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THE *NULLUM CRIMEN SINE LEGE* PRINCIPLE IN THE EUROPEAN CONVENTION OF HUMAN RIGHTS: THE ACTUAL SCOPE OF GUARANTEES

Abstract:
The principle of nullum crimen sine lege expresses an old idea that only the law can prescribe a particular act as punishable. It is commonly understood as a requirement of sufficient definiteness of an offence, in particular – of a statutory description of an offence before it has been committed (lex scripta, lex praevia), and of clarity and precision in criminal provisions so as to enable an individual to conform with them (lex certa), as well as their strict interpretation (lex stricta). Nowadays the principle is an internationally recognized human right to foreseeable criminalization, guaranteed by, inter alia, Article 7 of the European Convention on Human Rights. However, the European Court of Human Rights seems to formulate two slightly different requirements on its basis, namely that the application of criminal law must be foreseeable for an individual and coherent with the "essence of an offence". One may question whether this can serve as an adequate "shield" from arbitrariness on the part of State authorities. Nevertheless, the core aim of such a flexible approach is not to promote legal security for potential perpetrators, but to achieve better protection of human rights in general.

Keywords: ECHR, ECtHR, European Convention on Human Rights, European Court of Human Rights, nullum crimen sine lege

INTRODUCTION

The principle of *nullum crimen sine lege*, expressing the idea that only the law can prescribe a particular act as punishable, is one of the fundamental principles of modern criminal law. Derived from the era of Enlightenment, it is commonly understood as a requirement that an offence be sufficiently defined, but one can draw from it further postulates, namely: that an offence needs to be previously constituted in an act of par-

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liament (*lex scripta*, *lex praevia*); that its legal basis should be clear and accessible to an individual (*lex certa*); and that judges cannot use analogy or a broad interpretation to the detriment of a perpetrator (*lex stricta*). It is, therefore, a directive addressed to state power (the legislative and judicial branches) to make proper laws and to apply them in a proper manner. On the other hand, it is also a guarantee to individuals that they will not bear criminal responsibility until they commit an act previously prescribed as punishable by a legal provision, or to put it differently, that they will have *fair warning* before being punished.[1] This is the reason why the principle is said to be a part of the more general concept of the rule of law – the requirement of a legal basis for all activities of state authorities and, at the same time, the foreseeability of states' use of coercive power.[2]

What is important from the point of view of this paper is that the *nullum crimen sine lege* principle also embodies an internationally recognized human right – the right not to be punished without a legal basis. In terms of the European system of human rights protection, this right is set out in Article 7 of the European Convention on Human Rights (ECHR or Convention),[3] the first paragraph of which declares that

> 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.[4]

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[1] S. Glaser, *Nullum Crimen Sine Lege*, 24 Journal of Comparative Legislation and International Law 29 (1942), p. 33; A. Zoll, in: A. Zoll (eds.), *Kodeks karny. Część ogólna. Komentarz. Tom I* [The penal code. General part. Commentary. Volume I], Wolters Kluwer, Warszawa: 2007, pp. 34-49. *See also* the judgment of Trybunał Konstytucyjny (the Constitutional Tribunal of Poland) of 5 May 2004, P 2/03, OTK-A 2004, No. 5, item 39.

[2] K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge University Press, Cambridge: 2009, p. 15; M. Królikowski, R. Zawłocki, *Prawo karne* [Criminal law], Wydawnictwo C.H. Beck, Warszawa: 2015, p. 84. *See generally* J. Raz, *The Authority of Law: Essays on Law and Morality*, Oxford University Press, Oxford: 2009, pp. 210-232.

[3] D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, Butterworth, London: 1995, p. 274; P. van Dijk, G.J.H. van Hoof, *Theory and practice of the European Convention on Human Rights*, Kluwer Law International, The Hague: 1998, p. 485; F.G. Jacobs, C. Ovey, R.C.A. White, *The European Convention on Human Rights*, Oxford University Press, Oxford: 2010, p. 296. *See also* B. Kunicka-Michalska, *Projekt Kodeksu karnego w świetle art. 7 Europejskiej Konwencji o Ochronie Praw i Podstawowych Wolności Człowieka* [The project of the Polish Penal Code in the light of Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms], in: T. Bojarski, E. Skrętowicz (eds.), *Problemy reformy prawa karnego* [Problems of criminal law reform], Lubelskie Towarzystwo Naukowe, Lublin: 1993, p. 82.

[4] The second paragraph of Article 7 provides that para. 1 "shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations," which means, in general, that the prosecution of war crimes committed during the Second World War is not contrary to the ECHR. *See* J.G. Merrills, *The development of international law by the European Court of Human Rights*, Manchester University Press, Manchester: 1988, p. 207; M. Balcerzak, *Zasada nullum crimen sine lege w kontekście ścigania zbrodni wojennych i zbrodni przeciwko ludzkości na tle orzecznictwa Europejskiego Trybunału Praw Człowieka* [The principle of nullum crimen sine lege in the context of prosecution of war crimes and crimes

The importance of the *nullum crimen sine lege* principle in the ECHR system seems indisputable, as Article 15 of the ECHR provides that the right conferred by Article 7 cannot be derogated even in time of war or other public emergency. Bearing in mind that the State Parties to the ECHR are obliged to observe the engagements undertaken, the system created by the ECHR constitutes the minimum standard of human rights protection.[5] This is especially true since the standard is recognised by the Court of Justice of the European Union.[6] Notably, the Constitutional Tribunal of Poland recognizes it as well.[7]

The European Court of Human Rights (ECtHR or Court) was established on the basis of Article 19 of the ECHR to ensure state's compliance with its obligations. It has consistently confirmed the prominent place of the *nullum crimen sine lege* principle in the ECHR system. As pointed out in many rulings, "it should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment."[8] It is worth noting that the ECtHR is the main institution entitled to construe the provisions of the ECHR (Article 32 of the Convention). Furthermore, it exercises its powers on a broad scale. One can say that the jurisprudence of the ECtHR is a good example of judicial activism, i.e. the judiciary developing law to achieve certain goals.[9] A leading principle in this context seems to be that of effectiveness, i.e. to make the protection of human rights "practical and effective" and not "theoretical and illusory".[10] While the ECHR is a Charter of human rights, embodying principles rather than rules, it is openly acknowledged that the ECtHR is empowered with a wide range of discretion when applying it.[11] As a con-

against humanity in the light of the European Court of Human Rights case-law], in: T. Jasudowicz, M. Balcerzak, J. Kapelańska-Pręgowska (eds.), *Współczesne problemy praw człowieka i międzynarodowego prawa humanitarnego* [Contemporary issues in human rights and international humanitarian law], TNOiK Dom Organizatora, Toruń: 2009, pp. 440-441.

[5] P. Hofmański, in: L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18. Tom I* [Convention for the Protection of Human Rights and Fundamental Freedoms. Commentary on Articles 1-18. Volume I], Wydawnictwo C.H. Beck, Warszawa: 2010, pp. 466-467. *See also* E. Brems, *Human Rights: Minimum and Maximum Perspectives*, 9 Human Rights Law Review 349 (2009), pp. 350-353.

[6] Case C-63/83 *Regina v Kent Kirk* [1984] ECR 2689, para. 22. *See also* B. de Witte, *The use of the ECHR and Convention case law by the European Court of Justice*, in: P. Popelier, C. Van De Heyning, P. Van Nuffel (eds.), *Human Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts*, Intersentia, Cambridge: 2011, p. 17; Ch. Peristeridou, *The Principle of Legality in European Criminal Law*, Intersentia, Cambridge: 2015, p. 6, pp. 178-220.

[7] *See* the judgments of the Constitutional Tribunal of Poland of 18 October 2004, P 8/04, OTK-A 2004, No 9, item 92, and of 17 May 2012, K 10/11, OTK-A 2012, No 5, item 51.

[8] A. Mowbray, *The Creativity of the European Court of Human Rights*, 5(1) Human Rights Law Review 57(2005), p. 72; L.J. Clements, *European Human Rights. Taking a Case under the Convention*, Sweet & Maxwell, London: 1994, p. 155.

[9] *See* Merrills, *supra* note 4, p. 231.

[10] K. Starmer, *European Human Rights Law*, Legal Action Group, London: 2000, pp. 155, 158-160.

