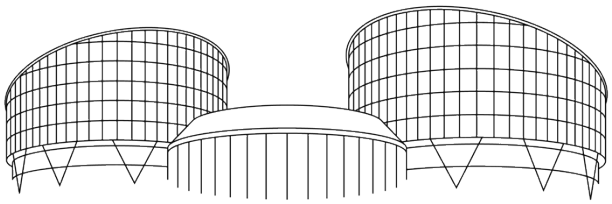

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

DIVISION DE LA RECHERCHE
RESEARCH DIVISION

Article 7
The "quality of law" requirements and the principle of (non-)retrospectiveness of the criminal law under Article 7 of the Convention

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STUDY OF THE ECHR CASE-LAW
ARTICLE 7

SUMMARY

1. Offences and penalties must be both accessible and foreseeable in order to prevent any arbitrariness by the domestic courts. These twin requirements have consistently featured in the case-law under Article 7 and Articles 8 § 2 to 11 § 2. First the law must be sufficiently clear for individuals to conduct themselves in accordance with its commands and, secondly, where there is judicial development of the law, any changes must be predictable. Albeit based on similar general principles, the rule that *only the law may prescribe a penalty* under Article 7, and the principle that the interferences with rights must be *prescribed by law* in Articles 8-11 § 2, reveal differences in practice.

2. Article 7 of the Convention prohibits the retrospective application of the criminal law – penalties and the substantive provisions – to an accused's disadvantage. It also embodies the principle of retrospectiveness of the more lenient criminal law – penalties and the substantive provisions – in an accused's favour. In its case-law, the Court has not established a list of criteria for the assessment of whether the criminal law adopted after the offence has been committed is less or more favourable to the accused. It has rather examined this matter in the particular circumstances of each case with a view to determining whether the application of the criminal law in the given case complied with the general tenets of its case-law relating to the (non-)retrospectiveness of the criminal law under Article 7 of the Convention. Nevertheless, certain guiding indications for this assessment – analysed in the report – can be discerned from the Court's case-law.

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INTRODUCTION

1. In its *Achour v. France* judgment, the Court held that States are free to determine their own criminal policy provided that the system chosen does not contravene the principles set forth in the Convention ([GC], no. 67335/01, §§ 44 and 51, ECHR 2006-IV). According to Article 7, there should be "*no punishment without law*" (*Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 75, ECHR 2013 (extracts)).

2. The overall purpose of Article 7 is "*to provide effective safeguards against arbitrary prosecution, conviction and punishment*" (*Del Río Prada*, § 77, ECHR 2013 and *Vasiliauskas v. Lithuania,* § 153).

I. The quality of the "law" under Article 7[1]

3. According to the general line of case-law, the concept of "law" as used in Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law (*K.-H.W. v. Germany* [GC], no. 37201/97, § 62, ECHR 2001-II), that is statutory law as well as case-law (*Del Río Prada v. Spain* [GC], no. 42750/09, § 91, ECHR 2013, *Vasiliauskas v. Lithuania,* § 154, *Rohlena v. the Czech Republic* [GC], no 59552/08, § 91, ECHR 2015 and *Seychell v. Malta*, no. 43328/14, § 42, 28 August 2018). The Court has always understood the term "law" in its "substantive" sense, not its "formal" one. It has thus included both enactments of lower rank than statutes and unwritten law (*Kafkaris v. Cyprus* [GC], no. 21906/04, § 139, ECHR 2008, *Vyerentsov v. Ukraine,* no. 20372/11, § 23, 11 April 2013 and references therein).

4. Article 7 guarantees that criminal offences and the relevant penalties must be clearly defined by substantive criminal law; it does not, however, set any requirements as to the procedure in which those offences must be investigated and brought to trial (*Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 789, 25 July 2013).

[1] See also the *Guide on Article 7 – No punishment without law*.

A. The principle that only the "law" can define a crime and prescribe a penalty

5. Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) (*Kokkinakis v. Greece,* 25 May 1993, § 52, Series A no. 260-A and *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 153, ECHR 2015). While it prohibits in particular, extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (*Del Río Prada v. Spain* [GC], no. 42750/09, § 78, ECHR 2013, *Vasiliauskas v. Lithuania,* § 154, *Berardi and Mularoni v. San Marino*, § 39, 10 January 2019 and the references therein).

6. The principle that offences and sanctions must be provided for by law entails that criminal law must clearly define the offences and the sanctions by which they are punished, such as to be accessible and foreseeable in its effects (*G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 242, 28 June 2018).

7. The Court must examine if at the time when an accused person performed the act which led to him being prosecuted and convicted there was in force a "*contemporaneous legal basis"* (*Vasiliauskas v. Lithuania,* § 161 and *Berardi and Mularoni,* § 54) - a legal provision (*Coëme and Others*, § 145) - which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (*Achour v. France* [GC], no. 67335/01, § 43, ECHR 2006-IV and *Del Río Prada,* § 80, and the references therein).

8. In principle, the Court should not substitute itself for the domestic jurisdictions. Its duty, in accordance with Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States. Given the subsidiary nature of the Convention system, it is not the Court's function to deal with alleged errors of fact committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention and unless that domestic assessment is manifestly arbitrary and therefore is not based on a "*reasonable assessment of the evidence*" (*Rohlena,* § 51, *Parmak and Bakir v. Turkey*, no. 22429/07 and 25195/07, 3 December 2019). This is particularly the case where the domestic court assesses facts of some historical sensitivity, although the Court may accept certain well-known historical truths and base its reasoning on them (*Kononov v. Latvia* [GC], no. 36376/04, § 189 and § 196, ECHR 2010, and *Vasiliauskas v. Lithuania,* § 160). More generally, it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (*Rohlena,* § 51). This also applies

where domestic law refers to rules of general international law or international agreements (*Korbely v. Hungary* [GC], no. 9174/02, § 72, ECHR 2008), or where the domestic courts apply principles of international law (*Kononov,* § 196 and *Vasiliauskas v. Lithuania,* § 160). In the same vein, it is not the Court's task to substitute itself for the domestic courts as regards the assessment of the facts and their legal classification (*Rohlena,* § 51), or to rule on the applicant's individual criminal responsibility (*Kononov,* § 187). However, provisions of domestic or international criminal law shall not be applied to an act not covered by them (*Žaja v. Croatia*, no. 37462/09, §§ 91-92, 4 October 2016, and the references therein).

9. Hence, the Court's powers of review must be greater when the Convention provision itself, as Article 7, requires that there was a legal basis for a conviction and sentence. In such cases, a failure to comply with the domestic legislation could in itself entail a violation of the Convention. Accordingly, in such circumstances, the Court must have the power to decide whether the relevant provision of criminal law has been complied with as its application to an act not covered by that provision would directly result in a violation of Article 7. For instance, the Court will examine whether "*the domestic courts, which freely evaluated the evidence before them, were (...) allowed to draw (...) common-sense inferences from the established facts*" (*Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, no. 26711/07 and 2 others, §§ 110-111, 12 May 2016). In the Court's view, to accord it a lesser power of review would render Article 7 devoid of purpose (*Rohlena,* § 52, and *Vasiliauskas v. Lithuania,* § 161 and *Contrada v. Italy (no. 3)*, no. 66655/13, § 61, 14 April 2015). The Court also held that the same principle applied to situations where the domestic courts had applied international law (*Kononov v. Latvia* [GC], no. 36376/04, § 198, ECHR 2010 and *Žaja*, §§ 91-92, 4 October 2016, which reaffirmed the view of the former Commission thereon).

10. In sum, under Article 7, the "law" must be understood as the provision in force at the material time, as the competent courts have interpreted it (*Vyerentsov,* § 62). The applicant's act, at the time when it was committed, must have constituted an offence defined with sufficient accessibility and foreseeability by domestic or international law (*Korbely*, § 73; *Kononov,* §§ 185-186, § 196 and *Vasiliauskas v. Lithuania*, § 162).

11. The principle that offences and sanctions must be provided for by law entails that criminal law must clearly define the offences and the sanctions by which they are punished, such as to be accessible and foreseeable in its effects (*G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 242, 28 June 2018). Those qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries (*Del Río Prada*, § 91). As a result the meaning of the offence must be clear and foreseeable enough "*in order for*

the applicant to regulate his conduct in advance" (*Ashlarba v. Georgia*, no. 45554/08, § 35, 15 July 2014) or "*accordingly*" (*Kononov*, § 187).

12. The requirement of a sufficiently clear legal basis also applies to case where the legislator has to transpose an EU Directive into domestic law (*Cantoni,* § 30).

13. The requirement of 'lawfulness' does not mean that all persons charged with the same offence had to be found guilty or, for that matter, that if found guilty they all had to be fined in the same amount, or otherwise punished identically (*Matić and Polonia d.o.o. v. Serbia* (dec.), no. 23001/08, 23 June 2015).

14. The text of the law can be read in the light of the accompanying interpretative case-law. When the wording of a provision is not sufficiently clear and gives rise to uncertainty and ambiguity, it is to be examined whether the meaning of the provision was clarified through interpretation by the domestic authorities. As a result, the requirement as to the quality of the law, concerns both the domestic law as a whole and the way it was applied at the material time (see parts B. and C. below).

B. The principle of accessibility

(1) Domestic law

15. There must be a sufficiently clear legal basis for the applicant's conviction (*Rohlena,* § 53 and § 63). Should the applicant have access to the texts of the Constitution and relevant laws (as opposed to obscure regulations: *K.-H.W. v. Germany,* § 73), the maxim "*ignorance of the law is no excuse*" applies to him (*Polednová v. the Czech Republic* (dec.), no. 2615/10, 21 June 2011). Moreover, professionals can be asked to take additional steps to access technical documents (*Gherghe and Guna v. Romania*, nos. 32619/08 and 33622/08, (Committee Dec.), §§ 40 and 43, 1 October 2019).

16. This requirement concerns also the publication of the relevant text (on the accessibility of an "*executive order*", see *Custers, Deveaux and Turk v. Denmark* (dec.), § 82). In *G. v. France*, for instance, there was "*consistent case-law from the Court of Cassation, which was published and therefore accessible*" (27 September 1995, § 25, Series A no. 325-B). In *Kasymakhunov and Saybatalov v. Russia*, nos. 26261/05 and 26377/06, § 78, 14 March 2013, the fact that a Supreme Court's decision had not been officially published at the material time was not decisive, as this decision was not considered an essential element for the applicant's conviction under the Criminal Code (§§ 85-86). By contrast, should the decision be an essential element for a conviction, the Court made it very clear that "*journalistic reporting (...) cannot substitute for official publication of the text of the decision, or at least of its operative part. Only a publication*

emanating from an official source can give an adequate and reliable indication of the legal rules applicable in a given case" (§§ 92-93).

(2) International law

17. Where a conviction is based on norms of international law, the legal basis must be sufficiently clear (*Kononov,* §§ 196-199 and notably § 237, *Vasiliauskas v. Lithuania,* § 162 and §§ 167-168). For instance, in *Korbely v. Hungary* [GC], no 9174/02, 19 September 2008, the conviction was based exclusively on Article 3 of the Geneva Convention (§ 74). The Court was satisfied that the Geneva Conventions were sufficiently accessible to the applicant. The Geneva Conventions were proclaimed in Hungary by Law-Decree no. 32 of 1954 and in 1955 the Ministry of Foreign Affairs arranged for the official publication of a brochure containing the text (§ 75).

18. 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], §§ 90-106), as well as customary international law (for the international laws and customs of war, see *Kononov v. Latvia* [GC], §§ 186, 213, 227, 237 and 244; for the concept of "*crime against humanity*", see *Korbely v. Hungary* [GC], §§ 78-85; and for the concept of "*genocide*", see *Vasiliauskas v. Lithuania* [GC], §§ 171-175 and 178), even where the corresponding law has never been formally published (*Kononov v. Latvia* [GC], § 237).

19. 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], §§ 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], §§ 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], §§ 234-239 and 244).

C. The principle of foreseeability

20. This principle is twofold. First, it requires from the State that a rule *"affords a measure of protection against arbitrary interferences by the public authorities*". The relevant law must be sufficiently clear to provide "*effective safeguards against arbitrary prosecution, conviction or punishment*" (*Vasiliauskas,* § 153). Secondly, the purpose of this

requirement is to allow citizens to adapt their conducts accordingly in advance (*Plechkov v. Romania*, no. 1660/03, §§ 71, 16 September 2014).

(1) The legal rules

(a) PRINCIPLES

21. The relevant law is foreseeable, when "*the applicant's act, at the time when it was committed, constituted an offence defined with sufficient precision by domestic and/or international law to be able to guide the applicant's behaviour and prevent arbitrariness*" (*Žaja v. Croatia*, no. 37462/09, § 93, 4 October 2016 with further references).

22. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account (*Cantoni*, § 29, *Del Río Prada,* § 79; *Rohlena,* § 50 and the cases cited therein, *Koprivnikar v. Slovenia*, no. 67503/13, § 47, 24 January 2017, *Haarde v. Iceland*, no. 66847/12, § 127, 23 November 2017 and *Kadusic v. Switzerland*, no. 43977/13, § 68, 9 January 2018 and *G.I.E.M. S.R.L. and others,* § 242). The concept of "*appropriate advice*" refers to the possibility of taking legal advice (*Chauvy and Others v. France* (dec.); *Jorgic v. Germany*, § 113).

