Application of the principle of legality, right to a fair trial and other protected rights in core international crimes cases

Selected case-law of the European Court of Human Rights

EUROJUST

Network for investigation and prosecution of genocide, crimes against humanity and war 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 in 2002 to ensure close cooperation between national authorities in investigating and prosecuting the crime of genocide, crimes against humanity and war crimes. The Genocide Network facilitates the exchange of information among practitioners, encourages cooperation between national authorities in EU Member States, and provides a forum for sharing knowledge and best practices. The Genocide Network is supported in its work by its Secretariat, based at the European Union Agency for Criminal Justice Cooperation (Eurojust) in The Hague, the Netherlands.

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Contents

1.
Executive summary

Following the end of the Second World War, the Nuremberg trials marked the beginning of the pursuit of international criminal justice for atrocity crimes committed in the course of the conflict. Through the jurisprudence of the International Military Tribunal (IMT) in Nuremberg and as a result of substantive crimes charged and adjudicated (namely crimes against peace, war crimes and crimes against humanity), a new basis was created for principles of international law which could be applied in the future.

The IMT was nonetheless criticised for applying ex post facto law, contrary to the principle of legality in criminal law. However the IMT argued that it was bound by its statute (the Charter of the International Military Tribunal, annexed to the London Agreement of 8 August 1945), which was not 'an arbitrary exercise of power by the victorious nations' but rather 'the expression of international law existing at the time of its creation' ([1]). Therefore, these trials set the progressive precedent that to violate international legal principles was a crime, even when no specific treaty provisions existed specifically defining the crime and sanctions to be applied.

After the war, the principle of legality experienced a shift towards the doctrine of strict legality. States started to ratify a number of important human rights treaties, which laid down this principle, establishing a legal standard for national courts ([2]). In particular, the principle of legality is set forth explicitly in Article 7 of the European Convention on Human Rights (ECHR), providing that 'no one shall

([1]) Trial of the major war criminals before the international military tribunal (Secretariat of the International Military Tribunal ed., 1947), paragraph 218.

([2]) Cassese, A. and Gaeta, P., Cassese's International Criminal Law, 3rd edn, Oxford University Press, 2013, p. 26.

be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed'. This provision is an absolute and non-derogable right. In that context, Article 7 paragraph 2 of the ECHR was adopted with the intention to ensure the legitimacy of war crimes trials led against members of the Nazi regime after the Second World War. Its purpose is to ensure that atrocious acts, which were not fully criminalised by either treaty or customary law, may still be held criminal and thus punishable by the virtue of 'general principle of law recognized by civilised nations' ([3]).

As international criminal law has been steadily developing, many European countries have also been doing their part to successfully investigate and prosecute core international crimes by integrating international obligations into their national legislation, in particular by implementing crimes contained in the Rome Statute of the International Criminal Court. As a result, the situation has arisen where these countries are confronted with the principle of non-retroactivity of criminal law when prosecuting individuals for core international crimes, as the acts in question may have been perpetrated prior to the implementation of these crimes in their domestic legislation.

This report outlines the most prominent cases in which the European Court of Human Rights evaluated the application of Article 7 of the ECHR. These decisions confirmed that the retroactive application of domestic criminal law is, in certain cases, possible for war crimes, crimes against humanity and the crime of genocide.

Furthermore, the report also delves into other protected rights under the ECHR, examining the application of universal jurisdiction in regard to the right to a fair trial, along with the duty of a state to effectively investigate these crimes, and fair trial guarantees for the purpose of extradition.

The aim of this report is to offer national authorities comprehensive expertise on the matter and encourage them to explore the legal possibility of conducting investigations and subsequent prosecutions of core international crimes even if the acts in question have been committed prior to the implementation of the relevant provisions in their national legislation.

By considering the Court's jurisprudence and opting for a progressive application of domestic legislation, national authorities will continue to ensure accountability and fight against impunity.

([3]) Cassese, A., 'Balancing the prosecution of crimes against humanity and non-retroactivity of criminal law: The Kolk and Kislyiy v Estonia case before the ECHR', Journal of International Criminal Justice, Vol. 4, No 2, 2006, p. 410–418.

2.
Introduction

With more than 60 years of practice, the European Court of Human Rights (ECtHR) 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 or to review their sentences, it has jurisdiction over 46 States parties to the European Convention on Human Rights (ECHR). The Court's decisions relate to specific issues pertaining to the protection of rights and freedoms enshrined in the convention that may arise in the course of proceedings on core international crimes – the crime of genocide, crimes against humanity and war crimes – at the national level.

The purpose of this expert report is to provide an overview of cases and rulings of the ECtHR which directly relate to the investigation and prosecution of core international crimes. The Court has mainly examined the specific application of the principle of legality, enshrined in Article 7, the right to life and related obligations under Article 2, and the right to a fair trial provided for under Article 6. In particular, the Court has interpreted the complex principle of non-retroactivity, foreseeability and accessibility of the criminal law, which presents numerous challenges when it comes to the prosecution of core international crimes for past events. With regard to the right to life, the Court has particularly delved into this issue by ruling on the procedural aspect of this provision, namely the obligation to carry out an effective and adequate investigation into alleged breaches of Article 2.

As for the right to a fair trial, embedded in Article 6 of the ECHR, the Court specifically addressed the question of universal jurisdiction in both a civil and criminal context, along with the alleged risk of flagrant denial of justice, in the event of extradition to a non-EU country on core international crimes charges.

3.

The principle of legality applied to the crime of genocide, crimes against humanity and war crimes: Flexible interpretation of Article 7 of the ECHR

In 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 the courts. In this context, the ECtHR has had the opportunity to directly address complex issues of procedural criminal law pertaining to core international crimes, mainly with regard to the compatibility of domestic proceedings with Article 7 of the ECHR. This article 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 Article 7 of the ECHR states the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege). In its essence, the article prohibits criminal convictions and sentencing without legal basis. It means that criminal laws have to be sufficiently clear and precise to allow individuals to ascertain which conduct constitutes a criminal offence and foresee the consequences of violations. This refers to the qualitative requirements enshrined in Article 7, notably those of accessibility and foreseeability ([4]).

The second sentence of the first paragraph stipulates that the penalty for a violation and criminal behaviour must not be aggravated retroactively. In other words, the sanction imposed for a criminal offence must not be more severe than the one provided for by law when the offences were committed ([5]).

The second paragraph of Article 7 was specifically adopted so as not to affect the trials conducted for core international crimes following the Second World War ([6]). The intention behind this paragraph was to emphasise a very limited exception to the non-retroactivity rule. In the course of the travaux préparatoires, it was argued that this paragraph might be superfluous, as it merely reiterated what was already contained in the expression 'international law' in the first paragraph, and may also have the unintended opposite effect of calling into question the validity of the post-war judgements ([7]). On the other hand, others expressed the view that the saving provision of paragraph 2 was not fully covered by this expression. In any case, the Court has repeatedly found that paragraphs 1 and 2 of Article 7 are interlinked and must be interpreted in a consistent manner ([8]).

The crime of genocide, crimes against humanity and war crimes have raised numerous issues under Article 7 of the ECHR in relation to both the principle of legality and the prohibition of retroactive application of criminal law. The respect of these principles is particularly interesting in the context of criminal laws that were adopted by contracting parties after the crimes had been committed.

([4]) ECtHR, Guide on Article 7 of the European Convention on Human Rights, updated on 31 August 2022, p. 12–13, accessible at https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf.

([5]) Ibid., p. 5.

([6]) Kononov v Latvia [GC], No 36376/04, § 186, 17 May 2010: ' ... 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 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).'

([7]) ECHR Travaux Préparatoires Art. 7, DH (57) 6.

([8]) Ibid. Also Tess v Latvia (dec.), No 34854/02, 12 December 2002.

Historical background

The application of the principle of legality had already been questioned in Nuremberg. Specifically, the Charter of the International Military Tribunal (hereinafter 'the Nuremberg Charter') introduced the concept of crimes against peace and crimes against humanity, which had not been previously codified, after the acts had been committed ([9]).Until the Second World War, the laws of warfare only proscribed violations involving the adversary or enemy populations. However, some of the inhuman acts perpetrated by the Nazi regime were directed, due to political and racial reasons, against their own citizens, as well as other persons not protected by the laws of warfare. In 1945, the Nuremberg Charter granted the IMT jurisdiction to try and punish those guilty, inter alia, of 'crimes against humanity', an apparently novel concept marking a development of international law ([10]).