[11] Merrills, *supra* note 4, p. 34. This, of course, can be subject to criticism, since the danger of the ECtHR being a policy-making body is not unreasonable. In this respect, *see* i*bidem*, p. 80; M. Forowicz,

sequence, even though the 'traditional' rules concerning the interpretation of treaties, namely Articles 31 to 33 of the Vienna Convention on the Law of Treaties (Vienna Convention), are pertinent, the ECtHR still reads the ECHR in its own way. The doctrine of an "autonomous concept" provides a good example. In the context of Article 7 the Court has stated that in its interpretation of the concept of a "penalty", it remains free to go behind appearances and to assess for itself whether a particular measure amounts in substance to a penal response to a "criminal offence". In particular, a preventive detention order might be deemed as a penalty and, accordingly, falls within the protection of the *nullum crimen* (*nulla poena*) *sine lege* principle.[12] On the other hand, one should distinguish between a penalty and other measures that concern its execution or enforcement. If one deals with a measure that in substance constitutes a penalty (or additional penalty), the ban on retroactive criminal law applies. However, if a measure only concerns the execution of a penalty that was applicable at the relevant time, then the guarantee enshrined in Article 7 does not apply. This is particularly true in relation to instruments that concern the remission of a sentence or a change in a regime for early release, and those that are merely of a preventive nature (like placement on a register of offenders).[13] However even more prominent, from the point of view of the judicial activism, is the "living instrument" doctrine, which enables the ECtHR to match the content of the ECHR to changing circumstances by making use of evaluative interpretations. Inclusion of the *lex mitior* rule within the scope of Article 7 is a good illustration of this technique. The ECtHR has departed over time from its previously established case-law[14] by ruling that a defendant should be able to benefit from a subsequent criminal law (i.e. one enacted after an offence has been committed) providing for a more lenient penalty, as is expressed in Article 15 of the International Covenant on Civil and Political Rights, which was adopted after the ECHR.[15]

It is widely stated that Article 7 stands for the legal definitiveness of an offence and constitutes a ban on an overly broad construction of criminal provisions, in particular by analogy.[16] The ECtHR requires, therefore, that both offences and penalties be clearly defined by law. Its role in this context is to verify whether, at the time when an

The Reception of International Law in the European Court of Human Rights, Oxford University Press, New York: 2010, p. 12.

[12] ECtHR, *M. v. Germany* (App. No. 19359/04), 17 December 2009, paras. 120, 127-133. The judgment, as well as all other ECtHR judgments, is available at http://www.echr.coe.int.

[13] *See ibidem*, paras. 121, 134-136; ECtHR, *Gardel v. France* (App. No. 16428/05), 17 December 2009, paras. 40-47. In this matter, *see also* I.C. Kamiński, *Zakaz karania bez podstawy prawnej – orzecznictwo ETPCz za lata 2008–2010* [No punishment without law - case law of the ECtHR of 2008-2010], 11 Europejski Przegląd Sądowy 36 (2011), pp. 40-42.

[14] *X v. Germany*, Commission decision of 6 March 1978, Decisions and Reports 13, para. 70-72

[15] ECtHR, *Scoppola v. Italy (no. 2)* (App. No. 10249/03), Grand Chamber, 17 September 2009, paras. 106-109; *see also* Kamiński, *supra* note 13, pp. 36-37.

[16] *E.g.* ECtHR, *Kokkinakis v. Greece* (App. No. 14307/88), Grand Chamber 25 May 1993, para. 52; ECtHR, *Başkaya and Okçuoğlu v. Turkey* (App. Nos. 23536/94 & 24408/94), Grand Chamber, 8 July 1999, paras. 42-43.

allegedly criminal act (or omission) was committed, there existed a binding legal provision making that act (or omission) punishable, and whether the imposed penalty did not exceed the limits determined by that provision.[17] The term "law" as used in Article 7 is, however, grounded on the same concept as used elsewhere in the ECHR, namely it encompasses both statutory law and case-law and implies the qualitative requirements of accessibility and foreseeability.[18] The ECtHR has pointed out that while "the law" is of general application, the wording of statutes is not always precise, especially due to some general categorizations that are commonly used in every legal system. Insofar as many terms used by a legislator are imprecise, an element of judicial interpretation, aimed at the elucidation of doubtful points and adaptation to changing circumstances, is inevitable.[19] It is thus claimed that while certainty of law is highly desirable, its flexibility and ability to keep pace with reality is also of great importance. It is, therefore, the role of the courts to dissolve any interpretational doubts. The Court has declared that

> Article 7 cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.[20]

Moreover, the requirement of foreseeability is satisfied

> where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account.[21]

Consequently, on the basis of Article 7 the ECtHR has formulated two slightly different demands than *lex scripta*, *lex praevia*, *lex certa,* and *lex stricta*, namely that the application of criminal law must be foreseeable for an individual, and that such an application must be in accordance with the "essence of an offence".[22] Hence, the

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[17] *E.g.* ECtHR, *Coëme and Others v. Belgium* (App. Nos. 32492/96, 32547/96, 32548/96, 33209/96 & 33210/96), Grand Chamber, 22 June 2000, para. 145; ECtHR, *Achour v. France* (App. No. 67335/01), Grand Chamber, 29 March 2006, para. 43.

[18] ECtHR, *The Sunday Times v. the United Kingdom* (App. No. 6538/74), 26 April 1979, para. 49.

[19] *E.g.* ECtHR, *Kafkaris, v. Cyprus* (App. No. 21906/04), Grand Chamber, 12 February 2008, para. 141.

[20] *E.g.* ECtHR, *Khodorkovskiy and Lebedev v. Russia* (App. Nos. 11082/06 & 13772/05), 25 July 2013, para. 780.

[21] *E.g.* ECtHR, *Kafkaris v. Cyprus*, para. 140; ECtHR, *Cantoni v. France* (App. No. 17862/91), Grand Chamber, 15 November 1996, para. 29.

[22] Starmer, *supra* note 10, p. 124; A. Bernardi, *Nullum crimen, nulla peona sine lege between European law and national law*, in: M.C. Bassiouni, V. Militello, H. Satzger (eds.), *European Cooperation in Penal Matters: Issues and Perspectives*, Cedam, Padova: 2008, pp. 101-102; Peristeridou, *supra* note 6, p. 96; T. Sroka, in: M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I. Komentarz do art. 1–86* [The Constitution of Poland. Volume I. Commentary on Article 1-86], Wydawnictwo C.H. Beck, Warszawa: 2016, p. 1014. *But see* B. Kunicka-Michalska, *supra* note 3.

human right which is enshrined in Article 7 can be called the right to foreseeable criminalization.[23] This seems to be, however, less 'shielding' than the afore-cited principles. The requirement of a clear, unambiguous statutory provision, enacted beforehand and publicly accessible, was thought to enable an individual to foresee possible criminal responsibility just by reading the statute. If one must search for criminal law information elsewhere, then such foreseeability seems to be problematic. Since the ECtHR's interpretation of the *nullum crimen sine lege* principle is said to follow "from its object and purpose", one may rightfully wonder what this means in practice. In particular, the *nullum crimen sine lege* principle is used to stress the protective finality of criminal law, that is, protection of individuals against the arbitrary use of state power (the vertical dimension of human rights). Yet there is another aspect of personal security that needs to be taken into consideration when dealing with criminal policy – protection of individuals against each other (the horizontal dimension). This object is an element of the instrumental finality of criminal law, which is aimed, broadly speaking, at controlling social order and protecting legal assets.[24] So one may ask: is the Court's promotion of a flexible approach to the above-described legal principles aimed at attaining legal security for individuals, or more broadly at personal security for members of society?

The following analysis of the ECtHR's rulings examines the actual scope of guarantees enshrined in Article 7. It should be stressed at the outset that attention is primarily paid to the issue of the criminal conduct, whereas the matter of the penalty is raised only additionally. Having this in mind, the first part of the paper is aimed at investigating the scope of protection of the foreseeability condition. The second part is devoted to the definition of the essence of an offence and its application in practice. In the third part, the objects and purposes of the ECHR and its role in this context will be examined.