23. Overlapping provisions in two different areas of law, namely criminal and administrative, can lead to an ambiguity as to the interpretation of each one of these provisions in light of the other. In such a situation it is for the courts to clarify the relationship between both provisions. There is no issue under Article 7 as long as the interpretation adopted can reasonably be foreseen (*Kalabalik v. Turkey*, no. 26364/04, Committee decision, 2 February 2016).

24. Admittedly, laws must be of general application and the wording of statutes may not always be precise. For instance, it may be difficult to frame laws with absolute precision and a certain degree of flexibility may be called for to enable the national courts to assess whether a publication should be considered separatist propaganda against the indivisibility of the State (*Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 39, ECHR 1999-IV). Moreover, States could not be reasonably expected to provide details in their legislation on the regime to be applied in extraordinary situations (*Öcalan v. Turkey (no. 2)*, nos. 24069/03 and 3 others, § 187, 18 March 2014).

25. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (*Kokkinakis,* § 40, *Del Río Prada,* § 92, *Rohlena,* § 92). There is a need to

avoid excessive rigidity and to keep pace with changing circumstances (*Cantoni*, § 31).

26. By way of an example, the absence definition of a "terrorist organisation" in a specific Article of the Criminal Code is not an issue when such definition may, however, be found in another Article of the Code or in the Anti-Terrorism Act, *read in conjunction,* and is formulated with sufficient precision to enable an individual to regulate his conduct, if need be with appropriate legal advice (*Kasymakhunov and Saybatalov v. Russia*, § 82). By the same token, the fact that "tax evasion" has been defined in the Criminal Code in very general terms did not raise any issue under Article 7 because "*forms of economic activity are in constant development, and so are the methods of tax evasion. In order to define whether a particular behaviour amounts to "tax evasion" in the criminal-law sense the domestic courts may invoke legal concepts from other areas of law, in particular the tax law. The law in this area may be sufficiently flexible to adapt to new situations, without, however, becoming unpredictable*." (*Khodorkovskiy and Lebedev*, § 791).

27. 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. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice (*Cantoni,* § 32, and more recently, *Soros v. France*, no. 50425/06, § 52, 6 October 2011).

28. A distinction is to be made between, on the one hand, a development of the Criminal Code, which makes legislative provision for conduct that had already been expressly referred to and classified as an offence by the former Criminal Code, and, on the other hand, the introduction of a new offence (*Ould Dah v. France*). Admittedly, a specific legislation could be seen to have been the logical continuation of a perceptible line of case-law developing in the matter (*Panaitescu v. Romania* (dec.), no. 8398/04, 19 March 2013).

29. 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 (*Kafkaris v. Cyprus* [GC], no. 21906/04, §§ 140 and seq., ECHR 2008). This is particularly true in relation to persons carrying out 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 (*Vasiliauskas,* § 157).

30. According to the general principles of law, defendants are not entitled to justify the conduct which has given rise to their conviction

simply by showing that such conduct did in fact take place and therefore formed a practice (*Vasiliauskas,* § 158). It is important to reiterate the finding in *K.-H.W. v. Germany* [GC], no. 37201/97, § 75, ECHR 2001-II to the effect that even a private soldier could not show total, blind obedience to orders which flagrantly infringed internationally recognised human rights, in particular the right to life, which is the supreme value in the hierarchy of human rights. 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 (*Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, §§ 74 and 77-79, ECHR 2001-II, and *Vasiliauskas,* § 158).

31. As a result, a practice which flagrantly infringed the right to a fair trial and, in particular, the right to life, cannot be described as "law" within the meaning of Article 7 (*Polednová v. the Czech Republic* (dec.), no. 2615/10, 21 June 2011). In this case, the applicant was accused of having participated, as a prosecutor, in a trial which had been conducted under the direct control of the political authorities of the time, and which had culminated in the sentencing to death of several innocent persons. In particular, the applicant was accused of having misused her role as a prosecutor and of not having fulfilled it in accordance with the legal provisions, among others Articles 3, 30 and 24 of the Code of Criminal Procedure applicable at the material time, relating to the obligation of the authorities to look for incriminating and exonerating evidence, to protect the interests of the State and to establish the truth by all available methods.

32. There is a correlation between the degree of foreseeability of a criminal-law provision and the personal liability of the offender. Thus punishment under Article 7 requires the existence of a mental link through which an element of liability may be detected in the conduct of the person who physically committed the offence (*G.I.E.M. S.R.L. and Others*, § 242 and *Sud Fondi S.r.l. and Others v. Italy*, no. 75909/01, § 116, 20 January 2009). Nevertheless, this requirement does not preclude the existence of certain forms of objective liability stemming from presumptions of liability, provided they comply with the Convention, and in particular Article 6 § 2 thereof (*G.I.E.M. S.R.L. and Others,* § 243).

33. Another consequence of cardinal importance flows from the principle of legality in criminal law, namely a prohibition on punishing a person where the offence has been committed by another. While it is true that anyone must be able at any time to ascertain what is permitted and what is prohibited via clear and detailed laws, a system which punished persons for an offence committed by another would be inconceivable (*G.I.E.M. S.R.L. and Ohers*, §§ 271-272).

34. As a matter of principle, any law allowing for inevitably subjective decision and leaving room for arbitrariness, particularly given the lack of procedural safeguards, breaches Article 7 (*Seychell*, §§ 48-50).

(c) EXAMPLES

35. In *Vasiliauskas,* the Court identified a lack of clarity arising out of the discrepancy within the domestic law, namely the Criminal Code, and the Genocide Convention. A violation was found in *Koprivnikar v. Slovenia*, no. 67503/13, §§ 55-60, 24 January 2017, where the legal provision relied on by the courts provided a deficient legal basis for the determination of the sentence. In particular, the application of the wording of the Criminal Code to the applicant's situation led to contradictory results. This deficiency resulted from the legislature's failure to regulate, in the Criminal Code, an overall sentence for a situation such as the applicant's. The resultant lacuna in the legislation persisted for three years and no special reasons had been adduced by the Government to justify it. Such situation was found to contravene the principle of legality, by which the "*requirement that a penalty must be clearly defined in law is an essential part*". While the courts were certainly the best placed to interpret and apply domestic law, they were not allowed to fill the legislative lacuna by way of extensive judicial interpretation. A violation was also found in *Kafkaris*, due to conflicting statutory provisions concerning the meaning of a sentence of life imprisonment for the purposes of establishing eligibility for remission (§ 150). In *Liivik v. Estonia*, no. 12157/05, § 101, 25 June 2009, the Court found a violation as the interpretation and application of the criminal provision in question involved the use of too broad notions and vague criteria. Conversely, in *Jorgic*, the Court did not endorse the allegation by the applicant that the definition of the offence of genocide (at international and domestic levels) used by the domestic courts was unduly wide.

36. In *Seychell* (§ 48), as well as in *Camilleri v. Malta*, no. 42931/10, § 42, 22 January 2013, the Court found that the law did not determine with any degree of precision the circumstances in which a particular punishment bracket applied. The Court found a violation of Article 7 in relation to the unfettered discretion of the Attorney General to choose the trial court and therefore the applicable punishment. Following changes to the relevant laws, in *Porsenna v. Malta* (dec.), no. 1109/16, 22 January 2019, the Court found that the law did satisfy the foreseeability requirement or provide effective safeguards against arbitrary punishment as provided for in Article 7.

37. Furthermore, the fact that the members of a jury are responsible for applying criminal legislation to the offence being prosecuted does not render that legislation unforeseeable under Article 7 (*Jobe v. the United Kingdom* (dec.), no. 48278/09, 14 June 2011). A criminal law conferring discretion on a jury in applying the law to the facts of the 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 (*O'Carroll v. the United Kingdom* (dec.), no. 35557/03, 15 March 2005).

(2) Clarification of the legal rules through judicial interpretation:

(a) PRINCIPLES

38. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation (*Rohlena,* § 57). There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (*Scoppola,* § 100, *Del Río Prada,* § 92, *Rohlena,* §§ 92-93 and the reference therein).

39. Consequently, it is for the domestic courts to interpret the provisions of substantive criminal law in order to determine, by reference to the structure of each offence, the date on which, all the requirements of the offence being present, a punishable act was committed (*Rohlena,* § 58 and §§ 61-62, *Berardi and Mularoni v. San Marino*, § 43).

40. Moreover, the "*progressive development of the criminal law through judicial law-making*" is a well-entrenched and necessary part of legal tradition. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (*Kafkaris,* § 141, and for a clear and well-established case-law satisfying the requirements of Article 7: *Cantoni,* §§ 34-35).

41. As a result, Article 7 is not incompatible with judicial law making and does not outlaw 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*", that is to say whether it could be considered "*to reflect a perceptible line of case-law development*" (*C.R. v. the United Kingdom*, 22 November 1995, § 32 and § 41, Series A no. 335-C, *S.W. v. the United Kingdom*, 22 November 1995, § 36 and § 43, Series A no. 335-B, *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, § 50, ECHR 2001-II *Previti* (dec.), §§ 275-281, *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 101, 17 September 2009, *Kononov*, § 186 with further references, *Del Río Prada,* §§ 112-113, *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 821, 25 July 2013, *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 155, ECHR 2015, *Seychell*, § 44, and *Berardi and Mularoni*, § 43). This principle applies to international instruments as well (see the Istanbul Convention, *Žaja* , § 98,

and an UN Convention, *Plechkov v. Romania*, no. 1660/03, §§ 70-71, 16 September 2014) and relates both to the elements of the offence and to the applicable penalty.

42. Furthermore, in *Pessino v. France*, (§ 35) and *Dragotoniu and Militaru-Pidhorni v. Romania*, nos. 77193/01 and 77196/01, §§ 42-44, 24 May 2007, the Court stated as follows:

> « Il résulte de l'interdiction d'application extensive de la loi pénale que, faute au minimum d'une interprétation jurisprudentielle accessible et raisonnablement prévisible, les exigences de l'article 7 ne sauraient être regardées comme respectées à l'égard d'un accusé. »

In these case, faced with the lack of previous case-law, even though the applicants were in a profession where they could seek legal advice, it would have been difficult, if not impossible, for them to foresee the last instance court's departure from precedent and thus to know, at the time when they committed them, that their acts might give rise to criminal sanctions (an approach which can differ depending on the nature and severity of the offence, see *S.W.* and *C.R. v. the United Kindgom*, §§ 44 and 42, below under *the ECHR standards*).

43. Subsequently, in *Žaja v. Croatia*, the Court elaborated the following principle (§§ 102-103):

> "(…) an interpretation capable of clarifying the meaning of an otherwise insufficiently clear provision which serves as the legal basis for an offence must, in order to comply with the requirements of Article 7, result from a practice (case-law) of the domestic authorities which is consistent [at the time when the applicant allegedly committed the offence]. That is so because an inconsistent case-law lacks the required precision to avoid all risk of arbitrariness and enable individuals to foresee the consequences of their actions".

It is to be noted that the Court added the following:

> "104. This principle was initially enunciated in the context of complaints under Article 1 of Protocol No. 1 (…) for the purposes of establishing whether an interference with the right of property was foreseeable and thus "provided for by law" within the meaning of that Article (…).
>
> 105. The Court considers that this principle applies *a fortiori* in the context of Article 7 (…) (*Matić and Polonia d.o.o.,* § 50), given that its object and purpose is to provide effective safeguards against arbitrary prosecution, conviction or punishment (…). No person should be forced to speculate, at peril of conviction, whether his or her conduct is prohibited or not, or to be exposed to unduly broad discretion of the authorities, in particular if it was possible, either by drafting legislation in more precise terms or through judicial interpretation, to specify the relevant provision in a way that would dispel uncertainty."

44. In addition, the law-making function of the domestic courts must remain "*within reasonable limits*" (compare *Dallas v. the United Kingdom*,

no. 38395/12, §§ 74 and 77, 11 February 2016 and the notion of '*acceptable clarification of the law*', with *Navalnyye v. Russia*, no. 101/15, § 68, 17 October 2017, where the interpretation of the law could not be said to have constituted a development consistent with the essence of the offence - see also, most recently, *Parmak and Basir v. Turkey*, § 77).

45. As a result of an inconsistent interpretation of the law by the domestic authorities at the relevant time, the room left to those authorities for the interpretation and application of the law is "*too wide to provide effective safeguards against arbitrary prosecution, conviction or punishment*" (*Žaja v. Croatia,* § 106).

46. Be as it may, the domestic courts, which freely evaluate the evidence before them, are allowed to draw "*common-sense inferences from the established facts*" (*Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, no. 26711/07 and 2 others, § 111, 12 May 2016).

47. Finally, the Court admitted that, in certain circumstances, a long-lasting and conscious toleration of certain conduct, otherwise punishable under the criminal law, might grow into a *de facto* decriminalisation of such conduct (*Khodorkovskiy and Lebedev* , § 817 and § 820).

(b) THE ASSESSMENT OF THE NOTION OF FORESEEABLE CASE-LAW

i No precedent

48. The absence of previous identical cases in the domestic judicial practice does not mean that a criminal conviction is contrary to Article 7 (*K.A. and A.D. v. Belgium*, nos. 42758/98 and 45558/99, § 55, 17 February 2005 as regards a very rare criminal act); it is conceivable that the national jurisdictions have not yet had a chance to be confronted with such situations (*Soros v. France*, no. 50425/06, §§ 57-58, 6 October 2011, *Khodorkovskiy and Lebedev,* § 785, *X and Y v. France*, no. 48158/11, § 61, 1 September 2016). Even when a point is ruled on for the first time in an applicant's case, a violation of Article 7 will not arise if the meaning given is both foreseeable and consistent with the essence of the offence (see the precedents cited in *Navalnyy v. Russia*, nos. 29580/12 and 4 others, § 56, 2 February 2017).

