| Chapter 9 |

No Punishment Without Law

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ABSTRACT

The Chapter provides a comprehensive overview of the procedural rights related to the right to a fair trial in criminal cases, other than the ones set forth by Art. 6 of the European Convention on Human Rights. These rights are analysed from the perspective of the case law of the European Court of Human Rights, but also of the Explanatory Reports of the various Protocols to the Convention, highlighting the importance of the respect of these rights as a salient part of the overall respect of human rights in Europe.

KEYWORDS

no punishment without law, non-retroactivity, right to compensation, contractual obligations, right to appeal

The European Convention on Human Rights (ECHR) protects several procedural rights, some in its main body and some in the optional protocols. The main procedural rights are directly related to the right to a fair trial and its guarantees, expressly provided by or implied in Art. 6. Another procedural right included in the main body is the right to an effective remedy (Art. 13). Art. 7 provides two rights at the crossroads of substantial and procedural rights in criminal trials: no punishment without law and the non-retroactivity of criminal law, except for the more lenient criminal law. In this Chapter, we analyse the first right provided by Art. 7 and the procedural rights included in the subsequent protocols: the right not to be tried and punished twice, the right to appeal in criminal matters, the right to compensation for wrongful conviction and the prohibition of imprisonment for debt or breach of contractual obligations. Furthermore, the impact of the European Court of Human Rights' (ECtHR) case law regarding these rights on the national law of States and the rule of law in general will be highlighted.

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1. No Punishment Without Law – Art. 7 of the ECHR

1.1. The Principle of Legality – Main Concepts

Art. 7 para. 1 of the European Convention on Human Rights (ECHR) reads as follows:

> '(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.'

These rights are guarantees of a fair trial in criminal cases (rights of the accused person) and of the rule of law. Art. 7 is one of the 'core rights' provided by Art. 15 of the ECHR, from which no derogation is possible even in times of war or other public emergencies. However, like most Convention rights, the object of the right guaranteed by Art. 7 is not explicitly defined. Therefore, the European Court of Human Rights (ECtHR) deciphered and interpreted the main concepts.

The first guarantee in Art. 7 is based on the principle of *nulla poena sine lege* (no punishment without law). This means that any conviction of a criminal penalty should be procedurally and substantially legal. The procedural basis for the conviction is ensured by Art. 6 ECHR, whereas the substantial foundation lies in Art. 7. Therefore, the ECtHR's main task was, first and foremost, to define the concept of 'law'.

1.1.1. The Concept of 'Law'

The concept of 'law' is essential in the economy of the ECHR and its protocols and can be considered one of the 'red threads' that goes through it. It can be found in the clauses that set the rules for restricting certain rights (para. 2 of Arts. 8, 9, 10 and 11), in Arts. 5 (procedure prescribed by law) and 6 (tribunal established by law) and in Art. 2 (protected by law). In each instance, the ECtHR defined and interpreted the complex notion of 'law' to align the diverse meanings from diverse legal systems of the States Parties to the Convention to the same standard of rights protection.

As a general approach, the Court exercises its supervisory function over the national authorities; however, it 'only exceptionally' finds the interpretation and application of national law by national courts to be in breach of Art. 7.[1] Art. 7 is peculiar compared to the other texts that refer to the concept of 'law'. It expressly invokes the notion of 'international law' and the crimes thereby defined, which requires further interpretation in the case law of the ECtHR.

1 Harris et al., 2023, p. 331.

1.1.1.1. Domestic Law

The concept of 'law' as part of the domestic legal system is a wide one, as interpreted by the ECtHR. The principle of legality is essential in a rule of law-based state; however, the peculiarities of each legal system must be considered. Thus, in *Cantoni v. France* (1996), the Court established that the notion of 'law' within the meaning of Art. 7: 'comprises the written and unwritten law and implies qualitative conditions'. Furthermore, in *Sunday Times v. UK* (1979), the Court held, although not in the context of Art. 7, but of Art. 10, that: the word 'law' in the expression 'prescribed by law' covers not only statute law but also unwritten law. Accordingly, the Court does not attach importance here to the fact that contempt of court is a creature of the common law and not of legislation.

In its analysis, the Court referred to the intention of the drafters and various legal traditions of the States Parties:

> 'It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not 'prescribed by law' on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Art. 10(2) and strike at the very roots of that State's legal system.'

Mutatis mutandis, this interpretation applies to the concept of 'law' used by Art. 7.

Regarding written law, this concept includes, within Art. 7, statute law (statutes understood as acts of Parliament or pieces of primary legislation) and lower-rank normative acts, such as prison regulations[2] or judicial decisions or case law.[3] In a recent Advisory Opinion delivered under Protocol 16 to the Convention,[4] the Court tackled the matter of judicial interpretation of constitutional provisions related to Art. 7. It admitted that 'as in the case underlying the request for the present advisory opinion, the referenced constitutional provisions may be formulated as general principles, and therefore in a general and very abstract manner'. This entails the intervention of lower-ranking acts and of 'non-codified constitutional customs and (...) jurisprudence'. Moreover, the Court cited its case law where it held:

> 'Art. 7 of the Convention did not exclude the possibility that evidence of existing constitutional practice could form part of the national courts' overall analysis of the foreseeability of an offence based on a provision of a constitutional

2 ECtHR, *Kafkaris v. Cyprus* [GC], 2008, para. 138, 145; see ECtHR, *De Wilde, Ooms and Versyp v. Belgium* (1971).

3 ECtHR, *Kafkaris v. Cyprus* [GC], 2008, para. 138.

4 EctHR [GC], Advisory Opinion concerning the use of the 'blanket reference' or 'legislation by reference' technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, 2020, para. 69.

> nature in the context of fundamental constitutional principles regulating the separation of powers.'[5]

Although the Advisory Opinion has no binding force, it reflects the authoritative position of the Court and could become a part of the *res interpretata* effect of the Court's jurisprudence. Hence, Art. 7 does not apply to procedural regulations and only to substantive criminal law regulating the definition of the offences and penalties. This is important for temporal application because substantive criminal law can be applied retroactively, whereas procedural criminal law requires immediate application. Particularly important are the rules concerning the statute of limitations. According to the Court's case law, the rules on limitation periods are procedural. However, it held that the revival of prosecution after the expiry of the limitation period was contrary to Art. 7[6] because of the penalty effects. The Court reminded:

> 'Limitation may be defined as the statutory right of an offender not to be prosecuted or tried after the lapse of a certain period since the offence has been committed. Limitation periods are a common feature of the domestic legal systems of the Contracting States and serve several purposes, including that of ensuring legal certainty.'

Regarding the case at hand, the Court mentioned that 'the expiry of the statute of limitations in the applicants' case was explicitly established by the Supreme Court'. However, concerning the applicants, the way in which the domestic courts apply the rules regarding the statute of limitations could lead to uncertainty regarding their penalty and, therefore, was concluded as a violation of Art. 7.

1.1.1.2. International Law

The notion of 'international law' used by Art. 7(1) covers the classic sources of international law: international treaties[7] ratified by the respondent state, international customary law, including laws and customs of war,[8] genocide and other crimes against humanity as part of *ius cogens*.[9] For example, in *Kononov v. Latvia*, the Court held that:

> 'The 1926 Criminal Code did not contain a reference to the international laws and customs of war and that those international laws and customs were not

5 ECtHR, *Haarde v. Iceland,* 2017, para. 129.
6 ECtHR, *Antia and Khupenia v. Georgia,* 2020. See: ECtHR, Advisory Opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture, Requested by the Armenian Court of Cassation (Request No. P16-2021-001), *Strasbourg, 26 April 2022,* para. 76.
7 ECtHR [GC] *Streletz, Kessler and Krenz v. Germany,* 2001, para. 73.
8 ECtHR [GC] *Kononov v. Latvia,* 2010.
9 ECtHR [GC] *Korbely v. Hungary,* 2008, *Vasiliauskas v. Lithuania,* 2015, *Kononov v. Latvia,* 2010.