On the one hand, several courts and leading scholars have stated that the conduct sanctioned by Article 6(c) of the Nuremberg Charter mirrored emerging rules of customary international law, which pre-existed the establishment of the Nuremberg tribunal. According to this analysis, it reflected the violation of general principles of law, as shown by the prohibition of such conduct in the world's major criminal justice systems, as well as by analogy to 'war crimes', which had already been partially codified in the 1899 and 1907 Hague Conventions and in the 1929 Geneva Conventions ([11]). On the other hand, others believe that it is more correct to contend that it constituted new law ([12]). This posed the fundamental question of whether the prosecution of these wrongs, hitherto not part of the limited application of war crimes, created a new crime under positive international law and as such whether it breached the principle of legality. In response to this question, the IMT concluded that the Charter was not 'an arbitrary exercise of power by the victorious nations' but that it was 'the expression of international law existing at the time of its creation' ([13]). The Tribunal specifically expressed its view on this matter by stating that subjective justice punishes acts that harm society deeply and are regarded as abhorrent by all members of society, even if these acts were not criminalised at the time of their commission ([14]). In addition, immediately after the Second World War, the legality principle could be seen as a moral maxim, as the strict legal prohibition of ex post facto law had not yet found expression in international law, nor could it be considered a general principle of law universally accepted by all states. The IMT established that 'the maxim nullum crimen sine lege … is in general a principle of justice' allowing the punishment of actions not proscribed by law when the acts are committed, when it would be 'unjust' for such acts to be 'allowed to go unpunished' ([15]).

As a result of these trials, major developments of international law took place. For instance, on 11 December 1946 the UN General Assembly unanimously adopted a resolution 'affirming' the principles laid down in the Nuremberg Charter and the Tribunal's judgement. This type of resolution illustrates that the category of crimes against humanity was in the process of becoming part of customary international law ([16]).

([9]) Article 6 of the Nuremberg Charter. See Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, as they were formulated by the International Law Commission and submitted to the General Assembly of the United Nations in 1950.

([10]) Cassese, A. and Gaeta, P., Cassese's International Criminal Law, 3rd edn, Oxford University Press, 2013, p. 86.

([11]) Bassiouni, M. C., 'Crimes Against Humanity: The Need for a Specialized Convention', Columbia Journal of Transnational Law, Vol. 31, No 3, 1994, p. 457-461.

([12]) Cassese, A. and Gaeta, P., Cassese's International Criminal Law, 3rd edn, Oxford University Press, 2013, p. 87.

([13]) Trial of the major war criminals before the International Military Tribunal (Secretariat of the International Military Tribunal ed., 1947), paragraph 218.

([14]) Cassese, A. and Gaeta, P., Cassese's International Criminal Law, 3rd edn, Oxford University Press, 2013, p. 25.

([15]) Ibid., p. 88–89.

([16]) Ibid., p. 89.

3.1. Crimes against humanity

The issue of the retroactive application of national criminal law in core international crimes cases was first raised in Touvier v France and Papon v France. In the former case, the applicant was, at the time of the crimes, an officer of the Milice, a special military force established to combat the French Resistance and other enemies of the Vichy government, during the Second World War. Touvier was first tried in absentia twice, in 1946 and 1947, for his participation in assassinations perpetrated by the militia in the Lyon region. Later on, in 1973, a criminal complaint for crimes against humanity was filed by the son of one of the victims of a firing squad at Rillieux-la-Pape ([17]). In the latter case, the applicant was the secretary general of the Gironde prefecture during the war. In 1981, a criminal complaint was lodged against the applicant together with a civil-party application for crimes against humanity, aiding and abetting murder and abuse of official authority in connection with the deportation of eight persons to Auschwitz, where they were killed. Six other criminal complaints in relation to 17 other victims of deportations were filed in 1982 ([18]).

In both cases, the applicants were convicted for aiding and abetting a crime against humanity and complained that they had been convicted on account of an act or omission which was not a criminal offence under national or international law at the time of commission of the acts ([19]).

On this note, the Court reiterated that paragraph 2 of Article 7 of the ECHR expressly states that this provision shall not 'prejudice the trial and punishment of a 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'. This is the case for crimes against humanity, for which the Court also recalled the rule of non-applicability of statutes of limitation, as established by the Nuremberg Charter.

The Court also noted that the interpretation and application of the domestic law is a task that, in principle, should be conducted by the national courts. It is not therefore for the Court to examine the errors of facts or law allegedly committed by a national court. Its role is limited to the determination of an infringement upon the rights and freedoms protected by the Convention. The Court thus concluded, in 1997 and 2001 respectively, that both complaints had to be rejected, as they were manifestly ill-founded ([20]).

The Court significantly developed its jurisprudence on the topic in 2006 in Kolk and Kislyiy v Estonia ([21]) and in Penart v Estonia ([22]). Both cases related to a retroactive application of criminal law to crimes against humanity.

In the former case, the applicants had been convicted of crimes against humanity under the Estonian Criminal Code for their participation in the deportation of civilians from occupied Estonia to remote areas of the Soviet Union in 1949. In the latter case, the applicant, who had served as the head of a department of the Ministry of the Interior of the Estonian Soviet Socialist Republic, was convicted of crimes against humanity for planning and directing the killing of several civilians hiding in the woods from the repressions of the occupation authorities between 1953 and 1954.

In their complaint to the Court, the applicants 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 (i.e. the Soviet Union's law). According to them, criminal responsibility for crimes against humanity had been established in Estonia only on 9 November 1994, when the Estonian Criminal Code was amended to include these crimes ([23]). They fur-

([17]) Touvier v France, No 29420/95, Commission decision of 13 January 1997, Decisions and Reports 88-B, p. 150–151.

([18]) Papon v France (No 2) (dec.), No 54210/00, p. 1–2, ECHR 2001-XII.

([19]) Papon v France (No 2) (dec.), No 54210/00, 16 § 5, ECHR 2001-XII; Touvier v France, No 29420/95, Commission decision of 13 January 1997, Decisions and Reports 88-B, p. 156.

([20]) Ibid., p. 21; Ibid, p. 161–162.

([21]) Kolk and Kislyiy v Estonia (dec.), Nos 23052/04 and 24018/04, ECHR 2006-I.

([22]) Penart v Estonia (dec.), No 14685/04, 24 January 2006.

([23]) Kolk and Kislyiy v Estonia (dec.), Nos 23052/04 and 24018/04, p. 7–8, ECHR 2006-I.

ther argued that the acts in question had not been acts within the jurisdiction of the Nuremberg Tribunal, and that the applicants had had no possibility of foreseeing that 60 years later their acts would be regarded as crimes against humanity ([24]).

The Court assessed the question as to whether the applicants should have been aware that their acts constituted crimes against humanity, and found that, as stated in the Nuremberg Charter, there is no time bar on crimes against humanity, irrespective of the date of their commission and whether committed in times of war or in times of peace ([25]). Furthermore, even though the Nuremberg Tribunal was established to try the perpetrators of the horrendous crimes committed during the Second World War, the Nuremberg Charter explicitly stated that the Tribunal had jurisdiction over crimes against humanity which were committed before 1939 ([26]). 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 on 11 December 1946 ([27]).

As a result, the Court reasoned that 'responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War' ([28]). The Court further found that it is not relevant whether the acts committed could have been regarded as lawful under the Soviet law, as Estonian courts found them to constitute crimes against humanity under international law at the time of commission ([29]). Strengthening this point, the Court also noted that not only was the Soviet Union a party to the London Agreement (8 August 1945) by which the Nuremberg Charter was enacted, but it was also a member of the United Nations at the time of adoption of Resolution No 95. Thus, it cannot be claimed that these principles were unknown to the Soviet authorities.

In both cases, the Court concluded that the applicants' allegations were groundless and declared their applications inadmissible as there was no apparent violation of Article 7 of the ECHR. It found no reason to call into question the Estonian courts' interpretation and application of domestic law made in the light of the relevant international law ([30]).

In Korbely v Hungary ([31]), the Court dissociated the two elements of accessibility and foreseeability, both enshrined in Article 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 Hungarian Revolution in 1956. At the outbreak of the Hungarian Revolution in Budapest on 23 October 1956, the applicant was serving as an officer in charge of a training course at the Tata military school for junior officers. On 26 October, the applicant was ordered to disarm insurgents who had taken control of the building of the local police department by force. Once in the police building, the applicant ordered his platoon to fire on several of the insurgents, some of whom were unarmed while one of them had drawn a weapon. Most of the insurgents were killed ([32]).

On 8 November 2011, the applicant was finally convicted of 'crimes against humanity' for having intentionally murdered more than one person. According to the judgement, the conviction was obtained on the basis of Common Article 3 of the four Geneva Conventions of 12 August 1949. The applicant argued that he had been prosecuted for an

([24]) Ibid., p. 7–8.

([25]) Ibid., p. 9; Penart v Estonia (dec.), No 14685/04, p. 9, 24 January 2006.

([26]) Article 6(c) of the Nuremberg Charter.

([27]) UNGA Res 95 (I) (11 December 1946) UN Doc A/RES/1/95; Kolk and Kislyiy v Estonia (dec.), Nos 23052/04 and 24018/04, p. 8–9, ECHR 2006-I.; Penart v Estonia (dec.), No 14685/04, p. 9, 24 January 2006.

