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

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1. Executive summary

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

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

After the war, the principle of legality experienced a shift towards the doctrine of strict legality. States started to ratify a number of important human rights treaties, which laid down this principle, establishing a legal standard for national courts ([2]). In particular, the principle of legality is set forth explicitly in Article 7 of the European Convention on Human Rights (ECHR), providing that 'no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed'. This provision is an absolute and non-derogable right. In that context, Article 7 paragraph 2 of the ECHR was adopted with the intention to ensure the legitimacy of war crimes trials led against members of the Nazi regime after the Second World War. Its purpose is to ensure that atrocious acts, which were not fully criminalised by either treaty or customary law, may still be held criminal and thus punishable by the virtue of 'general principle of law recognized by civilised nations' ([3]).

As international criminal law has been steadily developing, many European countries have also been doing their part to successfully investigate and prosecute core international crimes by integrating international obligations into their national legislation, in particular by implementing crimes

(1) Trial of the major war criminals before the international military tribunal (Secretariat of the International Military Tribunal ed., 1947), paragraph 218.
(2) Cassese, A. and Gaeta, P., *Cassese's International Criminal Law,* 3rd edn, Oxford University Press, 2013, p. 26.
(3) Cassese, A., 'Balancing the prosecution of crimes against humanity and non-retroactivity of criminal law: The *Kolk and Kislyiy* v *Estonia* case before the ECHR', *Journal of International Criminal Justice,* Vol. 4, No 2, 2006, p. 410–418.

contained in the Rome Statute of the International Criminal Court. As a result, the situation has arisen where these countries are confronted with the principle of non-retroactivity of criminal law when prosecuting individuals for core international crimes, as the acts in question may have been perpetrated prior to the implementation of these crimes in their domestic legislation.

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

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

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

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