1. THE FORESEEABILITY OF LAW

In the case of *Groppera Radio AG and Others v. Switzerland* it was declared that "the scope of the concepts of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed."[25] In each case the ECtHR must, therefore, determine objectively whether there exists, in national or international law,

[23] Peristeridou, *supra* nota 6, *passim*.

[24] *See generally ibidem*, pp. 132-134; A. Zoll, in: T. Bojarski (eds.), *System prawa karnego. Tom II. Źródła prawa karnego* [System of criminal law. Volume II. Sources of criminal law], Wydawnictwo C.H. Beck, Warszawa: 2011, pp. 241-255; J. Utrat-Milecki, *The effects of the civilising process on penal developments in the European Union*, in: J.B. Banach-Gutierrez, Ch. Harding (eds.), *EU Criminal Law and Policy: Values, Principles and Methods*, Routledge, London/New York: 2017, pp. 21-36.

[25] ECtHR, *Groppera Radio AG and Others v. Switzerland* (App. No. 10890/84), 28 March 1990, para. 68.

a plausible legal basis for a criminal conviction; and determine subjectively whether, at the time of the alleged commission of the crime, it was reasonably foreseeable to the accused citizen that his or her conduct would make him/her responsible for such an offence. Bearing in mind the idea that underlies the *nullum crimen sine lege* principle, one can assume that within the field of criminal law the highest standard of foreseeability is required.

The *Kokkikakis v. Greece* case was one of the first in which the ECtHR applied the foreseeability test in relation to the right guaranteed by Article 7. The case concerned a citizen of Greece, who, as a practicing Jehovah's Witness, had been accused and convicted of the crime of proselytism. In his application to the ECtHR he maintained that the definition of proselytism was so broad that even the slightest discussion of religious subjects might be considered as an indirect attempt to illegally intrude on someone's beliefs.[26] Moreover, he claimed that it was not only the lack of definitiveness of the offence that was contrary to the ECHR, but also that the law was a violation of the freedom to manifest one's religion guaranteed by Article 9 of the ECHR. In its ruling the ECtHR noted that criminal provisions on proselytism were an exemplification of laws "inevitably couched in terms which, to a greater or lesser extent, are vague", the interpretation and application of which depend on existing practice. Since national case-law had already been settled and was such as to enable the applicant to regulate his conduct with respect thereto, the limitation of his right was found to be "prescribed by law" within the meaning of Article 9 of the ECHR and, from the point of view of Article 7, could serve as a valid basis for criminal responsibility.[27] On the other hand, the Court held that there had been a violation of freedom of religion, since the conviction was not justified in democratic society by "a pressing social need" for criminalization.[28]

The Court offered a similar stance on foreseeability in the case of *Flinkkilä and Others v. Finland*. The applicants were charged with spreading data depicting the private life of another person. They claimed it had not been clear from the penal provision that their conduct might be punishable, because the scope of private life was not clarified. Inasmuch as the provision constituted a restriction on the right to freedom of expression, they also argued, based on Article 10 of the ECHR, that the limitation was not "prescribed by law" and not "necessary in a democratic society". The ECtHR noted, however, that although the legislation was not precise, the Guidelines for Journalists and the practice of the Council for Mass Media (which professional journalists like the applicants should have been aware of – even if they were not binding) provided even more strict rules than criminal law. For this reason the limitation was found to be

[26] The definition reads as follow: "By 'proselytism' is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (eterodoxos), with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naïvete."

[27] ECtHR, *Kokkinakis v. Greece*, para. 52.

[28] *Ibidem*, paras. 49-50.

"prescribed by law" and, accordingly, coherent with the *nullum crimen sine lege* principle.[29] At the same time, it was considered to be too excessive in a democratic society, especially due to the severe sanction imposed on the applicants. In other words, the Court found that "the domestic courts failed to strike a fair balance between the competing interests at stake."[30]

It is clear from the foregoing that the scope of foreseeability, i.e. the measure of legal certainty, is not stricter for the right to foreseeable criminalization than that applied to other fundamental rights under the ECHR. In fact, one may posit that the protection of the freedom to manifest one's religion or beliefs, the freedom of expression respectively, is even more far-reaching, since any restrictions on those rights need to meet more conditions than in case of "freedom from" an arbitrary conviction. While Article 7 requires only that a limitation to an individual's freedom in general be "prescribed by law", this is just the first requirement when dealing with other rights guaranteed by the ECHR. Limitation of them must be, additionally, justified with a legitimate aim and be necessary in a democratic society.

On the other hand, the cases cited above show that Article 7 is an element of a wider approach to criminal justice, where the proportionality of criminalization, i.e. whether a particular conduct should be penalised in democratic society and how severe a sanction should be provided for its commitment, is also relevant. It must be borne in mind that every criminal provision restricts an individual's freedom of action – it prohibits particular conduct under threat of penalty, so citizens are not free to exercise their autonomy. It can be claimed, therefore, that criminalization should not only be prescribed by law, but also justified by a need to protect those legal assets that are valuable in democratic society. This is another aspect of protection against the arbitrary use of criminal sanctions, namely – against arbitrary criminalization by the legislator.[31] This is what is called the "material characteristic" of an offence, which is covered by the principle of *nullum crimen sine periculo sociali* (whereas the *nullum crimen sine lege* principle stands for a formal characterization). In Polish legal system one will say that the legislator is required to prescribe as punishable only such behaviours that are socially harmful (an abstract viewpoint). The judge, in turn, is not to impose punishment if the harmfulness of an alleged criminal conduct is negligible (a concrete viewpoint).[32] Notably, such a supplemental guarantee is not enshrined in Article 7 itself, but stems from other provisions. If the applicant claims that the State Party has violated not only his right to foreseeable criminalization, but also other right guaranteed by the ECHR, precisely – one that is limited by a criminal provision, an additional charge must be made.

Even though the ECtHR's analysis of foreseeability is to assess whether a particular person has had the opportunity to recognize the legal consequences of an act under-

[29] ECtHR, *Flinkkilä and Others v. Finland* (App. No. 25576/04), 6 July 2010, paras. 67-68, 94.

[30] *Ibidem*, paras. 82-93.

[31] L. Gardocki, *Ponadustawowe i pozaustawowe standardy prawa karnego* [Super-statutory and non-statutory standards of criminal law], 48 Studia Iuridica (2008), p. 331.

[32] *See generally* Zoll, s*upra* note 1, pp. 19-21.

taken, it is not the individual's subjective viewpoint that matters. Since the law may satisfy the above-mentioned requirement if the legal consequences can be determined with a help of legal advisor, the standard that is applicable is that of someone who is a lawyer by profession and, for this reason, who is well acquainted with legal doctrine in the overall sense. Importantly, the ECtHR noted that "this is particularly true in relation to persons carrying on professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails."[33] However, at present such a "lawyer standard" is related not only to professionals. It serves as a general criterion of foreseeability – even if no professionals are involved. In particular, in *Del Rio Prada v. Spain* it was applied in relation to a person convicted of terrorist offences,[34] in *Ashlarba v. Georgia* to a person convicted of being a member of a criminal syndicate,[35] in *Jorgic v. Germany* and *Vasiliauskas v. Lithuania* to persons convicted of genocide.[36] In these cases there was no legal basis to demand any special degree of knowledge and care from an individual, other than acquaintance with formally binding legal provisions, in assessing the risks of being subject of criminal responsibility. There are no reasons to require that ordinary citizens be familiar with established case-law (at least in continental legal systems), much less with the legal doctrine of both national and international criminal law.[37] Taking into account public international law[38] or "common knowledge"[39] as the basis for foreseeability also creates some doubts. Nevertheless, it is justifiable to demand from a lawyer that he or she will not get lost in such a "thicket of rules" and will be able to provide an individual with proper legal advice. Yet, does an individual have a duty to consult a lawyer in everyday life? This leads, consequently, to making criminal responsibility be more objective, as an individual's subjective possibility to anticipate legal consequences, especially due to clear, unambiguous criminal provision, written in everyday language and thought to be interpreted literally, is not crucial. What is crucial, instead, is whether a decision to apply (criminal) law could be objectively expected in the "legal world".[40]

Notably, one may claim that the requirement of a perpetrator's awareness of unlawfulness must still be met. The problem of subjective foreseeability could be, therefore,

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[33] *E.g.* ECtHR, *Cantoni v France*, para. 34-35; ECtHR, *Pessino v. France* (App. No. 40403/02), 10 October 2006, para. 33.

