviewed where the original decision in the criminal proceedings had been taken by the Criminal Cases Division of the Senate of the Supreme Court, by five senators of that Senate who had not previously participated in the case (Article 392). On reviewing the prosecutor's decision to re-examine a case, the reviewing court could quash the original judgment and send the case for a new investigation or adjudication; quash the judgment and terminate the criminal action; or reject the decision of the prosecution and leave the original unaltered.

(c) Criminal Procedure Law (effective from 1 October 2005)

106. The provisions of the 2005 Criminal Procedure Law with regard to the reopening of criminal proceedings read as follows:

Section 655 – Basis for the reopening of criminal proceedings in view of newly discovered circumstances

"(1) Criminal proceedings in respect of which a court judgment ... has become final may be reopened in view of newly discovered circumstances.

(2) The following shall be deemed as newly discovered circumstances:

...

4) a determination by the Constitutional Court that a legal provision, on the basis of which a ruling has become final, or its interpretation does not comply with the Constitution;

5) a determination by an international judicial institution that a ruling by a Latvian court which has become final contravenes an international norm that is binding upon Latvia."

3. Law on the Constitutional Court

107. Section 16 of the Law on the Constitutional Court provides that that court is competent to examine only the following matters:

"1) compliance of laws with the Constitution;

2) compliance with the Constitution of international agreements signed or entered into by Latvia (even before [parliament] has confirmed the agreement);

3) compliance of other legal instruments or parts thereof with the legal norms (instruments) of superior legal force;

4) compliance of other instruments (with the exception of administrative acts) by [parliament], the Cabinet of Ministers, the President, the Speaker of [parliament] and Prime Minister with the law;

5) compliance of Regulations, by which a Minister, authorised by the Cabinet of Ministers, has suspended binding regulations issued by a Local Government Council, with the law;

6) compliance of the national legal norms of Latvia with the international agreements entered into by Latvia, which are not incompatible with the Constitution."

108. Section 17 of the Law on the Constitutional Court provides that any person who considers that his or her fundamental rights have been breached has the right to submit an application to the Constitutional Court.

109. Section 19^2 of the Law on the Constitutional Court provides:

"(1) Any person who considers that a legal provision, which is not in compliance with a provision having superior legal force, has infringed his or her fundamental rights under the Constitution may lodge a constitutional complaint (an application) with the Constitutional Court.

(2) A constitutional complaint (an application) may be lodged only after exhaustion of all the possibilities for securing protection of such rights through ordinary legal remedies (appeal to a higher authority, appeal or application to a court of general jurisdiction, etc.) or where such remedies do not exist.

(3) Where examination of a constitutional complaint (an application) is in the public interest or where legal protection of the rights in question *via* ordinary remedies does

not enable the appellant to avoid substantial damage, the Constitutional Court may decide to examine the application even before all other domestic remedies have been exhausted.

(4) A constitutional complaint (an application) may be lodged within six months of the date on which the decision of the highest instance becomes final.

(5) The submission of a constitutional complaint (an application) shall not suspend the execution of a judicial decision, except in cases where the Constitutional Court decides otherwise.

(6) In addition to its substance, as required by section 18(1) of this Law, a constitutional complaint (an application) must contain submissions concerning:

(i) the violation of the appellant's fundamental human rights as provided in the Constitution, and;

(ii) the exhaustion of all ordinary remedies or the fact that no such remedies exist.

(7) The following information must be appended to a constitutional complaint (an application):

(i) the explanations and documentation required to establish the facts of the case;

(ii) documents certifying that, where they exist, all ordinary remedies have been exhausted."

110. Section 32 of the Law on the Constitutional Court provides:

"(1) The judgment of the Constitutional Court shall be final. It shall come into legal effect at the time of delivery.

(2) The judgment of the Constitutional Court shall be binding on all State and municipal institutions and authorities, including the courts, and also on natural persons and legal entities.

(3) Any legal provision or act which the Constitutional Court has found incompatible with the legal provision having superior legal force shall be considered invalid from the date of publication of the Constitutional Court's judgment, unless the Constitutional Court rules otherwise.

(4) If the Constitutional Court has declared any international agreement signed or entered into by Latvia as incompatible with the Constitution, the Cabinet of Ministers shall ensure that amendments to the agreement are made without delay, the denunciation of the agreement, the suspension of its operation or the revocation of accession."

Section 32(2) of the Law on the Constitutional Court was amended to provide that the interpretation of a legal provision provided by the Constitutional Court would also be binding. The amendment was effective from 1 January 2010.

4. Selected case-law of the Constitutional Court

111. On 5 March 2002 the Constitutional Court delivered a judgment in case no. 2001-10-01 on the compliance of sections 390-392[2] of the Code of Criminal Procedure and paragraph 3 of its transitional provisions with Article 92 of the Constitution (right to a fair trial). It ruled:

"1. The application includes a claim concerning the compliance of the contested provisions with Article 92 of the Constitution. However, it transpires from the application and the applicant's statements at the hearing that the applicant is in fact challenging only the compliance with the first sentence of Article 92 of the Constitution, namely that 'everyone has the right to defend their rights and lawful interests in a fair court'.

In order to assess whether the contested impugned comply with [this provision], one has to, first of all, ascertain whether the right to a fair court, included in Article 92 of the Constitution:

1) envisages the right to have a criminal matter reviewed under the supervisory procedure and the right to appeal to the court if there are newly discovered circumstances;

2) incorporates other rights or limitations with regard to the rehearing of such criminal matters on which a court decision has taken effect.

In order to establish whether Article 92 of the Constitution incorporates any of the above components, on the one hand the norms of international human rights, including the Convention and its interpretation in ECHR case-law, must be analysed, and on the other hand it must be ascertained whether or not the Latvian legislator has included in Article 92 of the Constitution more extensive rights than those established by the international documents (*see Judgment of 17 January 2002 by the Constitutional Court in case No. 2001-08-01*).

2. Article 14 of the International Covenant on Civil and Political Rights, among other things, envisages that 'everybody, who has been charged with a criminal offence and whose case is being reviewed in court, has the right to request that his case be reviewed by a fair, competent, independent and objective court, established by law'. Article 6 of the Convention also establishes that 'in the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

The objective of this Article is to ensure justice by making use of court proceedings. The right to a fair court includes two aspects – institutional (for example, independence and objectivity) and procedural (adequate examination of the case). In addition, Article 6 of the Convention read together with Article 5 imposes on States a specific, positive obligation to create and maintain the institutional infrastructure necessary to ensure a fair trial. States also have to adopt and implement laws and regulations guaranteeing the fairness and objectivity of the procedure itself (*see Law and Practice of the European Convention on Human Rights and the European Social Charter, Council of Europe, 1996, p.157*).

Likewise, the notion of 'a fair court' enshrined in Article 92 of the Constitution includes two aspects, namely, an independent judicial institution and an adequate process that complies with the rule of law, in accordance with which cases are examined. As regards the first aspect, this notion must be read together with Chapter 6 of the Constitution; as regards the other, it must be read together with the principle of the rule of law, which follows from Article 1 of the Constitution. Article 92 of the Constitution provides for both – the duty to establish a specific system of judicial institutions and the duty to adopt corresponding procedural laws and regulations.

