



Network for investigation and
prosecution of genocide, crimes
against humanity and war crimes



Digest of the European Court for Human Rights jurisprudence on core international crimes



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The Genocide Network

The 'European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes' (the 'Genocide Network') was established by the Council of the European Union (EU) in 2002 to ensure close cooperation between the national authorities in investigating and prosecuting genocide, crimes against humanity and war crimes. The Network facilitates the exchange of information amongst practitioners, encourages cooperation between national authorities in various Member States and provides a forum for sharing knowledge and best practice. The Genocide Network is supported in its work through the Secretariat based in The Hague with Eurojust.

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1. Introduction

With more than 50 years of practice, the European Court of Human Rights has dealt with cases related to genocide, crimes against humanity and war crimes on a number of occasions. Although the role of the Court is not to try individuals for international criminal offences, it may be faced with issues pertaining to core international crimes because it has jurisdiction over the 47 states parties to European Convention on Human Rights (ECHR) that initiate proceedings for such crimes.

The purpose of this paper is to provide an overview of cases and rulings of the Court which are related to the crime of genocide, crimes against humanity and war crimes. Although many cases brought before the Court pertain to core international crimes, the Court rarely rules specifically on these crimes. For example, in the context of the case of Mr Sylvère Ahorugeze¹, a Rwandan national accused of genocide and crimes against humanity, who was arrested in Sweden and requested for extradition by Rwanda's authorities, the applicant appeared before the Court for his extradition, but the Court did not refer to the genocide issue as it was irrelevant to the case.

However, as explained below, the Court directly addresses serious international crimes mainly in the context of the compatibility of domestic proceedings with Article 7 (*principle of legality*) of the ECHR. Art. 7 of the ECHR reads as follows:

Article 7 — No punishment without law

1. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*
2. *This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.*

The first paragraph of Art. 7 of the ECHR States the principle *nullum crimen, nulla poena sine lege*. It prohibits criminal convictions and sentencing without legal basis. In addition, it contains the principle that criminal laws have to be sufficiently clear and precise so as to allow individuals to ascertain which conduct constitutes a criminal offence and foresee what the consequences of transgressions would be. The second sentence of the first paragraph stipulates that the penalty for criminal behaviour must not be aggravated retroactively. The sanction imposed for a criminal offence must not be more severe than the one provided for by law when the offences were committed.²

The second paragraph of Art. 7 (which constitutes the only exception to paragraph 1) was specifically adopted so as not to affect the trials conducted on international core crimes following the Second World War.³

¹ *Ahorugeze v. Sweden*, Judgement, ECHR, 27 October 2011.

² See <http://echr-online.info/artikel-7-echr/>

³ *Kononov v. Latvia*, Judgement, ECHR, 17 May 2010, para 186: '[...] the Court considers it relevant to observe that the travaux préparatoires to the Convention indicate that the purpose of the second paragraph of Article 7 was to specify that Article 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, inter alia, war crimes so that Article 7 does not in any way aim to pass

Genocide, crimes against humanity and war crimes have raised issues under Art. 7 of the ECHR with respect both to the principle of legality and to the prohibition of retroactive application of criminal law.

2. The principle of legality in Art. 7 of the ECHR applied to cases of genocide, crimes against humanity and war crimes

Over the last century, Europe was devastated by two world wars and several regional conflicts. In the aftermath of such disasters, States have sought to bring perpetrators of core international crimes before justice. However, national and international jurisdictions have to ensure that their judgements and decisions respect the principles of *nullum crimen sine lege* and *nulla poena sine lege*. Therefore, the principle of legality under Art. 7 of the ECHR has been developed by the Court to cover the following three main elements: (1) only the law can define and prescribe a penalty; (2) any retroactive application of criminal law is prohibited; and (3) extensive rules interpreting criminal law are prohibited.⁴

The respect of these principles is particularly interesting in the context of international criminal laws that were sometimes adopted after the crimes had been committed (see, for instance, the concept of crimes against humanity which was applied to prosecute criminals during the Nuremberg trials although the concept only appeared in the Charter of the International Military Tribunal (hereinafter, 'the Nuremberg Charter') after the acts had been committed).⁵ In particular, violations of the laws and customs of war [war crimes] and crimes against humanity were recognised as crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility.⁶

The issue of the retroactive application of criminal law was firstly raised in **Kolk and Kislyiy v. Estonia**,⁷ and in **Penart v. Estonia**.⁸ Both cases related to a retroactive application of criminal law to crimes against humanity. In the former case, the applicants were involved in the

legal or moral judgment on those laws (see *X. v. Belgium*, no. 268/57, Commission decision of 20 July 1957, Yearbook 1, p. 241). In any event, the Court further notes that the definition of war crimes included in Article 6 (b) of the Charter of the IMT Nuremberg was found to be declaratory of International laws and customs of war as understood in 1939 (see paragraphs 118 above and 207 below).'