([28]) Kolk and Kislyiy v Estonia (dec.), Nos 23052/04 and 24018/04, p. 9, ECHR 2006-I.

([29]) Ibid., p. 9. The Court also recalled that the interpretation and application of domestic law falls in principle within the jurisdiction of the national courts, including where domestic law refers to rules of general international law or international agreements. The Court's role is therefore confined to ascertaining whether the effects of such an interpretation are compatible with the ECHR.

([30]) Ibid., p. 10; Penart v Estonia (dec.), No 14685/04, p. 10, 24 January 2006.

([31]) Korbely v Hungary [GC], No 9174/02, 19 September 2008.

([32]) Ibid, § § 9–15.

act which had not constituted a crime at the time of its commission.

Turning first to the accessibility criterion, the Court observed that the applicant was convicted of multiple homicide, an offence considered by the Hungarian courts to constitute 'a crime against humanity punishable under Article 3 § 1 of the Geneva Convention' ([33]). It further found that the text of the Geneva Conventions, and their synopsis, were published in a military gazette on 5 September 1956 and therefore were sufficiently accessible to the applicant.

Turning to the foreseeability criterion, the Court indicated it had to determine whether it was foreseeable that the act for which the applicant was convicted would be qualified as a crime against humanity. The Court delved a bit further into the qualification of 'crimes against humanity' relied on by the Hungarian Courts, despite the conviction being based on Common Article 3 of the Geneva Conventions, which actually relates to war crimes. It notably pointed out that 'the applicant was convicted of multiple homicide constituting a crime against humanity .... In convicting the applicant, the courts essentially relied on common Article 3, which – in the view of the Hungarian Constitutional Court – characterised the conduct referred to in that provision as "'crimes against humanity'". Therefore the Court indicated that it would examine both (i) whether this act was capable of amounting to 'a crime against humanity' as that concept was understood in 1956, and (ii) whether it can reasonably be said that, at the relevant time, the insurgent killed by the applicant was a person who was 'taking no active part in the hostilities' within the meaning of Common Article 3 ([34]).

Noting that, according to the Hungarian Constitutional Court, '[a]cts defined in Article 3 common to the Geneva Conventions constitute crimes against humanity', the ECtHR observed that 'no further legal arguments were adduced by the domestic courts dealing with the case against the applicant in support of their conclusion that the impugned act amounted to "a crime against humanity within the meaning of common Article 3"' ([35]). The Court added that none of the sources cited by the Constitutional Court characterise any of the actions enumerated in Common Article 3 as constituting, as such, a crime against humanity ([36]). The Court concluded that domestic courts had reduced their examination to the question of whether the insurgents were protected persons under Common Article 3, without explaining whether the prohibited actions set out in this article are to be considered as constituting, as such, crimes against humanity.

In particular, recalling the Nuremberg Charter, and the definitions of crimes against humanity contained in the statutes of international courts and tribunals, the Court found that murder may amount to a crime against humanity, and thus that murder within the meaning of Common Article 3 paragraph 1(a) could provide a basis for a conviction for crimes against humanity committed in 1956 ([37]). However, the Court insisted that other elements, not contained in Common Article 3, also need to be present, in particular the requirement that the crime in question should form part of a 'State action or policy' or be committed as part of a widespread and systematic attack on the civilian population ([38]). The Court found that the domestic courts did not examine whether the killing of the two insurgents met the additional criteria necessary to constitute a crime against humanity, and further concluded that the presence of those elements was doubtful ([39]).

Moreover, the fact that one of the insurgents killed was secretly carrying a gun and had not clearly and unequivocally signalled an intention to surrender prevented him from being regarded as someone who had laid down his arms within the meaning of Common Article 3 or falling within any of the other

([33]) Ibid, § 74.

([34]) Ibid, § § 76–77.

([35]) Ibid, § 79.

([36]) Ibid, § 80.

([37]) Ibid, § 81.

([38]) Ibid, § 83. The Court uses the phrase 'widespread and systematic' while the Rome Statute determination is 'widespread or systematic'.

([39]) Ibid., § § 81, 83–85.

categories of non-combatant protected by the article ([40]).

Consequently, the Court decided that domestic courts had violated Article 7 of the ECHR as they convicted the applicant for acts that he could not have foreseen to constitute crimes against humanity ([41]).

3.2. War crimes and command responsibility

In the case of Kononov v Latvia ([42]), the Court reaffirmed and developed its interpretation of the nullum crimen sine lege principle, this time in relation to war crimes.

The applicant, a former member of a Soviet commando unit of partisans, was convicted of war crimes by Latvian courts, after Latvia attained independence in the 1990s and implemented a provision dealing with war crimes inserted in the Criminal Code in 1993. He was found guilty for executing nine villagers in a punitive expedition in Nazi-occupied Latvia in 1944. The applicant claimed that his conviction was based on a retroactive application of criminal law, contrary to Article 7 of the ECHR, and that he could not have foreseen that his acts would constitute war crimes or that he would be prosecuted.

In a first decision, issued on 24 July 2008, the Third Section of the ECtHR found that there had been a violation of Article 7 of the Convention. The Court noted that the applicant's personal involvement in the events was his leadership of the unit that carried out the punitive expedition, while he did not personally commit the acts in question ([43]). Further, the Court examined the status of the victims under international law, finding that the men killed may not be reasonably regarded as 'civilians', a notion not precisely defined by the regulations appended to the Hague Convention of 1907 (applicable at the time) ([44]). As for the women killed, the Court considered the relevant circumstances of the case could not be reasonably regarded as a violation of the laws and customs of war ([45]). After a detailed assessment of the facts, the Court concluded that the applicant could not have reasonably foreseen that his acts constituted a war crime within the meaning of the jus in bello at the time, and therefore the conviction could not be based on a plausible legal basis in international law ([46]). In addition, the Court asserted that even if the applicant had committed offences punishable under general domestic law, their prosecution would now be statute barred ([47]).

However, the case was referred to the Grand Chamber of the Court, which reversed this judgement on 17 May 2010. The Court was called upon to examine if the legal provisions at the time of acts being committed, 27 May 1944, had been sufficiently clear for the applicant's convictions, whether later prosecution had become statute barred, and whether these offences had been defined with sufficient accessibility and foreseeability.

After having analysed the legal basis applicable in 1944, the Court noted that the jus in bello considered it unlawful to ill-treat or summarily execute a prisoner of war, and that civilians could only be attacked for as long as they took a direct part in hostilities ([48]). Furthermore, even if civilians were suspect-

([40]) Ibid., § § 88–94.

([41]) Ibid., § 95.

([42]) Kononov v Latvia, No 36376/04, 24 July 2010.

([43]) Ibid., § 124.

([44]) Ibid, § 131. The Court found that Article 50 of the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Conflicts, adopted in 1977 and defining the term 'civilian' as covering any person not belonging to one of the predefined categories of combatants or in respect of whom there is a doubt on that point, cannot be applied retrospectively to characterise the acts the applicant may have committed 30 years earlier. Hence, according to the Court, '[i]n sum, there is nothing to show that under the jus in bello as it existed in 1944 a person who did not satisfy the formal conditions to qualify as a "combatant" had automatically to be assigned to the category of "civilians" with all its attendant guarantees'.

([45]) Ibid., § 140.

([46]) Ibid., § § 137, 148.

([47]) Ibid., § § 144–148.

([48]) Kononov v Latvia [GC], No 36376/04, § § 202–203, 17 May 2010.

ed to have committed war treason, they remained subject to arrest, fair trial and punishment by military or civilian tribunals for such acts ([49]). Taking an in-depth look at the reasoning followed by the Latvian courts, the Grand Chamber – irrespective of the deceased villagers' legal status under international humanitarian law – found there was a sufficiently clear legal basis for the applicant's conviction and punishment for war crimes as commander of the unit responsible for the attack (under the principle of command responsibility) ([50]).

The Court also reaffirmed that no statute of limitations would apply under international law for war crimes ([51]).

Turning to the applicant's argument that his conviction for war crimes was unforeseeable, the Court underlined that, although the Latvian Criminal Code did not contain any explicit reference to international laws and customs of war and those laws and customs were not formally published in the Soviet Union and in the Soviet Socialist Republic of Latvia at the time, the impugned acts were of such a flagrantly unlawful nature that the applicant, as a commanding military officer, should have at least considered the possibility of being held individually and criminally responsible for war crimes ([52]).

Finally, the Court rejected the applicant's submission that his prosecution had been politically unforeseeable, as it was both legitimate and foreseeable for a successor State to bring criminal proceedings against those who had committed crimes under a former regime. The Court added that: 'successor courts cannot be criticised for applying and interpreting the legal provisions in force at the material time during the former regime, but in the light of the principles governing a State subject to the rule of law and having regard to the core principles on which the Convention system is built. It is especially the case when the matter at issue concerns the right to life, a supreme value in the Convention and international hierarchy of human rights and which right contracting parties have a primary Convention obligation to protect' ([53]). Consequently, the Grand Chamber found that Latvia had not violated Article 7 of the ECHR ([54]).