Thus Article 92 of the Constitution demands the establishments of a system in which criminal matters will be reviewed by a fair, objective court under a procedure that ensures a fair and objective review by a court."

112. On 16 December 2008 the Constitutional Court delivered its judgment in case no. 2008-09-0106 on the compliance of the first paragraph of section 230^1 of the Criminal Law with the first sentence of Article 7 § 1 of the Convention and Articles 64 (subjects enjoying legislative initiative) and 65 (procedure for submitting draft laws to parliament) and the second sentence of Article 92 (presumption of innocence) of the Constitution. It ruled:

> "4. The second sentence of Article 92 of the Constitution provides: 'Everyone shall be presumed innocent until his or her guilt has been established in accordance with the law.'
>
> The content of the provisions of Chapter 8 of the Constitution on 'Fundamental Human Rights' has been formed by observing the proper form and laconic style of the Constitution. Therefore fundamental human rights are provided for in the Constitution in general wording. When evaluating the norms included in the Constitution, it is necessary to take into consideration Latvia's international liabilities in the field of human rights. International human rights legislation and its application in practice serve as a means of interpretation on the level of constitutional law to determine the content and scope of fundamental rights and the principle of the law-governed State, in so far as it does not lead to a decrease in or limitation of the fundamental rights included in the Constitution (*see Judgment of 13 May 2005 by the Constitutional Court in case No. 2004-18-0106, paragraph 5 of the Concluding Part and Judgment of 18 October 2007 by the Constitutional Court in case No. 2007-03-01, paragraph 11*). The State's duty to take into consideration its international liabilities in the field of human rights follows from Article 89 of the Constitution, which provides that the State shall recognise and protect fundamental human rights in accordance with this Constitution, and with laws and international agreements binding upon Latvia. This article clearly indicates that the objective of the constitutional legislator was to ensure that domestic human-rights provisions were in harmony with international human-rights legislation (*see Judgment of 30 August 2000 by the Constitutional Court in case No. 2000-03-01, paragraph 5 of the Concluding Part, Judgment of 17 January 2002 by the Constitutional Court in case No. 2001-08-01, paragraph 3 of the Concluding Part and Judgment of 18 October 2007 by the Constitutional Court in case No. 2007-03-01, paragraph 11*).
>
> 4.1. The first sentence of Article 7 § 1 of the Convention provides: '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.'
>
> This provision first of all includes the principle of prohibition of the retrospective application of the law, although it simultaneously establishes other principles, namely that only a law can define a crime and prescribe a penalty. The criminal law must not be extensively construed to an accused's detriment, for example by analogy (*see, for example, Kokkinakis v. Greece, judgment of 25 May 1993, no. 14307/88, paragraph 52 and C.R. v. The United Kingdom, judgment of 22 November 1995, no. 20190/92, paragraph 35*).
>
> Taking into consideration the case-law of the ECHR, it can be concluded that an action of a person (action or inactivity) may be regarded as criminal only in the event that prohibition of such action has been established by law. The law implies the legal norms that are accessible and foreseeable (*see Tolstoy Miloslavsky v. the*

United Kingdom, judgment of 23 June 1995, no 18139/91, paragraph 37 and C.R. v. the United Kingdom, judgment of 22 November 1995, no 20190/92, paragraph 33).

4.2. The principle of presumption of innocence is first of all established in the second sentence of Article 92 of the Constitution (*see Judgment of 23 February 2006 by the Constitutional Court in case No. 2006-22-01, paragraph 4*). Like the first sentence of Article 7 § 1 of the Convention, however, the words of the second sentence of Article 92 of the Constitution 'in accordance with the law' imply the principle of *nullum crimen, nulla poena sine lege*, namely, a person shall be held guilty and convicted only for such activities (or inactivity) that are regarded as a criminal offence in accordance with the law.

It can be concluded that the content of the second sentence of Article 92 of the Constitution includes the fundamental human rights established in the first sentence of Article 7 § 1 of the Convention.

Consequently, the Constitutional Court will examine the compliance of the contested provision with the second sentence of Article 92 of the Constitution, using the interpretation of Article 7 of the Convention provided for by the ECHR.

5. In order to assess whether the contested provision complies with the second sentence of Article 92 of the Constitution, which provides that everyone shall be presumed innocent until his or her guilt has been established in accordance with the law, it is necessary to establish the following:

1) whether the law (the contested provision) was enacted in accordance with the procedure established in the Rules of Procedure of Parliament;

2) whether the contested provision is publicly accessible, clear and unambiguous enough to serve as the basis for holding a person criminally liable.

...

Consequently, the contested provision permits the subject of the litigation, including the applicant, to understand and anticipate his duty. As to the persons who apply the contested provision, it permits the establishment of all factual and legal circumstances with a view to assessing the ongoing processes and deciding whether to hold a person liable under the law.

Consequently, the contested provision shall be regarded as clear enough to hold a person criminally liable.

The Constitutional Court

Based on sections 30 – 32 of the Constitutional Court Law,

holds:

The first paragraph of section 230^1 of the Criminal Law complies with Article 64, Article 65 and the second sentence of Article 92 of the Constitution of the Republic of Latvia and the first sentence of Article 7 § 1 of the Convention."

C. Relevant Soviet law

1. Decree no. 761 defining "Kulaks" in Soviet law

113. The Decree "on the characteristics of *Kulak* farms and the manner of taxing them" was adopted by the Council of Ministers of the Latvian SSR on 27 August 1947. It read, in so far as relevant, as follows:

Article 1

"Those [agricultural] properties which, after the liberation of the territory of the Latvian SSR from German occupation, corresponded to one or several of the following characteristics shall be considered to be farms of *Kulaks*:

(a) they employed or employ, on a permanent basis, labourers who are remunerated for agricultural or industrial work;

(b) they systematically employed or employ seasonal or day labourers for agricultural or industrial work;

(c) they systematically used the labour of other citizens by making them work in very difficult conditions to reimburse the loan of horses, food products, seed or agricultural machinery;

(d) they systematically received remuneration, in money or in kind, for the use of complex agricultural machinery belonging to them (tractors, locomotives, harvesters, combine harvesters) on other agricultural properties;

(e) they systematically received or receive income from mills, butter churns, barley grinders or other machinery powered by motor, water or steam, and from the hiring out of such installations;

(f) they received or receive income from purchases, resale or usury."

Article 2

"Those [agricultural] properties which, during the occupation of the territory of the Latvian SSR [by Nazi Germany], included repossessed land or property which had been confiscated from the owners during the land reform of 1940 and 1941 and which was again taken from them ... after the liberation ... of the Latvian SSR from the German occupation, as well as the properties of active collaborators with the German-Fascist occupiers, shall be regarded as equivalent to *Kulak* farms."