49. As a result, in assessing the foreseeability of a judicial interpretation, no decisive importance should be attached to a lack of comparable precedents (*Khodorkovskiy and Lebedev,* § 821, *K.A. and A.D. v. Belgium*, §§ 55-58 as interpreted in *Berardi and Mularoni*, § 44). Where the domestic courts are called on to interpret a provision of criminal law for the first time (as in *Berardi and Mularoni*, § 44), as opposed to cases concerning a reversal of pre-existing case law, an interpretation of the scope of the offence which is "*consistent*" with the essence of that offence and could "*reasonably*" be foreseen, as a rule, compliant with Article 7 (*Jorgic*

v. Germany, no. 74613/01, § 109, ECHR 2007-III, as interpreted in *Berardi and Mularoni*, § 44).

50. A slightly different formulation of this principle is to be found in *Huhtamäki v. Finland*, no. 54468/09, § 51, 6 March 2012. In this case, the Finnish Supreme Court was facing a new situation in which it had to take a stand for the first time on the issue of the right not to incriminate oneself. Both domestic law and jurisprudence were silent on this point. The Court found that both alternative interpretations retained had been "*foreseeable*" and "*consistent*" with the essence of the offence in question' (§§ 50-51). It is to be noted that the Court added the following (§§ 52-53):

> "52. Moreover, according to the Court's general approach, it does not question the interpretation and application of national law by national courts unless there has been a flagrant non-observance or arbitrariness in the application of that law (see also *Mikulović and Vujisić v. Serbia* (dec.), nos. 49318/07 and 58216/13, § 44, 17 December 2015, *Navalnyye v. Russia*, no. 101/15, § 57, 17 October 2017 with further references). The Court is unable to find such non-observance or arbitrariness in the present case. (…) the Court concludes that the Supreme Court could, acting within its margin of appreciation, maintain the applicant's conviction also in the changed circumstances."

51. This approach was developed subsequently in *Khodorkovskiy and Lebedev* as regards decisions of the domestic courts which develop the existing case-law and interpret provisions of the law in the light of the "*modern-day conditions*". According to the Court (§ 781), there is "*a relaxed standard in such matters, which allows the States to develop their case-law and adjust it to the changing conditions of modern society*" (compare *Eurofinacom v. France* (dec.), no. 5873/00, ECHR 2004-VII and *S.W. v. the United Kingdom, Huhtamäki v. Finland*). In this case, there was no case-law directly applicable to some specific offences in the heart of the applicants' case. Interestingly, the Court agreed with the Government's argument to the effect that the illegal character of such arrangements might have been established "*with reference to general principles derived from other areas of law, in particular the tax and civil law*" (§§ 794 and seq.). It is to be noted that the Court looked at whether the proceedings could be characterised as a "*flagrant denial of justice*" and whether the courts' findings had been "*arbitrary or manifestly unreasonable*".

52. The case of *Saiz Oceja v. Spain* (dec.), nos. 74182/01 and 2 others, 2 may 2007 concerned a slightly different scenario: there was no "*inappropriate change in the case-law of the Supreme Court*". Rather, the existing case-law had been applied to a new situation, not addressed previously. Hence, the impugned judgment did not contradict the previous jurisprudence. For the Court, this interpretation did not violated Article 7, the Supreme Court being the court of last instance when it came to interpreting the law in this area of the law.

53. Conversely, in *Del Río Prada v. Spain*, the applicant could reasonably have thought, while she was serving her prison sentence and when the decision to combine the sentences and fix a maximum prison term was taken, that the remissions of sentence for work done in prison would be deducted from the maximum thirty-year prison term in accordance with the established practice that had been applied consistently by the Spanish prison and judicial authorities for many years. It was with regard to that previous practice concerning the interpretation of criminal law and the scope of the sentence imposed that the Court considered that the Supreme Court's case-law reversal as applied to the applicant could not be deemed foreseeable, and that consequently there had been a violation of Article 7 (§§ 111-118).

54. As recalled in *X and Y v. France*, « *la solution retenue [doit faire] partie des interprétations possibles et raisonnablement prévisibles* » (§ 61). The application of this principle leave room for appreciation on a case-by-case basis: compare *Pessino v. France*, as to the absence of precedents and an abrupt change in approach §§ 34-36; *Soros v. France,* § 58, which relies favourably on first-instance judgments '*sur des situations connexes*'; *Dragotoniu and Militaru-Pidhorni v. Romania*, §§ 42-43 as concerns a case-law reversal; *Plechkov v. Romania*, as regards an inconsistent jurisprudence from the lower courts and an interpretation by the higher courts which diverged strongly from the text of the law (§§ 72-74).

55. In another situation, where a new legal concept is invoked by the domestic courts for the first time, the same case-law principles apply. Indeed, in *Parmak and Basir v. Turkey*, the Court assessed whether the interpretation of the criminal law was the "*resultant development of a perceptible line of case-law or its application in broader circumstances was nevertheless consistent with the essence of the offence*" (§ 65). In this very recent case, the Court stressed for the first time that 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 (terrorist offences included).

56. Finally, a case-law is comparable when it pertains to similar factual background. In *Seychell v. Malta*, no. 43328/14, §§ 48-50, 28 August 2018, there were only three previous cases, none of which was topical, so that the applicant could not have known, even with appropriate legal advice, the consequences which his actions could entail.

ii No established case-law

57. The absence of a settled case-law at the date of the offence for which the penalty was imposed (with existing conflict in the case-law) is not decisive as far as it forms part of the "*process of gradual clarification of the rules on criminal liability*" (*Valico Srl v. Italy* (dec.), no. 70074/01,

21 March 2006 - see also *Eurofinacom v. France* (dec.), no. 58753/00, 7 September 2004 where there was no supreme court judgment).

58. Moreover, in the Court's view, a settled case-law is a matter of time. In *Arrozpide Sarasola and Others v. Spain,* nos. 65101/16 and 2 others, §§ 122-129, 23 October 2018, there was no judicial or administrative practice consolidated over time which could have created legitimate expectations as regards a stable interpretation of criminal law. Nonetheless, the Court found no violation. It noted that the divergences among the different Spanish courts had only lasted for about ten months, up until the adoption by the Supreme Court of its leading judgment. The Court accepted that "*achieving consistency of the law may take time, and periods of conflicting case-law may therefore be tolerated when the domestic legal system is capable of accommodating them".* In this case, the highest court in matters of criminal law, that is to say the Supreme Court, settled the divergence in question and the solutions adopted in the applicants' cases merely followed the judgment of the plenary Supreme Court. This reasoning, quite recent, has confirmed the same approach taken in 2015 in *Borcea v. Romania* (dec.), § 66.

59. Moreover, the *Drėlingas v. Lithuania*, no. 28859/16, 12 March 2019 judgment stressed the Supreme Courts' role in clarifying the domestic case-law. It is to be noted in this case that the Court emphasized "*the statutory obligation on the domestic courts to take into account their case-law provides "*an important safeguard*" under Article 7*" (§§ 108-110).

60. These judgments can be compared with the approach taken previously in *Contrada (n° 3)* (§§ 74-75). In this case, the Court held that the offence of "*aiding and abetting a mafia-type organisation from the outside*" had resulted from a development in the case-law which had begun toward the end of the 1980s and was consolidated in 1994, and that it was not therefore sufficiently clear and foreseeable for the applicant at the time of the events in respect of which he was charged (1979-1988).

61. Finally, in the case of *Jorgic,* there were two possible interpretations of the term "*to destroy*" in the definition of the crime of genocide. The Court examined the compatibility with Article 7 of the applicant's conviction on the basis of the wider interpretation. It stated that 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*", although, exceptionally, an applicant could rely on a particular interpretation of the provision being taken by the domestic courts in the special circumstances of the case. The Court went on to examine whether there were special circumstances warranting the conclusion that the applicant, if necessary with legal advice, could have relied on a narrower interpretation of the scope of the crime of genocide by the domestic courts. The Court found that, while various authorities (international organisations, national and international courts as well as scholars and writers) had

favoured both the wider and the narrower interpretations of the crime of genocide at the time of the impugned acts, the applicant, if need be with the assistance of a lawyer, could reasonably have foreseen the adoption in his case of the wider interpretation and, therefore, that he risked being charged with and convicted of genocide (§§ 108-114).

iii A combined test

62. Should the case-law not be that conspicuous, the professional status and experience of the applicant and his familiarity with the context may be compensating factors to conclude in favor of the foreseeability of the 'law'. The Court has held that persons carrying on a professional activity must proceed with a high degree of caution when pursuing their occupation and can be expected to take special care in assessing the risks that such activity entails (*Kononov*, § 235). As a matter of fact, the absence of previous identical cases in the domestic judicial practice requires a '*greater cautious*' on their part (*Soros v. France,* §§ 58-59). The same goes when the case-law is not finally settled (*Valico Srl v. Italy*). The notion of foreseeability seems then stricter concerning professionals as they should show particular caution to foresee the risk of punishment **(**see for instance, *Cantoni and below part 3.b) iii* – bearing in mind the inevitable limits of the rule: *Pessino,* §§ 34-36 and *Dragotoniu and Militaru-Pidhorni,* § 44). In addition, it is for the accused legal advisers to clarify any ambiguity in the interpretation of the law with reference to the domestic court decisions (*Taylor v. the United Kingdom* (dec.), no. 48864/99, 3 December 2002).

63. The interpretation of the law by the legal literature is also of relevance (*K.A. and A.D. v. Belgium*, § 59), although the Court has set the following limits:

> « le fait de la doctrine d'interpréter librement un texte de loi ne peut se substituer à l'existence d'une jurisprudence. Raisonner autrement serait méconnaître l'objet et le but de cette disposition, qui veut que nul ne soit condamné arbitrairement. Par ailleurs, la Cour note que le Gouvernement n'a fourni aucun exemple d'interprétation doctrinale [relative aux faits critiqués] » (*Dragotoniu and Militaru-Pidhorni*, §§ 42-43).

(c) EXAMPLES

64. In sum, the constituent elements of an offence may not be essentially changed by the case-law of the domestic courts. They can be clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence. Article 7 § 1 prohibits in essence that existing offences be extended to cover facts which previously clearly did not constitute a criminal offence.

The lack of an accessible and reasonably foreseeable judicial interpretation can lead to a finding of a violation of the accused's Article 7

rights (see, in connection with the constituent elements of an offence, *Pessino v. France*, no. 40403/02, §§ 35-36, 10 October 2006, and *Dragotoniu and Militaru-Pidhorni,* §§ 43-44; see, as regards penalties, Alimuçaj v. Albania, nos. 20134/05, §§ 154-162, 7 February 2012; see, as regards an inconsistent practice which lacked the required precision, *Žaja v. Croatia,* § 106 and as to an extrapolation of criminal provisions read in conjunction: *Navalnyye v. Russia*, no. 101/15, §§ 62 and seq., 17 October 2017). Where that is not the case, the object and the purpose of Article 7 – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated (*Del Río Prada*, § 93). In this case, at the time when the applicant was convicted, when she worked in detention and when she was notified of the decision to combine the sentences and set a maximum term of imprisonment, she could not have foreseen to a reasonable degree that the method used to apply remissions of sentence for work done in detention would change as a result of a departure from case-law by the Supreme Court, and that the new approach would be applied to her.

65. As opposed to cases concerning a reversal of pre-existing case-law, 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,* no. 74613/01, § 109, ECHR 2007-III. In *C.R.*, the judicial decisions did no more than "*continue a perceptible line of case-law development*" and there was "*an evident evolution, which was consistent with the very essence of the offence"*, of the criminal law through judicial interpretation. This evolution had reached a stage where there was a "*reasonably foreseeable development of the law*" (§ 41). In *Khodorkovskiy and Lebedev,* the applicants' case had no precedents. The Court did not find a violation as the novel interpretation of the concept of "*tax evasion*" was based on a reasonable interpretation of the law and "*consistent with the essence of the offence*" (§ 821)[2].

66. Conversely, a violation of Article 7 resulted in a unforeseeable case-law reversal (*Dragotoniu and Militaru-Pidhorni v. Romania*, §§ 39-48) or an expansive interpretation of the 'law' that was inconsistent with both prevailing national jurisprudence and the essence of the offence as defined by the national law (*Parmak and Basir v. Turkey*, § 76; *Navalnyye v. Russia*, § 68) or a conviction for an offence resulting from case-law development consolidated after the commission of that offence (*Contrada v. Italy (no. 3)*, §§ 64-76).