In the recent judgement Milanković v Croatia, issued on 20 January 2022, the applicant had been convicted for 22 counts of war crimes against the Serbian civilian population and one war crime against a prisoner of war. These crimes were committed in the period between August 1991 and June 1992 in the Sisak and Banovina area of Croatia, where the applicant was initially deputy head of a police department, to later become commander of police forces in the broader area in question ([55]). He was partly held accountable for these crimes on the basis of the principle of command responsibility, namely by failing to prevent them from being committed by the police units under his command. His convictions were upheld by the Croatian Supreme Court as well as the Constitutional Court. Consequently, the applicant lodged an application with the ECtHR, arguing that his convictions for war crimes on the basis of command responsibility had not had a sufficiently clear legal basis in national or international law at the time of commission of the crimes, and hence were in breach of Article 7 of the ECHR ([56]).

In particular, he argued that the concept of command responsibility applied solely in the presence of an international armed conflict (IAC), while the armed conflict in Croatia was a non-international one (NIAC) at the time of the acts, taking place prior to Croatia's effective independence. The applicant also claimed that the concept applied only to military commanders ([57]). Nonetheless, the Court unanimously rejected the applicant's arguments,

([49]) Ibid., § 204.

([50]) Ibid., § § 214–227.

([51]) Ibid., § § 233.

([52]) Ibid., § § 237–239.

([53]) Ibid., § § 240–242.

([54]) Ibid., § § 245–246.

([55]) Milanković v Croatia, No 33351/20, § § 8–12, 20 January 2022.

([56]) Ibid., § 42. According to the applicant, the domestic courts notably applied Article 86 and 87 of the First Protocol to the 1949 Geneva Conventions, providing for responsibility of commanders, although that protocol was applicable only to international armed conflicts.

([57]) Ibid., § §15, 45.

and concluded that there had been no violation of Article 7 of the ECHR.

In its reasoning, the Court concurred with the case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and recalled the Hadžihasanović case, wherein the ICTY Trial Chamber affirmed that customary international law extended command responsibility in times of NIAC already in 1991 ([58]). The Court held that the customary international law status of this principle arises from 'the essence of the command responsibility' stemming from the principle of responsible command, which implies duties and obligations inherent to a commander's role, the breach of which results in criminal liability irrespective of the qualification of NIAC or IAC.

Furthermore, the Court also recalled the terms of Article 7 paragraph 3 of the ICTY statute, referring in general to a 'superior' and the findings of both the Trial and Appeals Chamber in Delalić et al. and Mucić et al. where the analysis of Second World War jurisprudence provided the basis for extending superior responsibility to political leaders and other civilian superiors in positions of authority ([59]).

Moreover, with respect to the foreseeability and accessibility arguments raised, the Court emphasised that 'foreseeability means that the accused must be able to appreciate that his conduct is criminal in the sense generally understood, without reference to any specific provision, and … accessibility does not exclude reliance being placed on a law which is based on custom' (emphasis added) ([60]). Therefore, the Court inferred not only from the applicant's professional activity, and his education, but also from the 'flagrant unlawful nature of the war crimes committed by the police units under his command' that he had the ability to appreciate that his acts were criminal and that the failure to prevent or punish them on his part would risk involving his criminal liability (on the basis of command responsibility) ([61]).

The Court thus concluded that the applicant's conviction fully complied with the foreseeability and accessibility requirements of the legality principle enshrined in Article 7 of the ECHR ([62]).

3.3. Crime of genocide

In Jorgic v Germany, the question as to whether criminal laws must be strictly interpreted was raised ([63]). In this case, the applicant, a national of Bosnia and Herzegovina of Serbian origin, was convicted of genocide by German courts for participating in the 'ethnic cleansing' against Bosnian Muslims by Bosnian Serbs in the Doboj region between May and September 1992 ([64]). The applicant had been arrested when entering Germany in December 1995. Reference to the Court's examination of the application of the principle of universal jurisdiction as a violation of Article 6 is explained below in Chapter 4.

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 in national law at the time of the offence ([65]). In the applicant's view, the crime of genocide included only murder, extermination or deportation with the intent to destroy a narrowly defined group in a biological-physical sense, but not merely as a social unit ([66]). Accordingly, the qualification of his acts (which did not amount to physical or biological destruction) as the crime of genocide was unforeseeable and, thus, his conviction violated Article 7 of the ECHR.

On the contrary, German courts argued that the definition of the crime of genocide covered not only the biological or physical destruction of a group, but also the destruction of a group as a social unit with its distinctiveness and particularity as well as

([58]) Ibid., § § 37–38, 57.

([59]) Ibid., § § 56–61.

([60]) Ibid., § 63.

([61]) Ibid., § § 64–65.

([62]) Ibid., § 66.

([63]) Jorgic v Germany, No 74613/01, 12 July 2007.

([64]) Ibid., § § 9–18.

([65]) Ibid., § § 89, 92–95.

([66]) Ibid., § 93.

its feeling of belonging together ([67]). The German courts' judgement was partially based on the opinion of scholars that the notion of destruction of a group as such, in its literal meaning, was wider than physical or biological extermination. It also drew from 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 of a group such as measures to prevent births within the group or the forcible transfer of children ([68]).

Rulings on this matter had previously been issued by international courts, and specifically by the ICTY in the Krstić case ([69]). The ICTY 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 Convention ([70]), the International Court of Justice (ICJ) clearly differentiated ethnic cleansing from genocide ([71]).

Nonetheless, in the Jorgic case, the ECtHR, 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 rendered after the commission of the acts in question. 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, Article 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 ([72]).

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 1948 and as interpreted in UN General Assembly Resolution 47/121 ([73]), both of which defined the ethnic cleansing in Bosnia and Herzegovina as a form of genocide ([74]), 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 ([75]). Therefore, the courts' 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 these acts was foreseeable. No violation of Article 7 of the ECHR was found ([76]).

In another interesting case, Vasiliauskas v Lithuania, the Court considered retroactive application of the crime of genocide to a broader set of protected groups ([77]).

In 2004, the applicant was convicted of the crime of genocide for having participated in the killing of two

([67]) Ibid., § § 18, 96.

([68]) Ibid., § § 23, 36.

([69]) ICTY, Prosecutor v Krstić, Judgement, IT-98-33, 2 August 2001, § § 577–580.

([70]) ICJ, Bosnia and Herzegovina v Serbia and Montenegro, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment, I.C.J. Reports 2007, p. 43.

([71]) Ibid, § 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'" (Krstic´, 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." (Stakic´, 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 ....'

([72]) Jorgic v Germany, no. 74613/01, § 101, 12 July 2007.

([73]) UNGA Res 47/121 (18 December 1992) UN Doc A/RES/47/121.

([74]) UNGA Res 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.

([75]) Jorgic v Germany, No 74613/01, § § 105, 107, 12 July 2007.

([76]) Ibid., § § 109–114.

([77]) Vasiliauskas v Lithuania [GC], No 35343/05, 20 October 2015.

Lithuanian partisans (participants in the resistance to the Soviet occupation) during a military operation in 1953, which was part of the suppression of the partisan movement by the Soviet authorities. The applicant complained under Article 7 of the ECHR that his conviction had no legal basis in 1953. His conviction was based upon domestic legal provisions that were not in force in 1953 and had therefore been applied retroactively ([78]). While noting that the crime of genocide was clearly recognised as a crime under international law in 1953 ([79]), the Court considered that the applicant's conviction for genocide with respect to a 'political group' (the Lithuanian partisans) could not have been reasonably foreseen by him. As it stood in 1953, neither international nor customary international law included 'political groups' within the definition of genocide, which was limited to acts committed to destroy, 'in whole or in part', a national, ethnic, racial or religious group ([80]).

In response to the Lithuanian government's submission that due to their prominence, the partisans were 'part' of the national group – a group protected under Article II of the Genocide Convention – the Court noted that the term 'in part' contained a substantiality requirement (meaning that a substantial part of the group must have been targeted for destruction) ([81]). Furthermore, judicial guidance as to the interpretation of the phrase 'in part' did not emerge until half a century later from the ICTY (including Jelisić, Krstić, Sikirica and Tolimir) ([82]), International Criminal Tribunal for Rwanda (ICTR) (namely Rutaganda, Semanza and Kamuhanda) ([83]) and ICJ cases ([84]). Hence, the applicant could not have foreseen this interpretation. Moreover, even though the Lithuanian Court of Appeal rephrased the Trial Court's finding by determining that the partisans were also 'representatives of the Lithuanian nation, that is, the national group', it had not properly explained the basis of the argument. In particular, the Court of Appeal had not explained the notion of 'representatives', nor provided historical or factual accounts as to how partisans were representing the nation ([85]). Therefore, the Court found that 'there is no firm finding in the establishment of the facts by the domestic criminal courts to enable the Court to assess on which basis the domestic courts concluded that in 1953 the Lithuanian partisans constituted a significant part of the national group' ([86]). Hence, the Court concluded that the Lithuanian courts' conclusions were an interpretation by analogy, to the applicant's detriment, rendering the applicant's conviction unforeseeable ([87]).