2. Top secret Decree no. 390-138ss

114. The Decree "on the deportation from the territory of Lithuania, Latvia and Estonia of *Kulaks* and their families, the families of bandits and nationalists who are illegal, who were killed in the course of armed activities or who have been convicted, legalised bandits (*легализованные бандиты*) who continue hostile activities and their families, as well as the families of supporters of repressed bandits" was adopted by the Council of Ministers of the USSR on 29 January 1949. It read as follows:

"The Council of Ministers of the USSR decides:

1. To accede to the proposals of the Councils of Ministries of Lithuanian SSR, Latvian SSR and Estonian SSR, and the Central Committees of the Communist (bolshevist) Parties of Lithuania, Latvia and Estonia on the deportation out of the territory of the Lithuanian SSR, the Latvian SSR and the Estonian SSR of *Kulaks* and their families; the families of bandits and nationalists who are illegal, who were killed in the course of armed conflicts or who have been convicted; legalised bandits, who continue hostile activities, and their families; as well as the families of the supporters of repressed bandits.

To deport altogether 29,000 families consisting of 87,000 persons, of these 8,500 families, 25,500 persons from the Lithuanian SSR; 13,000 families, 39,000 persons from the Latvian SSR; 7,500 families, 22,500 persons from the Estonian SSR.

2. To deport forever (to send for perpetual exile) the persons belonging to the abovementioned categories to Yakutsk ASSR, the territories of Krasnojarsk and Khabarovsk, the regions of Omsk, Tomsk, Novosibirsk and Irkutsk, and to apply the Decree of the Presidium of Supreme Council of the USSR of 26 November 1948: 'Bringing to criminal account the persons who have been deported to remote areas of the Soviet Union during the Great Patriotic War, but who have escaped from the sites of compulsory exile'.

3. To oblige the Ministry of State Security of the USSR (comrade Abakumov) to carry out the deportation of the persons named in point 1 of this Decree from Lithuania, Latvia and Estonia during the period from 20 to 25 March 1949.

To deport kulaks and their families on the basis of the lists confirmed by the Councils of the Ministries of the Lithuanian, the Latvian and the Estonian SSRs; the families of bandits and nationalists who are illegal, who were killed in the course of armed conflicts or who have been convicted; legalized bandits, who continue resistance, and their families; also the families of the supporters of repressed bandits according to the decision of the Special Consultation by the Ministry of State Security of the USSR.

4. To oblige the Ministry of Internal Affairs of the USSR (comrade Kruglov) to guarantee the convoy and transportation of the deportees from Lithuania, Latvia and Estonia by means of railway and water carriage up to the sites of their exile; carefully guard the deportees on the way; to guarantee administrative surveillance of the deportees at exile sites and keep proper account over deportees – to apply a regime that prevents any escapes; to guarantee work for deportees in agriculture (in collective and State farms, in the timber industry and goldmine industry).

To organize special commandant's offices of the Ministry of Internal Affairs at exile sites.

5. To allow the deportees to take along personal valuables, household items (clothes, tableware, farming and household items) and food reserves, altogether up to 1,500 kilograms per family.

The rest of the property and livestock of the deportees should be confiscated.

The confiscated property of the deportees must be used to settle the State liabilities, the property that remains after [that] (residential and auxiliary buildings, enterprises, farming and household items and livestock) must be given to collective farms free of charge and put into indivisible assets. The rest of the property must be transferred to finance authorities for sale. Food cereals, fodder and industrial crops must be transferred to the State.

6. To oblige the Ministry of Finance of the USSR (comrade Zverev) to assign in 1949 additional financial resources from the all-Union budget to the Ministry of Internal Affairs for special commandant's offices, and also for feeding and medical care of deportees during transportation, calculating 5 roubles and 60 kopeks per person per day.

7. To oblige the Ministry of Transportation (Communication) of the USSR (comrade Beshchev) to provide to the Ministry of Internal Affairs the necessary amount of railway carriages for transporting deportees, and to ensure that the deportees' echelons would run up to the exile sites with the rights of army echelons.

Payments for transporting of the deportees must be made according to rates set for transporting prisoners.

8. To oblige the Ministry of Trade of the USSR (comrade Zhavoronkov) to organise warm meals for the deportees' echelons using railway buffets and to pay for the meals with financial resources provided to the Ministry of Internal Affairs on the basis of point 6 of this Decree.

9. To oblige the Ministry of Health of the USSR (comrade Smirnov) to provide for each deportees' echelon a doctor and two nurses together with the necessary amount of medicaments and bandages, in order to ensure medical aid during transportation.

10. To oblige the Council of Ministries of Yakutsk ASSR, and the Executive Committees of the Councils of the Deputies of the Working People of the territories of Krasnojarsk and Khabarovsk, and the regions of Omsk, Tomsk, Novosibirsk and Irkutsk to render assistance in settling the deportees and to organise their households and living environment; also, if necessary, to arrange for disabled and elderly people's homes for lonely disabled and elderly people who arrive among the deportees and to allocate necessary financial resources for setting up and maintaining such institutions."

3. Soviet criminal law

115. By decree of 6 November 1940, the Supreme Council of the Latvian SSR replaced the Latvian Criminal Code 1933 with the Criminal Code of the Soviet Union 1926, the applicability of which was extended to the territory of Latvia, and which remained in force until 1961.

116. On 6 January 1961 the Supreme Council of the Latvian SSR adopted a new Criminal Code, replacing the 1926 Code ("1961 Criminal Code"). It entered into force in 1961.

D. Relevant international law and practice

1. The Nuremberg Principles

117. The Charter of the International Military Tribunal ("the IMT") Nuremberg, set up in accordance with the London Agreement signed on 8 August 1945 by the Governments of the USA, France, the United Kingdom and the USSR, contained the following definition of crimes against humanity:

Article 6

"The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:...

(c) crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

118. The definition was subsequently codified as Principle VI in the "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal", formulated by the International Law Commission in 1950 under the United Nations ("UN") General Assembly Resolution 177 (II) and affirmed by the General Assembly.

119. Nuremberg Principle I read as follows:

"Any person who commits an act which constitutes a crime under international law is responsible thereof and liable to punishment"

120. Principle II stipulated as follows:

"The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law".

121. Principle IV provided:

"The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

122. Principle VI stated:

"The crimes hereinafter set out are punishable as crimes under international law:

...

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime."

2. Relevant UN resolutions

123. UN General Assembly Resolution No. 95(I), adopted on 11 December 1946, provided:

"The General Assembly ... [a]ffirms the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal ..."

124. UN General Assembly Resolution No. 96(I), also adopted on 11 December 1946, provided:

> "Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.
>
> Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.
>
> The punishment of the crime of genocide is a matter of international concern.
>
> The General Assembly, therefore,
>
> Affirms that genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable;
>
> Invites the Member States to enact the necessary legislation for the prevention and punishment of this crime ..."

3. Convention on the Prevention and Punishment of the Crime of Genocide ("the 1948 Convention")

125. The 1948 Convention was adopted by the UN General Assembly on 9 December 1948. It was signed by the USSR on 16 December 1949 and ratified by it on 3 May 1954. It reads, in so far as relevant, as follows:

> "The Contracting Parties,
>
> Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,
>
> Recognizing that at all periods of history genocide has inflicted great losses on humanity, and
>
> Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,
>
> Hereby agree as hereinafter provided:
>
> **Article I:** The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.
>
> **Article II:** In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Article III: The following acts shall be punishable:

(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

Article IV: Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V: The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI: Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

4. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity ("the 1968 Convention")

126. The 1968 Convention was signed by the USSR on 6 January 1969 and ratified by it on 22 April 1969. It was ratified by Latvia on 14 April 1992.