67. According to the former Commission, the national judge may specify the constituent elements of an offence but may not modify the substance of the offence to the defendant's detriment (*Enkelmann*

[2] Compare and contrast, *Khodorkovskiy and Lebedev v. Russia (No. 2)*, no. 51111/07 and 42757/07, 14 January 2020**.**

v. Switzerland (dec.), no. 10505/83, Commission (Plenary), 1 March 1985). An extensive interpretation with a view to adapting an offence to developments in society is acceptable only if it can reasonably be brought under the original concept of the offence and is foreseeable by the citizen (*G v. Federal Republic of Germany*, no. 13079/87, decision, 6 March 1989). Where under rules of common or customary law an act constitutes a criminal offence, the courts may clarify the constituent elements of the offence but not change them to the detriment of the accused. The manner in which the courts will define these constituent elements must be foreseeable for any person with appropriate legal advice (*X. v. the United Kingdom* (dec.), no. 8710/79, Commission (Plenary), 7 May 1982 and for a recapitulation of the case-law of the Commission, see §§ 8-10). In sum, the main criteria relied on by the former Commission was the notion of "*reasonable interpretation of the existing law*" (*Weber v. Switzerland* (dec.), no. 24501/94, Commission 17 May 1995), with reference to the 'principle of legal certainty' in *M.C. v. France* (dec.), no. 17862/91, 10 January 1994; *M.C. v. France*, *report 31*, §§ 63-64, Commission (Plenary), 12 April 1995).

(3) Factors relevant for the assessment of the foreseeability of the law

(a) ELEMENTS RELATED TO THE RULE OF LAW

i The political regime

68. In principle the gradual development of case-law is conceived "*in a given State subject to the rule of law and under a democratic regime*". These factors constitute the cornerstones of the Convention, as its Preamble states (*Ould Dah v. France* (dec.), no. 13113/03, 17 March 2009). In the event of a change of State sovereignty over a territory or a change of political regime on a national territory, it is entirely legitimate for a State governed by the rule of law to bring criminal proceedings against those who have committed crimes under a former regime. 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 (*Vasiliauskas,* § 159).

ii The rules of general international law

69. In principle, the gradual development of case-law remains also "*wholly valid where, an international instrument for the protection of human rights of universal scope has been enacted*" (*Ould Dah*). The impact of the international law is relevant (and extends to the case-law, practice of intentional bodies, and international agreements), as for instance in this case, where at the time they had been committed, the applicant's actions had been

offences defined in a sufficiently accessible and foreseeable manner under French and international law (with reference notably to the Statute of the International Criminal Court) and the applicant could reasonably have foreseen, if necessary with the help of informed legal advice, that there was a risk that he would be prosecuted for the acts of torture he had committed (see, also, *Jorgic,* §§ 108-114, *Van Anraat v. The Netherlands* (dec.), no. 65389/09, § 94, 6 July 2010, and as concerns the international protection of the right to life, *K.-H.W. v. Germany,* §§ 94-105 and *Streletz, Kessler and Krenz v. Germany,* § 75, and the right to a fair trial, *Glässner v. Germany* (dec.), no 46362/99, CEDH 2001 VII - see also The ECHR standards below).

70. A noteworthy example could be found in the case of *Šimšić v. Bosnia and Herzegovina* (dec.), 51552/10, 10 April 2012. While at the material time the impugned acts had not constituted a crime against humanity under domestic law until the entry into force of the new Criminal Code, they constituted a crime against humanity under international law (contrast *Korbely,* §§ 83-85).

71. More generally, 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,* § 58).

iii The ECHR standards

72. In order to assess the quality of the "*law*", the Court relied on the "*rule of law*" (*Vasiliauskas*, § 159), the "*principle of legal certainty*" (*Rohlena,* § 57), and "*the fundamental objectives of the Convention, the very essence of which is respect for human dignity and freedom*" (*Rohlena,* § 71). In particular, in *S.W. v. the United Kingdom*, the Court stated as follows (§ 44):

> "The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 (…), namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment. What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom." (see also *C.R. v. the United Kingdom*, § 42).

73. This approach has been applied since then in the context of domestic violence in *Rohlena,* § 71.

74. More specifically, when assessing the quality of the law under Article 7, the Court relied on Article 2 as far as it implies "*a primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences which endanger life*" (*Vasiliauskas v. Lithuania*, §§ 158-159 and the references therein, see also *Polednová v. the Czech Republic* (dec.)). Importantly, in *K.-H.W. v. Germany* [GC] (notably §§ 66-67 with reference to *Streletz, Kessler and Krenz*), the Court relied on the right to life which was internationally the supreme value in the hierarchy of human rights at the material time. Given its pre-eminence in all international instruments on the protection of human rights, including the Convention itself, the Court agreed that "*a strict interpretation of the domestic legislation had been compatible with Article 7 § 1*" (§§ 88-91). As a result, any conviction for breaching the right to life – not justified by the exceptions in Article 2 § 2 - would be sufficient accessible and foreseeable (see §§ 90-91 and also §§ 92-99, 102-104).

75. An offence can also be considered foreseeable because the impugned act amounts to a "*flagrant violation*" of the right to a fair hearing in a criminal matter (Article 6), which was binding on the State at the material time (*Glässner v. Germany* (dec.) and *Polednová v. the Czech Republic* (dec.)).

76. In general, a State practice which flagrantly infringes human rights and above all the right to life cannot be described as "*law*" within the meaning of Article 7 (*Streletz, Kessler and Krenz v. Germany*, § 87).

77. The Court went even further to hold that the leaders of the former German Democratic Republic (GDR), who had created the appearance of legality emanating from the GDR's legal system but then implemented or continued a practice which flagrantly disregarded the very principles of that system, "*cannot plead the protection of Article 7 § 1*" (*idem*, §§ 88-89)

iv The legal literature

78. The existence and scope, at the material time, of a doctrinal interpretation at domestic level (*Rohlena,* § 61, *Schimanek v. Austria* (dec.), no. 32307/96, 1 February 2000) or international level (*Vasiliauskas v. Lithuania*, §§ 174-175, *Korbely,* § 90, *Jorgic,* § 107, § 111) is another relevant element taken into consideration in the foreseeability assessment, depending on its authority (*Alimuçaj,* §§ 160-161, *Dragotoniu and Militaru-Pidhorni v. Romania,* §§ 42-43) and relevance (*Khodorkovskiy and Lebedev* , § 794, *K.A. and A.D. v. Belgium*, nos. 42758/98 and 45558/99, § 59, 17 February 2005).

(b) ELEMENTS RELATED TO THE LAW AND THE ACCUSED

79. According to the constant case-law, the 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" (*Vasiliauskas v. Lithuania*, § 157).

i The content of the law

80. In *Khodorkovskiy and Lebedev*, the applicants complained that they had been convicted for the use of various tax-minimisation techniques in respect of both company taxes and personal income taxes. The Court agreed that "*tax evasion*" was defined in the Criminal Code in very general terms. The Code describes tax evasion as "*knowing*" inclusion of "*false data*" in the fiscal declarations. However, according to the Court, such a broad definition did not raise any issue under Article 7. It clarified the following:

> "Forms of economic activity are in constant development, and so are the methods of tax evasion. In order to define whether a particular behaviour amounts to "tax evasion" in the criminal-law sense the domestic courts may invoke legal concepts from other areas of law, in particular the tax law. The law in this area may be sufficiently flexible to adapt to new situations, without, however, becoming unpredictable" (§ 791).

81. As far as the Constitution is concerned, the assessment of the '*foreseeability*' can rely on a historical approach based on the preparatory works relating to it, the constitutional doctrine and practice and the conclusions drawn by the domestic court (*Haarde v. Iceland*, no. 66847/12, §§ 128-132, 23 November 2017). In this case, the Court found that there had been no violation. The applicant, a former Prime minister of Iceland, had been tried by a Court of Impeachment and convicted of one count of gross negligence under Article 17 of the Constitution, in conjunction with section 8(c) of the Ministerial Accountability Act, for failing to hold ministerial meetings on "*important government matters*" ahead of the crisis. He complained under Article 7 that his conviction had been based on legal provisions that were vague and unclear. Moreover, he had not been able to foresee the criminal liability imputed to him as the Court of Impeachment, in applying these provisions, had disregarded an established convention regarding ministerial meetings. The Court emphasized the central importance of the relevant Article of the Constitution in the constitutional order and held that the century-old practice invoked by the applicant had not absolved the Prime Minister from his duty under the Constitution (§§ 129-130).

ii The field at hand

82. In *Radio France and Others v. France,* no. 53984/00, ECHR 2004-II, the Court's reasoning relied heavily on the relevant context: the audiovisual communication sector and the way the applicant's company operated (§ 20). Moreover, in highly technical spheres, such as, for example, taxation, the

Court's case-law incites businessmen to take "*special care*" in assessing the risks that their professional activity entails, if need be with the assistance of a lawyer (*Khodorkovskiy and Lebedev,* § 784),

iii The status of the accused

83. 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*" (see, among other authorities, *Achour,* § 54).

84. This is particularly true in relation to persons carrying out a professional activity, who expected to take "*special care in assessing the risks*" involved. Admittedly, the profession of the accused is all the more pertinent when he is a magistrate or a lawyer (*K.A. and A.D.,* §§ 55-58 as concerns a judge; *Glässner v. Germany* (dec.), no. 46362/99, CEDH 2001 VII, a prosecutor *Stoica v. France*, no. 46535/08 (dec.), 20 April 2010 a lawyer). However, it holds true as well in commercial criminal law: *Cantoni,* § 35, *Eurofinacom v. France*, *Valico Srl v. Italy*, *Varvara v. Italy*, no. 17475/09, § 56, 29 October 2013, *Delbos and Others v. France* (dec.), no. 60819/00, 16 September 2004, *Aras v. Turkey (no. 2),* no. 15065/07, § 57, 18 November 2014, and *Khodorkovskiy and Lebedev,* § 810, *Soros*, §§ 58-59). Hence, technical or relatively vague terms may be deemed to be sufficiently clear if they are used in specific fields of law applicable to a limited number of professionals/specialists.

85. This approach has also been applied to the following categories: *Šimšić v. Bosnia and Herzegovina* (dec.), no. 51552/10, § 24, 10 April 2012, a police officer, *Custers, Deveaux and Turk v. Denmark* (dec.), §§ 95-96, 9 May 2006, Greenpeace activists, and an applicant convicted twice for the same crime, *Witzsch v. Germany* (dec.), no. 7485/03, 13 December 2005 (see also in the same logic, *Tolgyesi v. Germany* (dec.), no. 554/03, 8 July 2008).

86. Interestingly, such a stricter standard applies also to persons in leading government positions or other public entities. Noteworthy examples could be found in *Kuolelis and Others v. Lithuania*, nos. 74357/01 and 2 others, § 120, 19 February 2008 as concerns alleged attempts to forcibly overthrow the democratically elected authorities of the country and breach of the sovereignty of the State; *Kononov,* § 235 as concerns a member of a commando unit; *Vasiliauskas,* § 157 as concerns a member of the Ministry of State Security; *Moiseyev v. Russia*, no. 62936/00, § 241, 9 October 2008, a civil servant from the Ministry of Foreign Affairs, and from the Ministry of the Interior: *Penart v. Estonia* (dec.), no. 14685/04, 24 January 2006 (compare with *Korbely,* where the applicant's conviction was based on him having fired, and ordered others to fire, at a group of civilians, resulting in several casualties). In the *Streletz, Kessler and Krenz v. Germany* judgment,

the Court stressed the former GDR leaders' responsibility for the deliberate implementation and continuation of a State practice which they knew or should have known to be in flagrant breach of the principles of the GDR's own legislation and internationally protected human rights. As a matter of principle, in the Court's view, political leaders cannot be ignorant of the domestic and international obligations (§ 88, § 103 and seq.). In *Jorgic*, the Court, when finding against the applicant, emphasized the "*considerable severity and duration*" of the acts he had committed, i.e. the killing of several people, the detention and ill-treatment of a large number of people over a period of several months, as the leader of a paramilitary group in pursuit of the policy of ethnic cleansing (§ 113).

87. In the same vein, obeying the instructions of superiors or an unacceptable practice of a totalitarian regime which flagrantly infringed the principles of national legislation but also internationally recognised human rights, in particular the right to life, does not prevent even a private soldier, and all the more a prosecutor, to be able to foresee criminal responsibility (*Polednová v. the Czech Republic* (dec.)). This is all the more true for a commanding military officer responsible for the flagrantly unlawful ill-treatment and killing of villagers during World War II (*Kononov,* §§ 238-239).

iv. Further relevant elements

88. The consequences of failure to comply with the relevant criminal law should be adequately foreseeable, "*with the assistance of legal advice, but also as a matter of common sense*" (*Kuolelis and Others v. Lithuania*, nos. 74357/01 and 2 others, § 121, 19 February 2008 as regards activities with a view to overthrowing the Government, *Moiseyev v. Russia*, as regards the offence of high treason in the form of espionage, and more recently, *Berardi and Mularoni*, § 54, as regards two Government officials convicted for bribery).

89. As stated above, the accused cannot invoke ignorance when facing very serious criminal behavior. In the Court's view, what matters the most is the "*flagrantly unlawful nature*" of the acts (as in *Šimšić v. Bosnia and Herzegovina* (dec.), no. 51552/10, § 25, 10 April 2012, for the murders and torture within the context of a widespread and systematic attack against civilians – qualified as crime against humanity only in international law - see also, *Streletz, Kessler and Krenz v. Germany*, *K.-H.W. v. Germany*, § 75, *Kononov v. Latvia,* § 238 and above §§ 86-87).