> formally published in the USSR or in the Latvian SSR (as in *Korbely* (...) paras. 74–75). However, this cannot be decisive (...). international laws and customs of war in 1944 were sufficient, of themselves, to found individual criminal responsibility.'[10]

1.1.2. The Concept of 'Being Held Guilty of a Criminal Offence'

The ECtHR has not interpreted 'criminal offence' for Art. 7. Therefore, the interpretation used by Art. 6 of the Convention is applicable. In Art. 6, the Convention uses the terms 'criminal charge' in para. 1 and 'criminal offence' in para. 2. The Court interpreted the meaning of the term used in para. 1 and applied it, *mutatis mutandis*, to the guarantees provided by paras. 2 and 3. The 'original' criteria for assessing the criminal nature of an offence in domestic law were stated in the famous *Engel and others v. Netherlands* case (1976) and comprised, besides the classification of the offence as 'criminal' in domestic law, the nature of the offence and the severity of the penalty imposed.

Regarding applicability, it is important to emphasise that Art. 7 only applies when the person has been 'found guilty' of committing 'any criminal offence'. The decision of guilt, within this text, entails the imposition of a criminal sanction by a final judicial decision. Thus, an ongoing prosecution cannot be considered the finding of guilt and security measures, such as decisions to extradite or other pre-trial measures, cannot be implemented. However, if the actual conviction by a court of law was avoided due to the statute of limitations, even though the substantive elements of the offence were proved, including a formal declaration of criminal liability before the actual conviction, the Court stated that there was a 'conviction'/finding of guilt within Art. 7.[11]

1.1.3. The Concept of 'Penalty'

The notion of 'penalty' is one of the autonomous concepts of the Convention, alongside 'civil rights and obligations', 'criminal charge' and 'home'. The Court acknowledged this in *G.I.E.M. S.r.L. and Others v. Italy* (2018) regarding its method of assessing the meaning of the concept regarding the effectiveness of Art. 7:

> 'The Court reiterates that the concept of a 'penalty' in Art. 7 has an autonomous meaning. To render the protection offered by this Art. effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a 'penalty' within the meaning of this provision.'[12]

The first factor accounted for by the Court in its assessment of a 'penalty' is the causality link between the 'conviction'/finding of guilt of a criminal offence and the 'penalty'.

10 ECtHR [GC] *Kononov v. Latvia,* 2010, para. 237.
11 ECtHR [GC], *G.I.E.M. S.R.L. and Others v. Italy,* 2018.
12 Ibid., para. 210

However, as stated, the lack of conviction is insufficient to remove a penalty. Other factors used by the Court to identify a penalty, depending on each case, are: (a) Characterisation of the measure under national law; (b) Punitive purpose of a measure; (c) Severity of the measure in connection with its punitive purpose. However, the Court stated that 'the severity of the order is not in itself decisive, however, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned';[13] (d) Manner and conditions of execution of the measure. The elements related to the execution are seen in connection to the severity of the measure; however, not decisively. For example, in *Ilnseher v. Germany,* which involved a criminal offence committed by a person with a mental disorder, the Court held that, in general: the specific conditions of execution of the measure in question may be relevant in particular for the nature and purpose, and also for the severity of that measure and thus for the assessment of whether or not the measure is to be classified as a penalty for the purposes of Art. 7 para. 1. These conditions of execution may change during a period of time covered by the same judicial order.[14]

However, regarding the case circumstances: The applicant's preventive detention was imposed because of and with a view to the need to treat his mental disorder, having regard to his criminal history. The Court accepts that the nature and purpose of his preventive detention, in particular, was substantially different from those of ordinary preventive detention executed irrespective of a mental disorder. The punitive element of preventive detention and its connection with the criminal offence committed by the applicant was erased to such an extent in these circumstances that the measure was no longer a penalty.

Hence, Art. 7 was not breached.

Therefore, a variety of measures have been considered by the Court as being 'penalties' within Art. 7: (a) Imprisonment following a final conviction; (b) Confiscation of property following the finding of guilt, 'in view of its punitive purpose, in addition to its preventive and compensatory nature';[15] (c) Administrative fines imposed for the wrongful construction of a building[16] or wrongful market manipulation;[17] (d) Confiscation of land on the grounds of illegal site development;[18] (e) Preventive detention ordered by a national court following a conviction for serious offences for applicants undergoing therapy in specialist centres or ordinary prisons (a series of cases against Germany).[19]

13 ECtHR [GC] *Del Rio Prada v. Spain,* 2013, para. 82.
14 ECtHR [GC] *Ilnseher v. Germany,* 2018, para. 204.
15 ECtHR [GC] *Welch v. United Kingdom,* 1995, para. 29.
16 ECtHR, (dec.) *Valico v. Italy,* 2006.
17 ECtHR, *Georgouleas and Nestoras v. Greece,* 2020.
18 ECtHR, *G.I.E.M. S.R.L. and Others v. Italy,* 2018.
19 ECtHR, *M. v. Germany,* 2009, *Bergmann v. Germany,* 2016.

Nonetheless, other measures were excluded from the meaning of the concept:[20] (a) Preventive detention ordered by a criminal court following conviction for a serious criminal offence, whose execution conditions were essentially altered by a new legislation to ensure treatment for the prisoner's mental disorder. This situation was considered an evolution (dynamic) of the initial penalty and the measure ceased to be considered a penalty due to the changes;[21] (b) Preventive detention imposed on a person lacking criminal responsibility;[22] (c) Prohibition of residence, imposed in addition to imprisonment, following a criminal conviction;[23] (d) Administrative surveillance for preventive purposes, after serving the sentence, and further restrictions on freedom of movement and imposing reporting obligations.[24]

Hence, a distinction should be drawn between the 'penalty' and 'enforcement of penalty'. The enforcement takes place after the 'imposition of the penalty' mentioned in Art. 7. The manner of enforcement may influence the punitive nature of a measure; however, in general, measures related to enforcement that concern the remission of a sentence or conditional release from prison are not considered part of the 'penalty' within Art. 7.[25] In other cases, the manner of enforcement influences the nature of the penalty and must be considered a part of it. The Court examines, case-by-case, the nature of the penalty and the measure where the enforcement affects the scope of the penalty, whereby the enforcement measure falls within Art. 7.[26]

1.2. Principle of Legality and the Quality of Law – The Substance of the Principle

The principle of legality is the essential feature of the rule of law and the legality of offences and penalties is a central part of the principle of legality. Therefore, the ECtHR, as the main guardian of the 'European legal order'[27] is strict in requiring the existence of a legal basis for criminal convictions, which should fulfil certain quality features: accessibility, foreseeability and non-retroactivity of the more severe criminal law. Notably, the ECtHR does not censor the decisions of the national courts. According to the fourth instance doctrine,[28] it does not assess the way in which national courts deal with the facts of the case or apply national law, unless these actions breach the ECHR's rights (e.g., use of unlawfully collected evidence or other breaches of the right to a fair trial guarantees). Regarding Art. 7, the Court's mission in the cases brought before it is particularly important in assessing the quality of the 'law' that forms the basis of the conviction.