127. The Preamble to the 1968 Convention recalls a number of instruments including UN resolutions 2184 (XXI) of 12 December 1966 and 2202 (XXI) of 16 December 1966 which expressly "condemned as crimes against humanity the violation of the economic and political rights of the indigenous population on the one hand and the policies of apartheid on the other". Article 1 of the 1968 Convention also provides that:

"No statutory limitation shall apply to the following crimes, irrespective of the date of their commission ...

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed."

5. Rome Statute of the International Criminal Court ("the Rome Statute")

128. Articles 6 and 7 of the Rome Statute read as follows:

Article 6 – Genocide

"For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group."

Article 7 – Crimes against humanity

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

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) 'Attack directed against any civilian population' means a course of 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;

(b) 'Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) ‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) ‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) ‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) ‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) ‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) ‘Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”

6. Relevant case-law

129. In 1951 the International Court of Justice (“the ICJ”) stated, in its *Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[1], that the principles underlying the 1948 Convention were recognised by civilised nations as binding on States even without any conventional obligation. The ICJ referred to the UN General Assembly Resolution 96(I) and to “the moral and humanitarian principles” which were at the basis of the 1948 Convention.

130. In the *Eichmann* case 1961[2], Adolf Eichmann was convicted by the District Court of Jerusalem under section I(a) of the Nazis and Nazi Collaborators (Punishment) Law, 5710/1950, an Israeli law which punished crimes against the Jewish people and which was derived from Article II of the 1948 Convention. Having quoted from the above-mentioned *Advisory Opinion*, the trial court found that there was no doubt that genocide was

1. ICJ Reports 1951, p. 23.
2. 36 International Law Reports (“ILR”), 1968, pp. 5-344.

recognised during the second world war as a crime under international law *ex tunc* so that jurisdiction over such crimes was universal.

131. By a judgment of 29 May 1962, the Supreme Court of Israel confirmed the trial court's judgment and added:

> "...[I]f any doubt existed as to this appraisal of the Nuremberg Principles as principles that have formed part of the customary law of nations "since time immemorial", two international documents justify it. We allude to the [UN] General Assembly Resolution [No. 95(1)] of December 11 1946, which 'affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal", and also to the General Assembly Resolution of the same date, No. 96(I), in which the General Assembly "affirms that Genocide is a crime under international law' ...
>
> What is more, in the wake of Resolution 96(I) of December 11, 1946, the [UN] General Assembly unanimously adopted on December 9, 1948, the [1948 Convention]. Article I of this Convention provides: '[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law'.
>
> As the District Court has shown, relying on the Advisory Opinion of the [ICJ] dated May 28, 1951, the import of this provision is that principles inherent in the Convention – as distinct from the contractual obligations embodied therein – "were already part of customary international law when the dreadful crimes were perpetrated, which led to the United Nations resolution and the drafting of the Convention – the crimes of Genocide committed by the Nazis (paragraph 21 of the judgment).
>
> The outcome of the above analysis is that the crimes set out in the Law of 1950, which we have grouped under the inclusive caption "crimes against humanity", must be seen today as acts that have always been forbidden by customary international law – acts which are of a "universal" criminal character and entail individual criminal responsibility. That being so, the enactment of the Law was not from the point of view of international law a legislative act which conflicted with the principle *nulla poena* or the operation of which was retroactive, but rather one by which the [legislature] gave effect to international law and its objectives ..."

7. Parliamentary Assembly of the Council of Europe ("PACE") Resolution 1481 (2006)

132. On 25 January 2006 the PACE adopted a "Resolution on the Need for International Condemnation of Crimes of Totalitarian Communist Regimes" which, in so far as relevant, reads as follows:

> "1. The Parliamentary Assembly refers to its Resolution 1096 (1996) on measures to dismantle the heritage of the former communist totalitarian systems.
>
> 2. The totalitarian communist regimes which ruled in central and eastern Europe in the last century, and which are still in power in several countries in the world, have been, without exception, characterised by massive violations of human rights. The violations have differed depending on the culture, country and the historical period and have included individual and collective assassinations and executions, death in concentration camps, starvation, deportations, torture, slave labour and other forms of mass physical terror, persecution on ethnic or religious grounds, violation of freedom

of conscience, thought and expression, of freedom of the press, and also lack of political pluralism.

3. The crimes were justified in the name of the class struggle theory and the principle of dictatorship of the proletariat. The interpretation of both principles legitimised the "elimination" of people who were considered harmful to the construction of a new society and, as such, enemies of the totalitarian communist regimes. A vast number of victims in every country concerned were its own nationals. It was the case particularly of the peoples of the former USSR who by far outnumbered other peoples in terms of the number of victims ..."

COMPLAINTS

133. The applicants complained under Article 7 of the Convention that they had been convicted of a crime which had not been a crime at the time of the impugned facts in 1949. They also complained in substance under Article 6 of the Convention that the proceedings against them had been unreasonably long.

THE LAW

A. Joinder of the applications

134. Given that the applications at hand raise related issues under the Convention, the Court decides to join them in accordance with Rule 42 § 1 of the Rules of Court (see *Likvidējamā p/s Selga and Vasiļevska v. Latvia* (dec.), nos. 17126/02 and 24991/02, § 74, 1 October 2013).

B. Article 7 of the Convention

1. The parties' submissions

135. The respondent Government argued that the applicants had failed to exhaust domestic remedies because the compatibility of Articles 6^1 and 68^1 of the 1961 Criminal Code with the Constitution and with international law had never been considered by the Constitutional Court through properly constituted proceedings under sections 16, 17 and 19 of the Law on the Constitutional Court. The applicants had sought to do so incorrectly during the criminal action but had failed to do so when they should have, at the end of the criminal proceedings.

136. The respondent Government underlined that a remedy was accessible, including for the applicants' successors. Section 19 of the Law on the Constitutional Court and Article 34 of the Convention were similar

and the Constitutional Court applied Convention case-law. The remedy would also have been capable of providing redress: while the Constitutional Court could not quash a conviction, its judgment would provide a basis for applying to reopen and adjudicate the case *de novo* (Articles 388(4) and 390 of the 1961 Criminal Code). Furthermore, the Court had acknowledged that in cases where a judgment of the Constitutional Court may serve as a basis for reopening proceedings, such a remedy was considered to be effective (the respondent Government referred to *Łaszkiewicz v. Poland*, no. 28481/03, §§ 67-68, 15 January 2008). Indeed, the result of a successful application to the Constitutional Court would have been the same as one to this Court. The respondent Government relied on several judgments of the Constitutional Court (case no. 2003-05-01, judgment of 29 October 2003; case no. 2006-03-0106, judgment of 23 November 2006; and case no. 2008-09-0106, judgment of 16 December 2008). The first case concerned the text of section 271 (defamation of public officials) of the Criminal Law: the Constitutional Court found that provision to be incompatible with Article 100 of the Constitution (freedom of expression) and declared the provision null and void (see, for more details, *Raudevs v. Latvia*, no. 24086/03, §§ 19-22, 17 December 2013). The second case concerned an application submitted by twenty members of parliament contesting several provisions of the Law on Meetings, Street Processions and Demonstrations: the Constitutional Court found most of those provisions to be incompatible with Article 103 of the Constitution (freedom of assembly) and Article 11 of the Convention. The third case concerned section 230^1 (1) of the Criminal Law and animal-keeping regulations. The plaintiff argued that that provision had not been adopted in accordance with the prescribed legislative procedure and had not been clear, accessible and foreseeable. The Constitutional Court rejected that complaint (see paragraph 112 above). The respondent Government argued that, contrary to the applicants' submissions, the complaint under Article 7 concerned the text of the domestic law because the contested retroactivity was provided for by the law itself.