90. In some cases, the Court has considered that new offences were foreseeable because they were "*matters of common knowledge and widely understood*" due to the evolution of society and the applicant's conduct had shown that he had been aware of their meaning, which could have been grasped by reference to other provisions. In *Ashlarba v. Georgia*,

no. 45554/08, § 36, 15 July 2014, the Court found that there had been no violation of Article 7, and stated as follows (§ 38):

> "(…) by introducing (…) two new offences, namely that of being a member of the "thieves' underworld" and that of being a "thief in law", the Georgian legislature merely criminalised concepts and actions relating to a criminal ("thieves'") subculture, the exact meaning of which were already well known to the public at large. Interestingly enough, the Georgian legislature opted to maintain colloquial language in the legal definition of those offences; in the Court's view, this was apparently done to ensure that the essence of the newly criminalised offences would be grasped more easily by the general public. That being the case, the Court was not convinced by the applicant's attempts to present himself as a person to whom the concepts concerning that criminal subculture had been entirely foreign (…) the applicant (...) also expressed opinions which clearly confirmed his interest in the fate of the relevant criminal subculture, the "thieves' underworld", and his understanding of the special set of rules governing it. (…), all the more than the new law could be read in conjunction with existing legal definitions (§§ 39-40)."

91. In this connexion, the rationale of the law and its inherent purpose is another element that the Court takes into account where assessing the foreseeability (see, notably, *Valico Srl v. Italy*) as is the intention of the legislator in a particular historical context, especially the transition to a democratic regime (*Polednová v. the Czech Republic* (dec.), no. 2615/10, 21 June 2011; *Schimanek v. Austria* (dec.), no. 32307/96, 1 February 2000, as regards the alleged lack of precision of the notion of "*activities inspired by National Socialist ideas*" and *Custers and Others v. Denmark*, nos. 11843/03 and 2 others, § 95, 3 May 2007, as regards the abolition of the death penalty). The Court followed the same approach in the context of the abolition of the death penalty in Ukraine (*Ruban v. Ukraine*, no. 8927/11, § 45, 12 July 2016) or the context of a step up in the fight against organised crime in Georgia (*Ashlarba v. Georgia*, § 36 and § 39). The intention of the legislator to humanize the criminal law is of relevance as well (*Ruban,* § 45 - compare and contrast, *Del Río Prada*, § 116).

92. Of some relevance is also the existence of a common practice between States (*Schimanek* and *Khodorkovskiy and Lebedev*, § 796).

(4) The specific case of State succession or a change of political regime

93. As reiterated most recently in *Vasiliauskas,* (§ 159), in the event of a change of State sovereignty over a territory or a change of political regime on a national territory, it is entirely legitimate for a State governed by the rule of law to bring criminal proceedings against those who have committed crimes under a former regime. 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, § 81, and *Kononov,* § 241). As well as the obligation on a State to prosecute drawn from the laws and customs of war, Article 2 also enjoins the States to take appropriate steps to safeguard the lives of those within their jurisdiction and implies a primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences which endanger life (*Kononov,* § 241). The role of the judicial interpretation in the elucidation of doubtful points and in the adaptation to changing circumstances remains valid in such a context (§ 185 and *Glässner v. Germany* (dec.), no. 46362/99, CEDH 2001 VII – see also *Polednová v. the Czech Republic* (dec.), *Kuolelis and Others v. Lithuania*, nos. 74357/01 and 2 others, § 117, 19 February 2008).

94. In *K.-H.W. v. Germany* [GC], no. 37201/97, §§ 54-59, ECHR 2001-II, the lawfulness requirement has been examined under the Criminal Code and the Police Act, in the light of the Constitution. The fact that different approaches had been taken by the domestic courts during the proceedings is not a matter of concern under Article 7 (§ 61).

D. Conclusion

95. Article 7 prohibits the retrospective application of the criminal law where it is to an accused's disadvantage, extending the scope of existing offences to acts which previously were not criminal offences (*Veeber v. Estonia (no. 2)*, no. 45771/99, ECHR 2003-I), and lays down the principle that the criminal law must not be extensively construed to an accused's detriment (*in malam partem*), for instance, by analogy (*Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A *Başkaya and Okçuoğlu v. Turkey,* § 42, *Korbely,* § 70, *Rohlena,* § 78, *Ould Dah*) as this renders the conviction unforeseeable (*Vasiliauskas,* § 183). According to the former Commission, Article 7 forbids to sentence an accused on the basis of an implicitly or expressly repealed law when the impugned facts are subsequent to it (*X. v. Federal Republic of Germany* (dec.), no. 1169/61, 24 September 1963).

96. For an example of the application of a penalty by analogy, see *Başkaya and Okçuoğlu* [GC], §§ 42-43), of a retrospective application of a law to acts which previously did not constitute a criminal offence, see *Puhk v. Estonia*, no. 55103/00, § 41, 10 February 2004, *Jamil v. France*, 8 June 1995, §§ 34-36, Series A no. 317-B, *Welch v. the United Kingdom*, 9 February 1995, § 26, §§ 34-35, Series A no. 307-A) and the application of a new law, see *Veeber v. Estonia (no. 2)*, no. 45771/99, ECHR 2003-I and *Mihai Toma v. Romania*, no. 1051/06, §§ 26-31, 24 January 2012).

97. Article 7 does not set any procedural requirements as to the investigation and prosecution. In the case of *Coëme and Others* (§ 149), the applicants, argued that Article 7 guaranteed not only the foreseeability of the punishment, but also the foreseeability of the prosecution. In that case

the new law had extended the limitation period and thus prolonged the period of time during which prosecutions could be brought in respect of the offences imputed to the applicants. The Court admitted that the application of the new law "*detrimentally affected the applicants' situation, in particular by frustrating their expectations*", but that it did not "*entail an infringement of the rights guaranteed by Article 7, since that provision cannot be interpreted as prohibiting an extension of limitation periods through the immediate application of a procedural law where the relevant offences have never become subject to limitation*". The Court took a similar approach in *Khodorkovskiy and Lebedev*. The applicants may have expected that the authorities would be unable to prosecute them in a criminal court without going first through separate court proceedings, tax or civil. The Court did not follow this argument. In its view, the alleged "*procedural obstacles*" did not mean that the acts imputed to the applicants had not been defined as "*criminal offences*" at the moment when they were committed. It follows that there was no violation of Article 7 on this account (§§ 789-790).

II. Common requirements under Article 7 and Articles 8-11

A. The Convention must be read as a whole

98. The "*lawfulness*" requirement set forth in the Convention – including the expressions "*in accordance with the law*", "*prescribed by law*" and "*provided for by law*" appearing in the second paragraph of Articles 8 to 11 and in Article 1 of Protocol No. 1, and the expression "*under national or international law*" contained in Article 7 – concerns not only the existence of a legal basis in domestic law but also a quality requirement inherent in the "*autonomous concept of lawfulness*" (*Mihalache v. Romania* [GC], no. 54012/10, §§ 111-113, 8 July 2019). This concept entails the requirement to afford a measure of protection against arbitrary interferences by the public authorities with the rights safeguarded by the Convention (see, for example, *Rohlena v. the Czech Republic* [GC], no. 59552/08, §§ 50 and 64, ECHR 2015, as regards Article 7; *Rotaru v. Romania* [GC], no. 28341/95, §§ 52-56, ECHR 2000-V; *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, §§ 123-24 and 134, 14 March 2013; and *Roman Zakharov v. Russia* [GC], no. 47143/06, §§ 228-229, ECHR 2015, as regards Article 8; *Leyla Şahin c. Turquie* [GC], no. 44774/98, §§ 88-91, CEDH 2005-XI, as regards Article 9; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 143, ECHR 2012, as regards Article 10; *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, §§ 114-15 and 118, 15 November 2018, as regards Article 11).

99. According to the well-established case-law, "*Article 7 alludes to the very same concept of 'law' as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability*" (*Coëme and Others*, § 145, *Achour*, § 42 and, as a recent authority, *Koprivnikar v. Slovenia,* no. 67503/13, § 48, 24 January 2017). This principle has been reiterated, for instance under Article 9 § 2 (*Kokkinakis*, § 52), Article 10 § 2 (*Perinçek v. Switzerland* [GC], no. 27510/08, § 134, ECHR 2015) or Article 11 § 2 (*Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 193, ECHR 2015).

100. On this assumption, when recalling the case-law principles on the 'quality of the law' under Article 7, the Court relies regularly on cases dealing with Articles 8, 9, 10 or 11 (*Plechkov v. Romania*, no. 1660/03, § 60, 16 September 2014, *Huhtamäki v. Finland*, no. 54468/09, §§ 41-43, 6 March 2012, and notably, *Perinçek v. Switzerland* [GC], no. 27510/08, § 134, ECHR 2015). Indeed, "*the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions*" (*Mihalache v. Romania* [GC], § 112).

B. Analogous case-law principles

101. On the basis of an autonomous interpretation of the notion of 'law', the Court defines the accessibility and foreseeability of the law through common standards under Articles 7 to 11. The *Kokkinakis* and *G. v. France* judgments have aligned Articles 7 and 10 in this regard at an early stage. As a result, the assessment of the requirement of foreseeability under Articles 8, 10 and 11 relies on the same principles as those elaborated under Article 7 as regards the notion of "*law*", the role of judicial interpretation (*Leyla Şahin v. Turkey* [GC], no 44774/98, §§ 91 and 98, CEDH 2005-XI as regards Article 9; see, for the first application of a criminal provision to the applicant under Article 10: *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 150, 27 June 2017 and Article 11: *Kudrevičius and Others,* § 115), the responsibility of an accused in taking legal advice (also under Article 8, see *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 171, 15 November 2016; *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 37, Series A no. 316-B under Article 10) and in assessing the risk involved (*Bernh Larsen Holding AS and Others v. Norway*, § 125 as regards Article 8, *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III as regards Article 10) taking into account his status (*Amihalachioaie v. Moldovan,* no. 60115/00, § 33, ECHR 2004-III as concerns Article 10 and *Maestri,* Article 11- and for a recapitulation of the case-law, see *Perinçek v. Switzerland*, §§ 131 and seq.). In this later case, the Court held as follows:

> "Even in cases in which the interference with the applicants' right to freedom of expression had taken the form of a criminal "penalty", the Court has recognised the impossibility of attaining absolute precision in the framing of laws, especially in fields in which the situation changes according to the prevailing views of society, and has accepted that the need to avoid rigidity and keep pace with changing circumstances means that many laws are couched in terms which are to some extent vague and whose interpretation and application are questions of practice".

102. The same is true for the criteria set forth above under Article 7 about "*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*" (*Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 77, ECHR 2010, as regards Article 8, *Leyla Şahin v. Turkey* § 91, Article 9; *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III, Article 10). Interestingly, in this latter case, the Court stressed that "*because of the general nature of constitutional provisions, the level of precision required of them may be lower than for other legislation*" (§ 34). As a result, generic terms in the Constitution are to be read in conjunction with complementary provisions contained in various laws (§§ 35-36).

103. As regards the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, the Court has also held, by reference to Articles 9, 10 and 11, that the mere fact that a legal provision is capable of more than one construction does not mean that it does not meet the requirement of foreseeability (*Leyla Şahin v. Turkey* [GC], no. 44774/98, § 91, ECHR 2005-XI, as regards Article 9; *Vogt v. Germany*, 26 September 1995, § 48 *in fine*, Series A no. 323, as regards Article 10, and *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 65, ECHR 2004-I, Article 11). In the context of Articles 7 and 10, the Court has noted that when new offences are created by legislation, there will always be an element of uncertainty regarding the meaning of this legislation until it is interpreted and applied by the criminal courts (*Perinçek,* §§ 134-135 and § 138 which follows explicitly the approach taken under Article 7). Even the broad approach taken in *Khodorkovskiy and Lebedev* seems to be echoed under Article 10 (compare *Hachette Filipacchi Associés v. France,* no. 71111/01, § 32, 14 June 2007, and the necessary flexibility of the law, compare with *Tolstoy Miloslavsky*, § 44 and *Perinçek v. Switzerland*, §§ 131 and seq.)

104. The protection against arbitrariness is essential under Articles 8-11 as well (*Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V as regards Article 8; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 86, ECHR 2000-XI as regards Article 9; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, §§ 141-143, ECHR 2012 with further references, *Chauvy and Others v. France*, no. 64915/01, §§ 44-49, ECHR 2004 VI, see also *RTBF v. Belgium*, no. 50084/06, §§ 103-104, ECHR 2011 as regards Article 10; *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others,

§ 114, 15 November 2018, *Hakobyan and Others v. Armenia*, § 107, *Huseynli and Others v. Azerbaijan*, § 98 as regards Article 11). Even a reference to the prohibition of an extensive application of a restriction to any party's detriment is to be found in the context of Article 10 (see, for instance, *Centro Europa 7 S.r.l. and Di Stefano*, § 143) and Article 11 (see, most recently with an extensive reasoning: *Bakır and Others v. Turkey*, no. 46713/10, §§ 54-69, 10 July 2018).

105. In the *RTBF v. Belgium* judgment, the application by the Court of Cassation of different provisions of the Constitution, depending on whether print media or audiovisual media were concerned, appeared artificial. It did not provide a strict legal framework for prior restraint on broadcasting, especially as Belgian case-law did not settle the question of the meaning to be given to the notion of "*censorship*" as prohibited by the Constitution. The legislative framework, together with the case-law of the Belgian courts, as applied to the applicant company, did not therefore fulfil the condition of foreseeability required by the Convention in breach of Article 10.

