KEY THEME[1]
Article 7
International crimes

(Last updated: 28/02/2025)

Introduction

Even though the Court is not called upon to rule on an applicant's individual criminal responsibility, Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant's conviction and sentence; in particular, it must satisfy itself that the result reached by the relevant domestic courts was compatible with Article 7 of the Convention (*Vasiliauskas v. Lithuania* [GC], 2015, § 161). In this context, if the conviction was based on a criminal offence under international law (e.g. genocide, crimes against humanity, war crimes), the Court is required to assess whether the acts committed by the applicant constituted that specific criminal offence under international law at the time when they were committed. In doing so, it is not its role to seek to establish authoritatively the definition or the meaning of a specific crime under international law.

General principles drawn from the current case-law as applied to national convictions for international crimes

- The Court's task under Article 7 § 1 is twofold: in the first place, to examine whether there was a sufficiently clear legal basis, having regard to the state of the law at the time when the applicant committed the acts, for the applicant's conviction of international crimes; and secondly, it must examine whether the international crimes for which he/she was convicted were defined by law with sufficient accessibility and foreseeability so that the applicant could have known at the time what acts and omissions would make him/her criminally liable for such crimes and regulated his/her conduct accordingly (*Kononov v. Latvia* [GC], 2010, § 187; *Vasiliauskas v. Lithuania* [GC], 2015, § 162).
- The Court's task in these types of cases is to examine whether the result reached by the relevant domestic courts was compatible with Article 7 of the Convention, even if there were differences between the legal approach and reasoning of this Court and the relevant domestic decisions (*Kononov v. Latvia* [GC], 2010, § 198).
- If the conviction was based on **domestic provisions** incorporating/defining an international crime which were not in force at the time of the acts, this would constitute a violation of Article 7 of the Convention (principle of non-retroactivity of criminal law) unless it can be established that the conviction was based upon international law as it stood at the relevant time (*Vasiliauskas v. Lithuania* [GC], 2015, § 166; *Šimšić v. Bosnia and Herzegovina* (dec.), 2012). If the conviction was based on domestic provisions which were in force at the material time and therefore not applied retroactively, the Court may still be required to examine the conviction from the standpoint of the principles of international law, in particular if the domestic courts used arguments grounded on those principles (*K.-H.W. v. Germany* [GC], 2001, §§ 50 and 92-93, concerning the rules of international law on the

[1] Prepared by the Registry. It does not bind the Court.

protection of human rights; *Jorgic v. Germany*, 2007, §§ 109-114, concerning the definition of genocide).

- Domestic provisions may contain a definition of an international crime broader than that existing under international law, but that broader definition cannot be applied retroactively by domestic courts (by way of example, *Vasiliauskas v. Lithuania* [GC], 2015, §§ 181 and 184, concerning the Lithuanian expanded definition of genocide to include "political groups"; see also *Drėlingas v. Lithuania*, 2019, § 107). Where there were different possible interpretations of an international crime at the material time, a wide interpretation followed by domestic courts does not contravene Article 7 as long as it is consistent with the essence of the offence in issue, and if the applicant could not have relied on a narrower definition by other authorities at the material time (*Jorgic v. Germany*, 2007, §§ 109-114, where the applicant was the first person to be convicted of genocide under a provision of the Criminal Code and the German courts' interpretation of the crime of genocide was wider than the one subsequently developed by the International Criminal Tribunal for the former Yugoslavia and the International Court of Justice).
- The principle that Article 7 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, applies equally to the development of national law as well as of international law (*Milanković v. Croatia*, 2022, §§ 59-60).
- In order to determine whether there was a **sufficiently clear legal basis under international law** for the applicant's conviction, the Court is required to examine the state of international law applicable at the material time, including **treaty law** (the 1966 International Covenant on Civil and Political Rights in *Streletz, Kessler and Krenz v. Germany* [GC], 2001, §§ 90-105; the 1948 Convention for the Prevention and Suppression of the Crime of Genocide in *Vasiliauskas v. Lithuania* [GC], 2015, § 170; *Drėlingas v. Lithuania*, 2019, §§ 103 and 108) and/or **customary international law** (see the definition of crimes against humanity in 1956 in *Korbely v. Hungary* [GC], 2008, §§ 78-85; the definition of genocide under customary international law in 1953 in *Vasiliauskas v. Lithuania* [GC], 2015, §§ 171-175; the definition of war crimes under the laws and customs of war in 1944 in *Kononov v. Latvia* [GC], 2010, §§ 205-227; the prohibition under customary international law of the use of mustard gas in international conflicts in *Van Anraat v. the Netherlands* (dec.), 2010, §§ 86-92; and the existence of command responsibility for war crimes in an internal armed conflict in 1991 in *Milanković v. Croatia*, 2022, §§ 52-66).
- As regards the **accessibility** of the legal basis for the conviction, the Court may be required to verify whether a particular international treaty had been adopted and signed (the 1948 Convention for the Prevention and Suppression of the Crime of Genocide in *Vasiliauskas v. Lithuania* [GC], 2015, §§ 167-168, where the acts pre-dated the ratification of the treaty by the USSR) or whether that treaty had been incorporated into domestic law and appeared in an official publication (see for instance the Geneva Conventions of 1949 in *Korbely v. Hungary* [GC], 2008, §§ 74-75; see however 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 - *Kononov v. Latvia* [GC], 2010, §§ 234-239 and 244; and *Milanković v. Croatia*, 2022, §§ 62-63).
- When examining the **foreseeability** of the legal basis/conviction, the Court takes into account 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. For instance, in connection with the status of the persons convicted, the Court has had regard to the particular position of