⁴ See, for instance, *Kafkaris v. Cyprus*, Judgement, ECHR, 12 February 2008, para 138: 'Accordingly, it embodies, in general terms, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) (see *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 22, § 52). 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 (*Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; and *Achour*, cited above, § 41' or *Korbely v. Hungary*, Judgement, ECHR, 19 September 2008, para 70: 'Accordingly, 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*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable. The Court has thus indicated that when speaking of "law" 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 and implies qualitative requirements, notably those of accessibility and foreseeability'..

⁵ Art. 6 of the Nuremberg Charter.

⁶ *Ibid.*

⁷ *Kolk and Kislyiy v. Estonia* (dec.), ECHR, nos. 23052/04 and 24018/04, 2006-I.

⁸ *Penart v. Estonia*, decision (inadmissible) of 24.1.2006, ECHR, application No 14685/04.

deportation of civilians in 1949, whereas in the latter one, the applicant was involved in planning and directing the killing of several civilians hiding in the woods in the period 1953-1954. All of them were convicted by the Estonian courts for crimes against humanity. Therefore, in their complaint to the Court, they stated that their conviction had been based on the retroactive application of criminal law as *crimes against humanity* were not crimes under the law applicable on Estonian territory at the time of the acts in question (the Soviet Union's law).

The Court assessed the question whether the applicants should have been aware that their acts constituted crimes against humanity, and concluded that, as laid down in the Nuremberg Charter, there is no time bar on crimes against humanity. Notably, the Nuremberg Trials illustrate the retroactive application of criminal law with respect to international crimes. Even though the Nuremberg Tribunal was established to try the perpetrators of the horrendous crimes committed during the Second World War, the Charter explicitly stated that the Tribunal had jurisdiction over crimes against humanity which were committed well before 1939.⁹ Moreover, the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, *inter alia*, Resolution No. 95 of the General Assembly of the United Nations, adopted in 1946. As a result, it is not relevant whether the acts were committed under the Soviet or Estonian law as they constituted crimes against humanity under international law. The cases were thus declared inadmissible as there was no apparent violation of Art. 7 of the ECHR and the complaints were manifestly ill-founded. Additionally, Estonia ratified the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, and was, therefore, obliged to implement its principles.

As already mentioned, the principle of legality requires that criminal law and penalties are accessible and foreseeable. The case of **Kononov v. Latvia**¹⁰ is relevant in this regard as it relates to war crimes. The case has also sparked heated reactions. Mr Vassili Kononov, a war veteran praised by the Soviet Union for his fight against Nazi Germany, was convicted by Latvian courts (when Latvia attained independence in the 1990s) for executing nine villagers in the Nazi-occupied Latvia in 1944 (war crime). The applicant claimed that his conviction was based on a retroactive application of criminal law contrary to Art. 7 of the ECHR. The question centred on whether the executed villagers should be considered as civilians or combatants. The Court's third section found (by a slight majority of four against three votes) that the applicant had not committed a war crime as his behaviour was not against the laws and customs of war enshrined in the Hague Conventions of 1907, and that a possible conviction would be against the principle of foreseeability.¹¹ However, the Grand Chamber of the Court reversed this judgment. It considered, without deciding on whether or not the villagers were combatants or not, in favour of the accused¹², that the villagers were combatants, but finally concluded that in any case they were *hors de combat* and therefore their execution constituted a war crime.¹³ In responding to the applicant's remark that his conviction for war crimes was unforeseeable, the Court underlined that, despite the fact that the Latvian Criminal Code did not contain any explicit reference to international laws and customs of war and even though those laws and customs were not published in the USSR or in the Latvian SSR, the impugned acts were of a such

⁹ Art. 6(c) of the Nuremberg Charter.

¹⁰ *Kononov v. Latvia*, Judgement, ECHR, 17 May 2010.

¹¹ *Ibid*, paras 144-148.

¹² *Ibid*, para 94.