The Court further stressed that the gravity of genocide is reflected in stringent legal requirements that must be satisfied (i.e. proof of specific intent and demonstration that the protected group was targeted for destruction in its entirety or its substantial part) so that convictions are not imposed lightly ([88]). Consequently, the Court held that there had been a violation of Article 7 of the ECHR.

However, in the subsequent judgement Drėlingas v Lithuania, rendered on 12 March 2019, the ECtHR followed the State's arguments and concluded differently, The factual circumstances are very similar to the above case, but here the Lithuanian courts successfully linked partisans to a protected national and ethnic group ([89]).

The applicant in question had been convicted for being an accessory to genocide under the new Lithuanian Criminal Code (in force from 2013) for having participated in an operation taking place on 11–12 October 1956 during which two Lithuanian partisans had been captured. One of them had been tortured and executed. Consequently, the applicant lodged a complaint before the ECtHR arguing that this conviction for genocide violated Article 7 of the ECHR, stating that the national courts' broad interpretation of the offence had no basis in international law ([90]).

([78]) Ibid., § § 165–166.

([79]) Ibid., § 168.

([80]) Ibid., § §170–175.

([81]) Ibid., § 176.

([82]) Ibid., § § 97–104.

([83]) Ibid., § § 109–113.

([84]) Ibid., § § 176–177.

([85]) Ibid., § 179.

([86]) Ibid., § 181.

([87]) Ibid., § 183.

([88]) Ibid., § 185.

([89]) Drėlingas v Lithuania, No 28859/16, 12 March 2019.

([90]) Ibid., § 78.

The Court carefully considered the ruling issued by the Lithuanian Supreme Court in this case, finding that it had dispelled the lack of clarity in the domestic case-law that had previously been identified in the case of Vasiliauskas v Lithuania ([91]). In its reasoning, the Lithuanian Supreme Court admitted that the Lithuanian courts had failed to adequately support their conclusions with regard to the partisans constituting a significant part of a national group (and hence a protected group under Article II of the Genocide Convention).

In the applicant's case, the Supreme Court had provided an extensive explanation, elaborating upon the elements of what constituted the 'nation', as well as elements which had led to the conclusion that the partisans had constituted 'a significant part of the Lithuanian nation as a national and ethnic group' ([92]). Among other characteristics, the Supreme Court had found that the Lithuanian partisans 'had played an essential role when protecting the national identity, culture and national self-awareness of the Lithuanian nation', on the basis of which it concluded that the partisans as a group were a significant part of a 'protected national and ethnic group', and that their extermination had therefore constituted genocide, both under Article 99 of the Lithuanian Criminal Code and under Article II of the Genocide Convention ([93]).

Accordingly, the ECtHR acknowledged this evolution of domestic case-law, resolving the lack of clarity observed in the application by domestic courts of Article 99 of the Lithuanian Criminal Code in Vasiliauskas v Lithuania. In sum, the Court noted that the grounds retained by the Supreme Court did not distort the findings of Vasiliauskas v Lithuania, and, on the contrary, provided 'a loyal interpretation of the Court's judgment, taken in good faith in order to comply with Lithuania's international obligations' ([94]). Hence, the Court concluded there had been no violation of Article 7 of the convention ([95]).

([91]) Ibid., § § 100, 103.

([92]) Ibid., § 103.

([93]) Idem.

([94]) Ibid., § 105.

([95]) Ibid., § § 108–111.

Focus on national jurisprudence – Neretse case, decision of the interlocutory court of appeal, 6 December 2018, Belgium

On 6 December 2018, the Brussels interlocutory court of appeal was seized by a defence request arguing that the defendants in this case could not be charged with genocide, given that the crime of genocide had not been implemented in Belgian national law at the time of the 1994 genocide against Tutsis in Rwanda.

The court examined both the issues of foreseeability and accessibility, in line with the ECtHR jurisprudence. It noted that Belgium had adopted the 1948 Genocide Convention in 1951, after having signed it in 1949. While the crime of genocide was implemented in Belgian law in 1999, preparatory works of the legislator had unequivocally indicated that this law would apply to violations of international humanitarian law committed prior to its entry into force, given that the criminalisation of such violations was based upon general principles of criminal law recognised by all civilised nations.

Therefore, in terms of accessibility, the court concluded that the act constituting the crime of genocide was clearly considered criminal under international law in 1994, and that the international instruments sanctioning genocide were sufficiently accessible to the defendants when the acts were committed.

Turning to the issue of foreseeability, the court considered that the definition of the crime of genocide contained in Art. 2 of the 1948 Genocide Convention describes in clear and unequivocal terms the behaviours that may constitute genocide, including the specific mens rea required by the crime.

The court therefore confirmed the admissibility of the charges.

On 20 December 2019, the Brussels Court of Assizes found the accused guilty of the crime of genocide and war crimes. The Belgian Supreme Court upheld the conviction on 27 May 2020.

3.4. Non-retroactive application of the more severe criminal law (lex mitior)

In Maktouf and Damjanović v Bosnia and Herzegovina ([96]), the applicants were convicted of war crimes against civilians, committed during the 1992–1995 war in Bosnia and Herzegovina. 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 main issue raised by the applicants was therefore the different sentencing frameworks applicable under the two codes ([97]).

In this case, the Court reiterated that it would not review in abstracto whether the retroactive application of the 2003 code in war crime cases is, per se, incompatible with Article 7 of the ECHR, as this issue should be assessed on a case-by-case basis by analysing the specific circumstances of each case ([98]). 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, the Court found a violation of Article 7 of the ECHR in the particular circumstances of the applicants' cases ([99]). However, 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 Criminal Code should have been applied ([100]).

([96]) Maktouf and Damjanović v Bosnia and Herzegovina [GC], Nos 2312/08 and 34179/08, § 67, 18 July 2013.

([97]) Idem.

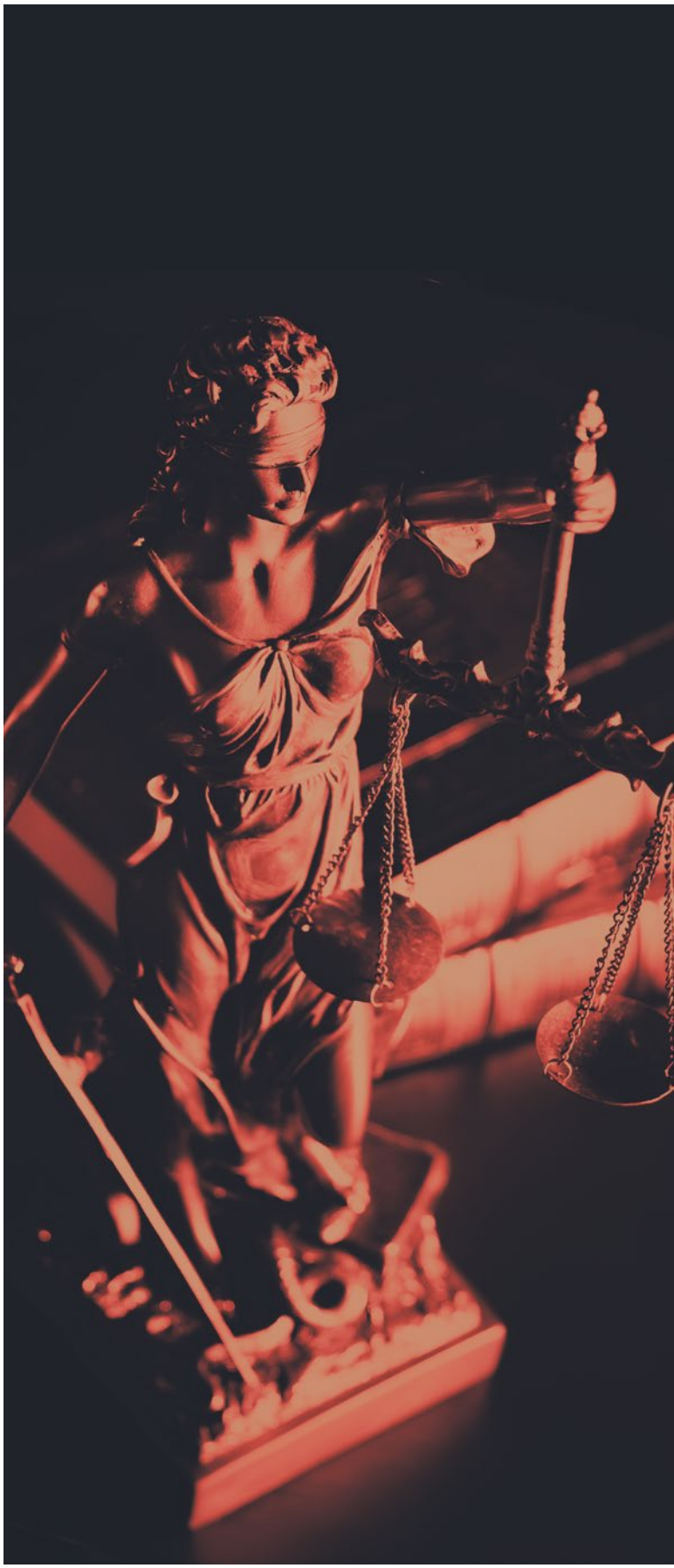
([98]) Ibid., § 65.

