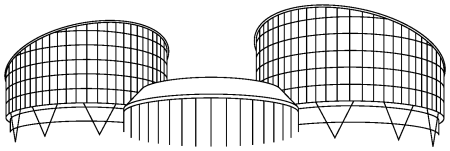

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Guide on Article 7 of the European Convention on Human Rights

No punishment without law: the principle that only the law can define a crime and prescribe a penalty

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Note to readers

This Guide is part of the series of Case-Law Guides published by the European Court of Human Rights (hereafter "the Court", "the European Court" or "the Strasbourg Court") to inform legal practitioners about the fundamental judgments and Decisions delivered by the Strasbourg Court. This particular Guide analyses and sums up the case-law under Article 7 of the European Convention on Human Rights (hereafter "the Convention" or "the European Convention"). Readers will find herein the key principles in this area and the relevant precedents.

The case-law cited has been selected among the leading, major, and/or recent judgments and decisions.*

The Court's judgments and decisions serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, § 154, 18 January 1978, Series A no. 25, and, more recently, *Jeronovičs v. Latvia* [GC], no. 44898/10, § 109, ECHR 2016).

The mission of the system set up by the Convention is thus to determine issues of public policy in the general interest, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v. Russia* [GC], § 89, no. 30078/06, ECHR 2012). Indeed, the Court has emphasised the Convention's role as a "constitutional instrument of European public order" in the field of human rights (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 156, ECHR 2005-VI, and more recently, *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 110, 13 February 2020).

Protocol No. 15 to the Convention recently inserted the principle of subsidiarity into the Preamble to the Convention. This principle "imposes a shared responsibility between the States Parties and the Court" as regards human rights protection, and the national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the rights and freedoms defined in the Convention and the Protocols thereto (*Grzęda v. Poland* [GC], § 324).

This Guide contains references to keywords for each cited Article of the Convention and its Additional Protocols. The legal issues dealt with in each case are summarised in a *List of keywords*, chosen from a thesaurus of terms taken (in most cases) directly from the text of the Convention and its Protocols.

The *HUDOC database* of the Court's case-law enables searches to be made by keyword. Searching with these keywords enables a group of documents with similar legal content to be found (the Court's reasoning and conclusions in each case are summarised through the keywords). Keywords for individual cases can be found by clicking on the Case Details tag in HUDOC. For further information about the HUDOC database and the keywords, please see the *HUDOC user manual*.

* The case-law cited may be in either or both of the official languages (English and French) of the Court and the European Commission of Human Rights. Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation "(dec.)" indicates that the citation is of a decision of the Court and "[GC]" that the case was heard by the Grand Chamber. Chamber judgments that were not final when this update was published are marked with an asterisk (*).

I. Introduction

Article 7 of the Convention – No punishment without law

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

Hudoc keywords

Nullum crimen sine lege (7-1) – *Nulla poena sine lege* (7-1) – Conviction (7-1) – Heavier penalty (7-1) – Criminal offence (7-1) – Time when the act or omission committed (7-1) – Retroactivity (7-1) – Criminal offence (7-2) – General principles of law recognised by civilised nations (7-2)

1. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (*S.W. v. the United Kingdom*, 1995, § 34; *C.R. v. the United Kingdom*, 1995, § 32; *Del Río Prada v. Spain* [GC], 2013, § 77; *Vasiliauskas v. Lithuania* [GC], 2015, § 153).

2. Article 7 of the Convention is not confined to prohibiting the retrospective application of criminal law to an accused's disadvantage. It also embodies, more generally, the principles that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and that the criminal law must not be extensively construed to an accused person's disadvantage, for instance by analogy (*ibid.*, § 154; *Kokkinakis v. Greece*, 1993, § 52).

II. Scope

A. The concept of "finding of guilt"

3. Article 7 only applies where the person has been "found guilty" of committing a criminal offence. It does not cover mere ongoing prosecutions, for example (*Lukanov v. Bulgaria*, Commission decision of 1995), or a decision to extradite an individual (*X v. the Netherlands*, Commission decision of 1976). For the purposes of the Convention, there can be no "conviction" unless it has been established in accordance with the law that there has been an offence (*Varvara v. Italy*, 2013, § 69).

4. The "penalty" and "punishment" rationale and the "guilty" concept and the corresponding notion of "*personne coupable*" (in the French version) support an interpretation of Article 7 as requiring, in order to implement punishment, a finding of liability by the national courts enabling the offence to be attributed to and the penalty to be imposed on its perpetrator (*Varvara v. Italy*, 2013, § 71; see also, as regards the requirement of *mens rea* in the perpetrator of the offence, *Sud Fondi srl and Others v. Italy*, 2009, § 116, and *G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], 2018, §§ 241-242 and 246).

5. The judgment in the case of *G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], 2018, § 251, pointed out that Article 7 precluded the imposition of a criminal sanction on an individual without his personal criminal liability being established and declared beforehand. However, it is not mandatory for the requisite declaration of criminal liability to be made in a criminal-court judgment formally convicting the defendant (*ibid*., § 252). In that sense, the applicability of this provision does not have the effect of imposing the "criminalisation" by States of procedures which, in exercising their discretion, they have not classified as falling strictly within the criminal law (*ibid*., § 253). Having thus ruled out the need for criminal proceedings *stricto sensu* in *G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], 2018, the Court considered whether there had at least been a formal declaration of criminal liability before the imposition of the criminal penalty. One of the applicants had been prosecuted for illegal site development but had not been convicted because the offence had become statute-barred. The illegally developed land had nonetheless been confiscated in its entirety. Since the domestic courts had noted that all the elements of the offence of illegal site development were present, while discontinuing the proceedings on the sole ground of statute limitation, the Court found that there had been a "conviction" for the purposes of Article 7, such that there had been no violation of the latter in the applicant's case (*ibid*., §§ 258-261). As regards the applicant companies (legal entities with a legal personality distinct from that of their directors or shareholders), insofar as they had not been prosecuted as such and had not been parties to the criminal proceedings, they could not have been the subject of such a declaration of criminal liability, so that the confiscation of their property had been incompatible with Article 7 (*ibid*., §§ 257 and 265-274).

B. The concept of "criminal offence"

6. The "criminal offence" concept ("*infraction*" in the French version) has an autonomous meaning, like "criminal charge" in Article 6 of the Convention[1]. The three criteria set out in the case of *Engel and Others v. the Netherlands*, 1976, § 82 (reaffirmed in *Jussila v. Finland* [GC], 2006, § 30) for assessing whether a charge is "criminal" within the meaning of Article 6 must also be applied to Article 7 (*Brown v. the United Kingdom* (dec.), 1998; *Société Oxygène Plus v. France* (dec.), 2016, § 43; *Žaja v. Croatia*, 2016, § 86):

- classification in domestic law;
- the very nature of the offence (the most important criterion, see *Jussila v. Finland* [GC], 2006, § 38);

1. For the scope of Article 6 (criminal aspect) and the concept of a "criminal charge", see the *Guide on Article 6 (criminal limb)*, available on the Court website (*www.echr.coe.int* – Case-law).

- the degree of severity of the penalty that the person concerned risks incurring.

7. In applying those criteria, the Court held that a breach of military discipline did not fall within the "criminal" sphere for the purposes of either Article 6 or Article 7 (*Çelikateş and Others v. Turkey* (dec.), 2000). The same applies to dismissals and restrictions on employment of former KGB agents (*Sidabras and Džiautas v. Lithuania* (dec.), 2003), a disciplinary offence committed by a student on university premises (*Monaco v. Italy* (dec.), 2015, §§ 40 and 68-69) and impeachment proceedings against the President of the Republic for gross violations of the Constitution (*Paksas v. Lithuania* [GC], 2011, §§ 64-69). In the absence of a "criminal offence" the Court found that the complaint was incompatible *ratione materiae* with the provisions of the Convention relied upon.

C. The concept of "law"

8. The concept of "law" ("*droit*" in the French version) as used in Article 7 corresponds to that set out in other Convention articles, covering both domestic legislation and case-law, and comprises qualitative requirements, notably those of accessibility and foreseeability (*Del Río Prada v. Spain* [GC], 2013, § 91; *S.W. v. the United Kingdom*, 1995, § 35). It obviously also embraces not only judicial law-making (*ibid.*, §§ 36 and 41-43; *Norman v. the United Kingdom*, 2021, § 62-66, concerning common law offences) but also statutes and enactments of lower rank than statutes (prison rules in *Kafkaris v. Cyprus* [GC], 2008, §§ 145-146), as well as non-codified constitutional customs (*Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law*, [GC], 2020, § 69). Article 7 does not require a criminal offence to be placed on a statutory footing (*Norman v. the United Kingdom*, 2021, § 62).The Court must have regard to the domestic law "as a whole" and to the way it was applied at the material time (*Kafkaris v. Cyprus*, § 145; *Del Río Prada v. Spain* [GC], 2013, § 90).