137. The applicants maintained that they had exhausted all effective domestic remedies. The Government's position was based on a wrong interpretation of the scope of their complaint. Their complaint was not that the legislator had enacted a law which was incompatible with international law, but rather that in 1993 it had enacted legislation (Article 68^1 of the 1961 Criminal Code) with a wider scope for criminalising genocide than that provided for in the 1948 Convention. The domestic authorities had applied that legislation retrospectively and convicted the applicants of acts perpetrated in 1949, which had not been considered criminal at the time. An application to the Constitutional Court after the criminal appeal would not have been effective as only the criminal courts could examine the merits of a criminal conviction. In any event, an application before the Constitutional

Court was not an effective domestic remedy in the present context as its jurisdiction was limited by section 16 of the Law on the Constitutional Court. Consequently, that court was not competent to annul or modify the judgment of an ordinary court and send a case back to the criminal court. Nor was it competent to assess the application of laws by the domestic courts (at issue in the present case), whereas it could examine the compliance of the text of laws with the Constitution and international law (not at issue).

138. The Russian Government, a third party to the application of the second applicant, also submitted that the Constitutional Court was not competent to review the domestic courts' interpretation and application of the law in a particular case, underlining that the respondent Government had submitted no relevant case-law substantiating their argument.

2. The Court's assessment

139. The Court reiterates that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Court is tasked with the supervision of the implementation by Contracting States of their obligations under the Convention. It cannot, and must not, usurp the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. Those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided for by the national legal system. The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases that require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions (see *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV; *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, § 69, ECHR 2010; and, more recently, *Vučković and Others v. Serbia* [GC], no. 17153/11, § 70, 25 March 2014).

140. The area of the exhaustion of domestic remedies requires a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the

applicant's complaints and offered reasonable prospects of success. However, once this burden has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Melnītis v. Latvia*, no. 30779/05, § 46, 28 February 2012 with further references). The existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Akdivar and Others*, cited above, § 71, and *Leja v. Latvia*, no. 71072/01, § 48, 14 June 2011). The Court has also held that where there is a doubt about the effectiveness of a remedy, the issue should be tested before the national courts (see *Ignats v. Latvia* (dec.), no. 38494/05, § 114, 24 September 2013, and *Iļjins v. Latvia* (dec.), no. 1179/10, § 37, 5 November 2013).

141. The Court has already examined the scope of the Constitutional Court's review in Latvia (see *Grišankova and Grišankovs v. Latvia* (dec.), no. 36117/02, ECHR 2003-II (extracts); *Liepājnieks v. Latvia* (dec.), no. 37586/06, §§ 73-76, 2 November 2010; *Savičs v. Latvia*, no. 17892/03, §§ 113-17, 27 November 2012; *Mihailovs v. Latvia*, no. 35939/10, §§ 157-58, 22 January 2013; *Nagla v. Latvia*, no. 73469/10, § 48, 16 July 2013; and *Latvijas jauno zemnieku apvienība v. Latvia* (dec.), no. 14610/05, §§ 44-45, 17 December 2013).

142. The Court has noted that the Constitutional Court examined, *inter alia*, individual complaints challenging the constitutionality of a legal provision or its compliance with a provision that has superior legal force. An individual constitutional complaint can be lodged against a legal provision only when an individual considers that the provision in question infringes his or her fundamental rights as enshrined in the Constitution. The procedure of an individual constitutional complaint cannot therefore serve as an effective remedy if the alleged violation resulted only from an erroneous application or interpretation of a legal provision, the content of which is not unconstitutional (see *Latvijas jauno zemnieku apvienība*, cited above, §§ 44-45).

143. Furthermore, the Constitutional Court has the competence to review the constitutionality of international treaties concluded by Latvia. In the Latvian legal system an alleged violation may result from a legal provision contained in an international treaty, since international treaties are directly applicable in Latvia. The Constitutional Court has previously engaged in a review of the constitutionality of international treaties and has the authority to rectify the situation if a conflict between the Constitution and the treaty in question were to be found (paragraph 110 above). This may, *inter alia*, give rise to new court proceedings and be the basis for

claims for compensation (see *Kroņkalns v. Latvia* (dec.), no. 21694/06, § 38, 17 September 2013).

144. Turning to the present case, the Court observes that, although the applicants complained to the Latvian Constitutional Court about the scope of Article 68^1 of the 1961 Criminal Code, before the Court they argued that their complaint did not concern an allegation that the definition of genocide was wider under national law than international law in terms of the inclusion of a social group as one of the protected groups (see paragraph 137, and contrast with the applicants' position at the domestic level, paragraphs 45, 58, 78, 82 above), but was rather about the retrospective application of the law.

145. Indeed, legislative jurisdiction is one of the spheres which traditionally form part of State sovereignty in the exercise of which the State may enact such laws as it considers necessary to criminalise particular conduct, subject to certain limitations. To give an example, a number of States (such as Bangladesh, Panama, Costa Rica, Peru, Slovenia, Lithuania and Paraguay) have done so by adding a group to those protected in relation to the crime of genocide. The Court finds that the applicants' complaint principally relates to the retroactive application of the criminal law in the criminal proceedings against them, allegedly in breach of Article 7 of the Convention. The parties did not dispute this.

146. In this connection, the Court would add that Article 7 of the Convention is not confined to prohibiting the retrospective 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. It follows from those principles that an offence must be clearly defined in the law, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see *Korbely v. Hungary* [GC], no. 9174/02, § 70, ECHR 2008, and, more recently, *Del Rio Prada v. Spain* [GC], no. 42750/09, § 91, ECHR 2013).

147. In the light of the parties' observations and the relevant domestic material, the Court observes that the constitutional review in Latvia is characterised by two important elements: its scope and the form of redress it provides. The parties' disagreement in the present case relates to precisely those two elements.

148. The Court has had ample opportunity to pronounce on the first of those elements, namely, that a constitutional complaint can only be lodged against a legal provision and not against a judicial or an administrative decision as such. Therefore, recourse to the Constitutional Court can only be had in a situation in which the alleged violation of the Convention resulted from the application of a legal provision which is called into question as

being contrary to the Constitution (see, among many others, *Grišankova and Grišankovs*, cited above). The Court would add that such a legal provision must constitute the direct legal basis for the individual decision in respect to which the violation is alleged. Thus, a constitutional complaint cannot serve as an effective remedy if the alleged violation resulted only from the erroneous application or interpretation of a legal provision, the content of which is not unconstitutional (see, among many others, *Liepājnieks*, cited above, § 73).

149. Consequently, the Court has to examine whether the judicial decisions in respect of both applicants, which allegedly violated the Convention, were adopted by directly applying a legal provision which can be called into question as being contrary to the Constitution. In the present case that means establishing whether the applicants' conviction of the crime proscribed by Article 68^1 of the 1961 Criminal Code for acts committed in March 1949 was directly related to any legal provisions which could reasonably be questioned as being contrary to the Constitution.