20 For a complete list, see: ECtHR, Guide on Art. 7 of the European Convention on Human Rights.
21 ECtHR, *Ilnseher v. Germany,* 2018.
22 ECtHR, *Berland v. France,* 2015.
23 ECommHR (dec.), *Renna v. France,* 1997.
24 ECtHR, *Timofeyev and Postupkin v. Russia,* 2021.
25 See, for example: ECtHR, *Kafkaris v. Cyprus* [GC], 2008, para. 151.
26 See: Guide on Art. 7 of the European Convention on Human Rights, p. 11.
27 Sudre, 1996, p. 50.
28 Harris et al., 2009, pp. 14–15.

1.2.1. Quality of Law – Accessibility, Clarity, Foreseeability, Non-retroactivity

The quality of the law has become a general standard for all Convention rights, especially for the 'conditional' ones, that is, the rights for which para. 2 of the respective Arts. 8–11 sets forth the restrictions by the State. Thus, all restrictions must, first and foremost, be 'prescribed by law'. In such cases, and in the case of the legality required by Art. 7, the 'law' within the meaning of the Convention must meet certain quality requirements to be considered the basis for legitimate measures of rights' restriction. Hence, some quality requirements are addressed to the legislator (accessibility, clarity, non-retroactivity and foreseeability) while others are addressed to the judge (foreseeability and interpretation of non-retroactivity).

1.2.1.1. Accessibility of the Law

Within the interpretation of Art. 7, accessibility of the law means that the criminal law establishing criminal offences and penalties is sufficiently accessible to the public, in general, and to the applicant, in particular. Thus, the law must be made public through the official means of publication of the concerned state. The matter of accessibility becomes sensitive in cases when the conviction is based on international law. In *Kononov v. Latvia* (2010) and *Korbely v. Hungary* (2008), the Court verified whether the international treaty in question (in the *Korbely* case, the Geneva Conventions on Humanitarian Law) was sufficiently accessible to the applicant. The Court stated that, although the ratification document – a Law-Decree – did not contain the text of the Geneva Conventions:

> 'In 1955 the Ministry of Foreign Affairs arranged for the official publication of a brochure containing the text. It is also to be noted that an order of the General Chief of Staff was published in the Military Gazette on 5 September 1956 on the teaching of the Conventions and was accompanied by a synopsis of them. In these circumstances, the Court is satisfied that the Geneva Conventions were sufficiently accessible to the applicant.'[29]

1.2.1.2. Clarity and Foreseeability of the Law

Clarity of the law means that the criminal offence should be defined in clear and non-ambiguous terms. The criminal behaviour in particular cases should be clearly identified in reference to the legal provisions establishing the offences. As stated in the doctrine, 'the clarity must be appreciated in the light of the 'ordinary legal experience', because an absolute precision is impossible, therefore a great caution is necessary in this matter, by taking into account the interests at stake'.[30] Thus, this condition

29 ECtHR, *Korbely v. Hungary,* 2008, para. 75.
30 Renucci, 2009, p. 287.

is met when the justiciable persons can understand 'what are the acts or omissions that engage criminal responsibility' from the legal text, or the related case law.[31]

Clarity and foreseeability are two sides of the same coin in the economy of the rights protected by Art. 7. However, clarity is more related to the definition of the criminal acts and the limits of the penalties, while foreseeability requires a degree of interpretation of the legal provisions in reference to the individual behaviour of the applicant, that is, to be able to foresee the element of criminal responsibility within a particular act or omission. Therefore, if clarity is more objective, foreseeability is more subjective: 'Art. 7 requires a mental link disclosing an element of liability in the conduct of the actual perpetrator of the offence if a penalty is to be imposed'.[32] Although, clarity cannot be completely dissociated from foreseeability; however, they must be assessed separately. For example, the use of vague terms in a legislative text defining an offence can lead to the text being declared unclear and unforeseeable and incompatible with the Convention, as in *Liivik v. Estonia* (2009):

> 'The Court finds on the whole that the interpretation and application of Art. 161 in the present case involved the use of such broad notions and such vague criteria that the criminal provision in question was not of the quality required under the Convention in terms of its clarity and the foreseeability of its effects.'[33]

Regarding Art. 7, clarity and foreseeability are not conditioned by the understanding of the meaning of the law by a person without legal training. Thus, the quality requirements are met even if the concerned persons seek legal advice to assess the consequences of their behaviour and the risks of engaging in criminal responsibility.[34] Like accessibility, a special situation is that of convictions based on provisions of international criminal law. In these cases, similar to foreseeability, the Court assesses the requirement by accounting for the standards of international law (definitions, case law, interpretation) applicable at the time of the facts. For example, in *Jorgic v. Germany* (2007), the Court held:

> 'The German courts' interpretation has not only been supported by a number of scholars at the relevant time of the commission of the crime (...), the United Nations General Assembly also agreed with the wider interpretation adopted by the German courts in the present case in its Resolution 47/121 of 18 December 1992.'[35]

31 Ibid, p. 288. For a controversial issue of clarity, see: *Cantoni v. France* (1996) and the related scholarship, for instance, Petit, 1997, p. 5.
32 ECtHR, *G.I.E.M. SrL and Others v. Italy,* 2018, para. 242.
33 ECtHR, *Liivik v. Estonia,* 2009, para. 101.
34 ECtHR, *Cantoni v. France,* 1996, para. 35; *Pessino v. France,* 2006, Para. 33; *Radio France and others v. France,* 2004, para. 20.
35 ECtHR, *Jorgic v. Germany,* 2007, para. 107.

Similar to the nature of the rights guaranteed by Art. 7, foreseeability is a requirement for national courts. No matter how clear a criminal legal provision may be, its actual effects on individual rights result from judicial decisions. The ECtHR acknowledged:

> 'Art. 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.'[36]

Hence, the judicial interpretation of criminal norms should meet the requirement of foreseeability. For example, in *Dragotoniu and Militaru-Pidhorni v. Romania* (2007), this requirement was not met by the judicial decisions convicting the applicants. The Court noted:

> 'The absence of prior case law concerning the assimilation of the passive corruption offences of bank employees with those of 'public officers' and 'other employees' of the [public] organisations provided by the Criminal Code resulted from the fact that the Government has not produced any precedents in this respect (...). A different reasoning would mean to disregard the object and purpose of this disposition, which imposes that no one shall be convicted in an arbitrary manner (...). By consequence, even as professionals who could be surrounded by legal advisers, it was difficult, if not impossible, for the applicants to foresee the supreme court's reversal of case law and thus to know that at the moment of their commission, their facts could entail criminal responsibility.'[37]

Thus, an unforeseeable reversal of case law could entail a breach of Art. 7. Moreover, as stressed by the Court, the interpretations in the legal doctrine cannot replace judicial interpretations.

An interesting application of judicial foreseeability, although rare in the States Parties to the Convention, is jury trials. The Court established, in an inadmissibility decision, that:

> 'In any criminal justice system based on trial by jury many defences are left for the jury to decide. Frequently, those defences involve an assessment of reasonableness, such as whether reasonable force has been used in self-defence. In any such case, any uncertainty is considerably lessened by the fact that the jury will have the benefit of full submissions from prosecution and defence counsel and the directions contained in the trial judge's summing up.'

36 ECtHR, *S.W. v. UK,* 1995, Para. 36. See also Sudre et al., 2023, p. 700.
37 ECtHR, *Dragotoniu and Militaru-Pidhorni,* 2007, paras. 43–44.

In the case at hand:

> 'The House of Lords' ruling in the applicant's case gave clear directions as to the factors which a trial judge could indicate to a jury in considering the issue of 'reasonable excuse' (...). These factors provide full and appropriate guidance as to the scope of the jury's discretion (...) and how that discretion should be exercised'.