9. On the other hand, State practice incompatible with the rules of the written law in force and which emptied of its substance the legislation on which it was supposed to be based cannot be considered as "law" within the meaning of Article 7 (the border-policing practice of the German Democratic Republic (GDR) in flagrant breach of its own legal system and the fundamental rights, in *Streletz, Kessler and Krenz v. Germany* [GC], 2001, §§ 67-87; also the practice of eliminating opponents of the communist regime by means of death penalties imposed after trials conducted in flagrant breach of the legislation and constitution of former Czechoslovakia, in *Polednová v. the Czech Republic* (dec.), 2011).

10. The concept of "international law" set out in Article 7 § 1 refers to the international treaties ratified by the State in question (*Streletz, Kessler and Krenz v. Germany* [GC], 2001, §§ 90-106), as well as customary international law (for the international laws and customs of war see *Kononov v. Latvia* [GC], 2010, §§ 186, 213, 227, 237 and 244; for the concept of "crime against humanity" see *Korbely v. Hungary* [GC], 2008, §§ 78-85; and for the concept of "genocide" see *Vasiliauskas v. Lithuania* [GC], 2015, §§ 171-175 and 178), even where the corresponding law has never been formally published (*Kononov v. Latvia* [GC], 2010, § 237).

D. The concept of a "penalty"

1. General considerations

11. The concept of "penalty" set out in Article 7 § 1 of the Convention is also autonomous in scope *G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], 2018, § 210. In order to ensure the efficacy of the protection secured under this article, the Court must be free to go beyond appearances and autonomously assess whether a specific measure is, substantively, a "penalty" within the meaning of Article 7 § 1. The starting point for any assessment of the existence of a "penalty" is to ascertain

whether the measure in question was ordered following a conviction for a "criminal offence". However, that criterion is only one of the relevant criteria; the lack of such a conviction by the criminal courts is not sufficient to rule out the existence of a "penalty" within the meaning of Article 7 (*G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], 2018, §§ 215-219).

12. Other factors may be deemed relevant in this respect: the nature and aim of the measure in question (particularly its punitive aim), its classification under domestic law, the procedures linked to its adoption and execution and its severity (*G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], 2018, §§ 211; *Welch v. the United Kingdom*, 1995, § 28; *Del Río Prada v. Spain* [GC], 2013, § 82; *Galan v. Italy* (dec.), 2021, §§ 70 and 85-96). However, the severity of the measure is not decisive in itself, because many non-criminal measures of a preventive nature can have a substantial impact on the person concerned (*Del Río Prada v. Spain* [GC], 2013, § 82; *Van der Velden v. the Netherlands* (dec.), 2006).

13. The specific conditions of execution of the measure in question may be relevant in particular for the nature and purpose, and also for the severity of that measure and thus for the assessment of whether or not the measure is to be classified as a penalty for the purposes of Article 7 § 1 (*Ilnseher v. Germany* [GC], 2018, § 204). In some cases, especially if national law does not qualify a measure as a penalty and if its purpose is therapeutic, a substantial change, in particular in the conditions of execution of the measure, can withdraw the initial qualification of the measure as a penalty within the meaning of Article 7 of the Convention, even if that measure is implemented on the basis of the same detention order (*ibid*., § 206). The Court has specified that some of the criteria used to establish whether a measure amounts, in substance, to a penalty are "static" (e.g. the criterion whether the measure in question was imposed following conviction for a criminal offence), and that some are "dynamic" (and therefore liable to change over time, e.g. the nature and purpose of the measure and its severity) (*ibid.*, § 208).

14. In applying these criteria the Court has, in particular, pinpointed the following measures as "penalties":

- a confiscation order in respect of the proceeds of a criminal offence following a finding of guilt, in view of its punitive purpose, in addition to its preventive and compensatory nature (*Welch v. the United Kingdom*, 1995, §§ 29-35, concerning the confiscation of the proceeds of drug-trafficking where the judge could take into account the degree of culpability of the accused in fixing the amount and the order could be enforced by imprisonment in default of payment);
- a measure involving imprisonment in default geared to guaranteeing payment of a fine by enforcement directed at the person of a debtor who has not demonstrated his insolvency (*Jamil v. France*, 1995, § 32);
- an administrative fine imposed in an urban development case equivalent to 100% of the value of the wrongfully erected building, which fine had both a preventive and a punitive function (*Valico SLR v. Italy* (dec.), 2006); and an administrative fine imposed for market manipulation contrary to the stock exchange law (*Georgouleas and Nestoras v. Greece*, 2020, §§ 33-43);
- confiscation of land on the grounds of unlawful construction ordered by a criminal court following an acquittal, with a primarily punitive aim geared to preventing recurrent breaches of the law and therefore constituting a preventive and punitive measure (*Sud Fondi srl and Others v. Italy* (dec.), 2007; *Varvara v. Italy*, 2013, §§ 22 and 51); and confiscation of land on the grounds of illegal site development ordered by a criminal court following a discontinuance decision based on statute limitation or in the absence of any involvement in the criminal proceedings (*G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], 2018, §§ 212-233);
- preventive detention ordered by a trial court following a conviction for serious offences, having regard to its preventive and also punitive nature, the mode of its enforcement in an ordinary prison, and its unlimited duration (*M. v. Germany*, 2009, §§ 123-133; *Jendrowiak*

v. Germany, 2011, § 47; *Glien v. Germany*, 2013, §§ 120-130; *a contrario*, *Bergmann v. Germany*, 2016, §§ 153-182, concerning preventive detention imposed on the applicant with a view to his undergoing therapy in a specialist centre);

- replacement of a prison sentence with expulsion and a ten-year prohibition of residence (*Gurguchiani v. Spain*, 2009, § 40);
- permanent prohibition on engaging in an occupation ordered by a trial court as a secondary penalty (*Gouarré Patte v. Andorra*, 2016, § 30).

15. Conversely, the following are excluded from the concept of "penalty":

- preventive measures (including mandatory hospitalisation) imposed on a person lacking criminal responsibility (*Berland v. France*, 2015, §§ 39-47);
- preventive detention ordered by a trial court following conviction for serious criminal offences, whose conditions of execution were substantially altered under a new legislative framework with a view to treating the prisoner's mental disorder (in particular, in a specialised centre rather than an ordinary prison), such that the measure evolved over time and no longer constituted a penalty (*Ilnseher v. Germany* [GC], 2018, §§ 210-236) ;
- inclusion of an individual on a police or judicial register of sex or violent offenders for preventive and deterrent purposes (*Adamson v. the United Kingdom* (dec.), 1999; *Gardel v. France*, 2009, §§ 39-47);
- DNA profiling of convicted persons by the authorities (*Van der Velden v. the Netherlands* (dec.), 2006);
- detention geared to preventing an individual from engaging in unlawful activities, in view of its preventive nature (*Lawless v. Ireland (no. 3)*, 1961, § 19);
- prohibition of residence (imposed in addition to a prison sentence) following a criminal conviction, the ban being treated as equivalent to a public-order measure (*Renna v. France*, 1997, Commission decision; see, *mutatis mutandis*, under the criminal head of Article 6 § 1, *Maaouia v. France* [GC], 2000, § 39);
- an administrative expulsion order or prohibition of residence (*Vikulov and Others v. Latvia* (dec.), 2004; *C.G. and Others v. Bulgaria* (dec.), 2007);
- transfer of a sentenced person to another country under the Additional Protocol to the Council of Europe Convention on the Transfer of Sentenced Persons, which measure is geared to promoting the person's social reintegration into his country of origin (*Szabó v. Sweden* (dec.), 2006; *Giza v. Poland* (dec.), 2010, § 30, as regards the surrender of a sentenced person under the EU Framework Decision on the European Arrest Warrant and the procedure for surrenders between Member States,);
- a preventive property confiscation order based on suspected belonging to mafia-type organisations, which order was not conditional upon any prior criminal conviction (*M. v. Italy*, Commission decision of 1991);
- special police surveillance or house arrest of a dangerous person designed to prevent the perpetration of criminal offences (*Mucci v. Italy*, Commission decision of 1998; *Raimondo v. Italy*, 1994, § 43, as regards the criminal aspect of Article 6 § 1);
- administrative surveillance for preventive purposes, after convicted persons had served their sentences, as well as subsequent restrictions on their freedom of movement and reporting obligations (*Timofeyev and Postupkin v. Russia*, 2021, §§ 70-82);
- a confiscation order imposed in the framework of criminal proceedings against third parties (*Yildirim v. Italy* (dec.), 2003; *Bowler International Unit v. France*, 2009, §§ 65-68);