¹³ *Ibid*, para 202.

a *flagrantly unlawful nature* that the applicant should have at the least considered the possibility of being prosecuted for war crimes. The Nuremberg Charter specifically stipulates that *war crimes shall include, but not be limited to murder, ill treatment, or deportation of civilians and murder or ill treatment of prisoners of war.*¹⁴ As the Court observed in *Kononov v. Latvia*, *the definition of war crimes included in Article 6(b) of the Nuremberg Charter was found to be declaratory of international laws and customs of war as understood in 1939.*¹⁵ Consequently, the Court found that Latvia had not violated Art. 7 of the ECHR.¹⁶ Russia strongly criticized the decision (*Kononov* obtained the Russian nationality during the proceedings), partly because it considered that the Court was siding with the Nazis.¹⁷

In **Korbely v. Hungary**¹⁸, the Court dissociated the two elements of accessibility and foreseeability, enshrined in Art. 7 of the ECHR, and assessed them separately. The applicant had been convicted of crimes against humanity in Hungary for ordering his squad to shoot at civilians during the internal conflict in 1956. As the Hungarian Court's judgement was based on Article 3 of the four Geneva Conventions of 12 August 1949 (treating those crimes as crimes against humanity¹⁹ although these are usually regarded as war crimes), the Court assessed the norms of international law on crimes against humanity and concluded that the Geneva Conventions were accessible to the applicant at the time of the offence.²⁰ The Court did not contest the Hungarian Court's qualification of the acts falling under said Art. 3 as crimes against humanity but added instead that contextual elements had to be examined to determine whether the impugned acts could qualify as crimes against humanity. The Court found that crimes against humanity must be committed as part of a widespread and²¹ systematic attack on the civilian population, and be linked to a 'state action or policy'. The Court concluded that the presence of those elements was doubtful.²² Moreover, the fact that the individuals killed had not clearly surrendered prevented them from being regarded as non-combatants within the meaning of said Art. 3.²³ Consequently, the Court decided that the Hungarian Court had violated Art. 7 of the ECHR as it had convicted the applicant for acts that he could not have foreseen to be crimes against humanity.²⁴

Finally, in **Jorgic v. Germany**, the question was raised whether criminal laws must be strictly interpreted²⁵. In this case, the Bosnian applicant was convicted of genocide by German courts for participating in the 'ethnic cleansing' against Bosnian Muslims by Bosnian Serbs in the Dobojo region. The applicant argued that the definition of the crime of genocide used by German courts to convict him was broader than the definition in international law or the definition in national law at the time of the offence.²⁶ In the applicant's view, the crime of genocide included only

¹⁴ Art. 6 of the Nuremberg Charter.

¹⁵ See *Kononov v. Latvia*, Judgement, ECHR, 17 May 2010, para 186.

¹⁶ *Ibid*, paras 239 and 244. See also *Lauri Malksoo, Kononov v. Latvia*, *American Journal of International Law*, Vol. 105, 2011.

¹⁷ See <https://sputniknews.com/voiceofrussia/2010/05/17/7994664/>

¹⁸ *Korbely v. Hungary [GC]*, ECHR, no. 9174/02, 19 September 2008.

¹⁹ *Ibid*, para 18.

²⁰ *Ibid*, para 75.

²¹ The Court uses the phrase 'widespread and systematic' while the Rome Statute determination is 'widespread or systematic'.

²² *Ibid.*, paras 83-85.

²³ *Ibid.*, para 94.

²⁴ *Ibid.*, para 46.

²⁵ *Jorgic v. Germany*, Judgment (merits), ECHR, 12 July 2007.

²⁶ *Ibid.*, para 89.

murder, extermination or deportation with the intent to destroy a group in a biological-physical sense, but not merely as a distinct social unit.²⁷ Accordingly, the qualification of his acts (which did not amount to physical or biological destruction) as a crime of genocide was unforeseeable and, thus, his conviction violated Art. 7 of the ECHR. On the contrary, German courts argued that the definition of the crime of genocide covered not only the biological-physical destruction of a group, but also the *destruction of a group as a social unit with its distinctiveness and particularity as well as its feeling of togetherness (Zerstörung der Gruppe als sozialer Einheit in ihrer Besonderheit und Eigenart und ihrem Zusammengehörigkeitsgefühl)*.²⁸ The German courts' judgement was based on the opinion of scholars (although in minority) as well as on the definition of genocide in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter, the 'Genocide Convention'), which includes non-physical destruction such as measures to prevent births within the group or the forcible transfer of children.²⁹ Rulings on this issue have already been issued by international courts, and specifically by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Krstić* case.³⁰ The ICTY, relying on the principle of *nullum crimen sine lege*, held that the definition of genocide was limited to acts of physical or biological destruction of a group, wholly or partly. Moreover, in a case concerning the application of the Genocide Convention³¹, the International Court of Justice (ICJ) clearly differentiated ethnic cleansing from genocide.³²

Nonetheless, in the *Jorgic* case, the European Court of Human Rights, while considering the interpretation given by the ICTY and the ICJ, took a decisively different stand on the interpretation of the crime of genocide. The Court noted that the applicant could not rely on the ICTY's and ICJ's judgements as they were both given after the commission of the acts committed. With regard to the rules of interpretation, the Court held that judicial interpretation is inevitable but also necessary for the progressive development of criminal law. As a consequence, Art. 7 of the ECHR cannot be read as prohibiting interpretation and clarification on a case-by-case basis, with the important condition that *the resultant development is consistent with the essence of the offence and could reasonably be foreseen*³³. The task of the Court was thus to assess the compatibility of the German courts' interpretation with the essence of the offence. In this regard, the Court's judges accepted the German courts' arguments and concluded that based on the definition of the crime of genocide, as laid down in the Genocide Convention of

²⁷ *Ibid.*, paras 94 and 95.