[34] ECtHR, *Del Rio Prada v. Spain* (App. No. 42750/09) Grand Chamber, 21 October 2013, paras. 79, 112.

[35] ECtHR, *Ashlarba v. Georgia* (App. No. 45554/08), 15 July 2014, paras. 34, 40.

[36] ECtHR, *Jorgic v. Germany* (74613/01), 12 July 2007, paras. 111-113; ECtHR, *Vasiliauskas v. Lithuania* (App. No. 35343/05), Grand Chamber, 20 October 2015, paras. 154, 156, and joint dissenting opinion of Judges Villiger, Power-Forde, Pinto de Albuquerque & Kuris, para. 30.

[37] *See* ECtHR, *Jorgic v Germany*, para. 113, where the minority opinion was taken into account.

[38] *See* ECtHR, *van Anraat v. the Netherlands* (65389/09), 6 July 2010, paras. 83-96; *see also* Kamiński, *supra* note 13, p. 40.

[39] *See* ECtHR, *Ashlarba v. Georgia*, para. 40.

[40] Peristeridou, *supra* note 6, p. 99.

relocated on the grounds of culpability.[41] In this regard the case of *Sud Fondi Srl and Others v. Italy* is worthy of mention. In this case the applicant companies agreed on a building project with the municipality. Despite the fact that a planning permission had been granted to them, the public prosecutor commenced a criminal investigation, considering the development to be illegal. Subsequently a criminal court agreed with that point of view. Nevertheless, taking into account "inevitable and excusable error" in the interpretation of "vague and poorly formulated" regional regulations (which interfered with the national law) and, primarily, the granting of a planning permission, the accused representatives of the companies were acquitted owing to their lack of a "guilty mind". However, at the same time the confiscation of all the land and buildings was ordered. In their complaint to the ECtHR, the applicants pleaded a violation of Article 7, referring to the close connection between the *nullum crimen sine lege* and *nullum crimen sine cupla* principles. The ECtHR (having found that the confiscation order constituted a "penalty" in terms of Article 7) noted that indeed there is a requirement of an intellectual connection (consciousness and will) to detect an element of responsibility in the perpetrator's conduct, otherwise the penalty would not be justified. It also stressed that it would be incoherent to require an accessible and foreseeable legal basis and, conversely, to allow persons to be held "guilty" and punished in cases where they are not in a position to know the content of criminal law, owing to an error which could not be attributed to them. As a result, the imposition of the penalty in connection with a finding of no guilt violated Article 7.[42]

It seems from the above that the guarantee of *nullum crimen sine culpa* can also be derived from Article 7.[43] However, comparing this case with those aforementioned the only conclusion one may draw is that if an individual acts based on the approval of authorities it cannot be argued he or she should have made a special effort to verify his/her legal position. In other words, in such a case – and probably in no others – the error of law cannot be attributed to an individual.

Now the question arises whether the concept of the objective foreseeability of the application of law is enough to prevent arbitrariness? If a court decision is based on an already established construction of a particular offence, or at least if the opinion that a given behaviour falls within its scope is widely available to the "legal world" at the time of commission of the alleged offence, then the minimum standard of a *fair warning* guarantee would seem to be preserved. An individual has some objectively existing source of information about which acts are forbidden under threat of criminal penalty, and the reviewing court should also adhere to them.

In this context the *Kafkaris v. Cyprus* case is noteworthy. Although the Cypriot Criminal Code was clear about the penalty of mandatory life imprisonment for pre-

[41] *See generally ibidem*, pp. 61-63.

[42] *See* ECtHR, *Sud Fondi Srl and Others v. Italy* (App. No. 75909/01), 20 January 2009, paras. 116-117 (in French and Italian) and Information Note 115 concerning the case (in English); *see also* Kamiński, *supra* note 13, p. 42.

[43] *See generally* G. Panebianco, *The nulla poena sine culpa principle in European courts case law*, in: S. Ruggeri (ed.), *Human Rights in European Criminal Law*, Springer, Cham: 2015, pp. 47-76.

meditated murder (which the applicant was convicted of), pursuant to the Prison Regulations life prisoners were eligible for remission of up to a quarter of their sentence. Life imprisonment was defined merely as imprisonment for twenty years in this matter, but at the time in question there was a legal practice on the part of prison authorities to apply this length in each case of life imprisonment. The applicant had also been informed that he might qualify for earlier release with reference to his sentence of twenty years' imprisonment. Importantly, the Prison Regulations were later declared unconstitutional and *ultra vires*. As the new regulation prevented life prisoners from applying for remission, the applicant was not released within the previously prescribed period.[44] He argued before the ECtHR that the unforeseeable prolongation of his term of imprisonment on the one hand, and the retroactive application of the new legislation on the second hand, violated Article 7. Based on the fact that the penal provision had clearly provided for life imprisonment, the ECtHR did not agree with the argument of the retroactive imposition of a heavier penalty. It noted however that Cypriot law, taken as a whole, was not formulated with sufficient precision to enable the applicant to anticipate in a reasonable manner, even with appropriate legal advice, the scope of the imposed penalty. In this regard a violation of Article 7 was found.[45] In consequence, the state authorities are not free to improve a misleading legal practice (which affects the clarity of law) to the detriment of a perpetrator in a retroactive manner. Interestingly, this ruling is said to be the first one in which the ECtHR applied the rule prohibiting the use of a more severe penalty by reference to criterion of the quality of law. Since in the context of Article 7 the "law" does not mean merely the "statute", the claim that life imprisonment constituted, at the time in question, imprisonment for the remainder of the convicted person's life is, in fact, incoherent. Given that, the *lex severior retro non agit* rule should have been applied in this case.[46]

In brief, although criminal law information is not easily available, those who want to obtain it can do so. As stems from the above, such a wide concept of law can be problematic not only for citizens, but also for state authorities. Nevertheless, there is another important aspect of *nullum crimen sine lege* principle, namely demarcation of the boundaries of human freedom. It is undeniable that the more vagueness there is within a legal system, the more restricted are the opportunities to apply a strict interpretation. This leaves room for judicial discretion. Accordingly, if the definition of a criminal act is full of imprecise terms, the boundary between its literal interpretation and an extensive one cannot be precisely delineated. The requirement of *lex stricta* would seem to be, in such cases, unfounded. Significantly, even if the case-law or legal doctrine can indicate the actual scope of criminalization, that scope may be extended over time in relation to what had been originally supposed to be punishable by a legislator. This is so especially because of scholars, who (in contrast to what the ECtHR postulates with reference to

[44] *See particularly* ECtHR, *Kafkaris v. Cyprus*, paras. 12-23, 65-67.
[45] *Ibidem*, paras. 148-150.
[46] Kamiński, *supra* note 13, p. 38.

domestic courts) are not bound by the existing interpretations in their research studies. On the other hand, courts can also put forward some new ideas as a side note (within the *common law* system known as *obiter dictum*), with no direct effect on a particular decision. All these viewpoints can modify the existing scope of criminalization for future reference. From this point of view there is no stable 'boundary of human freedom'.

In this regard the *Dragotoniu and Militaru-Pidhorni v. Romania* case is worthy of mention. The applicants, employees of a private bank in Timisoara, were sentenced for taking bribes. In their applications to the ECtHR they indicated that their conduct did not constitute a crime because, according to Article 254 of the Rumanian Criminal Code, bribery could only be committed by a government official or an employee of state-owned company. Since they were employed in a private bank, they could not be held criminally responsible for such an offence. In its analysis the ECtHR drew attention to the fact the Rumanian Government did not reveal that in its national case-law the status of private banks' employees had been equated, for purposes of criminal law, to that of a civil servant, nor that such a view was shared by scholars. For this reason, it was difficult, if not impossible, for the applicants to anticipate that their actions would entail such consequences. Accordingly, the *nullum crimen sine lege* principle was found to have been breached.[47]

Notably, the ECtHR seems to take the view that what is important is not the method of adjudication, nor, strictly speaking, the way in which the law is applied in a particular case, but their effects – whether a final decision on someone's criminal responsibility was foreseeable or unforeseeable.[48] The mere fact that a "forbidden" analogy or broader interpretation is employed is not decisive when dealing with the guarantee enshrined in Article 7. As stems from the *Dragotoniu and Militaru-Pidhorni* case, interpretation made by analogy (since the statute expressly narrowed the scope of criminalization to individuals with certain features) could constitute a basis for foreseeability if it were previously expressed in the legal doctrine, and the *nullum crimen sine lege* principle would not be infringed in such case. Remarkably, what the ECtHR nicely described as the "progressive development of law through judicial interpretation" can bring to one's mind nothing more and nothing less than reasoning *per analogiam*. In this context an old German case concerning "stealing electricity" must be cited. The Supreme Court of Germany ruled that the liberal construction of the concept of a 'thing' (not just as a physical object that occupies a given space) would stand for the impermissible extension of criminal law by analogy. In its opinion the application of the criminal provision so as to cover new developments in living conditions was not possible without altering the statute.[49]

To sum up, the foreseeability requirement seems to provide some restrictions on judicial arbitrariness. Since a decision should be based on an already established in a

[47] ECtHR, *Dragotoniu and Militaru-Pidhorni v. Romania* (App. Nos. 77193/01 & 77196/01), 24 May 2007, paras. 43-44.