- a confiscation of assets considered to have illicit origins imposed at the end of the criminal proceedings against the applicants, despite their acquittal on money laundering charges (*Balsamo v. San Marino*, 2019, §§ 60-65);
- a forfeiture of criminal assets following conviction, ordered in a separate set of proceedings, and considered to be comparable to a civil forfeiture *in rem* (*Ulemek v. Serbia* (dec.), 2021, §§ 46-57);
- revocation of an MP's parliamentary mandate and declaration that he had become ineligible following the dissolution of a political party (*Sobacı v. Turkey* (dec.), 2007);
- disqualification from standing for election and removal from elected office (Parliament) on account of a final criminal conviction for corruption (*Galan v. Italy* (dec.), 2021, §§ 70-97);
- impeachment and declaration of ineligibility against a President following impeachment proceedings for serious violation of the Constitution (*Paksas v. Lithuania* [GC], 2011, §§ 65-68);
- suspension of a civil servant's pension rights following disciplinary proceedings (*Haioun v. France* (dec.), 2004);
- three weekends in solitary confinement (*A. v. Spain*, Commission decision of 13 October 1986; *Payet v. France*, 2011, §§ 94-100, under the criminal aspect of Article 6);
- social isolation of a prisoner owing to the fact that the applicant was the only inmate of the prison, in respect of which the Court found that this was such an extraordinary measure that a State could not be reasonably expected to provide details in its legislation on the regime to be applied in such cases (*Öcalan v. Turkey (no. 2)*, 2001, § 187);
- a tax reassessment following the forfeiture of favourable tax treatment, where no penalty had been imposed on the applicant company (*Société Oxygène Plus v. France* (dec.), 2016, §§ 40-51);
- revocation of license to act as a liquidator in insolvency proceedings (*Rola v. Slovenia*, 2019, §§ 60-66);
- disciplinary suspension in a professional sports context (*Platini v. Switzerland* (dec.), 2020, §§ 44-49);
- demolition order issued by a criminal judge in view of its predominantly restorative nature under national law (*Longo* (dec.), 2024, §§ 62-68).

2. Distinction between substantive criminal law and procedural law

16. The Court has specified that the rules on retroactivity set out in Article 7 of the Convention only apply to the provisions defining the offences and the corresponding penalties. In principle, they do not apply to procedural laws, the immediate application of which in conformity with the *tempus regit actum* principle was deemed reasonable by the Court (*Scoppola v. Italy (no. 2)* [GC], 2009, § 110, with the references therein to cases concerning Article 6 of the Convention: see, for example, the rules concerning the use of witness statements, referred to as "procedural rules", in *Bosti v. Italy* (dec.), 2014, § 55), subject to the absence of arbitrariness (*Morabito v. Italy* (dec.), 2005). However, where a provision classified as procedural in domestic law influences the severity of the penalty to be imposed, the Court classifies that provision as "substantive criminal law" to which the last sentence of Article 7 § 1 is applicable (*Scoppola v. Italy (no. 2)* [GC], 2009, §§ 110-113, in connection with a provision of the Code of Criminal Procedure concerning the severity of the penalty to be imposed in proceedings using the simplified procedure).

17. As regards statutory limitation in particular, the Court has held that Article 7 does not impede the immediate application to live proceedings of laws extending limitation periods, where the alleged offences have never become subject to limitation (*Coëme and Others v. Belgium*, 2000, § 149). The Court has to this extent treated the rules on limitation periods as procedural, inasmuch as they do not

define offences and penalties and can be construed as laying down a simple precondition for the assessment of the case (*Previti v. Italy* (dec.), 2013, §§ 80-85; *Borcea v. Romania* (dec.), 2015, § 64; *Orlen Lietuva Ltd. v. Lithuania*, 2019, § 97). However, the Court has considered that Article 7 precludes the revival of a prosecution after the expiry of a limitation period (*Antia and Khupenia v. Georgia*, 2020, §§ 38-43; *Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], 2022, § 77). Furthermore, where the crimes for which an individual was convicted were punishable under international law, the issue of the applicable limitation period must be decided in the light of the relevant international law in force at the material time (*Kononov v. Latvia* [GC], 2010, §§ 229-233, where the Court found that the relevant international law in force at the material time had not specified any limitation period for war crimes and therefore held that the proceedings against the applicant had never become statute-barred; compare *Kolk and Kislyiy v. Estonia* (dec.), 2006, and *Penart v. Estonia* (dec.), 2016, where the Court held that crimes against humanity were not subject to statutory limitations).

3. A distinction must be drawn between the "penalty" and its enforcement

18. The Court has drawn a distinction between measures constituting a "penalty" and measures relating to the "enforcement" or "implementation" of that penalty. Where the nature and purpose of a given measure concern remission of sentence or a change in the procedure for conditional release, that measure is not an integral part of the "punishment" within the meaning of Article 7 (for the granting of sentence remission, see *Grava v. Italy*, 2003, § 49; and *Kafkaris v. Cyprus* [GC], 2008, § 151; for a legislative amendment on the conditions for release on parole, see *Hogben v. the United Kingdom*, Commission decision of 1986; and *Uttley v. the United Kingdom* (dec.), 2005; for differences between the regulations on release on parole in various cases of transfer of sentenced persons, see *Ciok v. Poland* (dec.), 2012, §§ 33-34). Issues relating to release policies, the manner of their implementation and the reasoning behind them fall within the power of the member States to determine their own criminal policy (*Kafkaris v. Cyprus* [GC], 2008, § 151). Nor does a failure to apply amnesty legislation to a conviction which has already become final fall within the ambit of Article 7 (*Montcornet de Caumont v. France* (dec.), 2003).

19. In practice, however, the distinction between a measure that constitutes a "penalty" and one that relates to the "enforcement" of a penalty is not always clear. For instance, the Court has accepted that the manner in which a set of prison regulations on the method of enforcing sentences had been construed and implemented *vis-à-vis* the penalty in question went beyond straightforward enforcement and thereby covered the actual scope of the sentence (*Kafkaris v. Cyprus* [GC], 2008, § 148, relating to a life sentence). Similarly, the extension of preventive detention by the sentence enforcement courts under legislation which had come into force after the applicant had committed the offence amounted to an "additional penalty" and therefore did not exclusively concern the enforcement of the penalty (*M. v. Germany*, 2009, § 135).

20. In that regard, the Court has emphasised that the term "imposed", used in the second sentence of Article 7 § 1, cannot be interpreted as excluding from the scope of that provision all measures introduced after the pronouncement of the sentence (*Del Río Prada v. Spain* [GC], 2013, § 88). Consequently, when measures taken by the legislature, the administrative authorities or the courts after the final sentence has been imposed or while the sentence is being served result in the redefinition or modification of the scope of the "penalty" imposed by the trial court, those measures should fall within the scope of the prohibition of the retroactive application of penalties enshrined in Article 7 § 1 *in fine* of the Convention (*ibid.*, § 89). In order to determine whether a measure taken during the execution of a sentence concerns only the manner of execution of the sentence or, on the contrary, also affects its scope, the Court must examine in each case what the "penalty" imposed actually entailed under the domestic law in force at the material time or, in other words, what its intrinsic nature was (*ibid.*, § 90). For example, the Court considered the application of a new approach

to the system of remissions of sentence as having led to the redefinition of the scope of the penalty, inasmuch as the new approach had had the effect of modifying the scope of the penalty imposed to the sentenced person's disadvantage (*ibid.*, §§ 109-110 and 117, concerning a thirty-year prison sentence to which, under a case-law reversal, no remissions of sentence for work done in detention would effectively be applied). See also a case where concurrent sentences passed by different trial courts were combined into one overall sentence (*Koprivnikar v. Slovenia*, 2017, §§ 50-52; *Arrozpide Sarasola and Others v. Spain*, 2018, §§ 122-123, also concerning maximum terms of imprisonment in respect of combined sentences, including a request for the combination of sentences served in another European Union member State). The Court also held that Article 7 was applicable where a foreign reducible life sentence was converted, upon a prisoner's transfer, into an irreducible one by the authorities of the administering State (*Kupinskyy v. Ukraine*, 2022, §§ 45-56).