106. The 'rule of law', which is expressly mentioned in the Preamble to the Convention, is also taken into account under Article 8 (*Rotaru,* § 55, *Bernh Larsen Holding AS and Others v. Norway*, § 124), Article 9 (*Hasan and Chaush v. Bulgaria*, § 84), Article 10 (*Glas Nadezhda EOOD and Elenkov v. Bulgaria*, no. 14134/02, § 46, 11 October 2007) and Article 11 (*Navalnyy*, § 115, *Lashmankin and Others v. Russia*, nos. 57818/09 and 14 others, 7 February 2017, § 430) to the effect that:

> "In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise".

107. The principle of legal certainty is implicit in all the Articles of the Convention and has been relied on in *Ternovszky v. Hungary,* no. 67545/09, §§ 24-26, 14 December 2010 as regards Article 8. When examining compliance with the "*lawfulness*" criterion in respect of the interference provided for in Articles 8 to 11, the Court has on numerous occasions stated that any restrictive provision must be "*foreseeable*", this requirement being closely linked to the principle of legal certainty (*Maestri,* § 30).

108. As a result of this case-law, in view of a finding under Article 9 § 2, or 10 § 2, that the interference was "*in accordance with the law*", the Court finds no violation of Article 7 (*Kokkinakis*, § 52, *Grigoriades c. Greece*, 25 November 1997, § 50, Recueil 1997-VII, *Başkaya and Okçuoğlu v. Turkey*, § 49, *Erdoğdu and İnce v. Turkey* [GC], nos. 25067/94 and 25068/94, § 59, ECHR 1999-IV, *Soila v. Finland*, no. 6806/06, § 79, 6 April 2010 as concerns a politician).

109. In the same logic, in the absence of clear and foreseeable legislation under Article 11 § 2, the Court considered the applicant punishment for breaching an "*inexistent procedure*" as incompatible with Article 7 (*Vyerentsov v. Ukraine*, no. 20372/11, § 67, 11 April 2013). This case deals with the text of a Constitution which provided for some general rules requiring further elaboration. The Court found that there had been no clear and foreseeable procedure for holding peaceful demonstrations in Ukraine since the end of the Soviet Union. Indeed, the general rules laid down in the Ukrainian Constitution as regards the possible restrictions on freedom of assembly still required further elaboration in the domestic law. In particular, in a decision of 2001 the Constitutional Court held that the procedure regarding the notification of peaceful assembly to the Ukrainian authorities was a matter for legislative regulation. Moreover, the only existing document establishing such a procedure was a decree, which had been adopted in 1988 by a country that no longer existed – the USSR – and was not generally accepted by the domestic courts as still applicable. Therefore, it could not be concluded that the "*procedure*" referred to in the Code on Administrative Offences was formulated with sufficient precision to enable the applicant to foresee, to a degree that was reasonable in the circumstances, the consequences of his actions. Nor, for the same reason, did the procedures introduced by the local authorities to regulate the organisation and holding of demonstrations in their particular regions appear to provide a sufficient legal basis. Even though the Court acknowledged that it could take some time for a country to establish its legislative framework during a transitional period like the one Ukraine was currently going through, it could not agree that a delay of more than twenty years was justifiable, especially when such a fundamental right as freedom of peaceful demonstration was at stake. The interference with the applicant's right to freedom of peaceful assembly had therefore not been prescribed by law (§§ 54-55 and § 67), which resulted subsequently in a breach of Article 7.

110. In the same vein, when the Court finds no violation of Article 7, there is no issue as to the foreseeability of the 'law' under Article 8 (*K.A. and A.D. v. Belgium*, § 80) or Articles 9, 10, 11 (*Kuolelis and Others v. Lithuania*, § 126).

111. Some other factors considered under Article 7 to assess the quality of the law can be found under Articles 8-11. However, there are few such occurrences. The opinions of academic writers may be taken into consideration (*Kopp v. Switzerland*, 25 March 1998, § 60, *Reports of Judgments and Decisions* 1998-II as regards Article 8); an historic approach may also be considered in order to assess the 'quality of the law' under Article 10 § 2 (*Gorzelik and Others v. Poland* [GC], no. 44158/98, § 68, ECHR 2004-I) and the intention of the legislature (see, *mutatis mutandis*, *Esposito v. Italy* (dec.), no. 34971/02, 5 April 2007 under Article 8).

112. In one case, under Article 11, the Court took into account the impact of the impugned measure on another fundamental right (*Navalnyy,* § 118, Articles 11 and 5). This is apparently the only case where, finding reason to doubt that the manner of application of the relevant law was sufficiently foreseeable to meet the quality requirement inherent in the autonomous notion of lawfulness under Article 11 § 2, the Court added that this doubt was supported by the fact that on each occasion the authorities had interrupted the applicant's exercise of freedom of assembly by arresting and detaining him in circumstances at variance with Article 5 § 1 (§ 118, and compare with cases referred to in part The ECHR standards above).

III. Specific requirements under Article 7 as compared to Articles 8 to 11

113. Article 7 prescribes the requirement of "*clarity*" of the law in defining proscribed criminal behaviour in penal statutes, whereas Articles 8 to 11 concern restrictions on the enjoyment of a fundamental right. In their separate opinion in the *Maestri v. Italy* [GC] judgment, dissenting judges held that the requirement of clarity obviously appears necessary to a *higher degree* in the "*criminal*" context of Article 7. In their opinion, there were *different* requirements of foreseeability between, on the one hand, criminal laws and, on the other hands, norms which interfere with the enjoyment of fundamental rights (see along the same line, the separate opinion in the case of *Soros v. France*, no. 50425/06, 6 October 2011).

114. According to the case-law, "*in matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise*" (*Maestri,* § 30 under Article 11). In *Rohlena,* the Grand Chamber has specified that the law must meet "*the quality requirement of foreseeability flowing from the autonomous meaning of the notion of* 'law' *under Article 7*" (§ 64).

115. An analysis of both the text of the Convention and the relevant case-law reveals some specific requirements under Article 7 in respect of the 'quality of the law'.

A. In the text of the Convention

(1) No derogation: Article 15

116. Article 7 is a non-derogable clause, and "*an essential element of the rule of law*". It occupies "*a prominent place in the Convention system of*

protection", as underlined by the fact that no derogation from it is permissible under Article 15 of the Convention 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*" (*C.R. v. the United Kingdom*, 22 November 1995, § 32, Series A no. 335-C and *S.W. v. the United Kingdom*, 22 November 1995, § 34, Series A no. 335-B and *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 153, ECHR 2015). This does not extend to either Articles 8, 9, 10 or Article.

117. The principle of the rule of law has been reiterated since under Article 7 (see, for instance, *Scoppola,* § 108, *Gouarré Patte v. Andorra*, no. 33427/10, § 35, 12 January 2016, and *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 202, 4 December 2018).

(2) A criminal offence under "*international law*"

118. As compared to the text of Articles 8 to 11, Article 7 refers expressly to a "*criminal offence under national or international law*". The applicant's conviction can therefore be examined from both perspectives. As a result, should the applicant's conviction be based upon domestic legal provisions that were not in force at the relevant time, there will not be a violation of Article 7 if it can be established that the conviction was based on international law as it stood at the relevant time (*Vasiliauskas v. Lithuania*, § 166). Interestingly, in addition to conventional obligations, customary international law is also relevant to assess the foreseeability of a conviction (§§ 172-173) if it relies on a sufficiently strong basis (§ 175 and § 178). In addition, domestic authorities have discretion to interpret an offence more broadly than that contained in an international Convention. However, such discretion does not permit domestic tribunals to convict persons accused under that broader definition retrospectively (§ 181). In this context, international organisations, national and international courts as well as scholars and writers are taken into consideration (§ 167, § 185 and § 174, see also *Jorgic*, §§ 108-114).

119. When someone is punished on the sole basis of international law, the requirements of accessibility and foreseeability do apply as well (*Kononov v. Latvia* [GC], no. 36376/04, § 236, ECHR 2010, *Šimšić v. Bosnia and Herzegovina*.(dec.), no. 51522/10, 10 April 2012). In *Korbely v. Hungary* [GC], no. 9174/02, 19 September 2008, the conviction was based exclusively on Article 3 of the Geneva Convention (§ 74). To verify whether Article 7 was complied with, the Court examined whether it was foreseeable that the act for which the applicant was convicted would be qualified as a crime against humanity (§ 76). The Court concluded that the applicant did not fall within any of the categories of non-combatants protected by common Article 3. Consequently, no conviction for crimes

against humanity could reasonably be based on this provision in the present case (§ 94). Therefore, the Court concluded that it had not been shown that it was foreseeable that the applicant's acts constituted a crime against humanity under international law in violation of Article 7 (§ 95) (see also *K.-H.W.*, § 92-93 and *Drėlingas v. Lithuania,* no. 28859/16, 12 March 2019, no violation).

(3) A criminal offence "*at the time when it was committed*".

120. This is an important difference between the imposition of a criminal penalty without a law and an interference with a right that is not prescribed by law. In the former instance, the legal basis must exist at the time of the sanctioned action and not simply at the time of its repression by the State. Conversely, the legal basis for an interference with a right under Articles 8-11 must exist at the time of the interference itself. This particular aspect of Article 7 was emphasized for the first time in *Başkaya and Okçuoğlu v. Turkey,* [GC], § 50, as follows (and more recently in *Rohlena,* §§ 56 and 64):

> " As regards the second applicant, there is one difference between Article 7 and Article 10 § 2 which is relevant to his case. Under Article 7, it is a condition for punishment that the proscribed conduct constituted an offence "at the time when it was committed". In contrast, under Article 10 § 2, it is also the time of the imposition of the measures constituting the interference which is material to the consideration of the issue of lawfulness."

(see also *E.K. v. Turkey*, no. 28496/95, §§ 61-63, 7 February 2002 and compare, however, *Del Río Prada v. Spain* [GC], §§ 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).

(4) Article 7 § 2: "*the general principles of law recognised by civilised nations*"

121. This is a very limited clause. It relates only to the validity of prosecutions after the Second World War and does not have a general meaning (*Maktouf and Damjanović v. Bosnia and Herzegovina*, § 72). Despite not directly relevant for the quality of the 'law', one has to bear in mind that the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner, paragraph 1 containing the general rule of non-retroactivity and paragraph 2 being only a contextual clarification of the liability limb of that rule (*Vasiliauskas v. Lithuania,*§§ 188-189 – see also *Kolk and Kislyiy v. Estonia* (dec.), no. 23052/04 and no. 24018/04, 17 January 2006).

B. In the case-law

(1) Impact of ECHR/international standards on the "*lawfulness*" requirement under Article 7

122. Under Article 7, the foreseeability requirement seems to imply a balancing of this Article with the general spirit of the Convention or other human rights treaties. In sum, an offence would be 'foreseeable' when it flagrantly infringes human rights and above all the right to life (Article 2), because it is the supreme value in the international hierarchy of human rights. The reason for this is that any rule contrary to this fundamental right cannot be described as "*law*" within the meaning of Article 7 (see notably *K.-H.W.,* § 90 and §§ 93-*Streletz, Kessler and Krenz v. Germany*, § *105*). The same goes for Article 6 and the notion of 'fair trial' (*Glässner v. Germany* (dec.) and *Polednová v. the Czech Republic* (dec.)).

123. The Contracting Parties have a primary Convention obligation to protect the right to life (*Kononov v. Latvia* [GC], § 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], § 158; *Streletz, Kessler and Krenz v. Germany* [GC], §§ 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,* §§ 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], §§ 240-241).

124. Under Articles 8 to 11, the Court seems to have referred to Article 5 when assessing the foreseeability of the 'law' under Article 11 § 2 only in the case of *Navalnyy*.

(2) Specific requirements of the "*principle of legality in criminal law*"

125. In its *Sud Fondi S.r.l. and Others* judgment (§ 117), the Court held that "*Under Article 7, (...), a legislative framework which does not enable an accused person to know the meaning and scope of the criminal law is defective not only on the grounds of the general conditions of 'quality' of*

the 'law' but also in terms of the specific requirements of the principle of legality in criminal law". Subsequently, in *G.I.E.M. S.R.L. and Others,* (§ 242), the Grand Chamber endorsed the analysis to the effect that the rationale of the sentence and punishment, and the '*guilty*' concept (in the English version) with the corresponding notion of '*personne coupable*' (in the French version), supported an interpretation whereby Article 7 required, for the purposes of punishment, a mental link. The principle that offences and sanctions must be provided for by law means that, "*in principle, a measure can only be regarded as a penalty within the meaning of Article 7 where an element of personal liability on the part of the offender has been established*". There is a clear correlation between the degree of foreseeability of a criminal-law provision and the personal liability of the offender. The punishment under Article 7 requires the existence of a mental link through which an element of liability may be detected in the conduct of the person who physically committed the offence (§ 242, § 246, § 250). Moreover, the Grand Chamber clarified that Article 7 precludes the imposition of a criminal sanction on an individual without his personal criminal liability being established and declared beforehand (§ 251). Therefore, there is a "*prohibition on punishing a person where the offence has been committed by another*" (§ 271).

(3) Foreseeability test / proportionality test?

126. Interestingly, in some cases (*Navalnyy*, § 118 as regards Article 11), the Court considered that the law under scrutiny raised important questions extending beyond a mere analysis of its quality and foreseeability, and found it more appropriate "*to incorporate that analysis in the broader proportionality assessment to be carried out under the necessity test*", i.e. in an extended review of whether the discretion enjoyed by the authorities in this area was accompanied by adequate safeguards against abuse.