150. Firstly, the Court must determine the legal provisions that directly relate to the conviction of both applicants. While the crime for which the applicants were convicted was proscribed under Article 68^1 of the 1961 Criminal Code, its retrospective application, in terms of national law, as argued by the Government, was provided for by Article 6^1 of the 1961 Criminal Code and also by Article 45^1 of the 1961 Criminal Code, both inserted in the 1961 Criminal Code in 1993. The Court would add that those two provisions by their very nature could not be subject to interpretation by the domestic courts, providing as they did for retrospective application in respect of the most serious crimes. Retrospective application, as provided for in Articles 6^1 and 45^1 of the 1961 Criminal Code, was clearly set out in the national criminal law.

151. Moreover, the lack of statutory limitations and the possibility of convicting perpetrators of one of the gravest international crimes – "crimes against humanity including genocide" – irrespective of when such acts had taken place stems not only from the text of national law, but also from the very nature of that crime. In convicting both applicants, the domestic courts reasoned that the lack of any statutory limitations in respect of "crimes against humanity including genocide" – irrespective of the date of their commission and whether they had been committed in time of war or in time of peace – was not only provided for in national law but was also spelled out in the 1968 Convention (see paragraphs 65 and 100 above). After accession to the relevant international treaties, Latvia was bound to implement the principles contained therein. Importantly, the text of Article 68^1 of the 1961 Criminal Code defined the crime as a "crime against humanity including genocide". It also referred to the definition of the crime "by the respective normative treaty legislation" and contained a reference to international law (see paragraph 103 above). Therefore, the Court rejects the

applicants' argument that their convictions were merely related to an interpretation and application of the relevant provisions. Their convictions were based on the provisions of the national criminal law, which transposed the relevant provisions of international law.

152. Furthermore, assuming that the applicants' complaint referred to the allegedly broader definition of the crime in the relevant domestic law provision, that definition was provided by the legislator. It was not subject to interpretation by the domestic courts. It could, however, be subject to constitutional review in the event that a question regarding its constitutionality arose.

153. Having established that retrospective application of criminal law for the most serious crimes was provided for in the national criminal law and also inherent in the notion of the particular crime itself, the Court must next examine whether the constitutional complaint was an effective remedy, available in theory and practice in the circumstances of the present case. In view of the Court's case-law and parties' submissions, it means examining whether the relevant criminal-law provisions (see paragraph 150 above) could be called into question as being not compatible with the fundamental rights enshrined in the Constitution.

154. The Court notes that the Latvian Constitution does not contain an express provision corresponding to Article 7 of the Convention. Nevertheless, in its early case-law the Constitutional Court established that the notion of "a fair court", enshrined in Article 92 of the Constitution, includes two aspects – "an independent judicial institution and an adequate process that complies with the rule of law" (see paragraph 111 above). The Government have provided relevant examples of the Constitutional Court's case-law demonstrating, *inter alia*, that Article 92 of the Constitution includes the guarantees enshrined in Article 7 of the Convention (see paragraph 136 above).

155. Indeed, Article 92 of the Constitution, as interpreted by the Constitutional Court, includes not only the principle of *nullum crimen, nulla poena sine lege* but also provides that laws and regulations should be accessible and foreseeable (see the Constitutional Court's judgment in case no. 2008-09-0106, paragraph 112 above).

156. Similar issues in relation to the scope of protection afforded by the Constitution have also been noted in the national constitutional-law doctrine, namely that Article 90 together with Article 92 of the Constitution establish, in particular, that criminal-law provisions must be clear and foreseeable (see *Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga, Latvijas Vēstnesis*, 2011, p.70).

157. The Constitutional Court has further ruled that Article 89 sought to ensure harmony of the Constitutional provisions of human rights with international human rights law (see the Constitutional Court's judgment in

case no. 2008-09-0106, paragraph 112 above). In response to one of the applications lodged by the second applicant, the Constitutional Court held that Article 89 of the Constitution did not contain specific human rights but rather the principle of protection of human rights as such (see paragraph 78 above).

158. Furthermore, the cases relied on by the Government demonstrate that it is the practice of the Constitutional Court to examine the compatibility of legal provisions not only with the Constitution itself, but also with the Convention. As an example, the Government referred to case no. 2008-09-0106, which concerned the compatibility of a criminal-law provision not only with several Articles of the Constitution, but also with Article 7 § 1 of the Convention (see paragraph 112 above).

159. The examples provided by the Government are sufficient for the Court to find that the relevant domestic law provisions concerning retrospective application of criminal law and the scope of the crime itself could be challenged before the Constitutional Court as being contrary to the human rights enshrined in the Constitution (for example in Articles 89, 90 and 92 of the Constitution).

160. Moreover, the Court considers that the fact that the applicants on several occasions lodged constitutional complaints themselves and also requested the criminal courts to obtain preliminary rulings from the Constitutional Court before their respective trials were completed (see paragraphs 45, 58, 78, 81, 82, 86 and 97 above) indicates that both applicants had *a priori* deemed, contrary to their allegations now before the Court, that it would be an effective remedy. The Constitutional Court rejected those applications as premature since the applicants' trials had not been completed (see paragraphs 59, 82 and 97 above). The applicants' allegation that the Constitutional Court was not competent to annul or modify judgments adopted by the ordinary courts relates to the second element of constitutional review in Latvia, which the Court will examine immediately below.

161. The second element of constitutional review under Latvian law has not to date been examined by the Court. It concerns the redress the constitutional complaint provides to the individual. The Court observes that, in accordance with Article 85 of the Constitution the effect of a ruling of the Constitutional Court is to abolish a legal provision which has been found incompatible with the Constitution (see paragraph 102 above). Furthermore, under section 32(2) of the Law on the Constitutional Court, a judgment by that court and its interpretation of any legal provision contained therein are binding on all domestic authorities and natural and legal persons. Also, under section 32(3) the Constitutional Court has competence to decide the date from which the provision which it has found incompatible with the Constitution becomes invalid (see paragraph 110 above). Accordingly, the Constitutional Court has the competence to invalidate the impugned legal

provision from a particular date, including from the date of its enactment; it can also define the scope of persons affected by such invalidation. The Constitutional Court's ruling, however, does not automatically quash an individual decision in relation to the constitutional complaint which was lodged. The Government relied on the provisions of the Code of Criminal Procedure to argue that the author of a successful constitutional complaint had the right to request that the proceedings in his case be reopened or otherwise reviewed on the basis of newly discovered circumstances (see paragraph 105 above). The Court would add that the 2005 Criminal Procedure Law also contained similar provisions (see paragraph 106 above).

162. It is true that in Latvia a successful appellant has to go through another step – to request the reopening of his or her individual case in the event that the Latvian Constitutional Court has found that his conviction was based on provisions of national criminal law which were incompatible with the Constitution. However, since in the renewed examination of the case the authorities will be bound by the judgment of the Constitutional Court and its interpretation of the impugned provision, the two-step remedy envisaged under Latvian law can be considered as capable of providing redress in the circumstances of the present case.