4. Links with other provisions of the Convention and the Protocols thereto

21. In addition to the obvious links with the criminal aspect of Article 6 § 1 and the concept of "criminal charge" (see paragraph 6 above; *Bowler International Unit*, §§ 66-67; *Pantalon v. Croatia,* 2020, § 28; *Galan v. Italy* (dec.), 2021, § 71), the classification as a "penalty" for the purposes of Article 7 of the Convention is also relevant in determining the applicability of the *non bis in idem* rule as enshrined in Article 4 of Protocol No. 7 (*Sergueï Zolotukhin v. Russia* [GC], 2009, §§ 52-57, as regards the concept of "criminal procedure"; *Timofeyev and Postupkin v. Russia*, 2021, § 86). The notion of what constitutes a "penalty" cannot vary from one Convention provision to another (*Göktan v. France*, 2002, § 48).

22. Where the Court has already held that the proceedings in question did not involve the determination of a "criminal charge" within the meaning of Article 6, it has found, for reasons of consistency in the interpretation of the Convention taken as a whole, that the impugned measures could not be considered a "penalty" within the meaning of Article 7 of the Convention either (see, for example, *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], 2020, § 112; for a similar approach on the non-applicability of Article 6 under its criminal limb in light of a prior conclusion as to the non-applicability of Article 7, see *Timofeyev and Postupkin v. Russia*, 2021, § 92).

III. Principle that only the law can define a crime and prescribe a penalty

23. Article 7 of the Convention requires the existence of a legal basis in order to impose a sentence or a penalty. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (*Coëme and Others v. Belgium*, 2000, § 145; *Del Río Prada v. Spain* [GC], 2013, § 80).

24. Given the subsidiary nature of the Convention system, it is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (*Streletz, Kessler and Krenz v. Germany* [GC], 2001, § 49; *Vasiliauskas v. Lithuania* [GC], 2015, § 160), and unless the assessment conducted by the domestic courts is manifestly arbitrary (*Kononov v. Latvia* [GC], 2010, § 189). This also applies where domestic law refers to rules of general international law or international agreements, or where national courts apply principles of international law (*Total S.A. and Vitol S.A. v. France*, 2023, § 57). Even though the Court is not called upon to rule on the legal classification of the offence or the applicant's individual criminal responsibility, that being primarily a matter for assessment by the domestic courts (*ibid.*, § 187; *Rohlena v. the Czech Republic* [GC], 2015, § 51), Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant's conviction and, in particular, it must satisfy itself that the result reached by the relevant domestic courts was compatible with Article 7 of the Convention. To accord a lesser power of review to the Court would render Article 7 devoid of purpose (*ibid.*, § 52; *Kononov v. Latvia* [GC], 2010, § 198; *Vasiliauskas v. Lithuania* [GC], 2015, § 161).

25. Moreover, the principle of legality precludes the imposition on an accused person of a penalty heavier than that carried by the offence of which he was found guilty. Therefore, the Court can find a violation of Article 7 in the case of an error committed by the domestic courts in determining the severity of the sentence passed, having regard to the penalty incurred by the applicant pursuant to the mitigating circumstances as assessed by those courts (*Gabarri Moreno v. Spain*, 2003, §§ 22-34). The imposition of a penalty by analogy can also violate the "*nulla poena sine lege*" principle enshrined in Article 7 (*Başkaya and Okçuoğlu v. Turkey* [GC], 1999, §§ 42-43, concerning a prison sentence imposed on a publisher under a provision applicable to editors-in-chief).

26. The principle of legality requires the offences and corresponding penalties to be clearly defined by law (see paragraphs 7-9 above, with regard to the concept of "law"). The concept of "law" within the meaning of Article 7, as in other Convention articles (for instance Articles 8 to 11), comprises qualitative requirements, in particular those of accessibility and foreseeability (*G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], 2018, §§ 242; *Cantoni v. France*, 1996, § 29; *Kafkaris v. Cyprus* [GC], 2008, § 140; *Del Río Prada v. Spain* [GC], 2013, § 91; *Perinçek v. Switzerland* [GC], 2015, § 134). These qualitative requirements must be satisfied as regards both the definition of an offence (*Jorgic v. Germany*, 2007, §§ 103-114) and the penalty the offence in question carries or its scope (*Kafkaris v. Cyprus* [GC], 2008, § 150; *Camilleri v. Malta*, 2013, §§ 39-45, concerning the foreseeability of the applicable sentencing standards, which depended entirely on the choice of trial court by the prosecutor rather than on criteria established by law; *Porsenna v. Malta* (dec.), 2019, §§ 25-30, concerning legislative amendments introduced further to the *Camilleri* judgment, to the effect that a decision taken by a public prosecutor was no longer binding on the trial court in determining the applicable scale of penalties). Insufficient "quality of law" concerning the definition of the offence and the applicable penalty constitutes a breach of Article 7 of the Convention (*Kafkaris v. Cyprus* [GC], 2008, §§ 150 and 152).

A. Accessibility

27. As regards accessibility, the Court verifies whether the criminal "law" on which the impugned conviction was based was sufficiently accessible to the applicant, that is to say whether it had been made public (as regards the accessibility of domestic case-law interpreting a section of a law, see *Kokkinakis v. Greece*, 1993, § 40; and *G. v. France*, 1995, § 25; on the accessibility of an "executive order", see *Custers, Deveaux and Turk v. Denmark* (dec.), 2006, § 82). Where a conviction is exclusively based on an international treaty ratified by the respondent State, the Court can verify whether that treaty has been incorporated into domestic law and whether it appears in an official publication (as regards the Geneva Conventions, see *Korbely v. Hungary* [GC], 2008, §§ 74-75). The Court may also consider the accessibility of the definition of the crime at issue in the light of the applicable customary international law (as regards a Resolution of the United Nations General Assembly condemning genocide even before the entry into force of the 1948 Convention on Genocide, see *Vasiliauskas v. Lithuania* [GC], 2015, §§ 167-168; for a joint consideration of the accessibility and foreseeability of the definition of war crimes in the light of the international laws and customs of war – which had not appeared in any official publication – see *Kononov v. Latvia* [GC], 2010, §§ 234-239 and § 244).

B. Foreseeability

1. General considerations

28. An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and/or omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission (*Cantoni v. France*, 1996, § 29; *Kafkaris v. Cyprus* [GC], 2008, § 140; *Del Río Prada v. Spain* [GC], 2013, § 79). The concept of "appropriate advice" refers to the possibility of taking legal advice (*Chauvy and Others v. France* (dec.),2003; *Jorgic v. Germany*, 2007, § 113).

29. It follows that in principle, there can only be a "penalty" within the meaning of Article 7 if an element of personal liability has been established in respect of the perpetrator of the offence. There is a clear correlation between the degree of foreseeability of a criminal-law provision and the personal liability of the offender. Thus Article 7 requires a mental link disclosing an element of liability in the conduct of the actual perpetrator of the offence if a penalty is to be imposed (*G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], 2018, §§ 242 and 246; *Yüksel Yalçınkaya v. Türkiye* [GC], 2023, § 242). There may, however, be certain forms of objective liability stemming from presumptions of liability, provided they comply with the Convention, particularly Article 6 § 2 (*G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], 2018, § 243).

30. Owing to their general nature of statutes, their wording cannot be absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and the interpretation and application of such enactments depend on practice (*Kokkinakis v. Greece*, 1993, § 40, as regards the definition of the offence of "proselytism"; *Cantoni v. France*, 1996, § 31, as regards the legal definition of "medicinal product"). When the legislative technique of categorisation is used, there will often be grey areas at the fringes of the definition. This penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7, provided that it proves to be sufficiently clear in the large majority of cases (*ibid.*, § 32). On the other hand, the use of overly vague concepts and criteria in interpreting a legislative provision can render the provision itself incompatible with the requirements of clarity and foreseeability as to its effects (*Liivik v. Estonia*, 2009, §§ 96-104). The fact that the legislator subsequently reworded the law in a more detailed manner (e.g. as a result of the transposition of an EU Directive) does not necessarily mean that the behaviour had not been punishable until then (*Georgouleas and Nestoras v. Greece*, 2020, § 66).