Therefore, the Court decided that the complaint was manifestly ill-founded under Art. 35 paras. 3 and 4 of the Convention. Hence, the quality of the law is at the core of the principle of legality. In the absence of accessibility, clarity and foreseeability, the 'law' lacks fundamental features required to effectively implement the rights guaranteed. In substantive criminal law, another essential feature that goes hand-in-hand with the other three is the non-retroactivity of the more severe legal provisions.

1.2.1.3. Non-Retroactivity of the More Severe Criminal Law and Retroactive Application of More Lenient Criminal Law (Lex Mitior)

Time is an essential element of the rights protected by Art. 7 ECHR. Imperatively, Art. 7 prohibits a person from being convicted to a 'heavier penalty' than the one applicable 'at the 'time' the criminal offence was committed'. Therefore, a more severe criminal law concerning penalties cannot be applied retroactively. Non-retroactivity of any law is crucial for the rule of law; however, it has a special application and meaning in criminal law. Nonetheless, since time is so important in criminal law, it allows the only exception from non-retroactivity, that is, the retrospective application of the more lenient criminal law (*lex mitior*). Art. 7 expressly provides non-retroactivity, whereas the *lex mitior* principle was deduced by the ECtHR as a logical consequence of the former.

Non-retroactivity of criminal law concerns both aspects in the first sentence of Art. 7(1): the laws defining the offences and the provisions setting the penalties for each offence. The principle applies to the duration of the criminal trial and after the sentence has been imposed or during the execution of the penalty. In *Del Rio Prada v. Spain,* the Court stated:

> 'While the Court accepts that the States are free to determine their own criminal policy, for example by increasing the penalties applicable to criminal offences (...), they must comply with the requirements of Art. 7 in doing so (...). On this point, the Court reiterates that Art. 7 of the Convention unconditionally prohibits the retrospective application of the criminal law where it is to an accused's disadvantage.'[38]

38 ECtHR [GC], *Del Rio Prada v. Spain,* 2013, para. 116.

The applicant had been convicted to a maximum imprisonment term, and, at the time of conviction, there was no indication of any changes in case law at the Supreme Court. However, the Supreme Court reversed its case law in this case, increasing the length of the penalty, which was considered by the ECtHR a breach of the non-retroactivity principle. The non-retroactivity principle applies, in certain conditions, to the statute of limitations: the immediate application of a law, which extends the periods of limitations, is not in breach of Art. 7 'since that provision cannot be interpreted as prohibiting an extension of limitation periods through the immediate application of a procedural law where the relevant offences have never become subject to limitation'.[39]

Regarding non-retroactivity, the Court rules on a case-by-case basis rather than creating general standards. For example, it ruled that a penalty of life imprisonment was not heavier than the death penalty, in cases where the death penalty, although applicable at the time of the offence, was subsequently abolished and replaced by life imprisonment.[40] In other cases, it had to compare imprisonment penalties with detention in a psychiatric ward[41] or assess the effects of the application of the rules of release on parole on the severity of the penalty.[42]

In contrast with other human rights international instruments (Art. 15(1) ICCPR and Art. 9 American Convention on Human Rights), the retroactive application of the more lenient criminal law is not expressly provided by Art. 7 ECHR. The jurisprudential entrenchment of this principle came late in the development of the ECtHR's case law, in the landmark case of *Scoppola v. Italy (No. 2)* (2009). The Grand Chamber of the Court analysed the evolution of international law in this matter, including the Statute of the International Criminal Court, the case law of the International Criminal Tribunal for the former Yugoslavia and the EU Charter of Fundamental Rights, in which the principle was entrenched. The fact that the Court of Justice of the European Union (CJEU) had expressly recognised *lex mitior* as 'a part of the constitutional traditions of the Member States' of the EU was an incentive for the ECtHR in *Berlusconi and Others* (2005).[43] Thus, the evolution of international law encouraged the Court to conclude that the retroactivity of the more lenient criminal law can be considered a consequence of the second sentence of Art. 7(1):

> 'A consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law. (...) [The Court] observes that in prohibiting the imposition of 'a heavier penalty ... than the one that was applicable at the time the criminal offence was committed', Para. 1 *in fine* of Art. 7 does

39 ECtHR, *Coëme v. Belgium,* 2000, para. 149.
40 ECtHR, *Oçalan v. Turkey* (no.2), 2001, para. 177.
41 ECtHR, *Kadusic v. Switzerland,* 2018.
42 ECtHR, *Kupinskyy v. Ukraine,* 2022.
43 CJEU [GC], C-387/02, C-391/02 and C-403/02, *Berlusconi and Others,* para. 68.

> not exclude granting the accused the benefit of a more lenient sentence, prescribed by legislation subsequent to the offence."[44]

In *Parmak and Bakir v. Turkey* (2019), the Court held that the principle of retroactive application of the more lenient criminal law applied to the rules related to the definition of the offences as well. In *Maktouf and Damjanovic v. Bosnia and Herzegovina* (2013), the Court analysed the effects of each successive criminal law and did not decide *in abstracto* on the application of one or the other. The Government argued that the new law was more lenient because it decriminalised the death penalty. However, the Grand Chamber of the Court found that the old law was more lenient:

> 'Since there exists a real possibility that the retroactive application of the 2003 Code operated to the applicants' disadvantage as concerns the sentencing, it cannot be said that they were afforded effective safeguards against the imposition of a heavier penalty, in breach of Art. 7 of the Convention."[45]

The importance of the specific circumstances of the applicants in the case was highlighted in a more recent case law, such as the

> 'Advisory Opinion concerning the use of the 'blanket reference' or 'legislation by reference' technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law (2020).'

Continuing offences present a special situation. These are offences whose commission is spread over a longer period, under successive criminal legislations. The ECtHR defined continuing offences as 'a type of crime committed over a period of time', held that 'the principle of legal certainty required that the acts which went to make up that offence, and which entailed his criminal liability, be clearly set out in the bill of indictment'[46] and required that the elements of the continuing offence result from the decision of the domestic court. Thus, it is the domestic court's task 'to interpret the provisions of substantive criminal law in order to determine, by reference to the structure of each offence, the date on which, all the requirements of the offence being present, a punishable act was committed'. In *Ecer and Zeyrek v. Turkey,* these conditions were not met; therefore, the Court found a violation of Art. 7(1). In another case, the Court had to decide if the conviction of a person under the new law for a crime introduced by the new law and classified as a 'continuing offence' was contrary to the principle of non-retroactivity. The Court stated that the national law considered 'continuing offence' as a single act. Hence, it was assessed under the criminal law

44 ECtHR, *Scoppola v. Italy* (no.2.) [GC], 2009, paras. 106–107.
45 ECtHR, *Maktouf and Damjanovic v. Bosnia and Herzegovina* [GC], 2013, para. 70.
46 ECtHR, *Ecer and Zeyrek v. Turkey,* 2001, para. 33.

applicable at the time when the last element of the offence was committed. Therefore, it did not amount to a retroactive application of the new criminal law and did not breach Art. 7(1).[47]

The foreseeability of the law can be an issue in cases concerning continuing offences. Thus, if the conviction and the penalty were not foreseeable at the material time of the commission of the last act of the offence and the change of the law increased the penalty imposed, this was considered by the Court a violation of the principle of non-retroactivity of the more severe criminal law.[48]

1.2.2. Special Situations Issued Due to the Application of International Law

Art. 7(1) includes international law in the concept of 'law' to establish the legality of offences and penalties, which could lead to situations resulting from the specificity of the application of international law: definition of crimes under international law and the effect of the change of constitutional regime (without changes in the nature of the State) and the situation of state succession (crimes committed under a national regime of a state that was dismantled and the prosecution occurred under the legal regime of the successor state).