163. Lastly, as to the prospects of success, although to date the Latvian Constitutional Court does not appear to have examined on the merits an identical complaint, the Government's submissions as well as the Court's case-law on the nature of the proposed remedy (see paragraph 139 above) lead the Court to conclude that if a question as to the constitutionality of a provision of criminal law were to arise, the Constitutional Court could exercise its jurisdiction on that matter, once properly seized with it.

164. Furthermore, the Court reiterates that the guarantee enshrined in Article 7 is an essential element of the principle of the rule of law (see *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010). The Latvian Constitutional Court in its early case-law has established that the procedural aspect of the notion of a "fair court" has to be read together with the principle of the rule of law, which follows from Article 1 of the Latvian Constitution (see paragraph 111 above). In view of this domestic case-law, the Court notes that questions pertaining to the rule of law are also examined by the Latvian Constitutional Court. Consequently, it fell to the applicants to establish that that remedy was for some reason inadequate and ineffective in their circumstances. They have failed to do so.

165. Having regard to the foregoing, the Court finds that the applicants in the present case were required to lodge a constitutional complaint before having applied to the Court. It was open for them to question the constitutionality of Articles 68^1, 6^1 and 45^1 of the 1961 Criminal Code and to argue that those provisions were in breach of Articles 89, 90 or 92 of the Constitution and Article 7 of the Convention.

166. Had the applicants brought a constitutional complaint, and had they been successful, they could have requested, pursuant to Article 388(4) of the Code of Criminal Procedure and section 655(2)(4) of the 2005 Criminal Procedure Law, that the criminal proceedings against them be reopened. In the renewed examination of the case the domestic courts would have been bound by the findings of the Constitutional Court. Thus, as a result of the reopening of the criminal proceedings the alleged violation of Article 7 of the Convention could have been suitably redressed.

167. In conclusion, the Court finds that in the present case, by failing to lodge a constitutional complaint, the applicants failed to exhaust the remedy provided for by Latvian law. Thus, the Government's objection that the applicants did not bring a constitutional complaint in the instant case is well-founded.

168. It follows that the applicants' complaint under Article 7 of the Convention must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

C. Article 6 of the Convention

1. Loctus standi

(a) The parties' submissions

169. The respondent Government argued that the next-of-kin of the applicants (who had died in 2005 and 2004 respectively) did not have the necessary *locus standi* to maintain this complaint. While the Court had accepted that heirs or close family members could continue an application on behalf of a deceased applicant, the length of the criminal proceedings was an issue so closely and personally linked to the applicants that their next-of-kin had insufficient legal interest to continue the case on their behalf (*Nölkenbockhoff and Bergemann v. the Federal Republic of Germany*, no. 10300/83, Commission decision of 12 December 1984, Decisions and Reports (DR) 40, p.180; *Makri and Others v. Greece* (dec.), no. 5977/03, 24 March 2005; and *Biç and Others v. Turkey*, no. 55955/00, 2 February 2006). The case-law relied on by the applicants (see paragraph 170 below) concerned civil cases where the outcome would have had a real impact on the next-of-kin.

170. The applicants' next-of-kin disputed the relevance of the Convention case-law on which the respondent Government relied. They had sufficient links to the issue which was one of moral and financial importance to them: they were close relatives of the applicants against whom serious criminal proceedings had been launched fifty years after the impugned acts when the applicants were aged and those proceedings had taken a serious toll. The cases of *Malhous v. the Czech Republic* ((dec.)

[GC], no. 33071/96, ECHR 2000-XII) and *Deweer v. Belgium* (27 February 1980, §§ 37-38, Series A no. 35) rendered their *locus standi* clear.

(b) The Court's assessment

171. The Court notes that each applicant died after they introduced their applications to this Court. The first applicant's son continued a pending domestic appeal. The first applicant's son, the second applicant's widow and, after her death, the second applicant's brother, confirmed to this Court that they wished to continue the pending applications on the applicants' behalf. In so confirming, the second applicant's brother submitted that he was Mr Tess's only surviving close relative. His assertion was not contradicted by the respondent Government.

172. It is recalled that the Court normally permits next-of-kin to pursue an application, provided he or she has sufficient interest, where the original applicant has died after the introduction of the application before the Court (*Malhous*, cited above). This is to be contrasted with cases in which the application is introduced after the victim's death, as in the cases on which the respondent Government relied (see *Makri and Others* and *Biç and Others*, both cited above, and also *Fairfield v. the United Kingdom* (dec.), no. 24790/04, ECHR 2005−VI).

173. Having regard to the circumstances of the case, the Court considers that they have sufficient legitimate interest in this complaint, the applicants' next-of-kin have the requisite *locus standi* under Article 34 of the Convention. They can therefore continue this complaint on behalf of the applicants (see, for example, *Vocaturo v. Italy*, 24 May 1991, § 2, Series A no. 206-C, and, more recently, *Stojkovic v. "the former Yugoslav Republic of Macedonia"*, no. 14818/02, § 25, 8 November 2007).

174. Thus Mr Tess remains an applicant before this Court and he was a Russian citizen. The Court considers that this answers the respondent Government's objection to the participation of the Russian Government as a third party in relation to Mr Tess's application.

2. Admissibility

(a) The parties' submissions concerning the first applicant

175. The respondent Government argued that the proceedings had begun on 8 October 1999 (when the first applicant had been in custody and charged) and ended with the decision of the Supreme Court on 16 February 2006. While this amounted to more than six years and four months, each case had to be examined on its particular facts (*Lavents v. Latvia*, no. 58442/00, § 87, 28 November 2002).

176. The respondent Government maintained that the identification of the trial court was an issue raised and resolved in the interests of the first applicant and, notably, of speediness (Article 242 of the Code of Criminal

Procedure): the resulting transfer from a court in Riga to Zemgale was conducted speedily and the trial then took place within a reasonable period of time; the difficulties in scheduling trial dates were explained by the voluminous case file (fifteen volumes); and the adjournments from September 2002 to September 2003 were attributable to the first applicant and the victims**.** The appeal was also examined within a reasonable time given its complexity. The adjournment of 8 June 2004 was requested by the first applicant and allowed time to prepare a medical report. While the appeal was also adjourned owing to the illness of a prosecutor, it was difficult to appoint another prosecutor who could acquaint himself with the complex case in a shorter period of time and the resulting delay was not excessive. Lastly, the appeal on points of law was dealt with in one month.

177. The first applicant considered that the criminal action against him had lasted for more than seven years and three months: from 9 November 1998 (when the investigation against him opened) to 16 February 2006 (when his last appeal was rejected), a period he considered too long, not least given his advanced age and poor health. He took issue with, in particular, the length of the investigation, the time lost in deciding which trial court would hear his case, an alleged suspension of the case by the Riga Regional Court as well as with the delay in fixing a trial date, during the trial and on appeal.