politicians holding high office in the German Democratic Republic (GDR) state apparatus (*Streletz, Kessler and Krenz v. Germany* [GC], 2001, § 78), of a commanding officer in the Soviet army during the Second World War (*Kononov v. Latvia* [GC], 2010, §§ 211, 223 and 235-239), or of a police commander who was a military-academy-educated officer in Croatia in the early 1990s (*Milanković v. Croatia*, 2022, §§ 64-66). As regards the individual criminal responsibility of soldiers, the Court has found that soldiers could not show total, blind obedience to orders which flagrantly infringed not only domestic law but also internationally recognised human rights (*K.-H.W. v. Germany* [GC], 2001, § 75, concerning a GDR border guard acting on the orders of his superior officers and *Drėlingas v. Lithuania*, 2019, § 99, in relation to an officer of the KGB who must have clearly understood the consequences of capturing two partisan members of the resistance, who were respectively executed / sentenced to death and deported). 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).

- The principle of legality requires that not only the offences but also the **penalties** must be clearly defined by law. As regards the penalties for international crimes, the Court has for instance noted that where international law did not provide for a sanction for war crimes with sufficient clarity, a domestic tribunal could, having found an accused guilty, fix the punishment on the basis of domestic criminal law (*Kononov v. Latvia* [GC], 2010, § 212). When applying domestic law provisions on sentencing, the principle of non-retroactivity of penalties contained in Article 7 § 1 should however be complied with (see, by way of example, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], 2013, §§ 68-75, where the Court rejected the Government's argument that this rule should be set aside on the basis of the duty under international humanitarian law to punish war crimes).
- On the issue of whether the international crimes for which an applicant was prosecuted and convicted were statute-barred, the Court has held that the applicable **limitation period** should be decided in the light of the relevant international law in force at the material time, in the absence of domestic provisions applicable (*Kononov v. Latvia* [GC], 2010, §§ 228-233, 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; see also *Kolk and Kislyiy v. Estonia* (dec.), 2006, and *Penart v. Estonia* (dec.), 2006, where the Court held that crimes against humanity were not subject to statutory limitations according to international law).
- A conviction for international crimes by the national courts of a given State may concern acts committed by the individual in question in another State (*Jorgic v. Germany*, 2007, and *Van Anraat v. the Netherlands* (dec.), 2010). The issue of the extraterritorial or **universal jurisdiction** of a State's national courts does not fall within the ambit 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). 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 (*Ould Dah v. France* (dec.), 2009, a case involving the conviction of a Mauritanian officer by the

French courts for acts of torture and barbarity committed in Mauritania, where the Court held that the application of French criminal law to the detriment of a Mauritanian amnesty law was not incompatible with the principle of legality).

- Finally, the Court has clarified that Article 7 § 1 can be considered to contain the general rule of non-retroactivity and that **Article 7 § 2** ("act or omission which … was criminal according to the general principles of law recognised by civilised nations") 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). Consequently, if the conviction was justified under Article 7 § 1 because the acts constituted an offence under international law, it will not be necessary for the Court to examine also whether that conviction was justified under Article 7 § 2 (*Kononov v. Latvia* [GC], 2010, §§ 244-246). And if the conviction was not justified under Article 7 § 1 and concerned acts committed after the Second World War, Article 7 § 2 cannot not be used as an alternative basis for justifying it (*Vasiliauskas v. Lithuania* [GC], 2015, §§ 187-190).