[48] *See* Peristeridou, *supra* note 6, p. 98.

[49] W. Naucke, *Interpretation and Analogy in Criminal Law*, 3(2) Brigham Young University Law Review 535 (1986), pp. 535-536.

"legal world" line of interpretation, it cannot be said to be entirely arbitrary. However, the concept does not prevent a court from expanding the scope of criminalization set down by a legislator. Simultaneously, it will not thus prevent a court from narrowing the sphere of human freedom. The ECHR standard of *nullum crimen sine lege* principle is not, however, dependent only on the condition of foreseeability in the application of criminal law. Another issue is whether the concept of "the essence of an offence" can be a satisfactory barrier to an extension of criminalization. In other words, does "the essence of an offence" preclude the criminal responsibility from being based on every view expressed in a "legal world"?

2. THE ESSENCE OF AN OFFENCE

The concept of the "essence of an offence" is, basically, not defined in the ECHR system. In many cases it is just proclaimed that

> Article 7 of the ECHR 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.[50]

The Commission of Human Rights has, however, shed some light on the matter in its decision in *X Ltd and Y v. The United Kingdom*. Namely, it indicated that Article 7 precludes such an extension of existing offences so as to cover facts which previously did not entail criminal responsibility. Specifically, "this implies that constituent elements of an offence such as e.g. the particular form of culpability required for its completion may not be essentially changed, at least not to the detriment of the accused, by the case-law of the courts."[51] Nevertheless, as stems from the *Ould Dah v. France* case, such "constituent elements" might not be embodied in just one criminal provision. In this case, at the time in question "torture and acts of barbarity" constituted aggravating circumstances to the principal offence of murder, but at the time of conviction, after amendment of the applicable law, torture was classified as a separate offence. The new regulation was deemed, however, to be a "continuity" of the former one.[52] Thus the statutory classification of factual elements that entail criminal responsibility for a particular act can change over time without changing the essence of an offence.

Referring in this context to the Polish legal doctrine, it should be emphasized that the "essence of an offence" is a rather ambiguous issue. Without going into detail, it

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[50] *E.g.* ECtHR, *K.-H.W. v. Germany* (App. No. 37201/97), Grand Chamber, 2 March 2001, para. 85; ECtHR, *Kononov v. Lithuania* (App. No. 36376/04), Grand Chamber, 17 May 2010, para. 185.

[51] *X Ltd and Y v. the United Kingdom*, Commission decision of 7 May 1982, Decisions and Reports 28, 77, para. 9.

[52] ECtHR, *Ould Dah v. France* (App. No. 13113/03), 17 March 2009. Since the penalty imposed on the applicant did not exceed the maximum one carried by the former regulation, Article 7 has not been violated. *See also* Kamiński, *supra* note 13, p. 40.

can be understood as consisting of both the objective and subjective elements of an offence that determine its criminality (essence of a criminal act), or in broader sense, of each element that prejudge its unlawfulness (essence of an unlawful act). As regards the criminality only statutory elements are pertinent. This stands, simultaneously, for the *nullum crimen sine lege* guarantee. With respect to the unlawfulness however, some non-statutory elements of an offence should also be taken into account, as this "essence" is to determine whether a particular behaviour is contrary to the legal order as a whole.[53] However, if we assume that a particular act cannot be prescribed as punishable unless it is unlawful,[54] then the "non-statutory" scope of unlawfulness should not be wider than the one existing at the time of the alleged commission of the offence. In this respect German legal doctrine uses the term *Garantietatbestand* – the guarantee essence of an offence – to cover both its objective and subjective elements and, additionally, its unlawfulness and the culpability. Since all these elements determine the criminal liability, they cannot be changed retroactively to the detriment of a perpetrator.[55]

Referring to the ECHR system, the "essence of an offence" seems to be considered as a limitation on judicial discretion when existing penal provisions are being applied to "present-day conditions". So long as the courts only clarify the statutory elements of an offense and "settle them in" new circumstances, no objection can be made.[56] What should take place, then, is an analysis of what the statutory terms currently designate. The above thesis that the effect of a broad interpretation or analogy could constitute a prospective legal basis for conviction because of its "foreseeability" would be, therefore, unfounded. The decision to apply a law could not be accepted if it goes beyond the boundary determined by the existing elements of an offence, even if it were based on an already established precedent and could be considered foreseeable. On the other hand, the task of jurisprudence is, after all, to refine vague provisions of statutory law. Thus, it would be unfounded to make the claim that within the ECHR system the essence of an offense is determined by the constitutive elements embodied in criminal provisions that are yet undetermined. Hence these components must be rooted elsewhere. The concept of "unlawfulness" seems to be an attractive solution in this regard. One should bear in mind, however, that the boundary between lawfulness and unlawfulness is not necessarily reflected in binding legislation. In particular, the standard of care that is required in given circumstances is, as a rule, of a non-statutory character.[57] Since "unlawfulness" does not have a purely normative character, it seems that it is rather a "social sense of

[53] *See generally* R. Dębski, *Pozaustawowe znamiona przestępstwa* [Non-statutory element of an offence], Wydawnictwo Uniwersytetu Łódzkiego, Łódź: 1995, pp. 80-90, 96-106; A. Zoll, *Okoliczności wyłączające bezprawność czynu (zagadnienia ogólne)* [Circumstances excluding unlawfulness of an act (general issues)], Wydawnictwo Prawnicze, Warszawa: 1982, pp. 36-43.

[54] *See generally* Zoll, *supra* note 1, pp. 25-28.

[55] W. Beulke, J. Wessels, *Strafrecht. Allgemeiner Teil. Die Straftat und ihr Aufbau*, Müller, Heidelberg: 2012, p. 46.

[56] Starmer, *supra* note 10, p. 224.

[57] *See generally* Dębski, *supra* note 53, pp. 288-291.

unlawfulness" that is pertinent. This standpoint seems to be supported by the ECtHR's conclusion in the *Ashlarba v. Georgia* case that the applicant could easily have foreseen which of his actions would make him criminally responsible, primarily "through common knowledge based on the progressive spread over decades of the subculture of the 'thieves' underworld' over the public at large."[58]

To clarify what the "essence of an offence" is in the ECHR system, the already cited case of *Jorgic v. Germany* and the 'essence' of genocide is noteworthy. The ECtHR observed that domestic courts had construed the "intent to destroy a group as such" based on the entire context of Article 220a para. 1 of the German Criminal Code, having regard particularly to the "imposition of measures which are intended to prevent births within the group" and the "forcible transfer of children of the group into another group." These forms of annihilation did not necessitate a physical destruction. Such an interpretation was said to be adopted by a number of national and international scholars. Moreover, the ECtHR indicated that the United Nations General Assembly advocated for the wider interpretation of genocide in its resolution from December 1992. For these reasons it concluded that the so-called "ethnic cleansing" in the Doboj region, intended to destroy the Muslims as a social unit, could reasonably be regarded as falling within the ambit of genocide. Notably, it has been emphasized that the scope of the offence must, consistent with its essence, as a rule be considered to be foreseeable.[59]