1.2.2.1. Definition of International Crimes Under Different National Legal Regimes

In *Korbely v. Hungary* (2008), the ECtHR found that, at the time of the commission of the crimes against humanity – the violent events in 1956 in Hungary – it was not foreseeable for the applicant that the impugned acts constituted such crimes and the conviction was considered contrary to Art. 7. However, this was not a general standard set by the Court and was decided strictly according to the circumstances of the case.

However, in *Kononov v. Latvia*, the applicant, who was convicted for war crimes, contested the conviction on the grounds of retroactive application of more severe criminal law. Nevertheless, the Court reminded that, when the offences were committed, war crimes were clearly defined in international law. Therefore, the applicant's conviction had a sufficiently clear basis in the international law in force in 1944.[49] The Court concluded that, from the international legal rules at the time of the commission of the offences, it cannot be deduced that the crimes were statute-barred:

> 'Firstly, that any prescription provisions in domestic law were not applicable (...) and, secondly, that the charges against the applicant were never prescribed under international law (...). It therefore concludes that the prosecution of the applicant had not become statute-barred.'[50]

47 ECtHR, *Rohlena v. Czech Republic,* 2015, para. 62.
48 ECtHR, *Puhk v. Estonia,* 2004, para. 34.
49 ECtHR, *Kononov v. Latvia,* 2007, para. 222.
50 Ibid, para. 233.

Thus, the principle of imprescriptibility of war crimes was applied in the case. A similar approach was taken in *Jorgic v. Germany* (2007) regarding the genocide committed during the war in the former Yugoslavia.

1.2.2.2. The Case of State Succession

This special situation derives from major changes in the political regime or changes regarding the state sovereignty over a territory. The CJEU ruled that it was legitimate for a state and, in accordance with the principle of legal certainty, to bring criminal charges against persons who committed crimes under a former regime, especially when these crimes were against the right to life and were considered as such under international law as well. The leading case in this matter was *Streletz, Kessler and Krenz v. Germany* (Grand Chamber, 2001), where the Court found that the convictions of political leaders of the former 'German Democratic Republic' and of a former border guard (for murders of persons from East Germany attempting to leave the country between 1971 and 1989) were foreseeable under domestic and international law. Thus, it noted:

> 'Irrespective of the GDR's responsibility as a State, the applicants' acts as individuals were defined as criminal by Art. 95 of the Criminal Code [StGB-DDR] (...) Any person whose conduct violates human or fundamental rights ... may not plead statute law, an order or written instructions in justification; he shall be held criminally responsible (...) There is accordingly no doubt that the applicants bore individual responsibility for the acts in question.'[51]

Hence, from the international law perspective, the Court held that, 'If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned'.[52] In the case of new States or restored States, the Court decided that a conviction based on the legislation of such a State for crimes under international law was foreseeable and in conformity with Art. 7.[53]

1.3. Conclusion

Art. 7 of the ECHR and its principle – no punishment without law, in a broad sense – is an essential part of the rule of law in general and of legal certainty in particular. The development of this principle through the interpretations of the ECtHR is important to the States Parties to the ECHR and to the entire European legal system for a high degree of integration and the principle of 'mutual trust' developed by the CJEU within the EU.

51 ECtHR, *Streletz, Kessler and Krenz v. Germany* [GC], 2007, paras. 75–76.
52 Ibid, para. 104.
53 See, for example: *Vasiliauskas v. Lithuania* [GC], 2015, *Kuolelis, Bartasevicius and Burokevicius v. Lithuania,* 2008.

The ECtHR defined the key concepts in Art. 7 and identified and imposed the standards of respect for the rights. The interpretation of the core notion of 'law' is particularly important, considering the diversity of the legal systems in the States Parties. The European standards of the quality of the law were applied and extended regarding the salient principle of legality in establishing offences and penalties. Alongside the case law on the right to a fair trial, this work of the Court on Art. 7 contributed to the development of the domestic legislations and practices towards the general standards of the rule of law and legal certainty, which are important for Europe, especially in the Central and Eastern European countries.

2. *Non Bis in Idem* – The Right Not to Be Tried and Punished Twice – Art. 4 of Protocol No. 7

The right to not be tried and punished twice for the same offence – *non bis in idem* – is set forth by Art. 4 of Protocol no. 7 to the ECHR. The text was inspired by Art. 14(7) of the International Covenant on Civil and Political Rights. This principle guarantees a fair trial in criminal proceedings, which was excluded from Art. 6 ECHR. This means that only claims against a State that is a party to Protocol no. 7 will be admissible before the ECtHR.

Art. 7 Protocol 7 reads:

> '1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
> 2. The provisions of the preceding Para. shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
> 3. No derogation from this Art. shall be made under Art. 15 of the Convention.

This text highlights several conditions of application of this principle:

1. The *non bis in idem* principle only applies to criminal proceedings. If a person is subjected to proceedings of a different nature (civil, disciplinary) for the same offence, the principle will not apply.
2. The *non bis in idem* principle only applies to the jurisdictions of the same State, for the same offence for which the person concerned was acquitted or convicted. Therefore, the Court will declare complaints as inadmissible regarding duplication of proceedings involving more than one State.[54]

54 ECtHR, *Krombach v. France* (decision), 2018.

3. The *non bis in idem* principle allows the reopening of cases when there is evidence of newly discovered facts that would influence the outcome of the trial, or if there has been a fundamental error in the proceedings, which could affect the outcome.
4. The *non bis in idem* principle is an inderogable right according to Art. 15 ECHR.
Beyond these express provisions, it was for the Strasbourg authorities – the former Commission and the Court – to define the main terms used in the text and make the necessary clarifications regarding their application.'

2.1. Criminal Proceedings

2.1.1. Meaning of 'Criminal Proceedings'

For Art. 4 Protocol 7 to be applicable, several conditions must be met, the main one being the 'criminal' nature of the duplicated proceedings. The CJEU applied, like in Art. 7, the principle of coherence for interpreting the Convention. Regarding Art. 4 Protocol 7, this applies to 'criminal proceedings', which has the same meaning, according to the Court, as 'criminal charge' used by Art. 6 ECHR, and must be interpreted in conformity with the jurisprudential criteria presented in *Engel and Others v. The Netherlands* (1976):

> 'The concept of a 'criminal charge' within the meaning of Art. 6 para. 1 is an autonomous one. Its established case law sets out three criteria, commonly known as the '*Engel* criteria', to be considered in determining whether or not there was a 'criminal charge'.[55]

The *Engel* criteria are the classification of the offence under domestic law, the nature of the offence and the degree of severity of the penalty that the concerned person risks incurring.

2.1.2. Do the Proceedings Have the Same Nature?

The case law of the ECtHR and the former Commission, regarding Art. 4 Protocol 7, frequently concerned the determination of whether the various proceedings conducted in relation to a specific applicant were criminal or not. For example, the prohibition to remain on the territory of a State because of committing an offence is not a 'criminal charge' under Art. 6. Therefore, the conviction of a foreign citizen to an imprisonment penalty and prohibition to remain on the national territory does not breach Art. 4.[56]

Disciplinary proceedings pursued simultaneously with criminal proceedings determine the non-applicability of Art. 4. For example, administrative proceedings

55 ECtHR, *Mihalache v. Romania,* 2019, para. 54.
56 ECtHR, *Maaouia v. France,* 2000

against one of the applicants for non-compliance with safety regulations, in parallel with criminal proceedings for deliberately setting fire to items of value, did not breach Art. 4.[57] Similarly, the withdrawal of the driving licence following a criminal conviction for an offence related to driving did not entail the application of Art. 4.[58] However, if the withdrawal took place several months after the conviction and was a direct consequence of it, the Court could not consider it a safety measure and equated it with a criminal sanction. Nonetheless, no breach of Art. 4 was decided because the second penalty was considered accessory to the first one.[59] Generally, in the Court's case law, driving bans are considered preventive measures and not criminal penalties. The same goes for revocations of licenses and various permits.

