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The Awkward Encounter of Criminal Law and International Criminal Law in Article 7 of the European Convention on Human Rights▪▪

Criminal law and international criminal law encountered each other in the realm of the principle of legality in Article 7 of the European Convention on Human Rights in 1950. International circumstances, which existed after the Second World War and, notably, the Nuremberg Trials, i. e., the then-development of international criminal law, significantly influenced this encounter through the textual formulation of Article 7 of the European Convention on Human Rights. The choice of terms in that article, together with other factors, caused the creation of a certain terminological confusion regarding the principle of legality in the practice of the European Court of Human Rights. The international legal development that occurred in connection with this encounter influenced the determination of general principles of law by the United Nations Commission on International Law in 2022. Due to particular historical circumstances, the Nuremberg principles have been recognized as general principles of law, but this text will argue that they are rather principles of international criminal law.

Key words: principle of legality, general principles of law, principles of international criminal law

Introduction

The encounter occurred in circumstances that arose from the horrors of the Second World War and manifested in the field of international criminal law during the Nuremberg Trials in 1946. The Nuremberg Trials were a significant phase in the development of international criminal law.[1] In such circumstances, however, the encounter significantly contributed to a certain terminological

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[1] S. Avramov, M. Kreća, Međunarodno javno pravo, Naučna knjiga, Beograd, 1988., 264., M. Škulić, V. Bajović, Istorija međunarodnog krivičnog pravosuđa i osnovne odlike postupka pred stalnim Međunarodnim krivičnim sudom, Dosije, Beograd, 30, R. Etinski, S. Đajić, B. Tubić, Međunarodno javno pravo, Pravni fakultet u Novom Sadu, Novi Sad, 2021, 397., Q. Wright, "The Law of the Nuremberg Trial." American Journal of International Law, 1/1947, 71.

confusion regarding the principle of legality in the Convention for the Protection of Fundamental Rights and Freedoms, adopted in Rome on November 4, 1950 (referred to in this text as the European Convention on Human Rights or the Convention). Additionally, it influenced the work of the United Nations Commission on International Law on the concept of general principles of law in 2022. The encounter took place in the field of a crucial principle of criminal law, the principle of legality, known by the formulation "*nullum crimen, nulla poena sine lege*," proclaimed in Article 7 of the European Convention on Human Rights.[2] It crucially influenced the textual formulation of that article, namely the unexpected and surprising choice of terms in its text.[3] Behind the unusual and surprising choice of terms are specific historical circumstances in the second half of the 1940s. After discussing the unexpected textual formulation of Article 7 of the Convention, I will delve into the history of the emergence of that article, as well as its legal life, including the evolution and application of the principle of legality in the practice of the European Court of Human Rights. Special attention will be given to the general principles of law from paragraph 2 of Article 7 of the Convention.

1. Unexpected textual formulation of Article 7

The text of Article 7 of the European Convention on Human Rights reads:

"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.

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[2] For general information on the principle of legality in criminal law, see: Z. Stojanović, *Komentar Krivičnog zakonika*, Misija OSCE u Crnoj Gori, Podgorica, 2010, 28–31. R. Velarde, A. Jaime, "Principle of Legality in Criminal Law", *LEX — Journal of the Faculty of Law and Political Science / Revista de la Facultad de Derecho y Ciencia Politica*, 13/2014, 225–242; G. M. Flick, "The Principle of Legality", *New Journal of European Criminal Law*, 4/2015, 553–557. C. Sima, "*Principle of Legality*", Revista Pro Lege, 1/2016, 13–24. For general information on the principle of legality, see: D. M. Mitrović, „Načelo zakonitosti", *Anali Pravnog fakulteta u Beogradu*, 1/2004, 55–78.