²⁸ *Ibid.*, paras 18 and 96.

²⁹ *Ibid.*, paras 23 and 36.

³⁰ *Prosecutor v. Krstić*, Judgment of 2 August 2001, ICTY, para. 577-580.

³¹ ICJ, Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007.

³² *Ibid.*, para 190: '[ethnic cleansing] can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement [...] As the ICTY has observed, while "there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing'" (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide." (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) In other words, whether a particular operation described as "ethnic cleansing" amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term "ethnic cleansing" has no legal significance of its own [...].'

³³ ECHR, *Jorgic v. Germany*, Judgment (merits), 12 July 2007, para 101.

1948 and as interpreted in the resolution of the UN General Assembly 47/121³⁴, both of which defined the ethnic cleansing in Bosnia and Herzegovina as a form of genocide,³⁵ as well as on the work of scholars, the wide interpretation of German courts was reasonably consistent with the essence of the crime of genocide.³⁶ Therefore, the applicant's interpretation of the crime of genocide as encompassing the destruction of a group as a social unit and the resulting risk of being convicted of genocide for his acts were foreseeable. No violation of Art 7 of the ECHR³⁷ was found.

In addition to the interpretation issue, the Court addressed the contested jurisdiction of the German courts over the crime of genocide committed abroad by a foreign national. In application of Art. 6, para 1 of the ECHR³⁸, the accused must be heard by a *tribunal established by law*. According to that requirement, the tribunal must have jurisdiction over the case, which was contested in the *Jorgic v. Germany* case.³⁹ The applicant's plea was dismissed on the grounds that the parties to the Genocide Convention (including Germany) had the *erga omnes* obligation to punish genocide and could thus exercise their universal jurisdiction on an extraterritorial basis and regardless of the nationality of the accused, hence confirming the position of other national and international courts.⁴⁰

³⁴ General Assembly Resolution 47/121, 18 December 1992, available at: (<http://www.un.org/documents/ga/res/47/a47r121.htm>).

³⁵ General Assembly Resolution 47/121 referred in its Preamble to *the abhorrent policy of 'ethnic cleansing', which is a form of genocide*, as continuing in Bosnia and Herzegovina.

³⁶ ECHR, *Jorgic v. Germany*, Judgment (merits), 12 July 2007, paras 105 and 107.

³⁷ *Ibid*, paras 109 and 113.

³⁸ Art. 6 of the ECHR: '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and the facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

³⁹ ECHR, *Jorgic v. Germany*, Judgment (merits), 12 July 2007, para 64.

⁴⁰ *Ibid*, paras 50-51, 53-54. The Appeals Chamber of the ICTY, in its decision of 2 October 1995 on the defence motion for interlocutory appeal on jurisdiction in the case of *Prosecutor v. Tadic* (No. IT-94-1), stated that 'universal jurisdiction [is] nowadays acknowledged in the case of international crimes' (para 62). Likewise, the Trial Chamber of the ICTY, in its judgment of 10 December 1998 in the case of *Prosecutor v. Furundzija* (No. IT-95-17/1-T), found that '[...] [for] international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes'. As stated by the Supreme Court of Israel in the *Eichmann* case, and echoed by a USA court in the *Demjanjuk* case, 'it is the universal character of the crimes in question [...] which vests in every State the authority to try and punish those who participated in their commission' (para 156). In many Contracting States of the Convention, the prosecution of genocide is subject to the principle of universal jurisdiction, that is, jurisdiction for crimes committed outside the State's territory by non-nationals against non-nationals of that State, which are not directed against the State's own national interests, at least if the defendant was found to be present on the State's territory (e.g. Spain, France, Belgium (at least until 2003), Finland, Italy, Latvia, Luxembourg, the Netherlands (since 2003), Russia, the Slovak Republic, the Czech Republic and Hungary). At the time of the applicant's trial, numerous other States had authorised the prosecution of genocide committed abroad by foreign nationals against foreigners in accordance with provisions similar to the representation principle (*stellvertretende Strafrechtspflege*) (compare Art. 7, para 2, No. 2 of the German Criminal Code, para 34 above), e.g. Austria, Denmark, Estonia, Poland, Portugal, Romania, Sweden and Switzerland (since 2000). Contracting States of the Convention whose legislation does not provide for universal jurisdiction over genocide crimes include, notably, the United Kingdom. Apart from the Austrian, Belgian and French courts, it is particularly the Spanish courts that have already adjudicated on charges of genocide, relying