The above illustrates that the essence of an offense is determined by both the wording of a statute and how it is understood in the national and international legal doctrine. Significantly, the indicated criteria are similar to those of the test of foreseeability. It seems, therefore, that the conformity of a particular act with the essence of a statutory offense is not considered as an objective state of affairs (*status rērum*), but rather as some form of social evaluation. The conclusion of the ECtHR that the applicant's act "could reasonably be regarded as falling within the ambit of the offense of genocide" can be put forward as a confirmation of such a thesis.[60]

The case of *Radio France and others v. France* is also notable in this regard. The editor-in-chief of Radio France and its presenter had been charged with public defamation of a civil servant by giving erroneous information about his participation in the deportation of thousands of Jews in 1942. The legal basis for the charge was Article 93-3 of the Audiovisual Communication Act of 29 July 1982, that prejudged the criminal responsibility of a publishing director as the principal offender if the content of the offending statement had been "fixed prior to being communicated to the public", whereas the maker of the statement was to be prosecuted as an accessory. Before the ECtHR the applicants argued the criminal law had been over-extensively applied, since the courts had found the offending statement "prior-fixed" despite the fact that all news (the defamatory broadcast had been repeated sixty-two times) had been put

[58] ECtHR, *Ashlarba v. Georgia*.
[59] ECtHR, *Jorgic v. Germany*, paras. 104-109.
[60] *See* Peristeridou, *supra* note 6, p. 154.

out live. They pointed out that the scholars had all agreed that the condition of "prior-fixing" excludes live broadcasts from the scope of Article 93-3. On the other hand, the French authorities explained that the conviction was not based on the first broadcast, the content of which could not have been known to the editor-in-chief, but on the subsequent ones, when the content could be deemed to have been already known and impliedly accepted. It was emphasized that such an interpretation of the given provision is rational and keeps up with the changing reality. Moreover, it was said to capture the essence of the offense, which came down to having the possibility of supervision by a publishing director whenever a statement is repeated – whether live-to-air or not. The French authorities argued that this constituted a "reasonable reflection of the way the offence had originally been framed."[61] In its ruling the ECtHR basically agreed with the French Government. In particular, it did not carry out any broader analysis of the essence of the alleged offense on its own, but relied in this respect on the opinion of the State Party.[62] However, what is significant about that opinion is its argumentation. The Government did not indicate that nowadays some kinds of new methods of prior-fixing have been developed which force the courts to reinterpret that constitutive element of the offence. It argued instead that treating the first broadcast as a "prior-fixing" was in harmony with the underlying idea of the provision.

It can be concluded that the essence of an offense can also be determined by the idea to which a legislator adhered when introducing particular provisions, the so-called *ratio legis*. With this in mind one should recall what analogy means in criminal law. Namely, it

> […] declares some acts actually outside the coverage of a statute to be criminal because they are like acts that are covered by the statute, in ways that are relevant to preventing the evil addressed by the Statute. In the traditional use of crime creation by analogy to a statutory text, one looks to see if the act involved bears close resemblance to an already forbidden act.[63]

Hence the question arises: Is the *Radio France and others* case an example of analogy? If "prior-fixing" already had a stable meaning, i.e. there was a consensus as to how the term was understood and what kind of activities it covered, then the answer would be in the affirmative.

Another interesting case of a rather controversial nature is *Vasiliauskas v. Lithuania*. The applicant was a Lithuanian who, at the time of the Soviet Russian occupation regime, worked for the Ministry of State Security of the Lithuanian SSR. In 2004 he was found guilty of genocide on the basis of his participation in the killing of two partisans in 1953. The problem was that the definition of genocide in the new Lithuanian Criminal Code varied from that set out in the Convention on the Prevention and Punishment of the Crime of Genocide (Convention on Genocide). Specifically, it included political groups

[61] ECtHR, *Radio France and others v. France* (App. No. 53984/00), 30 March 2004, paras. 17-19.
[62] *Ibidem*, para. 20.
[63] Gallant, *supra* note 2, p. 26.

within the range of groups capable of being victims of genocide. The applicant argued therefore that his conviction was based on the retroactive application of the Lithuanian Criminal Code, defining genocide in wider terms than the Convention on Genocide had. The Government stressed, however, the applicant had been convicted of taking part in the extermination of partisans. The Soviet regime sought to annihilate the identity of the Lithuanian nation and eliminate it as a group, so the domestic court's conclusion that the murdered partisans must be regarded as members of a national and ethnic group was proper.[64] The ECtHR concluded, nonetheless, that the exclusion of political groups from the protected groups was, in light of the *travaux préparatoires* of the Convention on Genocide, intentional. They were considered to be a mobile group, whereas the Genocide Convention was intended to cover relatively stable and permanent ones. In addition, although the destruction of only a part of a protected group was relevant, it should be a "distinct" part – substantial in number, not just two members. The ECtHR also noted, with reference to Article 31 of the Vienna Convention, that it was not obvious whether the ordinary meaning of "national" or "ethnic" in the Genocide Convention covered partisans as a political group being part of the nation. Treating the victims as part of a protected group would mean, therefore, an analogous application of the criminal law to the detriment of the accused. Consequently, the applicant's conviction of genocide could not have been regarded as consistent with the essence of that offence as defined in international law at the time of commission, and thus it could not have been foreseen.[65] However, the decision was not unanimous. The main view expressed in dissenting opinions was that there were so many partisans fighting for the independence of Lithuania that they had to be perceived as a significant part of the nation.[66]

While the concept of foreseeability can be specified to some extent, the "essence of an offense" seems to be more intuitive. What the case of *Vasiliauskas* does confirm is that the legislator's intent, expressed in the *travaux préparatoires*, is important in deciding intent. However, this still does not prejudge anything since the common interpretation of an offence, the one carried out in order to assess the scope of a law's foreseeability, is also of relevance. For this reason the finding that a particular act falls within the ambit of an offence will lead to the finding of foreseeability (as in cases of *Jorgic* and *Radio France*), and conversely a finding of that an act falls outside the scope of the "essence of an offense" will lead to a finding of unforeseeability (as in the *Vasiliauskas* case). In light of this convergence, the concept of the "essence of an offence" cannot serve as the effective tool to combat a too-broad interpretation of a law. It lacks the objectivity required to limit judicial discretion. A court may consider every source of information about the law that was available at the moment a particular act had been committed (as in cases of *Jorgic* and *Vasiliauskas*), or even interpret it on its own, precisely – agreed on its new interpretation applied by state authorities (as in the *Radio France* case). Depending on

[64] ECtHR, *Vasiliauskas v. Lithuania*, paras. 121-146.

[65] *Ibidem*, paras. 170-186.

[66] *See* in particular the dissenting opinion of Judge Ziemele to ECtHR, *Vasiliauskas v. Lithuania*.

the Court's interpretative point of view and the arguments put forward, other elements of a prohibited act might be deemed to be essential. The *Vasiliauskas* case is a very good example, since the dispute between the judges was related to the essence of the crime of genocide and whether an extermination of a political group representing a significant proportion of the Lithuanian nation fell within that essence. On the other hand, bearing in mind the culpability requirement of Article 7, if the judges disagree about the scope of criminalization, it is unreasonable to claim it was foreseeable (whether objectively or subjectively) for an individual.[67] What is significant, however, is that while an unawareness of the unlawfulness of a particular act might exclude a finding of a "guilty mind", an unawareness of the criminality will not do so.[68] The cited case of *Sud Fondi Srl and Others*, where the granted building permission gave the appearance that the applicants' activity was lawful (since the applicable criminal provision was not questioned), shows that the ECtHR is rather of the same view.

3. THE OBJECT AND PURPOSE OF THE ECHR

It is clear from the above that what stands behind the guarantee of *nullum crimen sine lege* is an objectively existing legal basis for conviction making the application of criminal law to a case potentially fall within the established "essence of an offence" possible to anticipate by an individual. Such a construction however fails to prevent the arbitrary use of a criminal sanction, as the concept of the essence of an offence still allows for a not necessarily foreseeable decision. In other words, the foreseeability of criminalization is not fully secured. One should emphasize at this point that the idea of depriving the the *nullum crimen sine lege* principle of its binding force has already been endorsed within international criminal law, especially in the context of transitional justice.[69] This goes hand in hand with a general trend to eradicate impunity in relation to the most serious human right violations. However, within the ECHR system it is manifested mainly by an obligation to criminalize violations of the rights and freedoms protected by the ECHR, or – to put it more precisely – an obligation to provide criminal law protection "by putting in place effective criminal-law provisions to deter the commission of offences […], backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions".[70] In this respect one must be aware that within criminal law there is always a conflict of values.