[3] For general information on the Article 7 of the European Convention on Human Rights see: Z. Stojanović, „Garantivna funkcija krivičnog prava", *Kaznena reakcija u Srbiji*, (ur. Đ. Ignjatović), VI deo, Pravni fakultet Univerziteta u Beogradu, 2016, 5–8; S. Carić, „Načelo zakonitosti u praksi Evropskog suda za ljudska prava", text was published on 6. 9. 2019, https://www.paragraf.rs/100pitanja/strazbur/nacelo-zakonitosti-u-praksi-evropskog-suda-za-ljudska-prava.html, 4. 3. 2023.; A. Krstulović Dragičevi, „Načelo zakonitosti u praksi Evropskog suda za ljudska prava", *Hrvatski ljetopis za kaznene znanosti i praksu*, 2/2016, 403–433; I. Tomić, „Tumačenje, pravne praznine i načelo zakonitosti", *Zbornik radova Pravnog fakulteta Sveučilišta u Mostaru*, 2020., 125–127.

2. This Article 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 recognised by civilised nations."[4]

Using the term "internal or international law" in defining the principle of legality in criminal law is unexpected. This is particularly surprising considering that in other articles of the European Convention on Human Rights and in the protocols appended to the Convention, the term "law" is employed. The term "law" is used in Article 2 of the Convention, Article 1 of Protocol No. 1, Article 2 of Protocol No. 6, Article 2 of Protocol No. 7, and Article 1 of Protocol No. 12. The phrase "in accordance with the law" is used in Articles 5, 8, and 12 of the Convention, Article 2 of Protocol No. 4, and Articles 1, 3, and 4 of Protocol No. 7. The term "prescribed by law" is used in Articles 9, 10, and 11. The word "lawful" is employed in Article 5 of the Convention, and the expression "in accordance with the law" in Article 6. The use of the term "general principles of law" in the context of the principle of legality is surprising. The idea that general principles of law define criminal offences is indeed astonishing.

It should be noted that there is a certain linguistic inconsistency in the two authentic language versions of the Convention regarding the term "law." In the French original version, the term "loi," meaning "law," is used. However, in the English authentic version, the term "law," which has a broader meaning than the term "loi" and means "statutory law," and law in general, is used. In most national translations of the Convention text, the terms "law" and "loi" are translated into national expressions meaning "statutory law." Thus, in Spanish translation, the term "ley" is used; in German, it is "Gesetz," in Italian, it is "legge," and so on. The terms "national or international law," i. e., "le droit national ou international" from Article 7, are translated everywhere as "national or international law." Therefore, the English term "law" is translated as "statutory law" in all articles of the Convention and protocols, except in Article 7, where it is translated as "law in general." For the sake of completeness of this terminological review in different language versions, it should be added that in Article 1 of Protocol No. 1, alongside the term "law," the expression "general principles of international law" (French "principes généraux du droit international") is used.

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[4] French version reads: "1 Nul ne peut être condamné pour une action ou une omission qui, au moment oú elle a été commise, ne constituait pas une infraction d'après le droit national ou international. De même il n'est infligé aucune peine plus forte que celle qui était applicable au moment où l'infraction a été commise.

2 Le présent article ne portera pas atteinte au jugement et à la punition d'une personne coupable d'une action ou d'une omission qui, au moment où elle a été commise, était criminelle d'après les principes généraux de droit reconnus par les nations civilisées."

Today, it may seem strange that terms such as "internal or international law" and "general principles of law" were used in connection with the principle of *nullum crimen, nulla poena sine lege*, rather than the term "statutory law." The explanation for this unexpected choice of terms in Article 7 lies in the historical context of adopting the Convention. The Second World War and the Nuremberg Trials, which emerged from the war, and national trials related to the war, decisively influenced the selection of such terminology.[5]

2. History of Article 7 of the European Convention on Human Rights

2.1. Drafting of Article 7 of the Convention

It is known that the legal foundation of the European Convention on Human Rights lies in the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on December 10, 1948. A significant portion of the relevant terminology was transplanted from the Universal Declaration to the Convention. Article 11, paragraph 2 of the Universal Declaration, proclaiming the principle of legality in criminal law, served as the starting point for drafting the text of Article 7 of the European Convention on Human Rights. The term "national or international law" used in the text of Article 11, paragraph 2, was derived from the wording of paragraph 2, Article 11. In other articles of the Declaration, the term "law" is used. Although there are records of the sessions of the Human Rights Commission and its Drafting Committee regarding the preparation of the text of the Universal Declaration of Human Rights in digital form, and even though they are accessible online, determining the genesis of the text of paragraph 2, Article 11 of the Declaration is not easily ascertainable. In three drafts of the declaration prepared by the UN Secretariat, the United States, and the United Kingdom during 1947, the terms "national or international law" were not used in the relevant articles implementing the principle of legality in criminal law.[6]