Noteworthy examples

Genocide:

- *Vasiliauskas v. Lithuania* [GC], 2015 - conviction for genocide (participation in killing of individuals belonging to a political group) of Lithuanian partisans committed in 1953;
- *Jorgic v. Germany*, 2007 - conviction for genocide (killing and causing serious bodily harm to members of a protected group with the intent to destroy such group) committed in Bosnia and Herzegovina in 1992;
- *Drėlingas v. Lithuania*, 2019 - conviction for genocide (taking part in an operation in which persons belonging to a significant part of a protected national and ethnic group were captured) of Lithuanian partisans committed in 1956.

Crimes against humanity:

- *Korbely v. Hungary* [GC], 2008 - conviction for crimes against humanity (multiple homicide of civilians and non-combatants protected by common Article 3 of the Geneva Conventions) committed in 1956;
- *Papon v. France (no. 2)* (dec.), 2001 - conviction for crimes against humanity (aiding and abetting the unlawful arrest and false imprisonment of deported Jews) committed in 1942 and 1944;
- *Kolk and Kislyiy v. Estonia* (dec.), 2006 and *Penart v. Estonia* (dec.), 2006 - conviction for crimes against humanity (deportation of civilian population/organising the killing of civilians) committed in 1949 and in 1953-1954 respectively;
- *Šimšić v. Bosnia and Herzegovina* (dec.), 2012 - conviction for crimes against humanity (persecution) committed in 1992.

War crimes:

- *Kononov v. Latvia* [GC], 2010 - conviction for war crimes (ill-treatment, wounding and killing of combatants or civilians having participated in hostilities; burning of a pregnant woman to death; treacherous wounding and killing: attacks against undefended localities) committed in 1944;

- *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], 2013 - conviction for war crimes (taking of hostages, torture) committed during the 1992-1995 war;
- *Milanković v. Croatia*, 2022 - conviction for war crimes perpetrated in the territory of Croatia in the early 1990s against the Serbian civilian population and a prisoner of war, based on command responsibility.

Other crimes stemming from international law obligations:

- *Van Anraat v. the Netherlands* (dec.), 2010 - conviction for aiding and abetting the violation of the laws and customs of war as regards gas attacks on the Kurdish population in northern Iraq and on the territory of Iran between 1980-1988 (supplying chemicals and materials to the Republic of Iraq);
- *Ould Dah v. France* (dec.), 2009 - conviction for intentionally subjecting certain persons to acts of torture and barbarity in Mauritania between 1990-1991.

Recap of general principles

- *Streletz, Kessler and Krenz v. Germany* [GC], 2001, §§ 49-50, 81-83;
- *Korbely v. Hungary* [GC], 2008, §§ 69-73;
- *Kononov v. Latvia* [GC], 2010, §§ 185-187, 198, 235-236 and 241;
- *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], 2013, §§ 66, 72 and 75;
- *Vasiliauskas v. Lithuania* [GC], 2015, §§ 153-161 and 188-189.

Related (but different) topics under other Articles of the Convention

- International crimes and procedural obligations under Article 2 of the Convention: *Janowiec and Others v. Russia* [GC], 2013, §§ 149-151 (imprescriptibility of serious crimes under international law and the Court's competence *ratione temporis*); *Varnava and Others v. Turkey* [GC], 2009, §§ 147-149, 162-166 (the procedural obligation to investigate enforced disappearances, the Court's competence *ratione temporis* and the six-month rule); *Palić v. Bosnia and Herzegovina*, 2011, §§ 63-71 (the procedural obligation to investigate enforced disappearances and deaths); *Georgia v. Russia (II)* [GC], 2021, §§ 323-337 (the procedural obligation to investigate events occurred after the cessation of hostilities but also those occurred during active hostilities in the context of an international armed conflict outside the State's territory, having regard to the seriousness of the crimes allegedly committed - war crimes); *Hanan v. Germany* [GC], 2021, §§ 135-142, 198-236 (the procedural obligation to investigate civilian deaths occurred in an extraterritorial armed conflict, and the related obligation under international humanitarian law to investigate potential war crimes).
- An "administrative practice" contrary to the Convention in the context of an international armed conflict and after the cessation of active hostilities: *Georgia v. Russia (II)* [GC], 2021, §§ 213-222, 242-256, 272-281 and 296-301 ("administrative practices" contrary to Articles 2, 3, 8 and Article 1 of Protocol 1 with regard to killings of civilians, torching and looting of houses, and the resulting inhuman and degrading treatment; contrary to Articles 3 and 5 with regard to conditions of detention and treatment of civilians; contrary to Article 3 with regard to acts of torture of prisoners of war; and contrary to Article 2 of Protocol No. 4 with regard to the inability of internally displaced persons to return to their homes).
- International definition of human trafficking and Article 4 of the Convention (*S.M. v. Croatia* [GC], 2020, §§ 286-297).