31. While using the "blanket reference" or "legislation by reference" technique in criminalising acts or omissions is not in itself incompatible with the requirements of Article 7, the referencing provision and the referenced provision, read together, must enable the individual concerned to foresee, if needs be with the help of appropriate legal advice, what conduct would make him or her criminally liable (*Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], 2020, § 74; *Saakashvili v. Georgia*, 2024, §§ 145-146). This requirement applies equally to situations where the referenced provision has a higher hierarchical rank in the legal order concerned or a higher level of abstraction than the referencing provision. The most effective way of ensuring clarity and foreseeability is for the reference to be explicit, and for the referencing provision to set out the constituent elements of the offence. Moreover, the referenced provisions may not extend the scope of criminalisation as set out by the referencing provision *(http://hudoc.echr.coe.int/eng?i=003-6708535-9264619Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], 2020, § 74).

32. The scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed (*Kononov v. Latvia* [GC], 2010, § 235; *Cantoni v. France*, 1996, § 35). A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (*ibid.*). This is particularly true in the case of persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (*ibid.*; *Pessino v. France*, 2006, § 33; *Kononov v. Latvia* [GC], 2010, § 235; *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], 2020, §§ 61 and 68, in respect of professional politicians or high-office holders). For example, the Court held that a manager of a supermarket, with the benefit of appropriate legal advice, should have appreciated that he ran a real risk of prosecution for the unlawful sale of medicinal products (*Cantoni v. France*, 1996, § 35). The Court reached a similar conclusion on the convictions of the following individuals: directors of a cigarette distribution company for printing on its cigarette packets a phrase which was not prescribed by law (*Delbos and Others v. France* (dec.), 2004); the director of publication of an audio-visual company for public defamation of a civil servant via a statement "fixed prior to being communicated to the public" (*Radio France and Others v. France*, 2004, § 20); the manager of a company selling food supplements for commercialising a product containing a prohibited additive (*Ooms v. France* (dec.), 2009); the author and publisher of a book for the offence of public defamation (*Chauvy and Others v. France* (dec.), 2003, having regard to the professional status of the publisher, which should have alerted the author to the risk of prosecution); a lawyer for acting, without authorisation, as a go-between for the adoption of children (*Stoica v. France* (dec.), 2010, given her status as a lawyer specialising in family law); Greenpeace activists for illegally entering a military defence area in Greenland (*Custers, Deveaux and Turk v. Denmark* (dec.), 2006, §§ 95-96); politicians holding high office in the GDR state apparatus who had been convicted as the masterminds of the murders of East Germans who had attempted to leave the GDR between 1971 and 1989 by crossing the border between the two German States (*Streletz, Kessler and Krenz v. Germany* [GC], 2001, § 78); a GDR border guard for murdering an individual who had attempted to cross the border between the two German States in 1972, even though he was acting on the orders of his superior officers (*K.-H.W. v. Germany* [GC], 2001, §§ 68-81); and a commanding officer in the Soviet army for having led a unit of "Red Partisans" in a punitive expedition against alleged collaborators during the Second World War, whereby the risks should have been meticulously assessed (*Kononov v. Latvia* [GC], 2010, §§ 235-239).

As regards the individual criminal responsibility of private soldiers, the Court found that such soldiers could not show total, blind obedience to orders which flagrantly infringed not only domestic law but also internationally recognised human rights, in particular the right to life, a supreme value in the international hierarchy of human rights (*ibid.*, § 236; *K.-H.W. v. Germany* [GC], 2001, § 75).

33. Foreseeability must be appraised from the angle of the convicted person (possibly after the latter has taken appropriate legal advice) at the time of the commission of the offence charged (see, however, *Del Río Prada v. Spain* [GC], 2013, §§ 112 and 117, concerning the foreseeability of the change in the scope of the penalty imposed at the time of the applicant's conviction, that is to say *after* the commission of the offences).

34. Where a conviction is based exclusively on international law or refers to the principles of international law, the Court assesses the foreseeability of the conviction in the light of the standards of international law applicable at the material time, including international treaty law (the International Covenant on Civil and Political Rights as regards the GDR in *Streletz, Kessler and Krenz v. Germany* [GC], 2001, §§ 90-106; or the 1948 Convention for the Prevention and Suppression of the Crime of Genocide in the case of Germany in *Jorgic v. Germany*, 2007, § 106), and/or customary international law (see the definition of genocide in customary international law in 1953 in *Vasiliauskas v. Lithuania* [GC], 2015, §§ 171-175; the Laws and Customs of War in 1944 in *Kononov v. Latvia* [GC], 2010, §§ 205-227; and customary international law prohibiting the use of mustard gas in international conflicts in *Van Anraat v. the Netherlands* (dec.), 2006, §§ 86-97).

2. Judicial interpretation: clarification of legal rules

35. However clearly drafted a legal provision may be, in any system of law, there is an inevitable element of judicial interpretation. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (*Kafkaris v. Cyprus* [GC], 2008, § 141). The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the States Parties to the Convention. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (*S.W. v. the United Kingdom*, 1995, § 36; *Streletz, Kessler and Krenz v. Germany* [GC], 2001, § 50; *Kononov v. Latvia* [GC], 2010, § 185; *Norman v. the United Kingdom*, 2021, §§ 60 and 66). The Court has held that this applies equally to the development of national as well as of international law (*Milanković v. Croatia*, 2022, § 59).

36. The foreseeability of judicial interpretation relates both to the elements of the offence (*Pessino v. France*, 2006, §§ 35-36; *Dragotoniu and Militaru-Pidhorni v. Romania*, 2007, §§ 43-47; and *Dallas v. the United Kingdom*, 2016, §§ 72-77) and to the applicable penalty (*Alimuçaj v. Albania*, 2012, §§ 154-162; *Del Río Prada v. Spain* [GC], 2013, §§ 111-117). A finding by the Court that a conviction/offence lacks foreseeability dispenses it from assessing whether the penalty imposed was in itself prescribed by law within the meaning of Article 7 (*Plechkov v. Romania*, 2014, § 75). The interpretation of strictly procedural matters has no impact on the foreseeability of the offence and therefore raises no issues under Article 7 (*Khodorkovskiy and Lebedev v. Russia*, 2013, §§ 788-790, as regards alleged procedural obstacles to charging the applicants).

37. As regards the compatibility of the domestic judicial interpretation with the essence of the offence, the Court must determine whether that interpretation was in line with the wording of the provision of the criminal legislation in question as read in its context, and whether or not it was unreasonable (*Yüksel Yalçınkaya v. Türkiye* [GC], 2023, §§ 255-268; *Yasak v. Türkiye**, 2024, §§ 156-179, both as regards the crime of membership of an armed terrorist organisation; *Jorgic v. Germany*, 2007, §§ 104-108, as regards the crime of genocide; *Total S.A. and Vitol S.A. v. France*, 2023, §§ 58-71, as regards the crime of bribing foreign public officials; *Jasuitis and Šimaitis v. Lithuania*, 2023, §§ 119-140, as regards the crime of trafficking in human beings). The Court has also stressed that that conduct

does not fall outside the scope of the criminal law merely because it also constitutes a disciplinary offence (*Norman v. the United Kingdom*, 2021, § 68).