(b) The parties' submissions concerning the second applicant

178. The respondent Government submitted that the relevant period had begun on 21 March 2001 when the second applicant had been charged. Prior thereto, the prosecution had been gathering evidence as to the events of 25 March 1949, including locating and taking evidence as regards the deported families (forty-two in the second applicant's case). The second applicant was heard in June 1998 only as a witness to describe how the deportation process worked. The relevant period ended on 19 April 2005 (with the rejection of the cassation appeal). The overall length of the proceedings was four years and thirty days. The respondent Government submitted that any delays had been attributable to the second applicant. His ill-health delayed the pre-trial investigation and the trial: the trial was consequently adjourned five times. Trying him *in absentia* was not a legal option and forcing him to travel risked violating his rights under Articles 2 and/or 3 of the Convention. Delays were also caused by his unsuccessful constitutional applications during his trial. His allegation that his ill-health had been caused by violations of his defence rights had never been made domestically and was unfounded. The State had taken all the necessary steps to ensure that the proceedings ended within a reasonable period of time and to pursue the trial while respecting the applicant's health.

179. The second applicant argued that the proceedings had lasted from 19 March 1998 until 19 April 2005 (seven years and one month). The

former date was when the prosecution had begun a criminal investigation in connection with him, of which the applicant had been immediately informed. Although technically he had been interviewed as a witness, that had not excluded his also being a suspect under investigation.

180. The second applicant argued that the investigation (lasting almost three years and five months) had been unreasonably long, especially since the prosecution already had all the documents concerning his activities before the investigation (see the decision of 19 March 1998). His illness during the investigation had been provoked by the violation of his defence rights. For example, the forced withdrawal of his interpreter had caused him to have a heart attack. The transfer of his case from Riga to a court 200 km away in Kurzeme had not speeded up matters: on the contrary, it had slowed matters down because of his ill-health and inability to travel.

(c) The Court's assessment

181. The Court 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 of the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II; and, more recently, *Zandbergs v. Latvia*, no. 71092/01, § 87, 20 December 2011).

182. It is further recalled that, in criminal matters, the "reasonable time" referred to in Article 6 § 1 begins to run as soon as a person is "charged". "Charge", for the purposes of Article 6 § 1, may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected" (see *Eckle v. Germany*, 15 July 1982, § 73, Series A no. 51, and *McFarlane v. Ireland* [GC], no. 31333/06, § 143, 10 September 2010).

(i) As regards the first applicant

183. As to when the proceedings began, the first applicant claimed that he had been informed when the investigation began in November 1998. However, the Court notes that he did not provide any further details about, let alone substantiate, that allegation. It considers therefore that it has not been demonstrated that the situation of the first applicant was substantially affected prior to his being formally charged, so that the proceedings began on 8 October 1999. They ended on 16 February 2006 with the decision of the Senate of the Supreme Court. They lasted therefore six years and four months for two instances (trial and appeal), two constitutional claims as well as an appeal on points of law.

184. The Court considers that the case was undeniably complex, involving sensitive and intricate questions of a historic and legal (domestic law and international law) nature. Much archive research was required to obtain documentary evidence of the allegations and, since the case involved the deportation of 150 families, a considerable volume of substantiating documentary and oral evidence was required (including over 130 victim statements). The case file comprised fifteen volumes. The evident breadth and complexity of the case could justify, in principle, a longer procedure (see, for example, *Hozee v. the Netherlands*, 22 May 1998, §§ 51-54, *Reports* 1998-III, and *Lavents*, cited above, § 99) and this must be borne in mind when assessing different elements of the procedure below.

185. Within two months of the first applicant being charged, the investigation ended (including inspection of the file) and the final bill of indictment was served. While the case did not advance between January 2000 and November 2001, various domestic courts actively sought a means of speeding up the case, which was itself a complex exercise given the limitations imposed by the first applicant's serious ill-health, the location of the numerous victims, the complexity of the case and the consequent period of time a trial court would need to set aside to accommodate such a case. While the trial lasted for one year (from September 2002 to September 2003), there were fifty hearings, 132 victims gave evidence and numerous adjournments were required because either the first applicant or the victims were unable to attend (ten and six times, respectively).

186. While the appeal (the Criminal Cases Chamber of the Supreme Court) lasted for two years and two months, during which period the applicant died, it was not a period of inactivity. In particular, the first applicant's complaint to the Constitutional Court was lodged and ruled upon. The significant deterioration in his health, of itself, led to months of delay and rendered necessary enquiries with the prison authorities as to their ability to take care of the first applicant during any future period of imprisonment (see, for example, *Dementjeva v. Latvia* (dec.), no. 17458/10, § 21, 13 March 2012). While some time was then lost as a result of the illness of the prosecutor assigned to the case (from April to December 2005), the period between that *force majeure* circumstance and the adjudication of the first applicant's appeal cannot be considered excessive, given the complexity and sensitivity of the case and the time a new prosecutor would need to get acquainted with the case file (see, for example, *Gaļins v. Latvia* (dec.), no. 13295/02, 22 November 2007). Lastly, his appeal on points of law was disposed of within two months.

(ii) As regards the second applicant

187. The date on which the second applicant's proceedings began was also disputed. The second applicant also claimed that he had been informed when the investigation began in March 1998, but he too failed to

substantiate that claim in any way. While he suggested that his being interviewed by the prosecution in June 1998 had "substantially affected" his situation, he was formally interviewed as a witness and he gave no indication of any communication, act or element which implied that he risked being the subject of litigation. On the other hand, the respondent Government explained that he had been asked general questions about the deportation process, including how the list of deportees had been drafted and how the deportation orders had been signed. The Court considers that the second applicant has not therefore demonstrated how his situation was substantially affected prior to his being formally charged on 21 March 2001. The proceedings ended on 19 April 2005 with the decision of the Senate of the Supreme Court.

188. The proceedings therefore lasted four years and one month for two instances (trial and appeal), during which period the domestic courts also dealt with three constitutional claims and an appeal on points of law. As the charges against the second applicant concerned forty-two families, his file was less voluminous than that of the first applicant. However, the subject matter of the proceedings against him was the same, so that the proceedings against him were also complex and sensitive. Having regard to the number of instances involved as well as the complexity, the overall length of the proceedings is not therefore a period which *a priori* would give rise to a length issue under Article 6 of the Convention.

189. Moreover, the Court does not consider that there were any unjustified periods of inactivity. During a period of nine months after charging (from March to December 2001), he and twenty-seven victims had consulted the file, his illness had delayed matters for months and a different trial court had been found to ensure his speedy trial. It took a further two years (from December 2001 to December 2003) to obtain a trial and judgment. However, for much of that period the trial was adjourned or the second applicant did not appear, owing to the fact that he had been hospitalised or was ill. During that period, various domestic courts considered his unsuccessful requests to reopen the investigation and for a preliminary ruling from the Constitutional Court. His two complaints made directly to the latter court were also examined and rejected. The Court does not find the five-month period between the admissibility of the appeal and the appeal judgment or between the lodging and dismissal of the appeal on points of law, to be unreasonable, given the complexity of the case.

(iii) Conclusion as regards both applicants

190. Taking into account all the relevant factual and legal elements of the present case as regards both applicants, notably the particular complexity of their criminal cases (see *Kononov v. Latvia* (dec.), no. 36376/04, 20 September 2007, and *Korbely, cited above*, § 104), the

Court considers that the reasonable time requirement has not been breached in relation to either of them.

191. It follows that the applicants' complaint under Article 6 of the Convention is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares inadmissible the remainder of the applications.

Françoise Elens-Passos	Päivi Hirvelä
Registrar	President