[67] *See* H. van der Wilt, *Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test*, 84 Nordic Journal of International Law 515 (2015).

[68] Zoll, *supra* note 1, p. 465; Peristeridou, *supra* note 16, pp. 62-63. *But see* Dębski, *supra* note 49, pp. 27-29.

[69] *See* Gallant, *supra* note 2, pp. 38-39.

[70] ECtHR, *Mahmut Kaya v. Turkey* (App. No. 22535/93), 28 March 2000, para. 85. *See also* K. Holy, *Prawo międzynarodowe publiczne wobec amnestii* [Public international law and amnesty], Difin, Warszawa: 2015, pp. 75-77; A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, Oxford University Press, Oxford: 2009, pp. 114-115.

In the law-making process there are, on the one hand, legal assets, the protection of which becomes a justification for the criminalization of a particular behaviour; while on the other hand are the rights of a perpetrator, his or her freedom and autonomy, which are limited by a prohibition under threat of criminal sanction. Conversely, with respect to the application of law, the value at stake is the right to legal certainty and security. For this reason, punishment should not be imposed in the absence of a valid legal basis, even if someone has committed an act of significant social harm. Nowadays however, it is hard to defend this tenet of legalism when the act interferes with basic human rights. One can argue that in the light of principles of equity and social justice, legal security should not be deemed as an absolute.[71] Having this in mind, the conditions underlying the object and purpose of the ECHR give rise to the horizontal weighing of human rights that compete against each other in given circumstances. If the right to foreseeability conflicts with other human rights in the ECHR, what the ECtHR should do is to align the degree of foreseeability with the expected protection of the other right.[72] It is worth recalling in this context that currently one can encounter invocation of the protection of socially valuable legal assets to justify a need to criminalize particular behaviours.[73] This, however, not only means that the legislator cannot prohibit, under threat of criminal penalty, acts that lack any social harmfulness, but also that the legislator is obligated to provide a penalty when necessary to protect socially valuable assets. Accordingly, "criminal norms are not only a barrier to state arbitrariness, but also protect individual autonomy in its positive sense, i.e. they enforce standards of interpersonal activity."[74] Thus foreseeability is interpreted not in the light of the vertical relation between an individual and state authorities, but the horizontal dimension – interpersonal relationships. From this point of view some reasonable expectations of individuals with respect to each other, based on a legal system proper for democratic societies, are in need of protection.

At this point one may wonder whether the ECtHR tries to help State Parties fulfil such a positive obligation. Recourse to the object and purpose of the ECHR (which the ECtHR attempts to ensure every time when settling an issue of respect for human rights) when deciding on a possible violation of Article 7 seems to be useful in this matter. The widely discussed cases of *S.W. v. The United Kingdom* and *Streletz, Kessler and Krenz v. Germany* are worth mentioning in this regard. The acts which the applicants had been convicted of constituted an outstanding example of the so-called crime *mala per se*, where a common sense of justice requires a perpetrator to be punished regardless of the principle of *nullum crimen sine lege* and, in these special cases, regardless of the degree of foreseeability of criminal responsibility.

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[71] M. Pieszczek, *Zasada lex retro non agit w kontekście zbrodni wojennych - rozważania na tle orzeczeń ETPCz w sprawie Kononov v. Łotwa* [The principle of lex retro non agit in the context of war crimes – a few comments on the case of Kononov v Lithuania], 6 Europejski Przegląd Sądowy 14 (2011), p. 14.

[72] Peristeridou, *supra* note 6, p. 99.

[73] Zoll, *supra* note 24, p. 234.

[74] Peristeridou, *supra* note 6, p. 100.

The first case involved a rape conviction with the perpetrator's wife as a victim. The criminality of the rape was not in doubt, but in English common law there was an established so-called "marital immunity", according to which a husband could not be found guilty of raping his wife. Since the penal provision sanctioned "unlawful sexual intercourse", it was argued that sex within marriage was lawful as a rule. Although the recent jurisprudence has begun to provide for exceptions to this immunity, at the time in question it was still recognized. However, the State authorities claimed the immunity was already of doubtful validity, as this was an area where the law had been subject to progressive development and, if need be with help of legal assistance, the applicant could have foreseen that he would be charged.[75] The ECtHR agreed with that reasoning, stating that "the decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife."[76] It noted, furthermore, that

> the essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 […], namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment,

and that

> 'the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilized concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.[77]

One must agree that the idea of the so-called marital immunity, negating the illegality of rape within a marriage, is glaringly inequitable in the era of equality between men and women and the wide protection of freedom of sexual self-determination. Nevertheless, it can be considered as doubtful whether a "perceptible line of case-law development" is a sufficient source of criminal law foreseeability.[78] What is, however, significant is that the conditions of foreseeability and the essence of the offence (rape) were assessed with reference to "the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom", not just to national law of a "lower standard".

In the second case, one should note at the outset that the applicants were high-ranking officials and law-makers in the German Democratic Republic (GDR) structures,

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[75] ECtHR, *S.W. v. the United Kingdom* (App. No. 20166/92), 22 November 1995, paras. 19-27. *See also* ECtHR, *C.R. v. the United Kingdom* (App. No. 20190/92), 22 November 1995. The second case involved conviction for attempted rape.

[76] ECtHR, *S.W. v. the United Kingdom*, para. 43.

[77] *Ibidem*, para. 44.

[78] This decision was also criticized by the English legal doctrine. A. Ashworth, *Principles of Criminal Law*, Oxford University Press, Oxford: 2003, pp. 72-73.

and following the reunification of Germany they were convicted of incitement to murder many young people trying to escape to West Germany in the years 1971-1989. In their applications to the ECtHR they alleged that in giving such orders they had acted in accordance with the legal practise of that time and in the GDR they would never have been prosecuted for their actions. After a thorough analysis of the legal situation, the ECtHR ruled, nevertheless, that there was no violation of Article 7. It pointed out that as being high-ranking officials and, primarily, law-makers the applicants must have known not only the GDR's Constitution and legislation on protection of human lives and its international obligations in this matter, but also have been aware of the criticisms of its border-policing regime.[79] The Court's conclusion was that due to the special status of the right to life in international human rights instruments, including the ECHR, the German courts' strict interpretation of GDR law, detached from the legal practice that had been carried out, was not in violation of the *nullum crimen sine lege* principle. The ECtHR stressed that a legal practice which flagrantly infringes human rights and, above all, the right to life, cannot fall within the protection of Article 7. In other words, such a practice cannot be described as "law" within its meaning. The Court held that: "To reason otherwise would run counter to the object and purpose of that provision, which is to ensure that no one is subjected to arbitrary prosecution, conviction or punishment."[80]

It follows from the above that persons charged with a crime cannot rely on established, foreseeable legal practice of state authorities in order to defend their interests unless such practice respects basic human rights, especially human dignity and freedom and the right to life. One might recall in this context the Radbruch formula of *lex iniusta non est lex*. To plead for the protection of *nullum crimen sine lege* – in cases where the principle interferes with such values – can be recognised as something like an abuse of law. At the same time, inasmuch the ECtHR declares that this would run counter to Article 7, it can also argue that the lack of criminalization – when it is necessary to protect core values in democratic societies – falls within the ban on arbitrariness on the grounds of the ECHR.

Significantly, the condition referred to here as "the object and purpose of the ECHR", aimed at balancing human rights under protection, can also be derived from the requirement of foreseeability. The ECtHR has proclaimed that what is demanded it is not an absolute, but a "reasonable" foreseeability.[81] This "rationalism" obviously leaves a great deal of room for judicial discretion. Moreover, the condition described is connected with the essence of an offence as well. Such a balancing approach might be applied especially when assessing whether a particular act corresponds – in reasonable manner – to the essence of the offence. Taking as an example the *Vasiliauskas* case,

[79] ECtHR, *Streletz, Kessler and Krenz v. Germany* (App. Nos. 34044/96, 35532/97 & 44801/98), Grand Chamber, 22 March 2001, paras. 77-78.