In **Scoppola v. Italy** (No. 2)⁴¹, the Court's Grand Chamber referred — in the section on international texts and documents — to Art. 24, para 2 of the ICC Statute, which stipulates that the most favourable law applicable to a person being investigated, prosecuted or convicted must be applied in the event of a change in the law.⁴² The part of the judgment on comparative law quotes from the judgment in the *Dragan Nikolić case*, in which the ICTY Appeals Chamber held that the principle of applicability of the more lenient law applies to the ICTY Statute.⁴³ These two elements were then used as a supporting argument in the reasoning of the Court's finding on a violation. Specifically, the Court concluded that *a consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law [...]*⁴⁴. 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 [...]. In the light of the foregoing considerations, the Court takes the view that it is necessary to 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.*⁴⁵

In relation to the crime of genocide, the Court considered retroactive application to a broader set of protected groups in the case of **Vasiliauskas v. Lithuania**.⁴⁶ In 2004, the applicant was convicted of genocide for having participated in the killing of two Lithuanian partisans during a military operation in 1953, which was part of the suppression of the partisan movement by the Soviet authorities. The applicant complained under Art. 7 of the ECHR that his conviction had no legal basis in 1953. For the first time, the Grand Chamber was required to pronounce on whether the persecution of Baltic partisans by the Soviet authorities, following the Second World War, constituted genocide. The Chamber considered that the applicant's conviction for genocide with respect to a '*political group*' was not foreseeable at the time of the killing as the Lithuanian partisans were neither a group nor part of a group protected by international law (conventional or customary) on genocide, as understood in 1953. For that reason, the Chamber found a violation of Art. 7 of the ECHR. The judgment included references to the Charter of the Nuremberg Tribunal⁴⁷ and the Statutes of the ICTY, the ICTR and the ICC⁴⁸; it also referred

on the principle of universal jurisdiction. The Spanish *Audiencia Nacional*, in its judgment of 5 November 1998 in the *Augusto Pinochet case*, held that the Spanish courts had jurisdiction over the case..

⁴¹ ECHR, *Scoppola v. Italy (no. 2)* [GC], No. 10249/03, para 109, 17 September 2009.

⁴² *Ibid.*, para 40.

⁴³ *Ibid.*, para 41.

⁴⁴ *Ibid.*, para 105.

⁴⁵ *Ibid.*, paras 108-109.

⁴⁶ ECHR, *Vasiliauskas v. Lithuania [GC]*, No. 35343/05, 20 October 2015.

⁴⁷ *Ibid.*, paras 75-76.

⁴⁸ *Ibid.*, paras 85-87.

extensively to the ICTY's case law, including *Jelisić, Krstić, Sikirica* and *Tolimir*⁴⁹, as well as to ICTR cases such as *Rutaganda, Semanza* and *Kamuhanda*⁵⁰. This material played an important part in the Grand Chamber's reasoning (in particular paras 167-178).

The general principle of legality includes the principle that criminal law must not be extensively construed to an accused's detriment and that intervening more lenient criminal law must be applied retroactively.⁵¹

In *Maktouf and Damjanović v. Bosnia and Herzegovina*⁵², the applicants were convicted of war crimes against civilians, committed during the 1992-1995 war. They did not dispute the lawfulness of their convictions for war crimes but they contested their sentences, arguing that the 2003 Criminal Code had been retroactively applied to them, resulting in heavier sentences than if the 1976 Criminal Code had been applied. The Court noted that, since there was a real possibility that the retroactive application of the 2003 Code had operated to the applicants' disadvantage as regards sentencing, the applicants had not been afforded effective safeguards against the imposition of a heavier penalty. Accordingly, there had been a violation of Art. 7 of the ECHR in the particular circumstances of the applicants' cases; the Court emphasised that its conclusion did not indicate that lower sentences ought to have been imposed, but simply that the sentencing provisions of the 1976 Code should have been applied.

3. ECHR jurisprudence related to other articles

3.1. Art. 2 of the ECHR (Right to life)⁵³

Art. 2 of the ECHR ensures right to life, underlying the obligation of a state to investigate. In this relation, some judgments of the Court contain references to international criminal law.