Regarding administrative fines and other administrative sanctions, some of them are considered by the Court as 'criminal' penalties because of the degree of severity. For example, an administrative fine for refusing to provide a blood sample for determining the blood alcohol level of a driver amounted to a criminal penalty.[60] In other cases, the financial severity of the fine is essential for establishing its 'criminal' nature.[61] Imprisonment proceedings for 'minor offences' are considered 'criminal' penalties, making Art. 4 applicable.[62]

2.2. 'An Offence for Which S/he Has Already Been Acquitted or Convicted'

Another applicability issue is whether the person concerned was tried and convicted twice for the same offence.

2.2.1. The Same Offence (Idem)

When the same criminal behaviour gives rise to two distinct criminal offences, Art. 4 is not applicable. This condition was the most difficult to establish, from the point of view of uniformity.[63] In the landmark case *Sergey Zolotukhin v. Russia* (2009), the Grand Chamber of the Court acknowledged that the previous Commission and Court jurisprudence took different approaches to establish whether the 'same offence' was in question. In line with the principle of effective protection of rights, the Grand Chamber considered that the criterion of the legal classification of the two offences, used in previous case law,[64] was too restrictive. Therefore, the Court took the approach of identity of conduct[65] as a basis for the identity of offences:

57 ECtHR, *Kurdov and Ivanov v. Bulgaria,* 2011.
58 ECtHR, *Hangl v. Austria* (decision), 2001.
59 ECtHR, *Maszni v. Romania,* 2001.
60 ECtHR, *Mihalache v. Romania* [GC], 2019.
61 ECtHR, *Grande Stevens and Others v. Italy,* 2014, *C.Y. v. Belgium,* 2024; *Mihalache v. Romania,* 2019, *Sancakli v. Turkey*, 2018.
62 ECtHR, *Sergey Zolotukhin v. Russia* [GC], 2009. For other cases in which Art. 4 does not apply, see Guide on Art. 4 of Protocol No. 7 – Right not to be tried or punished twice, 29 February 2024, pp. 10–12.
63 See also: Harris et al. 2023, p. 986.
64 For example, in *Gradinger v. Austria* (1995) or *Ponsetti & Chesnel v. France,* 1999.
65 See Gauthier et al. 2017, p. 326.

> 'Art. 4 of Protocol No. 7 should be understood as prohibiting the prosecution or trial of an individual for a second offence, insofar as it arose from identical facts or facts which were 'substantially' the same as those underlying the first offence.'[66]

For example, the Court found, in its case law concerning the withdrawal of driving licenses, that although different sanctions (criminal sanctions and withdrawal of driving licences) concerning the same matter (drunken driving or driving in excess of the speed limit) had been imposed by different authorities in different proceedings, there had been a sufficiently close connection between them, in substance and time, to make Art. 4 applicable.[67]

In *Vasile Sorin Marin v. Romania* (2024), the duplication of proceedings concerned a socially offensive conduct that disturbed public order, for which the applicant had to pay an administrative fine and was prosecuted. However, the Court found that the criminal charges brought against the applicant comprised the administrative offence, which did not contain any elements that were not present in the criminal offence, with which the applicant was charged. Thus, the facts constituting the two offences had to be regarded as the same for Art. 4 Protocol 7 ECHR.[68]

In *Johannesson and Others v. Iceland,* the Court stated:

> 'The applicants' conviction and the imposition of tax surcharges were based on the same failure to declare income and that tax proceedings and the criminal proceedings concerned the same period of time and essentially the same amount of evaded taxes.
> Therefore, the criminal offences for which the applicants were prosecuted and convicted were considered 'the same' as those for which the tax surcharges were imposed. Thus, Art. 4 applied.'[69]

Concerning the identity of the offence, the principle of *non bis in idem* has been interpreted by the CJEU.[70] An interesting approach was the one in the joint cases *Menci and Garlsson Real estate and Others*,[71] where the Court, in its competence to answer preliminary rulings requests, accepted that, in view of the obligation of the EU Member States to take all legislative and administrative measures for collecting VAT and preventing fraud, it is acceptable to have a 'dual approach' regarding penalties, that is, a criminal and an administrative penalty. However, several other criteria should apply for such a dual approach to be consistent with *non bis in idem*.

66 ECtHR, *Sergey Zolotukhin,* 2009, para. 82.
67 ECtHR, *Boman v. Finland,* 2015.
68 ECtHR, *Vasile Sorin Marin v. Romania,* 2024, para. 50.
69 ECtHR, *Johannesson and Others v. Iceland,* 2017, para. 47.
70 For a more detailed account: Rosano, 2019, pp. 39–57.
71 CJEU, Case C-524/15 *Menci,* Case 537/16 *Garlsson Real Estate and Others.*

For instance, in the Menci case, the Court accepted the duplication of criminal and administrative proceedings, if the amount of the penalties together did not 'exceed the seriousness of the offence identified' (para. 55).[72] The CJEU referred to the ECtHR case law regarding Art. 4 Protocol 7 and acknowledged:

> 'In so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, Art. 52(3) of the Charter provides that their meaning and scope are the same as those laid down by that convention. It is therefore necessary to take account of Art. 4 of Protocol No 7 to the ECHR for the purpose of interpreting Art. 50 of the Charter.'[73]

2.2.2. Final Acquittal or Conviction (Bis)

For Art. 4 to be applicable, there must be a duplication of proceedings, followed by a final decision of acquittal or conviction. Both situations were strictly interpreted by the CJEU. In *A. and B. v. Norway* (2016), the Grand Chamber of the Court ruled on the compatibility of the Norwegian system of proceedings in tax-related offences with Art. 4 Protocol 7. This system entailed a dual set of proceedings – administrative and criminal – regarding incorrect information in tax statements. In its case law, the Court established a standard of 'sufficiently close connection in substance and in time' between the dual proceedings and 'the surest manner of ensuring compliance with Art. 4 Protocol 7' was to provide a unique procedure enabling both parts of the legislation regarding tax offences to be dealt with together. If the respondent State managed to demonstrate that the dual proceedings were sufficiently connected to form an integral 'scheme of sanctions', this situation could be considered in accordance with Art. 4.[74] This was considered a 'relaxation' of *non bis in idem*.[75] Although a connection 'in time' is required to apply *idem*, the two sets of proceedings must not have occurred simultaneously, over the same time span.

In *Nodet v. France* (2019), the close connection in substance and time could not be proven by the State. Therefore, the parallel proceedings (administrative and criminal) for market manipulation were considered a breach of Art. 4(1) Protocol 7. The same approach was taken in *Mihalache v. Romania* (2019), where no sufficiently close connection between the two procedures was demonstrated: the applicant was prosecuted in both proceedings for a single offence, punishable once according to the law.