([99]) Ibid., § 70.

([100]) Ibid., § 76.

4.

The right to a fair trial and interlinked issues under Article 6 of the ECHR



4.1. Universal jurisdiction – civil and criminal

In the case Naït-Liman v Switzerland ([101]), the applicant, who was granted asylum in Switzerland in 1995, claimed that the Swiss courts had denied his right to a fair trial, on the basis of Article 6 §1 of the ECHR, by declining to examine the substance of his civil claim for compensation in respect of the non-pecuniary damage caused by alleged acts of torture inflicted in Tunisia in 1992 ([102]).

In the first decision issued in the case, the Second Section of the Court first conducted a comparative survey on the practice of universal civil jurisdiction for acts of torture and on the principle of the forum of necessity ([103]). It established that at the time of the decision, none of the contracting States provided for universal international jurisdiction before civil courts, whether for acts of torture or for other criminal offences ([104]). However, it highlighted a clear distinction with the possibility to join criminal proceedings as a civil party on the basis of universal criminal jurisdiction, for torture or core international crimes ([105]). Regarding the 'forum of necessity' principle, the Court found that in the majority

([101]) Naït-Liman v Switzerland, No 51357/07, 21 June 2016; Naït-Liman v Switzerland [GC], No 51357/07, 15 March 2018.

([102]) Naït-Liman v Switzerland [GC], No 51357/07, § § 14–18, 15 March 2018.

([103]) Naït-Liman v Switzerland, No 51357/07, § 48, 21 June 2016.

([104]) Ibid., § 49–53.

([105]) Ibid., § § 54–57.

of contracting States, rules governing international civil jurisdiction do not recognise this principle ([106]).

Turning to the merits of the case, the Court concluded that 'the Swiss courts' refusal to accept jurisdiction to examine the applicant's civil action for damages ..., notwithstanding the fact that the prohibition on torture is part of the jus cogens, did not deprive the applicant's right of access to a court of its very essence, pursued legitimate aims and was proportionate to the aims pursued' ([107]).

The Court notably 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' ([108]). It also agreed with the Swiss government that the acceptance of universal jurisdiction in civil matters may cause undesirable interference by one country in the internal affairs of another ([109]). Considering these legitimate aims, the Court then assessed whether the restriction of the applicant's right of access to a court was proportionate to these aims. The Court found that the Swiss courts' finding of lack of jurisdiction was not arbitrary nor unreasonable, considering the strict conditions applicable under national law for the exercise of jurisdiction ([110]).

The case was then referred to the Grand Chamber, where the Court agreed with the previous decision, by highlighting the same legitimate concerns on the part of the authorities, namely the issues met by the courts in gathering and assessing the evidence, the difficulty of enforcing judgements, the risk of encouraging forum shopping, and lastly, the potential diplomatic difficulties entailed by the recognition of civil jurisdiction in the conditions proposed by the applicant ([111]).

The Grand Chamber reiterated that, despite the evolving State practice, the prevalence of universal civil jurisdiction 'is not yet sufficient to indicate the emergence, far less the consolidation, of an international custom which would have obliged the Swiss courts to find that they had jurisdiction to examine the applicant's action' ([112]). The Court thus concluded that international law had not obliged the Swiss authorities to open their courts to the applicant, either on the basis of universal civil jurisdiction for acts of torture or on the basis of the forum of necessity principle ([113]).

In the case Hussein and Others v Belgium ([114]), ten Jordanian applicants who lived in Kuwait during the first Gulf War (1990–1991) filed a civil party application in Belgium with the purpose of triggering criminal proceedings for genocide against high-ranking Kuwaiti officials on the basis of the principle of universal jurisdiction under the Belgian Act on the suppression of serious violations of humanitarian law (16 June 1993). They also sought compensation in respect of pecuniary and non-pecuniary damages.

As the 1993 act was superseded by the Belgian Act of 5 August 2003, the Belgian courts ruled that the defendants could not be prosecuted in Belgium as the law now limited the courts' jurisdiction on this matter. As explained by the Belgian government before the ECtHR, the reform was intended to reduce pressure on the Belgian courts' workload, avoid an explosion of cases without connection to Belgium, resolve practical difficulties in collecting evidence, and remedy some diplomatic tensions linked to the recognition of 'absolute' universal jurisdiction.

The applicants argued, relying in particular on Article 6 of the ECHR, that their right of access to a

([106]) Ibid., § § 58–60.

([107]) Ibid., § 121.

([108]) Ibid., § 107.

([109]) Idem.

([110]) Ibid., § § 198, 106–114.

([111]) Naït-Liman v Switzerland [GC], No 51357/07, § § 122–128, 15 March 2018.

([112]) Ibid., § § 187.

([113]) Ibid., § § 199–202.

([114]) Hussein and Others v Belgium, No 45187/12, 16 March 2021. (Judgement only available in French version, press release available in English).

tribunal was restricted by the new limitation of the jurisdiction of the Belgian courts ([115]).

Unlike the aforementioned case, which dealt with the issue of universal jurisdiction before civil courts in the context of autonomous civil proceedings, the case in question dealt with the possibility of lodging a civil party application in criminal proceedings based on the principle of universal jurisdiction. However, the general principle expressed in the Naït-Liman case concerning access to a civil tribunal remained applicable ([116]). The issue of applying a newly adopted law to ongoing judicial proceedings was also raised ([117]).

The Court noted that at the time of the applicants' civil-party application, the 1993 act was still in force. When the 2003 act entered into force, not only did these proceedings no longer satisfy the new, stricter criteria governing the jurisdiction of the Belgian Courts, but no investigative act had been carried out before that entry into force – which doomed the civil-party application to failure ([118]). Furthermore, according to the ECtHR neither international law nor the ECHR created an obligation for contracting States to assume civil universal jurisdiction, and 'it was not unreasonable for a State to make the exercise of civil universal jurisdiction conditional on certain connecting factors with that State' ([119]). Moreover, the Court noted that the reason given by the domestic courts for declining jurisdiction had been neither arbitrary nor manifestly unreasonable. Hence, the Court unanimously concluded that there was no violation of Article 6 of the ECHR [(120)].

In the Jorgic v Germany case, examined above in relation to the principle of legality, the Court also addressed the contested jurisdiction of the German courts over the crime of genocide committed abroad by a foreign national, therefore in a classic case of (extraterritorial) universal criminal jurisdiction.

In application of Article 6, paragraph 1 of the ECHR ([121]), the accused must be heard by a 'tribunal established by law'. According to this requirement, the tribunal must have jurisdiction over the case based on the provisions applicable under its domestic law. If not, said tribunal cannot be considered 'established by law' ([122]).

In order to confirm whether German courts had jurisdiction under their domestic law, the Court had to analyse whether this decision complied with the provisions of public international law applicable in Germany. The Court examined the 1948 Genocide Convention, in particular Article VI ([123]). It highlighted that the contracting States of this convention had not agreed to codify the principle of universal jurisdiction over the crime of genocide with regard to the domestic courts of all State parties.

([115]) Ibid., § 57.

([116]) Ibid., § 59.

([117]) Ibid., § 60.

([118]) Ibid., § § 67–69. Some exceptions were provided in transitory provisions of the 2003 Act, hence, the competence of Belgian Courts could have been maintained if investigative acts had been undertaken prior to the entry into force of the act.

([119]) Ibid., § 65.

([120]) Ibid., § § 72–74.

([121]) Article 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.'

([122]) Jorgic v Germany, No 74613/01, § 64, 12 July 2007.

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

Nevertheless, in accordance with Article I of the Genocide Convention, the contracting States 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 ([124]).

The Court also noted that this interpretation of Article VI of the Genocide Convention in connection with Article I, followed by the German courts, is confirmed by the case-law and statutory provisions of numerous parties to the ECHR as well as by the statute and case-law of the ICTY ([125]).

In conclusion, the Court established that the German court's interpretation of their domestic provisions and rules of international law was not arbitrary and therefore they had jurisdiction to try the applicant on charges of genocide. There has thus been no violation of Article 6 of the ECHR ([126]).