In *Janowiec and Others v. Russia*⁵⁴, for instance, the Court ruled on the applications of 15 Polish nationals, submitted against the Russian Federation. The applicants were relatives of Polish prisoners who had been killed by the Soviet Army in 1940. In total, 21 857 Polish, Ukrainian, and Belarusian prisoners perished in what became known as the Katlyn Massacre.⁵⁵ The applicants complained that the Russian authorities had not conducted an effective investigation into the death of their relatives and had displayed a dismissive attitude to all their requests for information about their relatives' fate. The Court, however, found that it was not competent to examine the adequacy of an investigation into events that had occurred before the adoption of the ECHR in 1950. Furthermore, by the time the ECHR entered into force in Russia, the death of the Polish prisoners of war had become established as a historical fact and no lingering uncertainty as to their fate — which might have given rise to a breach of Art. 3 of the

⁴⁹ Ibid, paras 97-104.

⁵⁰ Ibid, paras 109-113.

⁵¹ ECHR, *Scoppola v. Italy (no. 2) [GC]*, No. 10249/03, § 109, 17 September 2009.

⁵² ECHR, *Maktouf and Damjanović v. Bosnia and Herzegovina [GC]*, Nos. 2312/08 and 34179/08, 18 July 2013.

⁵³ Art. 2 of the ECHR: '1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'

⁵⁴ ECHR, *Janowiec v. Russia*, App. Nos. 55508/07 and 29520/09, 21 October 2013.

⁵⁵ Julia Koch, *The Difficulty of Temporal Jurisdiction in Janowiec and Others v. Russia*, 38 B.C. Int'l & Comp. L. Rev. 43, 2015.

ECHR in respect of the applicants — had remained. Nevertheless, for the purpose of this paper, what is relevant in the case at hand is the circumstance that the Court qualified mass murders of Polish prisoners by the Soviet secret police (NKVD) as war crimes, as defined by the Hague Convention IV of 1907, the Geneva Convention of 1929 and Art. 6(b) of the Nuremberg Charter of 1945.⁵⁶ Furthermore, the Court reiterated its constant position that a denial of crimes against humanity, such as the Holocaust, runs counter to the fundamental values of the ECHR and of democracy, namely justice and peace, and that the same is true of statements pursuing to justify war crimes, such as torture or summary executions. In the Court's view, by admitting that the victims had been held prisoners in the Soviet camps, but declaring that their subsequent death could not be clarified, the Russian Courts denied the reality of summary executions that had been perpetrated in the Katlyn forest and at other mass murder sites.⁵⁷ The Chamber qualified that approach as *a callous disregard for the applicants' concerns and deliberate obfuscation of the circumstances of the Katlyn massacre*, which was contrary to the fundamental values of the ECHR and exacerbated the applicants' suffering.⁵⁸

Another relevant statement of the Court's jurisprudence on the continuing obligation to investigate deaths is included in **Brecknell v. the United Kingdom**⁵⁹. The case originated from an application against the United Kingdom of Great Britain and Northern Ireland, lodged to the Court under Art. 34 of the ECHR by an Irish national, Ms Ann Brecknell. The applicant complained that the United Kingdom had failed to conduct an effective official investigation into the circumstances of her husband's death, after allegations had been made in 1999. The Court observed that the obligation to conduct an effective investigation into unlawful or suspicious deaths is well established in the Court's case law⁶⁰. Specifically, it asserted that *when considering the requirements flowing from the obligation, it must be remembered that the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. Furthermore, even where there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.*⁶¹ Continuing with its reasoning, the Court took the occasion to further stress that *there is a little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity.*⁶²

In **Jelic v. Croatia**⁶³, the applicant, Ana Jelic, complained that the authorities had not done enough to investigate the killing of her husband during the events of the early 1990s. The Court accepted that the case was complex and that there were indications that the killing of Mr Jelić had taken place in the context of targeted killings of Serbian civilians by members of the

⁵⁶ ECHR, *Janowiec v. Russia*, App. Nos. 55508/07 and 29520/09, 21 October 2013, para 106.

⁵⁷ *Ibid*, para 165.

⁵⁸ *Ibid*, para 165.

⁵⁹ ECHR, *Brecknell v. the United Kingdom*, Judgement, 27 November 2007, para 69.

⁶⁰ For a full statement of the Grand Chamber's principles, see, most recently, ECHR, *Nachova and Others v. Bulgaria* [GC], Nos. 43577/98 and 43579/98, paras 110-113, 2005-VII.

⁶¹ ECHR, *Brecknell v. the United Kingdom*, Judgement, 27 November 2007, para 65.

⁶² *Ibid*, para 69.

⁶³ ECHR, *Jelic v. Croatia*, application No. 57856/11, Judgment, 12 June 2014.