127. Under Article 8, according to *Roman Zakharov v. Russia* [GC], no. 47143/06, §§ 229-238, ECHR 2015, in cases where the legislation permitting secret surveillance is contested before the Court, the lawfulness of the interference is closely related to the question of whether the "*necessity*" test has been complied with and it is therefore appropriate for the Court to address jointly the "*in accordance with the law*" and "*necessity*" requirements. "*The "*quality of law*" in this sense implies that the domestic law must not only be accessible and foreseeable in its application, it must also ensure that secret surveillance measures are applied only when "necessary in a democratic society", in particular by providing for adequate and effective safeguards and guarantees against abuse.*" In *Malone v. the United Kingdom*, no. 8691/79, § 67, 2 August 1984, the Court emphasised the need for a specific definition of the foreseeability requirement in the special context of interception of communications. As a

result, the Court has formulated some special requirements of foreseeability for specific situation types (see also *Uzun v. Germany*, no. 35623/05, §§ 66-69, ECHR 2010).

(4) No formal stricter approach under Article 7 but specific criteria

128. According to the former Commission in the case of *Cantoni v. France, report 31* (§§ 61-62), « *si les critères élaborés par la jurisprudence des organes de la Convention au regard d'autres dispositions de la Convention et de ses protocoles peuvent être transposés à la matière de l'article 7, l'exigence de légalité doit être appréciée plus strictement aux fins de son application* (N° 8710/79, p. 85). *Il y va du droit à la liberté, fondement de toute société démocratique* (arrêt *Engel*, § 82) ». This position was not endorsed by the Grand Chamber (see §§ 27 and 29).

129. In old cases against Turkey, the approach of the former Commission used to be that in the particular case of restrictions on the freedom of expression taking the form of criminal sanctions (Article 10), "*Article 7 must be taken* into *account in addition to the more general requirement of lawfulness laid down in Article 10 § 2* (see, for instance, *Başkaya and Okçuoğlu v. Turkey,* nos. 24408/94 and 23536/94, *Report 31*, Commission (Plenary), § 58, with reference to *X. Ltd. And Y. v. United Kingdom* (dec.), no. 8710/79, 7 May 1982, D.R. 28 p. 77). Again, this has not been followed by the Grand Chamber in its judgment (*Başkaya and Okçuoğlu v. Turkey,* [GC], nos. 23536/94 and 24408/94, §§ 36-43 and §§ 48-49, ECHR 1999-IV).

130. None of these approaches have been taken on by the Court and the current case-law does not refer, formally speaking, to any stricter approach under Article 7 (see, however, *K.-H.W. v. Germany* [GC], § 88).

131. Nonetheless, there are multiple factors under Article 7 to assess the foreseeability of a criminal law. Some criteria seem to be dedicated fairly exclusively to this Article or at least used rather extensively. These criteria can be listed as follows: the international/ECHR standards (very specific); the reliance on the intention of the legislator when drafting the law; the weight attached to the necessary flexibility of the law/practice in order to adapt to new criminal situations; the notion of 'perceptible line of case-law' (exclusively used under Article 7); to some extent, the existence of a common practice in other European States (seemingly also unique under Article 7); and the gravity of flagrant unlawful acts (specific as well).

IV. The principle of (non-)retrospectiveness of the criminal law

A. The principle of non-retroactivity of the criminal law to an accused's disadvantage

132. It is well-stablished in the Court's case-law that Article 7 of the Convention prohibits the retrospective application of the criminal law to an accused's disadvantage (see, for instance, *Del Río Prada*, cited above, § 78, and *Vasiliauskas*, cited above, § 154, with further references). It also prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, or otherwise extensively construing the criminal law to an accused's detriment (see *Başkaya and Okçuoğlu*, cited above, § 36, and *Coëme and Others*, cited above, § 145). 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 (see *Del Río Prada*, cited above, § 89).

133. The principle of non-retroactivity of criminal law applies to the provisions setting the penalties for an offence (see, for instance, *Jamil*, cited above, §§ 34-36). Thus, in so far as a certain measure falls to be considered as "*penalty*" within the meaning of Article 7 and does not relate to the "*execution*" or "*enforcement*" of the "*penalty*", the absolute ban on retrospective criminal laws applies (see *M. v. Germany*, no. 19359/04, § 134, ECHR 2009).

134. However, in this context it is important to bear in mind that 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 (see *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and 2 others, § 105, ECHR 2013 (extracts)). The Court's assessment is confined to ascertaining that no heavier penalty is imposed than that which was applicable at the time of commission of the offence (see, for instance, *Hummatov v. Azerbaijan* (dec.), nos. 9852/03 and 13413/04, 18 May 2006, and *Hakkar v. France* (dec.), no. 43580/04, 7 April 2009).

135. The principle of non-retroactivity of criminal law also applies to the provisions defining the offence. Thus, an applicant's conviction based upon legal provisions that were not in force at the time of the commission of the offence would constitute a violation of Article 7 of the Convention (see *Vasiliauskas*, cited above, §§ 165-166). Similarly, as already stressed, extending the scope of existing offences to acts which previously were not criminal offences, runs counter to Article 7 (see *Kafkaris*, cited above, § 138).

136. However, in this context, it is important to differentiate between two situations. The first concerns instances where an applicant is found guilty under the existing criminal law of an act which did not constitute a criminal offence under the provisions applicable at the time of the commission of the offence (see *Korbely*, and *Vasiliauskas*, both cited above). The second concerns instances where the act in question was proscribed – even if under different names – both at the moment of the commission of the offence and the moment of the conviction.

137. The former situation, as already discussed (see paragraph 136 above), raises an issue of retrospective application of criminal law to an accused's disadvantage. On the other hand, the latter situation concerns the requalification of the charges in case of a succession of criminal laws in time. In such a situation, the Court primarily seeks to determine whether there is a continuity of the offence, taking into account the moment of the commission of the offence and the moment of the conviction.

138. In particular, the Court has held that, subject to the above-cited general principles, such requalification does not in itself contravene Article 7 of the Convention. Indeed, the Court is not concerned with the formal classifications or names given to criminal offences under the domestic law. To ensure that the requirements of Article 7 were complied with, it suffices to determine that the act leading to the conviction constituted, in its substance, a criminal offence under the national law at the relevant time, irrespective of the different names by which that offence was referred to at various times. Moreover, in order to comply with the requirements of Article 7, the punishment imposed must not exceed the limits fixed by the provision which made the act punishable at the moment when it was committed (see *Maksimov v. Azerbaijan* (dec.), no. 38228/05, 1 February 2007).

139. Thus, for instance, in *G. v. France* (cited above, §§ 25-26), where the acts of which the applicant was accused fell within the scope of the legislation applicable at the moment when they were committed and the new legislation under which he was eventually convicted, the Court found no violation of Article 7 of the Convention. It noted that the new provision was applied on the basis of the principle that the more lenient law should apply both as regards the definition of the offence and the sanctions imposed. In the applicant's case, the application of the new legislation downgraded the offence of which he was accused from serious offence (*crime*) to less serious offence (*délit*) and thus, although applied retrospectively, operated in the applicant's favour.

140. Similarly, the above principles apply even if at the time of the events the impugned acts constituted not separate offences (as they did at the time of the conviction) but aggravating circumstances of other offences. The Court noted that as such they could be held against any person who had committed a crime or an offence and constituted additional factors, separate

from the main offence and covered by a special law, which increased the penalty applicable to the main offence. Consequently, at the time they had been committed, the impugned actions had been offences defined in a sufficiently accessible and foreseeable manner. In these circumstances, in so far as the penalty imposed on the applicant did not exceed the maximum one provided for in the criminal law applicable at the time of the events, the Court considered that no issue arose under Article 7 of the Convention (see *Ould Dah*, cited above; see also *Berardi and Mularoni*, cited above, § 55).

141. By contrast, in *Parmak and Bakır* (cited above), the applicants were convicted under the provision of criminal law applicable at the time when the offence was committed taken in conjunction with the subsequent legislative amendments, which, according to the domestic courts, ought to be interpreted as broadening the scope of the proscribed acts under the applicable provision of criminal law. In these circumstances, the Court considered it important to examine whether the domestic courts' broad interpretation of the text of the law in convicting the applicants was reasonably foreseeable for the purposes of Article 7 § 1 of the Convention. In so doing, the Court, in the first place, had regard to whether the interpretation in question was the resultant development of a perceptible line of case-law. Secondly, it assessed whether the application of the law in broader circumstances was nevertheless consistent with the essence of the offence. On the facts, the Court found that the domestic courts had chosen to exercise their judicial discretion in an expansive manner by adopting an interpretation that was inconsistent with both prevailing national jurisprudence and the essence of the offence as defined by the national law. They therefore infringed the reasonable limits of acceptable judicial clarification contrary to the guarantees of Article 7 of the Convention (compare *Pessino*, cited above, §§ 32-37, and, by contrast, *S.W. v. the United Kingdom*, cited above, §§ 41-47).

142. Further, the principle of non-retroactivity of criminal law has special features as regards the cases of "continuing" or "continuous" offences (concerning acts extending over a period of time). In particular, when an accused is charged with a continuing offence, the principle of legal certainty requires that the acts which go to make up that offence, and which entail his criminal liability, be clearly set out in the bill of 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 (see *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, § 34, ECHR 2001-II).

143. Moreover, as the Court clarified in *Rohlena* (cited above, § 56), in case of offences concerning acts extending over a period of time, its function under Article 7 § 1 is twofold. Firstly, it must examine whether, at the time they were committed, the applicant's acts constituted an offence

defined with sufficient foreseeability by domestic law. Secondly, the Court must determine whether the application of the subsequently introduced provision by the domestic courts entailed a real possibility of the applicant's being subjected to a heavier penalty in breach of Article 7 of the Convention (see also *Veeber v. Estonia (no. 2)*, no. 45771/99, §§ 32-39, ECHR 2003-I, and *Puhk v. Estonia*, no. 55103/00, §§ 27-34, 10 February 2004).

144. Lastly, it should be noted that the rules on retrospectiveness set out in Article 7 of the Convention do not apply to procedural laws. The Court has held that it is reasonable for domestic courts to apply the *tempus regit actum* principle with regard to such laws (see *Scoppola*, cited above, § 110, with further references), provided that there is no arbitrariness in the conduct of the domestic courts (see *Previti*, cited above, § 81). In this connection, the Court has also held that Article 7 cannot be interpreted as prohibiting an extension of limitation periods through the immediate application of a procedural law where the relevant offences have never become subject to limitation (see *Coëme and Others*, cited above, § 149), and *Biagioli v. San Marino* (dec.), no. 8162/13, § 89, 8 July 2014).

145. Similarly, the entry into force of a new law providing for harsher provisions on the sentencing of recidivism is not contrary to Article 7 of the Convention. In this connection, the Court stressed that the practice of taking past events into consideration when sentencing should be distinguished from the notion of retrospective application of the law *stricto sensu*, provided that the offence for which an accused is prosecuted and punished took place after the entry into force of the new law providing for the harsher provisions on recidivism (see *Achour*, cited above, § 59).

B. The principle of retrospectiveness of the more lenient criminal law

(1) Principles

146. According to the previous position of the Convention institutions, Article 7 of the Convention did not guarantee the right to a more lenient penalty provided for in a law subsequent to the offence.[3] This was the opinion expressed by the European Commission of Human Rights in *X v. Germany* (no. 7900/77, Commission decision of 6 March 1978, Decisions and Reports (DR) 13, pp. 70-72). It accordingly declared manifestly ill-founded the complaint of an applicant who alleged that, after their commission, some of the offences he had been charged with had been decriminalised.

147. That ruling has been followed by the Court, which has reiterated that Article 7 does not guarantee the right to have a subsequent and

[3] See, by contrast, Article 15 § 1 *in fine* of the *United Nations Covenant on Civil and Political Rights*.

favourable change in the law applied to an earlier offence (see *Le Petit v. the United Kingdom* (dec.), no. 35574/97, 5 December 2000; *Zaprianov v. Bulgaria* (dec.), no. 41171/98, 6 March 2003; and *Hajiyev v. Azerbaijan* (dec.), no. 5548/03, 16 June 2005).

148. However, in *Scoppola* (cited above), the Court changed the position of its case-law in this regard. It noted that although Article 7 of the Convention did not expressly mention an obligation for Contracting States to grant an accused the benefit of a change in the law subsequent to the commission of the offence, it does not exclude granting the accused the benefit of a more lenient sentence, prescribed by legislation subsequent to the offence. In this connection, more specifically, the Court held as follows:

> "108. In the Court's opinion, it is consistent with the principle of the rule of law, of which Article 7 forms an essential part, to expect a trial court to apply to each punishable act the penalty which the legislator considers proportionate. 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. The Court notes that the obligation to apply, from among several criminal laws, the one whose provisions are the most favourable to the accused is a clarification of the rules on the succession of criminal laws, which is in accord with another essential element of Article 7, namely the foreseeability of penalties.
>
> 109. In the light of the foregoing considerations, the Court takes the view that it is necessary to depart from the case-law established by the Commission in the case of *X v. Germany* and affirm that Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness 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."

149. It is interesting to note that the cited *Scoppola* principles concerning the retrospectiveness of the more lenient criminal law, although couched in general terms by referring to "*the law whose provisions are most favourable to the defendant*", relate primarily to the retroactivity of the lighter penalty. Thus, in its subsequent case-law, the Court relied on these principles predominantly in relation to the question of whether the domestic courts applied penalties more favourable to the defendant (see *Maktouf and Damjanović*, cited above, § 65; *Öcalan*, cited above, § 175; *Borcea*, cited above, § 55; *Gouarré Patte*, cited above, § 28; and *Koprivnikar*, cited above, § 46).