38. As regards the reasonable foreseeability of the judicial interpretation, the Court must assess whether the applicant could reasonably have foreseen at the material time, if necessary with the assistance of a lawyer, that he risked being charged with and convicted of the crime in question (*Jorgic v. Germany*, 2007, §§ 109-113; *Delga v. France**, 2024, §§ 65-72), and that he would incur the penalty which that offence carried. The Court must ascertain whether the judicial interpretation of the criminal law merely continued a perceptible line of case-law development (*S.W. v. the United Kingdom,* 1995, and *C.R. v. the United Kingdom*, 1995, concerning rape and attempted rape of two women by their husbands, in which the Court noted that the essentially debasing character of rape is so manifest that the decisions of the British courts should be deemed foreseeable and in conformity with the fundamental objectives of the Convention, "the very essence of which is respect for human dignity and human freedom"), or whether the courts had adopted a new approach which the applicant could not have foreseen (*Pessino v. France*, 2006, § 36; *Dragotoniu and Militaru-Pidhorni v. Romania*, 2007, § 44; *Del Río Prada v. Spain*, §§ 111-117; see, conversely, *Arrozpide Sarasola and Others v. Spain*, 2018, §§ 124-130, concerning an isolated judgment not backed by any case-law which might have inspired legitimate expectations in the applicants, followed a few months later by a landmark judgment from the Plenary Supreme Court determining the impugned issue). In assessing the foreseeability of a judicial interpretation, no decisive importance should be attached to a lack of comparable precedents (*K.A. and A.D. v. Belgium*, 2005, §§ 55-58, concerning sadomasochistic practices which led to a conviction for actual bodily harm, the unusual violence of which was underscored by the Court; *Soros v. France*, 2011, § 58; *Sacharuk v. Lithuania*, 2024, § 158, concerning the voting of some members of parliament instead of the others; *Saakashvili v. Georgia*, 2024, § 152, concerning the first criminal proceedings for abuse of official authority instituted against a former head of State in relation to an act committed while in office and in the exercise of a discretionary power). Where the domestic courts are called on to interpret a provision of criminal law for the first time, an interpretation of the scope of the offence which was consistent with the essence of that offence must, as a rule, be considered as foreseeable (*Jorgic v. Germany*, 2007, § 109, where the applicant was the first person to be convicted of genocide under a provision of the Criminal Code). Even a new interpretation of the scope of an existing offence may be reasonably foreseeable for the purposes of Article 7, provided that it is reasonable in terms of domestic law and consistent with the essence of the offence (see, as regards a new interpretation of the concept of tax evasion, *Khodorkovskiy and Lebedev v. Russia*, 2013, §§ 791-821, where the Court found that criminal law on taxation could be sufficiently flexible to adapt to new situations, without, however, becoming unpredictable; *Sacharuk v. Lithuania*, 2024, §§ 156-159, as regards a new interpretation of the concept of 'major non-pecuniary damage to the State' insofar casting a vote for another member of parliament is concerned). In any event, the domestic courts must exercise special diligence to clarify the elements of an offence in terms that make it foreseeable and compatible with its essence (*Parmak and Bakir v. Turkey*, 2019, § 77).

39. Even though the Court can have regard to the doctrinal interpretation of the law at the material time, particularly where it tallies with the judicial interpretation (*K.A. and A.D. v. Belgium*, 2005, § 59; *Alimuçaj v. Albania*, 2012, §§ 158-160), the fact that writers have freely interpreted a statute cannot replace the existence of a body of case-law (*Dragotoniu and Militaru-Pidhorni v. Romania*, 2007, §§ 26 and 43; *Georgouleas and Nestoras v. Greece,* 2020, § 64).

40. Although under certain circumstances a long-lasting toleration of certain types of conduct, otherwise punishable under the criminal law, may grow into a *de facto* decriminalisation of such conduct in certain cases, the mere fact that other individuals were not prosecuted or convicted cannot absolve the sentenced applicant from criminal liability or render his conviction unforeseeable for the purposes of Article 7 (*Khodorkovskiy and Lebedev v. Russia*, 2013, §§ 816-820; *Sacharuk v. Lithuania*, 2024, § 153).

41. Where the domestic courts interpret legal provisions based on public international law, they must decide which interpretation to adopt in domestic law, provided that the interpretation is consistent with the essence of the offence and reasonably foreseeable at the material time (see, for example, the broader concept of genocide adopted by the German courts and subsequently rejected by other international courts such as the International Court of Justice, in *Jorgic v. Germany*, 2007, §§ 103-116).

42. The Court has found that the foreseeability requirement was not met in cases of an extensive interpretation of criminal law to the accused's disadvantage (*in malam partem*), both where that interpretation stems from an unforeseeable case-law reversal (*Dragotoniu and Militaru-Pidhorni v. Romania*, 2007, §§ 39-48) or from an interpretation by analogy which is incompatible with the essence of the offence (for example, the conviction for genocide in *Vasiliauskas v. Lithuania* [GC], 2015, §§ 179-186), and where there has been an extensive and unforeseeable interpretation of an offence to the accused's disadvantage that is incompatible with the very essence of that offence (*Yüksel Yalçınkaya v. Türkiye* [GC], 2023, § 271; *Navalnyye v. Russia*, 2017, § 68; *Parmak and Bakir v. Turkey*, 2019, § 76; *Tristan v. Moldova*, 2023, § 67). It may also find against a State on the grounds of a conviction for an offence resulting from case-law development consolidated after the commission of that offence (for example, the offence of aiding and abetting a mafia-type organisation from the outside in *Contrada v. Italy (no. 3)*, 2015, §§ 64-76), or the case of a conviction based on an ambiguous domestic law provision which had offered divergent interpretations (*Žaja v. Croatia*, 2016, §§ 99-106). In that connection, an inconsistent case-law lacks the required precision to avoid all risk of arbitrariness and enable individuals to foresee the consequences of their actions (*ibid.*, § 103).

43. The fact that a jury is responsible for considering a case and applying the criminal law to it does not mean that the effect of the law is unforeseeable for the purposes of Article 7 (*Jobe v. the United Kingdom* (dec.), 2011). Conferring a discretion on a jury to apply the law to a particular case is not in itself inconsistent with the requirements of the Convention, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, to give the individual adequate protection against arbitrariness (*O'Carroll v. the United Kingdom* (dec.), 2005, concerning a jury assessment of what constitutes indecency).

3. The special case of State succession

44. The concept of judicial interpretation applies to the gradual development of case-law in a given State subject to the rule of law and under a democratic regime, but it remains just as valid in the case of State succession. In the event of a change of State sovereignty over a territory or a change of political regime on a national territory, the Court has held that it is legitimate for a State governed by the rule of law to bring criminal proceedings against those who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law (*Streletz, Kessler and Krenz v. Germany* [GC], 2001, §§ 79-83; *Vasiliauskas v. Lithuania* [GC], 2015, § 159). It is especially the case when the matter at issue concerns the right to life, a supreme value in the Convention and international hierarchy of human rights and which right Contracting Parties have a primary Convention obligation to protect (*Kononov v. Latvia* [GC], 2010, § 241). A State practice of tolerating or encouraging certain acts that have been deemed criminal offences under national or international legal instruments and the sense of impunity which such a practice instils in the perpetrators of such acts does not prevent their being brought to justice and punished (*Vasiliauskas v. Lithuania* [GC], 2015, § 158; *Streletz, Kessler and Krenz v. Germany* [GC], 2001, §§ 74 and 77-79). Thus the Court found foreseeable the convictions of GDR political leaders and a border guard for the murders of East Germans who had attempted to leave the GDR between 1971 and 1989 by crossing the border between the two German States, which convictions had been pronounced by the German courts after reunification on the basis of GDR legislation (*ibid.*, §§ 77-89; *K.-H.W. v. Germany* [GC], 2001, §§ 68-91). It came to the same conclusion regarding the conviction of a commanding officer of the Soviet army

for war crimes committed during the Second World War, as pronounced by the Latvian courts after Latvia's declarations of independence of 1990 and 1991 (*Kononov v. Latvia* [GC], 2010, §§ 240-241).

45. The Court also held that a conviction based on the legislation of the restored Republic of Lithuania was sufficiently foreseeable and therefore in conformity with Article 7 of the Convention, despite the fact that Lithuania had not yet been recognised as an independent State at the material time (*Kuolelis, Bartosevicius and Burokevicius v. Lithuania*, 2008, §§ 116-122, concerning the conviction of the leaders of the Lithuanian branch of the USSR Communist Party for their involvement in subversive and anti-State activities in January 1991).

4. The special case of a State's universal criminal jurisdiction and the applicable national legislation

46. A conviction by the national courts of a given State on the basis of that State's domestic law may concern acts committed by the individual in question in another State (*Jorgic v. Germany*, 2007 ; *Van Anraat v. the Netherlands* (dec.), 2006). The issue of the extraterritorial or universal jurisdiction of a State's national courts falls within the ambit not of Article 7 (*Ould Dah v. France* (dec.), 2009) but of the right to a tribunal or court established by law as enshrined in Article 6 § 1 and Article 5 § 1 (a) of the Convention ("lawful detention of a person after conviction by a competent court") (*Jorgic v. Germany*, 2007, §§ 64-72, concerning a conviction for acts of genocide committed in Bosnia and Herzegovina).

47. However, when a State's national courts convict a person under universal criminal jurisdiction, the application of domestic law to the detriment of the law of the State in which the acts were committed can be examined under Article 7. For instance, in a case involving the conviction of a Mauritanian officer by the French courts for acts of torture and barbarity committed in Mauritania (on the basis of the United Nations Convention against Torture), the Court held that the application of French criminal law to the detriment of a Mauritanian amnesty law (which had been enacted before any criminal proceedings) was not incompatible with the principle of legality (*Ould Dah v. France* (dec.), 2009). In that regard, it held that "the absolute necessity of prohibiting torture and prosecuting anyone who violates that universal rule, and the exercise by a signatory State of the universal jurisdiction provided for in the United Nations Convention against Torture, would be deprived of their very essence if States could exercise only their jurisdictional competence and not apply their legislation. There is no doubt that were the law of the State exercising its universal jurisdiction to be deemed inapplicable in favour of decisions or special Acts passed by the State of the place in which the offence was committed, in an effort to protect its own citizens or, where applicable, under the direct or indirect influence of the perpetrators of such an offence with a view to exonerating them, this would have the effect of paralysing any exercise of universal jurisdiction and defeat the aim pursued by the United Nations Convention against Torture". The Court reiterated that the prohibition of torture occupies a prominent place in all international instruments relating to the protection of human rights and enshrines one of the basic values of democratic societies.