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[5] It is interesting and unexpected that the Federal Republic of Germany, through the ratification act of the European Convention on Human Rights on December 5, 1952, placed a reservation on Article 7, paragraph 2 of the Convention. This was done because this provision was not in line with Article 2, Section 103 of the Basic Law of the Federal Republic of Germany, which stipulates that an act is punishable only if it was defined as a criminal offense by law before the act was committed. This reservation was withdrawn on October 1, 2001. Portugal also restricted the application of Article 7 of the Convention. Council of Europe, Treaty Office, Full List, https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=005&codeNature=0, accessed on April 24, 2023.

[6] UN, Economic and Social Council, Commission on Human Rights, Drafting Committee, International Bill on Human Rights, E/CN. 4/AC. 1/11, 12 June 1947, 30.

In the drafts prepared by the UN Secretariat and the United States, the term "offence" was linked to "law." In the draft prepared by the Drafting Committee of the Human Rights Commission in 1947, the discussion revolved around "law," not national or international law.[7] At the same time as the preparation of the Declaration, the Human Rights Commission was working on drafting the Covenant on Human Rights. The representative of the USSR proposed that the text of the relevant article of the Covenant read:

"1. No one shall be held guilty of any offence on account of any act or omission which did not constitute such an offence at the time when it was committed, nor shall he be liable to any greater punishment than that prescribed for such offence by the law in force at the time when the offence was committed.

2. Nothing in this Article shall prejudice the trial and punishment of any person for the commission of any act which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations."[8]

This text appeared in Article 8 of the Draft Declaration, prepared by the Drafting Committee in May 1948,[9] so it can be assumed that the representative of the USSR proposed it. However, in the final text of the Declaration, this passage disappeared. Therefore, paragraph 2 of Article 11 of the Universal Declaration of Human Rights reads:

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 penal offence was committed."

As known, international law encompasses general principles of law. Thus, with the text of paragraph 2, Article 11 of the Declaration, general principles of law are also covered. It is possible that the text of paragraph 2, Article 11, was a compromise reached among the members of the Drafting Committee, agreeing on a broader term than "law" but still excluding explicit mention of general principles of law.

As mentioned earlier, paragraph 2, Article 11 of the Universal Declaration of Human Rights appeared as a proposal for the corresponding provision in the European Convention on Human Rights. At a meeting of the Committee of Experts to prepare the draft of the Convention in February 1950, while discussing the proposed text, the representative of Great Britain expressed concerns that the suggested text might be interpreted as an attack on the validity of

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7 Draft Outline of International Bill of Rights, UN, Economic and Social Council, Commission on Human Rights, Drafting Committee, International Bill on Human Rights, E/CN. 4/AC. 1/3, 4 June 1947, 10.

8 UN, Economic and Social Council, Commission on Human Rights, Report of the Drafting Committee to the Commission on Human Rights, E/CN. 4/95, 21 May 1947, 29.

9 *Ibid.,* 6.

the Nuremberg judgment. Consequently, he proposed adding a second paragraph:

"Nothing in this article shall prejudice the trial and punishment of any person for the commission of any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations."[10]

Evidently, this British proposal closely resembled the Soviet proposal from 1948. The representative of Luxembourg criticised paragraph 2 of Article 11 of the Universal Declaration, considering recent State practices. He noted that after World War II, many texts of international and national law had not only abandoned the principle of *nulla poena sine lege* but also *nullum crimen sine lege*. He added that some European States made exceptions to the prohibition of retroactive application of criminal law during and after the war. Some might think, he said, that incorporating the formulation from paragraph 2 of Article 11 of the Universal Declaration might constitute a moral condemnation of such practices. With this in mind, he also advocated including general principles of law recognised by civilised nations in the text of the European Convention besides national and international law.[11] Luxembourg supported the British proposal and became paragraph 2 of Article 7 of the European Convention on Human Rights. The text from Article 7 of the European Convention on Human Rights, in almost identical form, was transplanted into Article 15 of the International Covenant on Civil and Political Rights of 1966.