([124]) Jorgic v Germany, § § 66–68.

([125]) Ibid., § § 50–51, 53–54, 69. The Court noted that: '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"'. Further, the Court noted that in many contracting States, 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. Belgium (at least until 2003), Czechia, Finland, France, Hungary, Italy, Latvia, Luxembourg, the Netherlands (since 2003), Russia, Slovakia and Spain). 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, e.g. Austria, Denmark, Estonia, Poland, Portugal, Romania, Sweden and Switzerland (since 2000).

([126]) Ibid., § § 70–72.

4.2. Extradition to non-EU countries on core international crimes charges

In the case Ahorugeze v Sweden, the ECtHR assessed an alleged risk of flagrant denial of justice if the applicant, suspected of crimes against humanity and genocide, was extradited to stand trial in Rwanda ([127]). The applicant, a Rwandan citizen of Hutu ethnicity, who fled Rwanda in 1994, was arrested in 2008 in Sweden under an international arrest warrant ([128]). The Rwandan authorities then requested his extradition to Rwanda to stand trial on charges including genocide and crimes against humanity. Shortly after the Swedish Supreme Court ruled that there was no impediment to the extradition, the ECtHR issued an interim measure under Rule 39 of its Rules of Court, suspending the extradition pending its examination of the case ([129]).

First, the applicant argued under Article 3 of the ECHR (prohibition of torture or inhumane or degrading treatment) that his medical condition prevented his extradition and that he risked facing persecution or ill-treatment because he was Hutu ([130]). The Court rejected his arguments, noting that there was not any evidence of a general situation of persecution of the Hutu population in Rwanda, and that the ICTR and some international delegations had found prison facilities in Rwanda to meet international standards ([131]). In addition, the sentence of life imprisonment in isolation could not be imposed on persons transferred from other States ([132]). Hence the Court found the applicant would not suffer a violation of Article 3 if extradited to Rwanda.

Second, the applicant contended that his right to a fair trial, protected under Article 6 of the ECHR,

([127]) Ahorugeze v Sweden, No 37075/09, 27 October 2011.

([128]) Ibid., § § 9–12.

([129]) Ibid., § 22.

([130]) Ibid., § 78.

([131]) Ibid., § § 89–92.

([132]) Ibid., § 93; See ICTR, The Prosecutor v Jean Uwinkindi, Case No ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011.

would be violated in case of extradition ([133]). Based on its existing jurisprudence, the Court recalled that a decision to extradite could exceptionally give rise to an issue under Article 6 if the applicant risked a flagrant denial of a fair trial in the requesting State. For a risk of flagrant denial of justice to occur, what is required is a stringent test: 'such a fundamental breach of the fair-trial guarantee as to amount to a destruction of the very essence of that right' ([134]).

Referring to the jurisprudence of the ICTR dating back from 2008 and early 2009, and other jurisdictions, that had then refused to transfer or extradite genocide suspects to Rwanda owing to concerns that they would not receive a fair trial, the Court highlighted that changes had since been made to the Rwandan legislation that afforded adequate guarantees ([135]). It notably pointed out the possibility for the applicant to call witnesses to testify without fear of prosecution or to have their evidence examined by the Rwandan courts ([136]).

Concerning the alleged lack of qualified defence lawyers in Rwanda, the Court relied on a recent ICTR decision in the Uwinkindi case, in which the ICTR expressed confidence that the case would be prosecuted consistently with internationally recognised fair-trial standards ([137]). In its decision, the ICTR provided extensive information on the training and qualification of Rwandan lawyers, the legal aid framework, and the possibility to appoint foreign defence counsel ([138]).

Relying heavily on the findings in the Uwinkindi case and the experience of international investigative teams, the Court also concluded that there were insufficient grounds for calling into question the independence and impartiality of the Rwandan judiciary ([139]).

The Court finally noted that the ICTR's decision to transfer Uwinkindi for trial in Rwanda had been made pursuant to Rule 11bis of the ICTR Rules of Procedure and Evidence, which required the guarantee that the accused would receive a fair trial in the Rwandan courts. According to the Court, '[t]he standard thus established clearly set a higher threshold for transfers than the test for extraditions under Article 6 of the Convention, as interpreted by the Court' ([140]).

([133]) Ibid., § § 97–102. The applicant notably pointed out that (i) his witnesses may be reluctant to come forward before Rwandan courts; (ii) there was a lack of qualified defence lawyers in Rwanda, and (iii) the Rwandan judiciary was not impartial or independent from the executive.

([134]) Ibid, § § 113–116. See also Soering v the United Kingdom, No 14038/88, 7 July 1989.

([135]) Ahorugeze v Sweden, No 37075/09, § § 117–118, 27 October 2011.

([136]) Ibid., § § 120–123.

([137]) Ibid., § § 51–61. See ICTR, The Prosecutor v Jean Uwinkindi, Case No ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011, §223. The referral decision in the Uwinkindi case was the first transfer decision issued by the ICTR since the legislative reform in Rwanda. This decision was affirmed by the ICTR Appeals Chamber on 16 December 2011.

([138]) Ahorugeze v Sweden, § 124.

([139]) Ibid., § 125, citing Uwinkindi, § § 178, 180, 185.

([140]) Ibid., § 128.

5. Obligation to conduct effective investigations and command responsibility under Article 2 of the ECHR

5.1. Limitation of the temporal jurisdiction of the Court

Article 2 of the ECHR protects the right to life ([141]), and the underlying procedural obligation of a State to conduct an effective investigation into alleged breaches of this right. This obligation requires that there should be some form of effective official obligation when there is reason to believe that a person has sustained life-threatening injuries in suspicious circumstances, even where the presumed perpetrator of the fatal attack is not a State agent ([142]). In this context, some judgments of the Court contain references to international criminal law.

In Janowiec and Others v Russia ([143]), for instance, the Court ruled on the applications of 15 Polish nationals, submitted against Russia. 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' ([144]). 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, first 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 ([145]).

The case at stake was referred to the Grand Chamber, where the Court upheld the Chamber's finding concerning its jurisdiction ratione temporis ([146]). While analysing this issue, the Court concluded that the procedural obligation to conduct an effective investigation has evolved into a separate and autonomous duty, as it can be considered a detachable obligation on the basis of Article 2, capable of binding a contracting State even when the death took place before the date of the entry into force of the convention with respect to that party ('critical date') ([147]). However, this does not mean that the Court's temporal jurisdiction is open ended.

The limits were defined in the case Šilih v Slovenia, which can be summarised in the following manner:

Firstly, where the death occurred before the critical date, the Court's temporal jurisdiction will extend only to the procedural acts or omissions in the period subsequent to that date. Secondly, the proce-

([141]) Article 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.'

([142]) ECtHR, Guide on Article 2 of the European Convention on Human Rights, updated on 31 August 2022, p. 32, available at https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf; Mustafa Tunç and Fecire Tunç v Turkey [GC], No 24014/05, § 171, 14 April 2015.

([143]) Janowiec and Others v Russia [GC], Nos 55508/07 and 29520/09, 21 October 2013.

([144]) Julia Koch, 'The Difficulty of Temporal Jurisdiction in Janowiec and Others v. Russia', Boston College International and Comparative Law Review, Vol. 38, 2015, p. 43–57.

([145]) Janowiec and Others v Russia [GC], Nos 55508/07 and 29520/09, § § 103–107, 21 October 2013.

([146]) Ibid., § § 152–161, 21 October 2013.

([147]) Ibid., § § 131–132.

dural obligation will come into effect only if there was a 'genuine connection' between the death as the triggering event and the entry into force of the Convention. Thirdly, a connection which is not 'genuine' may nonetheless be sufficient to establish the Court's jurisdiction if it is needed to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective way ([148]).

When examining these elements, the Grand Chamber endorsed the Chamber's finding that the period of time between the death of the applicant's family members and the critical date (for Russia, 1998) was too long to establish a genuine connection between the death of the applicants' relatives and the entry into force of the convention in respect of Russia ([149]).

Finally, even though the Court found that the mass murder of Polish prisoners by the Soviet secret police had the features of a war crime, it concluded that, in the period after 5 May 1998, no piece of evidence of a character or substance that could revive a procedural obligation or raise new issues had been uncovered or produced ([150]). The Grand Chamber upheld this finding, noting that there were no elements enabling a bridge from the distant past into the recent post-ratification period ([151]).

5.2. Investigation of superiors and direct perpetrators

In Jelić v Croatia ([152]), the applicant complained that the authorities had not done enough to investigate the killing of her husband during the armed conflict in the early 1990s. The Court accepted that the case was complex and that there were indications that the killing had taken place in the context of targeted killings of Serbian civilians by members of the 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 certainly had 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 Article 2 of the ECHR as regards the authorities' procedural obligation to effectively investigate the death of the victim.