Regarding the terms 'acquittal' and 'conviction', the Court held that the terms of the national decision in question must be considered. The Court considered that 'the deliberate choice of the words 'acquitted or convicted' implies that the accused's 'criminal' responsibility has been established following an assessment of the circumstances of the case',[76] which means that the merits of the case have been examined by

72 Clifford, 2018, p. 584.
73 Art. 4 of Protocol 7 para. 60.
74 ECtHR, *A. and B. v. Norway* [GC], 2016, para. 132.
75 Sudre et al., 2023, p. 705.
76 ECtHR, *Mihalache v. Romania,* 2019, para. 97.

the national jurisdiction. This jurisdiction must be, according to the Court, 'vested by domestic law with decision-making power enabling it to examine the merits of a case' and must then study or evaluate the evidence in the case file and assess the applicant's involvement in one or all of the events prompting the intervention of the investigative bodies, for the purposes of determining whether 'criminal' responsibility has been established.[77]

Furthermore, the national decision on 'acquittal' or 'conviction' must be 'final', that is, to acquire the force of *res judicata*. If the applicant still has other ways of appeal, Art. 4 Protocol 7 will not apply. For example, the decision of a prosecutor not to prosecute could not be considered a final decision within Art. 4[78] and neither can a discontinuation of criminal proceedings by a prosecutor.[79] In *Mihalache v. Romania*, the Court emphasised that domestic law and the existing remedies are taken into account in assessing whether an acquittal or conviction is final. However, these remedies must be in accordance with the principle of legal certainty:

> 'A law conferring unlimited discretion on one of the parties to make use of a specific remedy or subjecting such a remedy to conditions disclosing a major imbalance between the parties in their ability to avail themselves of it would run counter to the principle of legal certainty.'[80]

2.3. Reopening of Proceedings

Art. 4(2) Protocol 7 provides an exception to *non bis in idem*. However, it is only apparently an exception, because the situation in which it applies is exceptional: 'there is evidence of new or newly discovered facts, or there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case'. These completely new situations can impact the outcome of the case and reopen the proceedings, even when a final decision of acquittal or conviction has been pronounced.

This is the only permissible limit to the principle of legal certainty in criminal justice. The ECtHR's case law highlights several rules regarding the application of this limit. The States are free to establish their own conditions for the reopening of proceedings. However, the reopening shall not be prevented by the opening of a new investigation based on newly discovered facts or evidence on grounds of Art. 4(1).[81] The reassessment of some of the circumstances of the first decision, such as the applicant's mental state, could be considered a 'newly discovered fact' under Art. 4(2).[82] However, reopening in the absence of any new facts or evidence is contrary to Art. 4(1). By 'new' circumstances, the Court understands any circumstances related

77 Ibid.
78 ECtHR, *Sundqvist v. Finland* (decision), 2005.
79 ECtHR, *Smirnova and Smirnova v. Russia* (decision), 2002.
80 ECtHR, *Mihalache v. Romania,* para. 115.
81 EComHR, *Korppoo v. Finland,* 1995.
82 ECtHR, *Kadusic v. Switzerland,* 2018.

to the case, which existed during the trial, yet remained hidden or unknown from the judge, and became known only after the trial.[83]

The notion of 'fundamental defect' is vaguer than 'newly discovered' facts. However, it mainly covers serious violations of procedural rules, which significantly affect the previous proceedings. For example, simple reassessments of evidence are not considered fundamental defects if the outcome is detrimental to the convicted person. If the outcome were in favour of the convicted person, then the interpretation of the notion of fundamental defects is wider. However, 'the need to harmonise prosecutorial practice' cannot be considered a fundamental defect under Art. 4(2).[84] Nonetheless, the failure to properly investigate a hate crime was included in 'fundamental defects' to justify the reopening of the proceedings against the accused.[85]

3. Right To Appeal in Criminal Cases – Art. 2 of Protocol No. 7

Art. 2 Protocol 7 is a guarantee of fair trial in criminal cases, which adds to the express and implicit guarantees in Art. 6 ECHR:

> '(1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. (2) This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.'

3.1. The Main Notions: Criminal Offence, Convicted, Tribunal and Higher Tribunal

Art. 2 Protocol 7 extends the fair trial guarantees in criminal cases by requesting the States to provide ways of appeal against a conviction sentence. However, its scope is limited: only conviction sentences can be subject to this right. The other notions used by Art. 2(1) may be challenging. Hence, the ECtHR has clarified their meaning in its case law, which must be complemented by the definitions in the Explanatory Report to the Protocol No. 7.[86] Nevertheless, the States Parties have a wide margin of appreciation in establishing the ways of appeal and the respective proceedings.[87]

'Criminal offence' and 'tribunal' have the same meanings as used by Art. 6 ECHR. 'Conviction' refers to any decision finding guilt or imposing a penalty. No right to

83 ECtHR, *Mihalache v. Romania,* 2019, para. 132
84 Ibid, para. 138. See: Harris et al., 2023, p. 989.
85 ECtHR, *Sabalic v. Croatia,* 2021.
86 Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984.
87 ECtHR, *Krombach v. France,* 2001, para. 96.

appeal against acquittal decisions is guaranteed by Art. 2(1).[88] However, according to the Explanatory Report, 'if the person convicted has pleaded guilty to the offence charged, the right may be restricted to a review of his sentence'.[89] The concept of 'higher tribunal' is more sensitive due to the diversity of judicial systems in the States Parties to the Protocol. According to the Court, the higher tribunal must exercise full jurisdictional control.[90] Applications against some prosecutorial acts to the chief prosecutor or other applications to court presidents are not considered for review by a higher tribunal. The extraordinary appeals that can only be initiated by the prosecution or the motion of a president of a higher court do not enter the scope of Art. 2. In *Grecu v. Romania* (2006), the Court found that the applicant did not have any way of appealing against the decisions of the court of first instance, which meant that he was deprived of his right to appeal under Art. 2 Protocol 7:

> 'A potential appeal of the applicant against the mentioned decision seemed meant to fail: as the Government acknowledges, at the time of the facts there was no legal provision on any way of appeal against the decisions of courts of first instance regarding decisions of the prosecutors, to be judges by higher courts; (...) from the relevant national practice it results that the national review courts, especially the supreme court of justice, declared inadmissible any appeal against such a decision of the courts of first instance.'[91]

The higher court must have jurisdiction over all matters of the case, which is why the *amparo* appeal to the Spanish Constitutional Tribunal was not considered as meeting the requirements of Art. 2: the tribunal was confined to examining the matter as regards matters of constitutionality or compatibility with fundamental rights guaranteed by the Constitution.[92] However, it is irrelevant if the higher tribunal can examine the case on all issues (of fact and law, or only on points of law).[93]

3.2. The Contents of the Right to Appeal

No restrictions on the right to appeal are compatible with Art. 2 if they deprive this right of its effectiveness. For example, in *Kamburov v. Bulgaria* (2009), the appeal procedure was not directly accessible to the applicant and was not considered compatible with Art. 2 Protocol 7. A similar decision was taken in *Galstyan v. Armenia* (2007) and *Gurepka v. Ukraine* (2005).

In *Rostovsyev v. Ukraine* (2017), the Court held that, although formally, the applicant had the right to appeal, the interpretation of the relevant domestic legal provisions adopted by the domestic courts was not 'foreseeable' and, by adopting it, the domestic

88 Explanatory Report, para. 22.
89 Ibid., para. 17.
90 ECtHR, *Grecu v. Romania,* 2006, para. 83.
91 Ibid, para. 84.
92 ECtHR, *Saquetti Iglesias v. Spain,* 2020, para. 57.
93 ECtHR, *Krombach v. France,* 2001.

courts infringed the applicant's right to appeal.[94] Another reason for declaring domestic ways of appeal incompatible with Art. 2 was the lack of suspensive effect of the appeal by referring to the execution of the sentence.[95]

3.3. The Limits on the Right to Appeal

Para. 2 of Art. 2 Protocol 7 sets forth three kinds of cases where the right to appeal may be limited: offences of a minor character, when the person concerned was tried in the first instance by the highest court and when the person was convicted following an appeal against acquittal.