150. It was only very recently that the Court affirmed the application of the *Scoppola* principles in relation to the substantive provisions of criminal

law, namely provisions defining the scope of a criminal offence. In particular, in *Parmak and Bakır* (cited above) the Court stressed as follows:

> "64. … [T]he principle that more lenient provisions of criminal law must be applied retrospectively is implicitly guaranteed by Article 7 of the Convention. 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 (see, *mutatis mutandis*, *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 109, 17 September 2009, and *Koprivnikar v. Slovenia*, no. 67503/13, § 49, 24 January 2017). The Court also notes in that connection that in Turkish criminal law, courts are required to comply with Article 7 § 2 of the Criminal Code, in accordance with which the provisions most favourable to the offender shall be applied (see also *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 51, ECHR 1999-IV)."

151. In sum, as it follows from the above considerations, not only that Article 7 of the Convention prohibits the retrospective application of the criminal law – penalties and the substantive provisions – to an accused's disadvantage (see paragraphs 133-136 above), it also embodies the principle of retrospectiveness of the more lenient criminal law – penalties and the substantive provisions – in an accused's favour.

(2) The Court's case-law

152. In *Scoppola* – which is the first case establishing the principle of retrospectiveness of the more lenient criminal law – the relevant legislative amendments provided that for the offences in question life imprisonment was to be replaced by thirty years' imprisonment. However, the applicant was eventually convicted to life imprisonment and was thus unable to benefit from this legislative amendment. In these circumstances, the Court found that the applicant had been given a heavier sentence than the one prescribed by the law which was most favourable to him, which run counter to the State's obligation under Article 7 to grant the applicant the benefit of the provision prescribing a more lenient penalty which had come into force after the commission of the offence.

153. The same principles apply with regard to the subsequent changes in the law affecting the application of the ancillary penalties, in so far as they can be classified as "*penalties*" within the meaning of Article 7 of the Convention. The Court has recently found that this applies even to the lighter ancillary penalties to a convicted person, inasmuch as domestic law expressly required the domestic courts to review a sentence *ex officio* where a subsequent law had reduced the ancillary penalty applicable to an offence. The Court held that where a State expressly provided in its legislation for the principle of the retroactivity of the more favourable law, it had to allow its citizens to use that right in accordance with the guarantees of the Convention. Thus, the maintaining of the application of an ancillary penalty,

which went beyond the more favourable provisions of the criminal legislation currently in force, runs counter to Article 7 of the Convention (see *Gouarré Patte*, cited above, §§ 28-36).

154. The principle of retrospectiveness of the more lenient criminal law may also apply to the fact of combining multiple sentences into one overall sentence. In *Koprivnikar* (cited above, § 59), the Court found a violation of Article 7 because the domestic courts, in calculating the overall penalty for more criminal offences, imposed a heavier sentence than the one which could have been imposed under the new legislation and thus breached the principle of retrospectiveness of the more lenient criminal law.

155. On the other hand, an unintended legislative gap of three months in the criminal legislation did not afford the applicant the right to the more lenient penalty which had thus become potentially applicable to his case (see *Ruban*, cited above, §§ 44-46; see also *Mikulović and Vujisić v. Serbia* (dec.), nos. 49318/07 and 58216/13, §§ 42-45, 17 December 2015, both concerning the legislative gap in the replacement of death penalty with life imprisonment).

C. The assessment of the more/less favourable criminal law

(1) Preliminary remarks

156. In its case-law to date, the Court has not established a list of criteria for the assessment of whether the criminal law adopted after the offence has been committed is less or more favourable to the accused. It has rather examined this matter in the particular circumstances of each case with a view to determining whether the application of the criminal law in the given case complied with the general tenets of its case-law relating to the principle of (non-)retrospectiveness of the criminal law under Article 7 of the Convention.

157. Nevertheless, certain guiding indications for this assessment can be discerned from the Court's case-law. It is also important to note that similar criteria for the assessment of (non-)retrospectiveness of the criminal law can be found in different legal systems of the Council of Europe member States.

(2) The Court's case-law

158. As already noted, in *G. v. France* (cited above, § 26), the Court has considered that the law is more favourable to the accused when it downgraded the offence of which he was accused from serious offence (*crime*) to less serious offence (*délit*).

159. It should also be noted that, in principle, in so far as the requalification of the charges in case of a succession of criminal laws in time does not lead to the imposition of a penalty that exceeds the maximum penalty provided under the legislation applicable at the time of the offence

(see paragraph 141 above), no issue arises under Article 7 of the Convention (see *Ould Dah*, cited above, and *Berardi and Mularoni*, cited above, § 55). Similar considerations apply as regards the cases of "*continuing*" or "*continuous*" offences (see paragraphs 143-144 above).

160. Moreover, where the criminal law applicable at the time of the commission of the offence already contained measures of the same severity as those laid down in the provisions of the new criminal law applied to the applicant, there is no retroactive application of criminal law contrary to Article 7 of the Convention (see *Kadusic*, cited above, §§ 71-76).

161. However, when there is such a change in the law that a more lenient penalty is provided for the offence in question than the one applicable at the time of the commission of the offence, the new law is considered to be more lenient and must be applied in accordance with the principle of retrospectiveness of the more lenient criminal law (see *Scoppola*, cited above, §§ 114-119).

162. The same principle applies to ancillary penalties (see paragraph 154 above), provided that they can be classified as "*penalties*" within the meaning of Article 7 of the Convention (see *Gouarré Patte*, cited above, § 30). At the same time, retroactive imposing of an ancillary penalty, such as confiscation order, amounts to a breach of Article 7 of the Convention (see *Welch*, cited above, §§ 26-35). This will also be the case where the new law – in an unforeseeable manner – retroactively makes the application of the ancillary penalty mandatory, whereas the application of that penalty under the old law was left to the discretion of the authorities and there was sufficient indication that the authorities intended to exercise that discretion to the applicant's favour (see *Mihai Toma*, cited above, §§ 26-31, concerning the annulment of the driving licence; compare also *Gurguchiani v. Spain*, no. 16012/06, §§ 32-44, 15 December 2009, concerning essentially automatic rule – not accompanied by the relevant procedural safeguards – on the replacement of a prison sentence by deportation and prohibition from re-entering the country for a period of ten years).

163. The principle of retrospectiveness of the more lenient criminal law also applies to the fact of combining multiple sentences into one overall sentence, in so far as the application of the new law may bring an accused into a better position as regards the overall penalty imposed (see *Koprivnikar*, cited above, § 59; see also *Alimuçaj*, cited above, §§ 154-162, concerning the effects of the domestic courts' retroactive clarification of the relevant law on sentencing for multiple offences).

164. As regards the criteria for the assessment of severity/heaviness of a penalty, the Court has held, for instance, that a life sentence is not heavier than 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 (see *Hummatov*, cited above; *Ruban*, cited above, § 46; and *Öcalan*, cited above, § 177).

165. However, as borne out by the Court's case-law, the assessment of severity/heaviness of a penalty relating to the question of retroactive application of the criminal law cannot be carried out *in abstracto*. This matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case (see *Maktouf and Damjanović*, cited above, § 65). Thus, in *Maktouf and Damjanović* (§§ 68-71), the Court did not consider that an abstract possibility of imposing, for the most serious cases, the death penalty under the criminal law applicable at the moment of the commission of the acts made that law more severe in comparison to the subsequent criminal law abolishing the death penalty but providing for a higher minimum of the applicable sentence, under which the applicants were eventually convicted. In accordance with the *in concreto* assessment, the Court took into account the fact that one applicant was convicted to the lowest possible sentence and the other to a sentence slightly above the minimum and that their crimes clearly did not belong to the category of most serious cases for which the death penalty could be applied under the old law. In these circumstances, since there was a real possibility that the retroactive application of the new law operated to the applicants' disadvantage as concerns the sentencing, the Court did not consider that they were afforded effective safeguards against the imposition of a heavier penalty, in breach of Article 7 of the Convention (compare, by contrast, *Moiseyev*, cited above, §§ 237-238).

166. As regards the amendments to the scope of a criminal offence, in particular, it is important to note that in *Vasiliauskas* (cited above, § 181), concerning a broad interpretation of the concept of genocide under the relevant domestic law, the Court stressed the following (emphasis added):

> "The Court accepts that the domestic authorities have discretion to interpret the definition of genocide more broadly than that contained in the Genocide Convention. However, such discretion does not permit domestic tribunals to convict persons accused under that broader definition retrospectively."

167. More recently, the Court reaffirmed that the broadening of the scope of the proscribed acts under the applicable provision of criminal law by reference to the subsequently adopted legislation may raise an issue under Article 7 of the Convention. In such circumstances, as already explained (see paragraph 142 above), the broad interpretation of the text of the applicable law may be accepted only if it was reasonably foreseeable for the purposes of Article 7 § 1 of the Convention (see *Parmak and Bakır*, cited above).

CONCLUSION

168. Article 7 concerns criminal behaviour in penal statutes. In comparison, Articles 8 to 11 concern restrictions on the enjoyment of a

fundamental right. Article 7 has its own structure and specificities in the text of the Convention. As concerns the requirements of accessibility and foreseeability, the comparative overview of the case-law between Article 7 and the paragraph 2 of Article 8-11 reveals common case-law standards (compare for instance *Rohlena* and *Maestri*).

169. The analysis also reveals a peculiarity under Article 7, to the effect that the assessment of the legal basis seems to be more stringent. Generally, an in-depth approach is taken to encompass several factors as: the law; the case-law; scholars; the political, historical, legal and social background of the impugned offence; and even its manifest seriousness. The Court seems to uphold legislations or practices in line with ECHR standards or other pre-eminent international rules in democratic States or new offences which could have been predictable in view of the evolution of a democratic society.

170. Comparatively, the quality of the 'law' under the paragraph 2 of Articles 8-11 tend to be more focused on procedural and adequate safeguards against abuses. Under Articles 8-11 § 2, the Court seems more ready to accept that the interference was 'prescribed by law', and then proceed with the examination of the proportionality test, which appears to be the central aspect for consideration (*The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, no. 44079/98, §§ 109-110, 20 October 2005, however compare and contrast with the cases cited above, in part III, B, (3).

171. Article 7 of the Convention prohibits the retrospective application of the criminal law to an accused's disadvantage. The principle of non-retroactivity of criminal law applies to the provisions setting the penalties for an offence, and to the provisions defining the offence (paragraphs 133-136 above). In this context, it is important to note that specific rules apply as regards the instances of continuity of the offence[4] (see paragraphs 137-142 above); in cases of "*continuing*" or "*continuous*" offences[5] (see paragraphs 143-144 above); concerning the application of the provisions of procedural laws (see paragraph 145 above); and in cases of recidivism (see paragraph 146 above).

172. Article 7 of the Convention also embodies the principle of retrospectiveness of the more lenient criminal law – penalties and the substantive provisions – in an accused's favour. 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.

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[4] Where the act in question was proscribed – even if under different names – both at the moment of the commission of the offence and the moment of the conviction.
[5] Where acts extend over a period of time.

173. In its case-law, the Court has not established a list of criteria for the assessment of whether the criminal law adopted after the offence has been committed is less or more favourable to the accused. It has rather examined this matter in the particular circumstances of each case with a view to determining whether the application of the criminal law in the given case complied with the general tenets of its case-law relating to the principle of (non-)retrospectiveness of the criminal law under Article 7 of the Convention.

174. Nevertheless, the following guiding indications for this assessment can be discerned from the Court's case-law:

- A law can be considered more favourable to the accused when it formally downgrades the domestic classification of the offence (see paragraph 159 above);
- In case of a succession of criminal laws in time, or regarding the cases of "*continuing*" or "*continuous*" offences, the penalty eventually imposed cannot exceed the maximum penalty provided under the legislation applicable at the time of the offence (see paragraph 160 above);
- Where the criminal law applicable at the time of the offence already contained measures of the same severity as those laid down in the provisions of the new criminal law applied to the applicant, there is no retroactive application of criminal law contrary to Article 7 of the Convention (see paragraph 161 above);
- When there is such a change in the law that a more lenient penalty – including the ancillary penalty – is provided for the offence in question than the one applicable at the time of the commission of the offence, the new law is considered to be more lenient and must be applied (see paragraphs 162-163 above);
- By contrast, the retroactive imposing of an ancillary penalty, which did not exist at the time of the commission of the offence, runs counter to Article 7 of the Convention (see paragraph 163 above);
- The principle of retrospectiveness of the more lenient criminal law also applies to the fact of combining multiple sentences into one overall sentence (see paragraph 164 above);
- A life sentence is not heavier than the death penalty (see paragraph 165 above);
- The assessment of severity/heaviness of a penalty relating to the question of retroactive application of the criminal law cannot be carried out *in abstracto*. This matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case (see paragraph 166 above);
- The broadening of the scope of the proscribed acts under the provision of criminal law applicable at the moment of the commission of the offence by reference to the subsequently adopted legislation may raise an issue under Article 7 of the Convention. In such circumstances, the broad

interpretation of the text of the applicable law may be accepted only if it was reasonably foreseeable for the purposes of Article 7 of the Convention (see paragraphs 167-168 above).