Croatian police and army in the Sisak area. It also observed that the authorities had faced a difficult situation during the war and post-war recovery, given the high number of war crime cases overall to be prosecuted. However, in the Court's view, while this situation had certainly an impact on the initial investigations, it could not justify subsequent shortcomings in the investigation after 1999. For that reason, the Chamber unanimously found that the investigations had not been adequate and that there had been a violation of Art. 2 of the ECHR as regards the authorities' procedural obligation to effectively investigate the death of Mr Jelic. Nevertheless, what is relevant in the case at hand is the circumstance that in the part of the judgment concerning international law,⁶⁴ the Chamber referred to the Statutes of the ICC (Art. 25), ICTR (Art. 6) and ICTY (Art. 7), which regulate individual criminal responsibility. In fact, the subject matter was developed in the reasoning of the Chamber: in the context of war crimes; responsibility of superiors (command responsibility) has to be distinguished from the responsibility of their subordinates.⁶⁵

In a later case, **Borojević and Others v. Croatia**⁶⁶, the European Court of Human Rights clarified the scope of the procedural obligation implied by Art. 2 of the ECHR, which is the obligation to conduct *some form of effective official investigation when individuals have been killed as a result of the use of force*⁶⁷. The Court stated that this procedural obligation is *not an obligation as to result, but as to means*⁶⁸. Therefore, it is understood that domestic authorities have to do everything that can reasonably be expected from them in the circumstances of a particular case in order not to breach a state's obligation under Art. 2 of the ECHR. The Court further explains that an investigation must be *adequate* and *effective*, and that the investigative steps followed by the national authorities should enable them to establish the facts, determine whether the use of force was unlawful and identify the alleged perpetrators.⁶⁹ However, the Court explicitly stated that *article 2 cannot be interpreted so as to impose a requirement on the authorities to launch a prosecution irrespective of the evidence which is available*.⁷⁰

In **Cindrić and Bešlić v. Croatia**⁷¹, the Court assessed whether the Croatian authorities upheld their obligation under Art. 2 of the ECHR in a case where the two suspects identified by the authorities became unavailable to them. The Court noted that the Croatian authorities used all available means to track down as far as possible the identity of the potential suspects in the case at stake. However, the Court considered that the unavailability of the suspects could not be held against Croatia as the first one became a Serbian national and could, therefore, not be extradited, and Croatia was *taking adequate steps* to request the extradition of the second one to the United States.⁷²

3.1.1. Question of amnesties

As to amnesties for grave human rights violations, a leading case is **Marguš v. Croatia**⁷³. The Court was required to pronounce on the acceptability under international law of granting

⁶⁴ Ibid, para 42.

⁶⁵ Ibid, paras 88-90.

⁶⁶ ECHR, *Borojević and Others v. Croatia*, Judgment, 4 April 2017.

⁶⁷ Ibid, para 46.

⁶⁸ Ibid, para 57.

⁶⁹ Ibid, paras 47-78.

⁷⁰ Ibid, para 58.

⁷¹ ECHR, *Cindrić and Bešlić v. Croatia*, Judgment, 6 September 2016.

⁷² Ibid, paras 74-75.

⁷³ ECHR, *Marguš v. Croatia* [GC], No. 4455/10, 27 May 2014.

amnesties for grave breaches of human rights law.⁷⁴ The applicant, a member of the Croatian army, was indicted for murder and other serious offences committed in Croatia in 1991, during the war. While some of the charges were dropped, he was amnestied as regards the others. Nevertheless, he was later convicted of war crimes in a parallel set of proceedings. In the case before the European Court of Human Rights, the applicant therefore complained, *inter alia*, under Art. 4 of Protocol No. 7 about a violation of his right not to be tried twice for the same acts (*ne bis in idem* principle). The Court looked into international law (international conventions, customary international law and practice, including decisions of international and regional courts and tribunals) and found that amnesty for core international crimes is in principle not admitted.⁷⁵ Indeed, it considered that while the applicant had been prosecuted twice for the same offences, Art. 4 was not applicable because the applicant had been improperly granted an amnesty for acts that amounted to grave breaches of fundamental human rights protected by Art. 2 and 3 of the Convention. The Court found that the growing tendency in international law was to consider such amnesties unacceptable because they were incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if amnesties may be acceptable in particular circumstances (for example, in a reconciliation process), no such circumstances existed in that case.