Formulations stating that no one can be considered guilty of a criminal act committed by an act that, at the time of its commission, was not a criminal offence under domestic or international law and that this does not affect the trial and punishment of a person for an act that was considered a criminal offence at the time of its commission according to the general principles of law recognised by civilised nations, may sound inappropriate to the subject and purpose of Article 7, appearing legally cumbersome and illogical. Domestic law encompasses various legal sources, including the constitution, laws, and legislation of lesser rank. Do the terms "domestic law" mean that a legal act below statutory law can prescribe a criminal offence? International law includes international treaties, customary international law, as well as general principles of law. Although covered by the term international law, they are specifically singled out in paragraph 2 of Article 7. Sometimes, historical circumstances override legal logic and the economy of legal regulation. The victorious powers, notably the USSR and Great Britain, wanted to protect the Nuremberg Trials and similar trials after World War II from later

[10] Council of Europe, Commission on Human Rights, Preparatory Work on Article 7 of the European Convention on Human Rights, Strasbourg, 21 May 1950, DH (57)6, 4.

[11] *Ibid.,* 5 i 6.

legal reexamination and criticism. Therefore, they sought to prevent this through the formulations in paragraph 2 of Article 11 of the Universal Declaration of Human Rights, Article 7 of the European Convention on Human Rights, and Article 15 of the International Covenant on Civil and Political Rights. That was the reason for entering Nuremberg principles in human rights documents as general principles of law.

2.2. Nuremberg Principles

The concept of general principles of law introduced in paragraph 2 of Article 7 of the European Convention on Human Rights originates thus from the Charter of the Nuremberg Tribunal and the judgment of that Tribunal. As known, the major victorious powers in World War II—France, Great Britain, the United States, and the USSR—signed the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis on August 8, 1945, which was supplemented by the Charter of the International Military Tribunal. The International Military Tribunal was competent for crimes against peace, war crimes, and crimes against humanity. Article 6 of the Charter defined these crimes. The International Military Tribunal in Nuremberg rendered its judgment on October 1, 1946.

Forty days after the Nuremberg judgment, the United Nations General Assembly, through Resolution 95 (I) adopted at its first session on December 11, 1946, affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of that Tribunal. Interestingly, the General Assembly affirmed "principles of international law," not general principles of law. In the Charter of the Nuremberg Tribunal, the principles are mentioned only in the title of the second part of the Charter, which reads: "Jurisdiction and General Principles."[12] In the judgment, reference is made to "fundamental principles of every law — international and domestic," "the general principles of justice," "general principles of

[12] This section covers Articles 6 to 13 of the Nuremberg Charter. Article 6 defines the crimes for which the Military Tribunal had jurisdiction. Article 7 provides that official position of the accused, including the position of the head of state or responsible officials in the government, shall not relieve them of responsibility. Article 8 states that acting under the orders of the government or a superior can be considered as a mitigating circumstance when the Military Tribunal deems that justice requires it. Article 9 relates to the declaration of a group or organization as a criminal organization. According to Article 10, the declaration of a group or organization as criminal will be valid for national courts and other military and occupation courts. In accordance with Article 11, individuals convicted before this Military Tribunal can be charged with other criminal acts before other courts. Article 12 regulates the issue of trial in absentia. Article 13 empowers the Military Tribunal to adopt rules of procedure.

law," and "principles of general international law." The Nuremberg Tribunal dealt with principles of various kinds.[13]