[80] *Ibidem*, paras. 87-88.

[81] *See especially* ECtHR, *The Sunday Times v. the United Kingdom*; also Peristeridou, *supra* note 6, pp. 97-98.

regardless of whether the decision reached by the ECtHR was the right one, expression of some kind of a "social need to punish" is visible in the dissenting opinions. It was claimed that too much attention has been devoted to the protection of an individual's right and too little to a specific collective right to the historical truth and fight against impunity for the most serious human rights violations (a line of reasoning which is a general trend in current international law[82]). Importantly, the ECtHR could have accomplished this in two ways – at the stage of the legal interpretation of genocide (i.e. that the extermination of a political group representing a significant proportion of the Lithuanian population falls within the ambit of genocide); and/or through factual findings (i.e. that the Lithuanian partisans that were to be exterminated constituted a significant part of the nation). As Judge Ziemele stated,

> While maintaining the rule-of-law standard that Article 7 provides, it is particularly important that this Court, at the level of the presentation of facts and the choice of methodology and issues, is guided by these broader principles regarding the right to truth and prohibition of impunity.[83]

At the same time, the case clearly illustrates that the assessment of whether the principle of *nullum crimen sine lege* has been violated is full of subjectivity. Depending on one's personal view of what acts deserved to be punished "the presentation of facts and the choice of methodology and issues" can be different. Hence, the decision on the State Party's compliance with Article 7 does not result from a mere legal syllogism, where the major premise is the proposition of a given law and the minor premise is the proposition of a given set of facts. Both the law and the facts are always matters of interpretation.

The importance of factual findings in this context can be easily seen also in the *Kononov v. Lithuania* case. In its first ruling the ECtHR concluded, in a 4-3 vote, that the applicant could not have foreseen that the killings and the burning of buildings at Mazie Bati village amounted to a war crime under domestic and international law at the time. Since a clear definition of "protected group of non-combatants" was lacking, the victims, due to their engagement in collaboration activity, could not have been deemed as civilians (non-combatants).[84] However, such a conclusion was changed by the Grand Chamber after re-examination of the case. While not referring to the exact status of the victims, the ECtHR ruled, by fourteen votes to three, that their mass execution without a trial was in any case contrary to the laws and customs of war, and consequently fell within the already established ambit of a war crime.[85] It was stressed that

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[82] *See* Y. Naqvi, *The right to the truth in international law: fact or fiction?*, 88 International Review of the Red Cross 245 (2006), pp. 269-272; Holy, *supra* note 70, pp. 85-88.

[83] The dissenting opinion of Judge Ziemele to *Vasiliauskas v Lithuania, supra* note 36, para. 27.

[84] ECtHR, *Kononov v. Latvia* (App. No. 36376/04), 24 July 2008, paras. 125-149.

[85] *See* ECtHR, *Kononov v. Latvia* (Grand Chamber), paras. 125-254. For a summary of the *Kononov* case, *see* Kamiński, *supra* note 13, pp. 38-39; Pieszczek, *supra* note 64, pp. 16-19; Balcerzak, *supra* note 4, pp. 450-452.

> having regard to the flagrantly unlawful nature of the ill-treatment and killing of the nine villagers in the established circumstances of the operation on 27 May 1944 […], even the most cursory reflection by the applicant would have indicated that, at the very least, the impugned acts risked being counter to the laws and customs of war as understood at that time and, notably, risked constituting war crimes for which, as commander, he could be held individually and criminally accountable.[86]

The case shows that, depending on subjective convictions, the same factual and legal bases can lead to opposite conclusions about the observance of Article 7. A parallel problem with the ECtHR's possibility to assess the factual findings on its own took place in the case of *Korbely v. Hungary*. Similarly as in the *Kononov* case, revision of the status of the applicant's victim from non-combatant to combatant led to the conclusion that there had been a violation of Article 7. However, the decision was made by eleven votes to six.[87]

What is important (and was criticized in some dissenting opinions[88]), the ECtHR deemed itself to be in a position to question the interpretation of law and facts made by national courts, and not only in the event that such an interpretation is manifestly arbitrary and undermines the rights and freedoms protected by the ECHR. It is also free to do so when the Convention itself refers to domestic law. Notably, in relation to Article 7 that would be the rule. It was explained that the ECtHR must be able to verify both the interpretation of the national and international law made by the domestic courts and their legal characterization of the factual description of the events. Otherwise Article 7 would be rendered devoid of purpose.[89]

CONCLUSIONS

In characterising the principle of *nullum crimen sine lege* in the ECHR system it should be noted at the outset that the requirement of the statutory definitiveness of an offence is rather a declaration. The same is true with respect to the prohibition of a broad interpretation and analogy. From the point of view of individuals it must be stressed that on the basis of a legal provision they only get an outline of punishable acts, which is further developed in both the case-law and the legal doctrine. However, a decision that is not in line with the current interpretation can still be approved as the right one. This would be especially true if the negation of the criminalization would violate basic human rights. As a consequence, it is "more safe" for an individual to be

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[86] ECtHR, *Kononov v. Latvia* (Grand Chamber), para. 238.

[87] ECtHR, *Korbely v. Hungary* (App. No. 9174/02), Grand Chamber, 19 September 2008. *See also* Kamiński, *supra* note 13, pp. 39-40; Balcerzak, *supra* note 4, pp. 447-448.

[88] *See* the joint dissenting opinion of Judges Lorenzena, Tulkensa, Zagrebelsky, Fury-Sandström and Popovicia to ECtHR, *Korbely v. Hungary.*

[89] ECtHR, *Kononov v. Latvia*, paras. 108-111. *See also* Z. M. Nedjati, *Human Rights under the European Convention*, North-Holland Publishing Company, Amsterdam: 1978, p. 133.

aware of the scope of unlawfulness rather than rely on the criminal legislation. In other words, it is not the criminal provision itself that demarcates the actual scope of criminalization, but the court is allowed to take into account established case-law and legal doctrine and, in addition, to construct the "essence" of a particular offence on its own so as to make it suitable to contemporary conditions. For this reason it is "safer" not to pay too much attention to criminal legislation – the boundaries of freedom it ought to provide are not decisive in legal practise. However, considering the requirement of the proportionality of criminal law, what should be decisive in this matter is a "pressing social need" for criminalization. Furthermore, assuming that the above-mentioned rule, according to which acts prohibited under threat of criminal penalties can only be acts contrary to the legal order, is an absolute principle in democratic societies, such a "pressing social need" for criminalization must refer to acts (or omissions) that have already been declared unlawful. One may claim, therefore, that an individual must keep up with the established legal order. However, it is not just legal norms, but also social ones that determine unlawfulness. For this reason individuals seem to be left with a "social sense of unlawfulness" that is applicable in modern democratic societies. One can recall in this regard the English principle of "skating on thin-ice", according to which individuals who are not sure whether their behaviour will or will not be labelled as criminal, but get involved in it anyhow and risk being prosecuted, cannot escape liability by pointing out the vagueness of the law.[90]

If one understands the guarantee of "foreseeable" criminalization as something that should work in every case, i.e. that is "guaranteed", this is not what the ECHR system ensures. At the same time, the concept of "unlawfulness" also fails to provide an individual with criminal law certainty, since in a particular situation it may not be certain whether a criminal punishment will or will not be imposed – this depends on the "pressing social need" for criminalization, which is a rather subjective matter. However, by preventing people from any and every potentially punishable unlawful behaviour, the reinforcement of personal security might be achieved. This seems to go hand in hand with what was posited at the beginning, that Article 7 is just one element of human rights protection. It cannot undermine other values enshrined in the ECHR, at least not when it is not justifiable. From this perspective, the flexibility of the *nullum crimen sine lege* principle within the ECHR system is aimed at ensuring that the fundamental social values, especially fundamental human rights, will not lack criminal law protection in the name of subjectively "foreseeable" criminalization. Consequently, the ECtHR promotes a balancing approach to human rights, which in the context of criminal law comes down to weighing the interests of both the accused and the "victim" and decide – taking into account the fundamental objectives of the ECHR by means of the "reasonable" foreseeability and the concept of the "essence of an offence" – which one prevails in a particular case.

[90] Ashworth, *supra* note 78, pp. 70-75.