Furthermore, it is important to highlight that the Court found that even though a senior official, who had allowed the killings of persons of Serbian origin and had failed to undertake adequate measures to prevent these killings, was convicted based on command responsibility, Croatia's procedural obligations under Article 2 still required the authorities to pursue the prosecution of the most probable direct perpetrators with promptness and reasonable expedition.

In the context of war crimes, the Court emphasised that superior command must be differentiated from the responsibility of the subordinates as direct perpetrators. Therefore, the punishment of superiors cannot exonerate their subordinates from their own criminal responsibility ([153]). As mentioned, the Court did not underestimate the complexity of the case in question, however, it considered that the political and social stakes relied on by the Croatian Government are not enough to justify the manner in which the investigations were carried out, where leads on the identification of direct perpetrators were not thoroughly followed ([154]).

In a later case, Borojević and Others v Croatia ([155]), the applicants complained about the killing of their

([148]) Ibid., § 141.

([149]) Ibid., § 157.

([150]) Ibid., § § 105–106.

([151]) Ibid., § 106.

([152]) Jelić v Croatia, No 57856/11, 12 June 2014.

([153]) Ibid., § § 88–89.

([154]) Ibid., § 95.

([155]) Borojević and Others v Croatia, No 70273/11, 4 April 2017.

respective husband and father, who was stabbed to death and found on the right bank of the river Kupa in Sisak, and the insufficiencies in the investigation regarding this incident.

The Court noted that the facts of this case were similar to those in Jelić v Croatia, but the circumstances of the case differed with respect to the prosecution of direct perpetrators ([156]). The Court observed that, despite the police efficiently following up all the leads in this case, none of the potential witnesses could identify any potential perpetrators.

Accordingly, the ECtHR clarified the scope of the procedural obligation under Article 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' ([157]). The Court stated that this procedural obligation is 'not an obligation as to result, but as to means' ([158]). 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 implied by Article 2 of the ECHR.

The Court further explained 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 ([159]). 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' ([160]). Moreover, in terms of the promptness requirement, the Court accepted that the obstacles in the investigation can be attributed to the overall situation in the country, in this case a newly independent and post-war country. Therefore, the Court found it acceptable that the relevant authorities gave priority to establishing command responsibility of the involved superior ([161]). The Court concluded that the investigations conducted did not infringe the minimum standards required under Article 2, hence there was no violation of this provision.

In its 2021 judgement in Georgia v Russia (II) ([162]), among other matters, the Court examined whether Russia had failed to comply with the procedural obligation to investigate effectively the events that occurred both during the active phase of the hostilities with Georgia in August 2008 and after their cessation. Admittedly, the Court found that the events that took place during the active phase of the hostilities did not fall within Russia's jurisdiction ([163]). Nonetheless, the Court reiterated that a jurisdictional link in relation to the obligation to investigate enshrined in Article 2 of the ECHR could be established if the contracting State had opened an investigation or proceedings under its domestic law in relation to a death which had occurred outside its jurisdiction, or if the case in question presented 'special features' ([164]).

With regard to the latter requirement, Russian prosecuting authorities did indeed start to inves-

([156]) Ibid., § § 52, 54.

([157]) Ibid., § 46.

([158]) Ibid., § 57.

([159]) Ibid., § § 47–78.

([160]) Ibid., § 58.

([161]) Ibid., § § 59–63.

([162]) Georgia v Russia (II) [GC], No 38263/08, 21 January 2021.

([163]) Ibid., § § 125–144. In particular paragraph 137: 'The Court attaches decisive weight to the fact that the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no "effective control" over an area as indicated above (see paragraph 126), but also excludes any form of "State agent authority and control" over individuals.'

([164]) Ibid., § § 329-330; Güzelyurtlu and Others v Cyprus and Turkey, No 36925/07, § 190, 29 January 2019: 'Where no investigation or proceedings have been instituted in a Contracting State, according to its domestic law, in respect of a death which has occurred outside its jurisdiction, the Court will have to determine whether a jurisdictional link can, in any event, be established for the procedural obligation imposed by Article 2 to come into effect in respect of that State. Although the procedural obligation under Article 2 will in principle only be triggered for the Contracting State under whose jurisdiction the deceased was to be found at the time of death, "special features" in a given case will justify departure from this approach, according to the principles developed in Rantsev, §§ 243-44. However, the Court does not consider that it has to define in abstracto which "special features" trigger the existence of a jurisdictional link in relation to the procedural obligation to investigate under Article 2, since these features will necessarily depend on the particular circumstances of each case and may vary considerably from one case to the other'.

tigate the allegations. Despite the fact that the events, which occurred during the active phase of hostilities, did not fall within Russian jurisdiction, it established effective control over the territories at stake soon afterwards. Furthermore, Georgia was prevented from conducting an adequate investigation into the allegations since all the potential suspects among the Russian service personnel were either in Russia or in territories under its control. Therefore, the Court considered that Russia's jurisdiction within the meaning of Article 1 of the ECHR was established in respect of the complaint at stake. Russia thus had a procedural obligation to conduct an adequate and effective investigation into events that occurred both during and after the active phase of hostilities ([165]).

Consequently, considering the seriousness of the crimes allegedly committed during the conflict and the scale and nature of the violations perpetrated during the period of occupation, the Court concluded that there had been a violation of Article 2 in its procedural aspect, as the investigations carried out by the Russian authorities were neither prompt nor effective nor independent ([166]).

([165]) Georgia v Russia (II) [GC], No 38263/08, § § 331–332, 21 January 2021.

([166]) Ibid., § § 336–337.

6.

Ne bis in idem and amnesties in relation to core international crimes

The delicate question of amnesties is often a key consideration in situations where grave violations of human rights and core international crimes have been committed, especially in post-conflict situations where the priority may be national reconciliation.

In this respect, Marguš v Croatia is a leading case where the Court was required to pronounce on the acceptability, under international law, of granting amnesties for grave breaches of human rights law [167].

The applicant, a member of the Croatian army, was indicted for murder and other serious offences committed in Croatia during the war in 1991. Some of the charges were withdrawn by the prosecution and amnesties were applied for the other offences. Nevertheless, he was later convicted of war crimes in a parallel set of proceedings. In the case before the ECtHR, the applicant therefore complained, inter alia, under Article 4 of Protocol No 7 to the ECHR about a violation of his right not to be tried twice for the same acts (ne bis in idem principle) [168].

After a thorough analysis of international law (international conventions, customary international law and practice, including decisions of international and regional courts and tribunals), the Court found that '[a] growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights' [169]. Indeed, it considered that while the applicant had been prosecuted twice for the same offences [170], Article 4 of Protocol No 7 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 Article 2 and 3 of the ECHR [171]. Furthermore, the Court noted that even if amnesties may be acceptable in particular circumstances (for example, in a reconciliation process), no such circumstances existed in that case [172].

Accordingly, the Court decided that the domestic authorities had acted in compliance with the obligations arising from Article 2 and 3 of the ECHR by bringing a fresh indictment against the applicant and convicting him of war crimes against the civilian population.

Under the circumstances, Article 4 of Protocol No 7 concerning the ne bis in idem principle was therefore found not applicable in the circumstances of this case and the complaint was declared inadmissible.

[167] Marguš v Croatia [GC], No 4455/10, 27 May 2014.

[168] Ibid., § 92.

[169] Ibid., § 139.

[170] Ibid., § § 114–123.

[171] Ibid., § § 127–128, 140.

[172] Ibid., § 139.

7.
Conclusion

The principle of nullum crimen sine lege, or principle of legality, is today one of the fundamental principles of criminal law. To incur criminal responsibility, a specific behaviour must be prohibited and carry criminal sanction at the time of conduct. This principle has a particular resonance at the international level given the relative imprecise nature of certain sources of international criminal law, namely customary international law. This has long been a contentious issue in international criminal law, including during the post-war Nuremberg trials. Nevertheless, the Nuremberg Tribunal established the progressive precedent that it was a crime to violate international legal principles, even in the absence of any specific treaty provisions defining the crime and sanctions to be applied. Since then, national and regional courts have applied the principle of legality with some flexibility in the context of core international crimes investigations and prosecutions.

The jurisprudence of the ECtHR outlined in this report, in particular regarding the principle of legality enshrined in Article 7 of the ECHR, should be seen as an open door for Member States to investigate and prosecute core international crimes even when their national legislation only implemented said crimes after the date of their commission. The ECtHR confirmed in many instances that, subject to the conditions of accessibility and foreseeability, the retroactive application of the law is possible for war crimes, crimes against humanity and the crime of genocide.

Therefore, as European countries – and others – continue to integrate international obligations into their domestic legislations, they should not be discouraged when facing the issue of non-retroactivity of criminal law, since the fact that the acts at stake have been committed before the implementation of the crimes in their national law is not necessarily a dead end. By taking into account the Court's jurisprudence on Article 7 and moving towards a progressive application of their domestic legislation, national authorities will continue to ensure accountability and fight against impunity.

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