IV. Principle of non-retroactivity of criminal law

A. General considerations

48. Article 7 unconditionally prohibits the retrospective application of the criminal law where it is to an accused's disadvantage (*Del Río Prada v. Spain* [GC], 2013, § 116; *Kokkinakis v. Greece*, 1993, § 52). The principle of non-retroactivity of criminal law applies both to the provisions defining the offence (*Vasiliauskas v. Lithuania* [GC], 2015, §§ 165-166) and to those setting the penalties incurred (*Jamil v. France*, 1995, §§ 34-36; *M. v. Germany*, 2009, §§ 123 and 135-137; *Gurguchiani v. Spain*, 2009, §§ 32-44). Even after the final sentence has been imposed or while the sentence is being served, the prohibition of retroactivity of penalties prevents the legislature, the administrative authorities and the courts from redefining or modifying the scope of the penalty imposed to the sentenced person's disadvantage (*Del Río Prada v. Spain* [GC], 2013, § 89, concerning a thirty-year prison sentence to which, under a case-law reversal, no remissions of sentence for work done in detention could effectively be applied, whereas at the time the applicant had committed the offences the maximum legal term of imprisonment was treated as a new, independent sentence to which remission of sentence for work done in detention should be applied).

49. The principle of non-retroactivity is infringed in cases of retroactive application of legislative provisions to offences committed before those provisions came into force. It is prohibited to extend the scope of existing offences to acts which previously were not criminal offences (see *Kotlyar v. Russia*, 2022, §§ 28-34, concerning the reclassification of charges). However, there is no violation of Article 7 where the acts in question were already punishable under the Criminal Code applicable at the material time – even if they were only punishable as an aggravating circumstance rather than an independent offence – (*Ould Dah v. France* (dec.), 2009, provided that the penalty imposed does not exceed the maximum laid down in that Criminal Code) or where the applicant's conviction was based on the international law applicable at the material time (*Vasiliauskas v. Lithuania* [GC], 2015, §§ 165-166, where the Court dealt with the applicant's conviction in the light of the international law in force in 1953, having noted that the provisions of the 2003 Lithuanian law on genocide had been applied retroactively; *Šimšić v. Bosnia and Herzegovina* (dec.), 2012, concerning crimes against humanity committed in 1992; *Milanković v. Croatia*, 2022, § 53, where the Court dealt with the applicant's conviction for war crimes, perpetrated in 1991/92, on the basis of his command responsibility). In the latter case, although the domestic authorities can always adopt a broader definition of an offence than that set out in international law (§ 40 above), they cannot impose *retroactive* sentences on the basis of that new definition in respect of acts committed previously (*Vasiliauskas v. Lithuania* [GC], 2015, § 181, concerning a conviction for genocide based on a 2003 Criminal Code, relating to acts committed against members of political group in 1953).

50. In order to establish to whether, for the purposes of Article 7, a law passed after an offence has allegedly been committed is more or less favourable to the accused than the law that was in force at the time of the alleged commission of the offence, regard must be had to the specific circumstances of the case (the principle of concretisation, as opposed to comparing the definitions of the offence *in abstracto*). If the subsequent law is more severe than the law that was in force at the time of the alleged commission of the offence, it may not be applied. (*Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law,* [GC], 2020, §§ 88 and 92).

51. As regards the severity of the penalty, the Court confines itself to satisfying itself that no heavier penalty is imposed than that which was applicable at the time of commission of the offence. Issues relating to the appropriateness of a penalty do not fall within the scope of Article 7 of the Convention. It is not the Court's role to decide the length of the prison sentence or the type of penalty which is suited to any given offence (*Hummatov v. Azerbaijan* (dec.), 2006; *Hakkar v. France* (dec.), 2009;

Vinter and Others v. the United Kingdom [GC], 2013, § 105). Issues relating to the proportionality of a penalty may, however, be assessed under Article 3 of the Convention (*ibid.*, § 102, concerning the concept of a "clearly disproportionate penalty").

52. As regards penalty severity/heaviness, the Court has, for example, ruled that a life sentence is not heavier that the death penalty, whereby the latter had been applicable at the time the offence was committed but had subsequently been abolished and replaced by life imprisonment (*Hummatov v. Azerbaijan* (dec.), 2006; *Stepanenko and Ososkalo v. Ukraine* (dec.), 2014; *Öcalan v. Turkey (no. 2)*, 2001, § 177; *Ruban v. Ukraine*, 2016, § 46). The Court has also held that a heavier penalty was not applied retroactively where a prison sentence was replaced with detention in a psychiatric institution under a new version of the criminal code, following the reopening of proceedings: as had been noted by the domestic courts, the former code applicable at the material time had already contained measures of the same severity as the those laid down in the new one (*Kadusic v. Switzerland*, 2018, §§ 71-76; see, *a contrario, W.A. v. Switzerland*, 2021, §§ 58-60, where the Court concluded that the applicant's subsequent preventive detention following reopening of proceedings amounted to a heavier penalty imposed retrospectively). In *Kupinskyy v. Ukraine*, 2022, § 64, the Court held that by denying the applicant the real possibility of seeking release on parole, the domestic authorities had converted his original reducible sentence into a *de facto* and *de jure* irreducible life sentence and had, therefore, changed the scope of the original punishment to the applicant's detriment, by imposing a heavier penalty.

53. In determining whether there has been any retroactive application of a penalty to an accused person's disadvantage regard must be had to the sentencing frameworks (minimum and maximum sentence) applicable under each criminal code. For example, even if the sentence imposed on the applicant was within the compass of two potentially applicable criminal codes, the mere possibility that a lighter sentence could have been imposed applying a lighter minimum sentence under a criminal code is sufficient for a finding of a violation of Article 7 (*Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], 2013, §§ 65-76). The assessment of which criminal law is more lenient or favourable to a defendant does not depend on an abstract comparison of the two criminal laws in question. What is crucial is whether, following a concrete assessment of the specific acts, the application of one criminal law rather than the other has put the defendant at a disadvantage as regards the sentencing (*ibid.,* §§ 69-70; *Jidic v. Romania*, 2020, §§ 85-98).

B. Continuing offences

54. In cases of "continuing" or "continuous" offences (concerning acts extending over a period of time), the Court has specified that the principle of legal certainty requires the elements of the offence incurring the person's criminal liability to be clearly set out in the indictment. Furthermore, the decision rendered by the domestic court must also make it clear that the accused's conviction and sentence result from a finding that the ingredients of a "continuing" offence have been made out by the prosecution (*Ecer and Zeyrek v. Turkey*, 2001, § 33). The Court held that the fact that the domestic courts had convicted a person of an offence introduced under a reform of the Criminal Code, *inter alia* for acts committed prior to the entry into force of that reform, classified as a "continuing" offence in domestic law, did not amount to retroactive application of a criminal law to the accused's disadvantage (*Rohlena v. the Czech Republic* [GC], 2015, §§ 57-64, concerning the offence of abusing a person living under the same roof). The Court noted that under the domestic law in question, a "continuing" offence was considered to constitute a single act, whose classification in criminal law had to be assessed under the law in force at the time of completion of the last occurrence of the offence, provided that the acts committed under any previous law would also have been punishable under the older law. Moreover, the application by the domestic courts of the concept of continuing offence as introduced into the Criminal Code before the first act committed by the applicant had been sufficiently foreseeable in the light of domestic law (*ibid.*, §§ 60-64). The Court also ascertained that the penalty imposed on the applicant under the "continuing" offence classification was not more severe than the

penalty which would have been imposed if the acts which he had committed before the legislative reform had been assessed separately from those committed afterwards (*ibid.*, §§ 65-69).

55. Conversely, where a conviction for a continuing offence was not foreseeable under the domestic law applicable at the material time and it had the consequence of increasing the sentence imposed on the applicant, the Court found that criminal law had been applied retroactively to the latter's disadvantage (*Veeber v. Estonia (no. 2)*, 2003, §§ 30-39; *Puhk v. Estonia*, 2004, §§ 24-34).