The Court concluded that granting amnesty for crimes characterised as war crimes by a Croatian court amounted to a *fundamental defect in the proceedings* (Art. 4 of the additional Protocol No. 7 allows the reopening of proceedings if there has been such a defect). Accordingly, the Court decided that the domestic authorities had acted in compliance with the obligations arising from Art. 2 and 3 of the Convention by bringing a fresh indictment against the applicant and convicting him of war crimes against the civilian population, even though he had previously been granted amnesty. Under the circumstances, Art. 4 of Protocol No. 7 concerning the *ne bis in idem* principle was therefore found not applicable to the case. The comparative part of the judgment refers to the Genocide Convention⁷⁶, Art. 20 of the ICC Statute on the *ne bis in idem* principle⁷⁷ and customary rules of international humanitarian law. Furthermore, in the reasoning⁷⁸, the Court explicitly took into account the rulings of several international courts, such as the ICTY's *Furundžija* judgment⁷⁹ and decisions of the special courts for Cambodia and Sierra Leone⁸⁰.

3.1.2. Statute of limitations

In addition to the issue of amnesties for grave breaches of human rights, the Court has often addressed the application of national statutes of limitations to investigations into grave and large-scale violations of human rights.

In the case of **Aslakhanova and Others v. Russia**⁸¹, for example, the statute of limitations had been applied to most of the investigations into abductions committed prior to 2007. The Court found that bearing in mind the seriousness of the crimes, the large number of persons affected

⁷⁴ Background paper for seminar, Opening of the Judicial Year, January 2016, International and National Courts confronting large-scale violations of human rights — Genocide, Crimes against Humanity and War Crimes.

⁷⁵ ECHR, *Marguš v. Croatia* [GC], No. 4455/10, 27 May 2014, paras 73 and 75.

⁷⁶ *Ibid*, para 42.

⁷⁷ *Ibid*, para 44.

⁷⁸ *Ibid*, para 135.

⁷⁹ *Ibid*, para 55.

⁸⁰ *Ibid*, paras 67-68.

⁸¹ ECHR, *Aslakhanova and Others v. Russia*, Nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, 18 December 2012.

and the relevant legal standards applicable to such situations in modern-day democracies, the termination of pending investigations into abductions solely on the grounds that the time limit has expired is contrary to the obligations under Art. 2 of the ECHR. The Court also noted that there was little ground to be overly prescriptive as regards the obligation to investigate unlawful killings many years after the events as the public interest in prosecuting and convicting the perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity.

3.2. Art. 6, paragraph 1 of the ECHR (Right to a fair trial)

In the case **Nait-Liman v. Switzerland**⁸², the applicant claimed that the Swiss courts had denied his right to a fair trial (Art. 6, para 1 of the ECHR) by declining to examine the substance of his claim about damages due to torture to which he had allegedly been subjected in Tunisia. In this case, the Court stated that the Swiss courts had not violated the applicant's right to a fair trial and that the Courts' refusal to entertain the applicant's civil claim was restrictive, hence neither unreasonable nor arbitrary.⁸³ The Chamber indeed shared the Swiss Government's view that universal jurisdiction, in a civil context, [...] *would risk creating considerable practical difficulties for the courts, particularly regarding the administration of evidence and the enforcement of such judicial decisions*.⁸⁴ Therefore, the Chamber concluded that the denial of the Swiss courts to exercise universal jurisdiction over a civil claim was in the interest of the proper administration of justice. The Chamber also agreed with the Swiss Government that *the acceptance of universal jurisdiction would be liable to cause undesirable interference by a country in the internal affairs of another country*.⁸⁵

3.3. Other relevant decisions

The case **Perinçek v. Switzerland**⁸⁶, concerning the criminalisation of genocide denial, is relevant since the Grand Chamber took occasion to make references to the Nuremberg Tribunal and the ICC Statute,⁸⁷ as well as to the ICTR's judgments issued in the *Akayesu* and *Nahimana et al.* cases, the latter often referred to as the *Media Case*. The case at stake concerned the criminal conviction of a Turkish politician for publicly expressing the view in Switzerland that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 and the following years did not amount to genocide. Although being aware of the great importance attributed by the Armenian community to the qualification of those mass deportations and massacres as genocide, the Court could not accept that Mr Perinçek's statements had been so wounding to the dignity of the Armenians as to require criminal law measures to be applied in Switzerland. Furthermore, the Court found that at the time there were no international treaties in force which clearly and explicitly required the imposition of criminal penalties for genocide denial as such.⁸⁸

⁸² ECHR, *Nait-Liman v. Switzerland*, application No. 51357/07, Judgment, 21 June 2016. Note that the judgment is not final; the applicant requested the referral of the case to the Grand Chamber. The judgment of the Grand Chamber is still to be expected.

⁸³ *Ibid.*, para. 112.

⁸⁴ *Ibid.*, para. 107.

⁸⁵ *Ibid.*

⁸⁶ ECHR, *Perinçek v. Switzerland*, application No. 27510/08, Judgment, 15 October 2015.

⁸⁷ *Ibid.*, paras 53-54.

⁸⁸ *Ibid.*, paras 262-268.