3.3.1. Offences of a Minor Character

As in the case of other vague notions used by the Convention, 'offence of a minor character' was clarified with the help of the Explanatory Report and further developed by the Court. The main criterion to assess whether an offence is of a minor character is the penalty. If the offence is punishable by imprisonment, it will not meet the requirement, making the right to appeal compulsory.[96] However, in a recent case, the Court considered an offence as being of a minor character, punishable by a maximum of two weeks of imprisonment for default of payment of a financial penalty. The applicant was convicted of a fine for breaching road traffic regulations and, in default of payment, sentenced to four days' imprisonment. The Court considered that the actual enforcement of the alternative imprisonment penalty was an exception in domestic law. Therefore, the offence met the requirements of Art. 2(2).[97] In a recent case law, the Court assessed this concept on a more case-by-case basis. For example, in *Saquetti Iglesias v. Spain* (2020), the Court emphasised that the absence of the imprisonment penalty cannot lead to an offence being considered of a minor character.

3.3.2. Person Tried in the First Instance by the Highest Tribunal and Conviction Following an Appeal Against Acquittal in the First Instance

The first situation applies to persons who occupy a higher position in the State – ministers, magistrates, Presidents, etc. or for high-profile offences. If the appeal is denied because the high value of the claim demands the examination of the case by the highest tribunal, the exception does not apply.[98] Regarding the second situation, in *Fortum Oil and Gas OY v. Finland* (2002), the Court stated that the sanction imposed by the higher court can be considered a conviction: 'The Supreme Administrative Court's conclusion that a fine should be imposed on Neste can be equated with a 'conviction' 'following an appeal against acquittal".[99]

94 ECtHR, *Rostovsyev v. Ukraine,* 2017, para. 36.
95 ECtHR, *Shvydka v. Ukraine,* 2014. See: *Ruslan Yakovenko v. Ukraine, i2015.*
96 ECtHR, *Grecu v. Romania,* 2006, para. 82, *Zaicevs v. Latvia,* 2007, para. 55.
97 ECtHR, *Kindlhofer v. Austria,* 2021, paras. 41–42.
98 ECtHR, *Saquetti Iglesias v. Spain,* 2020, para. 46.
99 ECtHR, *Fortum Oil and Gas Oy v. Finland* (decision), 2002.

4. Compensation for Wrongful Conviction – Art. 3 of Protocol No. 7

Art. 3 Protocol 7 sets forth that:

> 'When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.'

This complements the fair-trial guarantees regarding miscarriage of justice in criminal matters. The case law is quite scarce regarding this Art.; therefore, the Explanatory Report in Art. 7 is the most comprehensive source of interpretation. The right provided by Art. 3 applies only to persons convicted of a criminal offence who have suffered a punishment as a result of a final decision of justice. According to the Explanatory Report, which quoted the Explanatory Report of the European Convention on the International Validity of Criminal Judgments, 'final conviction' means a decision that:

> 'Has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.'[100]

Furthermore, the definition of 'final decision', present in the subsequent case law, must be considered.[101] If the applicant/accused person has been acquitted by a superior court, Art. 3 Protocol 7 does not apply.

The second condition is that the conviction was overturned or the convicted person was pardoned due to 'new or newly discovered facts' that led to the conclusion of a miscarriage of justice. Any other grounds for changing the final decision of conviction do not apply under Art. 3. For example, in *Bachowski v. Poland* (2010), the Court held that Art. 3 would not apply to a conviction overturned due to the superior court's evidence reassessment. The third condition concerns the convicted person's behaviour. Thus, if the convicted person was wholly or partly responsible for not disclosing the new facts, the right to compensation will not apply.

100 *Explanatory Report,* supra, note 83, para. 22.
101 ECtHR, *Mihalache v. Romania,* 2019, para. 88.

The States have a wide margin of appreciation in setting forth the procedure and means of establishing such miscarriages of justice. In *Poghoshian and Baghdasaryan v. Armenia* (2012), the Court found, for the first time, a violation of Art. 3 Protocol 7 because the national legislation did not provide a system of compensating the applicant for serving an imprisonment penalty for five-and-a-half years before acquittal:

> 'The Court considers that the purpose of Art. 3 of Protocol No. 7 is not merely to recover any pecuniary loss caused by a wrongful conviction but also to provide a person convicted as a result of a miscarriage of justice with compensation for any non-pecuniary damage such as distress, anxiety, inconvenience and loss of enjoyment of life. No such compensation, however, was available to the applicant in the present case.'[102]

According to the Explanatory Report, the right to compensation only exists when the convicted person is considered innocent after the determination of the miscarriage of justice. Hence, casting a reasonable doubt over the convicted person's guilt will not give rise to the right provided by Art. 3.[103]

5. The Right Not to Be Imprisoned for Debt – Art. 1 of Protocol No. 4

Art. 1 of Protocol no. 4 reads: 'No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation'. However, the scope of its application is limited to the 'inability to fulfil a contractual obligation', which can be any non-delivery or non-payment of a debt resulting from a contract. If another element, other than a contractual obligation, is present, the prohibition provided by Art. 1 Protocol 4 will not apply. As there is very little reference in the ECtHR's case law regarding this Art., the Explanatory Report to Protocol No. 4[104] provides examples and explanations of the core notions.

The Explanatory Report states that 'this Art. does not apply to obligations arising from legislation in public or private law'.[105] Furthermore, 'inability' is a situation when 'the individual had not the material means to fulfil his contractual obligations',[106] which cannot be the sole reason for the deprivation of liberty. Additionally, the report provides examples of situations when 'inability' is supplemented by other reasons, where Art. 1 does not apply: ' – if a debtor acts with malicious or fraudulent intent;

102 ECtHR, *Pogoshyan and Baghdasaryan v. Armenia,* 2012, para. 51.
103 *Explanatory Report,* para. 25.
104 Explanatory Report to the Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 16 November 1963.
105 Ibid., para. 4.
106 Ibid., para. 5.

– if a person deliberately refuses to fulfil an obligation, irrespective of his reasons therefore; – if the inability to meet a commitment is due to negligence'.[107]

The ECtHR referred to Art. 1 Protocol 4 in some judgments, without finding a violation. For example, it held that 'the imprisonment in default system, (...) [is] constituting an archaic custodial measure available only to the Treasury (in the French system)'. The case concerned an applicant who was imprisoned for not paying a fine; therefore, Art. 1 was not applicable. A similar situation was found in *Gatt v. Malta* (2010). However, according to the Explanatory Report, Art. 1 would be applicable in situations when the law provided:

> Deprivation of liberty of an individual who: – knowing that he is unable to pay, orders food and drink in a cafe or restaurant and leaves without paying for them; – through negligence, fails to supply goods to the army when he is under contract to do so; – is preparing to leave the country to avoid meeting his commitments.[108]

'Deprivation of liberty' stems from the interpretation of Art. 5(1) ECHR. However, reading Art. 1 Protocol 4 in conjunction with Art. 5(1)(b) ECHR, it must be interpreted as prohibiting the States Parties to Protocol 4 from sentencing persons to imprisonment who were unable to comply with a court's contractual obligation.[109]

6. Final Remarks

This Chapter showed how the provisions of the ECHR and its Protocols, along with the interpretation of the ECtHR in its case law, created a codification of important criminal law principles within the European legal order. The Court's case law on the principles of no punishment without law, non-retroactivity of more severe criminal law and the procedural rights included in the subsequent Protocols to the ECHR (the right not to be tried and punished twice, the right to appeal in criminal matters, the right to compensation for wrongful conviction and the prohibition of imprisonment for debt or breach of contractual obligations) have become a source of inspiration to national courts and the CJEU.

107 Ibid., para. 5.
108 Explanatory Report, supra, note 102, para. 6.
109 See: Harris et al., 2023, p. 963.

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