C. Recidivism

56. The Court held that the fact that the applicant's previous criminal status was subsequently taken into account by the trial and appeal courts, a possibility resulting from the fact that his 1984 conviction remained in his criminal record, was not in breach of the provisions of Article 7, seeing that the offence for which he was prosecuted and punished took place after the entry into force of a new law extending the time during which recidivism was possible (*Achour v. France* [GC], 2006, §§ 44-61, concerning the immediate application of a new criminal code laying down a ten-year period during which recidivism was possible, whereas the old code which had been in force at the time of commission of the first offence stipulated a five-year period, on whose expiry, according to the applicant, he would have benefited from a "right to oblivion"). Such a retrospective approach is distinct from the concept of retroactivity in the strict sense.

V. Principle of retrospective application of more favourable criminal law

57. Even though Article 7 § 1 of the Convention does not expressly mention the principle of the retroactivity of the lighter penalty (unlike Article 15 § 1 *in fine* of the United Nations Covenant on Civil and Political Rights and Article 9 of the American Convention on Human Rights), the Court held that Article 7 § 1 guarantees not only the principle of non-retroactivity of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant (*Scoppola v. Italy (no. 2)* [GC], 2009, §§ 103-109, concerning a thirty-year prison sentence instead of a life sentence). The Court considered that "inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time. In addition, it would amount to disregarding any legislative change favourable to the accused which might have come in before the conviction and continuing to impose penalties which the State – and the community it represents – now consider excessive" (*ibid.*, § 108). The Court noted that a consensus had gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, had become a fundamental principle of criminal law (*ibid.*, § 106). Furthermore, the Court has found that the principle of the retrospective application of the more lenient criminal law applies not only to the applicable penalty but also in the context of an amendment relating to the definition of the offence (*Parmak and Bakir v. Turkey*, 2019, § 64; *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], 2020, § 82).

58. In *Mørck Jensen v. Denmark*, 2022, §§ 44-54, the applicant was convicted for breach of the prohibition on entry and stay in a specific conflict zone (defined by secondary legislation), which had been lifted by the time of the adjudication of the case following a change in the situation in that zone. The Court considered that the criminal law applicable at the time of the offence should apply as the repeal of the prohibition was attributable only to extrinsic circumstances irrelevant to the issue of guilt. The Court therefore distinguished the case from the case-law on the principle of the retroactivity of the more lenient criminal law.

59. However, a legislative gap of three months between the abolition of the death penalty and the consequent amendment to the Criminal Code (replacing the death penalty with life imprisonment) did not afford the applicant the right to the more lenient penalty which had since become applicable (*Ruban v. Ukraine*, 2016, §§ 41-46, concerning a fifteen-year prison sentence). In such situations the Court has regard to the context in which the death penalty was abolished in the State in question, and in particular to the fact that the impugned legislative gap was not intentional (*ibid.*, § 45).

60. Even though in *Scoppola v. Italy (no. 2)* [GC], 2009, the Court did not explicitly come down in favour of any retrospective effect of legislative changes in favour of convicted persons, it did apply the principle of the retroactivity of the lighter penalty to a convicted person, inasmuch as domestic law expressly required the domestic courts to review a sentence ruling *ex officio* where a subsequent law had reduced the penalty applicable to an offence (*Gouarré Patte v. Andorra*, 2016, §§ 28-36). The Court held that where a State expressly provided in its legislation for the principle of the retroactivity of the more favourable penalty, it had to allow its citizens to use that right in accordance with the guarantees of the Convention (*ibid.*, § 35; compare and contrast *Artsruni v. Armenia* (dec.), 2021, §§ 47-62, where the proceedings, by which the applicant had sought a review of his sentence following

legislative changes, were not considered to fall within the scope of Article 7, given the conclusions reached by the domestic courts).

61. The principle of retrospectiveness of the more lenient criminal law may also apply to the fact of combining multiple sentences into one overall sentence (*Koprivnikar v. Slovenia*, 2017, § 59).

62. In determining whether a law passed after an offence has allegedly been committed is more or less favourable to the accused than the law that was in force at the time of the alleged commission of the offence, regard must be had to the specific circumstances of the case – the principle of concretisation (*Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law*, [GC], 2020, §§ 86-92).

VI. Article 7 § 2: the general principles of law recognised by civilised nations

Article 7 § 2 of the Convention

"2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

Hudoc keywords

Criminal offence (7-2) – General principles of law recognised by civilised nations (7-2)

63. It transpires from the *travaux préparatoires* to the Convention that Article 7 § 1 can be considered to contain the general rule of non-retroactivity and that Article 7 § 2 is only a contextual clarification of the liability limb of that rule, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war (*Kononov v. Latvia* [GC], 2010, § 186; *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], 2013, § 72). This makes it clear that the authors of the Convention did not intend to allow for a general exception to the non-retroactivity rule. In fact, the Court has pointed out in several cases that the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner (*Tess v. Latvia* (dec.), 2008; *Kononov v. Latvia* [GC], 2010, § 186).

64. In the light of these principles, the Court excluded the application of Article 7 § 2 to a conviction for war crimes committed in Bosnia in 1992 and 93 (*Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], 2013, §§ 72, in which the Government had contended that the impugned acts had been criminal under the "general principles of law recognised by civilised nations" and that the non-retroactivity of penalties should not apply), and to a conviction for genocide committed in 1953 (*Vasiliauskas v. Lithuania* [GC], 2015, §§ 187-190). As regards a conviction for war crimes committed during the Second World War, the Court considered it unnecessary to assess it under Article 7 § 2 given that the applicant's acts constituted an offence under "international law" within the meaning of Article 7 § 1 (*Kononov v. Latvia* [GC], 2010, §§ 244-246, understood as referring to customary international law, in particular the Laws and Customs of War).

VII. Measures indicated by the Court in cases of violation of Article 7 of the Convention

65. In the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which the Court finds a breach of the Convention imposes on the respondent State a legal obligation to put an end to the breach found and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. The Court's judgments are, however, essentially declaratory in nature. Accordingly, the Contracting States that are parties to a case are in principle free to choose, subject to supervision by the Committee of Ministers, the means whereby they will comply with a judgment in which the Court has found a breach – including any general and/or, if appropriate, individual measures to be adopted in their domestic legal order –, provided that the execution is carried out in good faith and in a manner compatible with the "conclusions and spirit" of the judgment (*Yüksel Yalçınkaya v. Türkiye* [GC], 2023, § 404).

66. However, in some specific situations, in order to help the respondent State to discharge its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures which might be taken to put an end to the situation giving rise to the finding of a violation. In the event of violation of Article 7, the Court has sometimes, on an exceptional basis, indicated practical individual measures: reopening the domestic proceedings at the applicant's request (*Dragotoniu and Militaru-Pidhorni v. Romania*, 2007, § 55, applying the same principle as where an individual has been convicted in breach of Article 6 of the Convention); releasing the applicant at the earliest possible date (*Del Río Prada v. Spain* [GC], 2013, § 139 and operative provision no. 3, having found a violation of Article 7 and Article 5 § 1 of the Convention); or requiring the respondent State to ensure that the applicant's sentence of life imprisonment is replaced by a sentence not exceeding thirty years' imprisonment, pursuant to the principle of the retroactivity of the lighter penalty (*Scoppola v. Italy (no. 2)* [GC], 2009, § 154 and operative provision no. 6 (a)).

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Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation "(dec.)" indicates that the citation is of a decision of the Court and "[GC]" that the case was heard by the Grand Chamber.

Chamber judgments that were not final within the meaning of Article 44 of the Convention when this update was published are marked with an asterisk (*) in the list below. Article 44 § 2 of the Convention provides: "The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43". In cases where a request for referral is accepted by the Grand Chamber panel, the Chamber judgment does not become final and thus has no legal effect; it is the subsequent Grand Chamber judgment that becomes final.

The hyperlinks to the cases cited in the electronic version of the Guide are directed to the HUDOC database (*http://hudoc.echr.coe.int*) which provides access to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note) and of the Commission (decisions and reports), and to the resolutions of the Committee of Ministers.

The Court delivers its judgments and decisions in English and/or French, its two official languages. HUDOC also contains translations of many important cases into more than thirty non-official languages, and links to around one hundred online case-law collections produced by third parties. All the language versions available for cited cases are accessible via the 'Language versions' tab in the *HUDOC* database, a tab which can be found after you click on the case hyperlink.

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