- International definition of piracy, arrest and detention for acts of piracy on the high seas under Article 5 of the Convention (*Hassan and Others v. France*, 2014, §§ 61-68).
- Crimes stemming from international law and right of access to a court under Article 6 § 1 of the Convention: *Al-Adsani v. the United Kingdom* [GC], 2001, §§ 52-67 (State immunities in respect of civil claims for torture); *Jones and Others v. the United Kingdom*, 2014, §§ 186-215 (immunities of States and State officials in respect of civil claims for torture); *Naït-Liman v. Switzerland* [GC], 2018, §§ 173-220 (absence of universal jurisdiction in respect of civil claims for torture); *Hussein and Others v. Belgium*, 2021, §§ 59-74 (absence of universal jurisdiction in respect of civil claims for crimes under international humanitarian law); *Sassi and Benchellali v. France* (dec.), 2024, §§ 54-66 (State immunity from jurisdiction in respect of civil claims for torture).
- Unattainable standard of proof imposed to claim damages for relative's death following detention and disappearance under the control of State agents, under Article 6 § 1 (civil) and taking into account the Court's case-law on disappearances under Article 2 (*Baljak and Others v. Croatia*, 2021, §§ 33-42).
- Denial of international crimes and historical facts (negationism) under Article 10 of the Convention: *Perinçek v. Switzerland* [GC], 2015, §§ 209-212, 258-268.
- Statements made in the context of defence during a trial for war crimes, from the perspective of Article 10 of the Convention: *Miljević v. Croatia*, 2020, §§ 44-83.
- International crimes and amnesties under Article 4 of Protocol No. 7 (*ne bis in idem*): *Marguš v. Croatia* [GC], 2014, §§ 124-141.
- Proceedings/detention before international criminal courts and lack of jurisdiction *ratione personae* of the Court (Article 35): *Galić v. the Netherlands* (dec.), 2009, §§ 30-49 (International Criminal Tribunal for the Former Yugoslavia); *Djokaba Lambi Longa v. the Netherlands* (dec.), 2012, §§ 69-84 (International Criminal Court).

Further references

Case-law guides:

- Guide on Terrorism

Other:

- Conference: The European Convention on Human Rights and the Crimes of the Past (2016)

KEY CASE-LAW REFERENCES

Leading cases:

- *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, ECHR 2001-II (no violation of Article 7);
- *Korbely v. Hungary* [GC], no. 9174/02, ECHR 2008 (violation of Article 7);
- *Kononov v. Latvia* [GC], no. 36376/04, ECHR 2010 (no violation of Article 7);
- *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, ECHR 2013 (extracts) (violation of Article 7);
- *Vasiliauskas v. Lithuania* [GC], no. 35343/05, ECHR 2015 (violation of Article 7).

Other cases under Article 7:

- *K.-H.W. v. Germany* [GC], no. 37201/97, ECHR 2001-II (extracts) (no violation of Article 7);
- *Papon v. France (no. 2)* (dec.), no. 54210/00, ECHR 2001-XII (extracts) (inadmissible - manifestly ill-founded);
- *Kolk and Kislyiy v. Estonia* (dec.), nos. 23052/04 and 24018/04, ECHR 2006-I (inadmissible - manifestly ill-founded);
- *Penart v. Estonia* (dec.), no. 14685/04, 24 January 2006 (inadmissible - manifestly ill-founded);
- *Jorgic v. Germany*, no. 74613/01, ECHR 2007-III (no violation of Article 7);
- *Ould Dah v. France* (dec.), no. 13113/03, ECHR 2009 (inadmissible - manifestly ill-founded);
- *Van Anraat v. the Netherlands* (dec.), no. 65389/09, 6 July 2010 (inadmissible - manifestly ill-founded);
- *Šimšić v. Bosnia and Herzegovina* (dec.), no. 51552/10, 10 April 2012 (inadmissible - manifestly ill-founded);
- *Drėlingas v. Lithuania*, no. 28859/16, 12 March 2019 (no violation of Article 7);
- *Milanković v. Croatia*, no. 3351/20, 20 January 2022 (no violation of Article 7).