Since these principles were confirmed by Resolution 95 (I) in 1946, by Resolution 177 (II) on November 21, 1947, the United Nations General Assembly entrusted the International Law Commission with formulating the principles of international law recognised by the Charter of the Nuremberg Tribunal and its judgment. The General Assembly also tasked the Commission with preparing a draft code of crimes against peace and security, making it clear that the principles should be implemented in the draft. Immediately after its establishment, in its first session in 1949, the International Law Commission took on this assigned task and adopted the text titled "Principles of International Law Recognized by the Charter of the Nuremberg Tribunal and its Judgment" in 1950.[14] On May 9, 1949, the Commission established a working group consisting of P. A. François, A. E. F. Sandström, and J. Spiropoulos, which submitted the first draft of the principles. The first principle in the draft reads: "A violation of international law may constitute an international crime even if no legal instrument characterises it as such."[15] This could indeed be a formulation of the first Nuremberg principle. However, the Commission softened the blunt openness of this formulation and reformulated the proposed first principle into the following two principles. The first principle in the text adopted in 1950 reads: "Any person who commits an act which constitutes a crime under international

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[13] The Criminal Military Tribunal states that the defense of the accused emphasized the fundamental principle of every law — international and domestic — the principle of "*Nullum crimen sine lege, nulla poena sine lege*". In connection with this, the Military Tribunal noted that this maxim, as the Tribunal called it, does not constitute a limitation on sovereignty but is a general principle of justice. The Nuremberg Tribunal explained that international treaties, such as the Pact of Renunciation of War, are not products of international legislation but deal with general principles of law. It adds that the law of war is not only found in treaties but also in customs and practices of states that gradually gain universal recognition, deriving from general principles of justice as applied by legal experts and military courts. The tribunal refers to well-established principles, among which the most important is individual criminal responsibility. It states that equal treatment of the accused should be a fundamental principle. The military tribunal refers to the principle of international law that protects representatives of states, stating that it does not apply to acts declared criminal by international law. It also discusses principles of general international law regarding the treatment of war prisoners.

[14] Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth session, Supplement No. 12 (A/1316), A/CN. 4/34, *Yearbook of the International Law Commission*, 1950., vol. II, 374.

[15] Formulation of the principles recognized in the Nürnberg Tribunal and in the Judgment of the Tribunal — Draft proposed by the Sub-Committee on the formulation of the Nürnberg principles incorporated in document A/CN. 4/SR. 25, A/CN. 4/W. 6, *Yearbook of International Law Commission,* 1949, vol. I, 183.

law is responsible and liable to punishment."[16] The second principle from that text states: "The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed such an act from responsibility under international law."[17] By Resolution 488(V) of December 12, 1950, the United Nations General Assembly called on the governments of Member States to provide their observations on the formulations of the Nuremberg Principles prepared by the International Law Commission. The General Assembly now refers to these principles as the "Nuremberg Principles." In the meantime, they were inserted in Article 7 of the European Convention on Human Rights as general principles of law. As a result, it might have been inconvenient to qualify them as principles of international law. Only a small number of states responded.[18] Of the founding members of the Nuremberg Tribunal, only France and the United States replied. Only Lebanon commented on the principle of *nullum crimen, nulla poena sine lege*, by reiterating the key position of the Nuremberg Tribunal regarding that principle.

2.3. Principle of Legality in the Nuremberg Edition

Aggressive war was not explicitly defined as a criminal act when it occurred, and no punishment was prescribed for its commission. Additionally, no court was established to prosecute the perpetrators. It was a major objection of defence at the Nuremberg Trials. However, the International Military Tribunal took the position that by 1939, aggressive war was implicitly defined as a criminal act under international law. The Nuremberg Tribunal referred to Article 1 of the General Pact for the Renunciation of War, concluded in Paris on August 27, 1928 (known as the Briand-Kellogg Pact or the Pact of Paris). Responding to the defence's objection to the legality of the trial for aggressive war, the International Military Tribunal stated:

"But it is argued that the Pact does not expressly enact that such wars are crimes or set up courts to try those who make such wars. To that extent, the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truth, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention, but since 1907, they have certainly been crimes, punishable as offences against the law of war. Yet, the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor

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[16] Report of the International Law Commission on its Second Session, *op. cit.*

[17] *Ibid*.

[18] Observations of Governments of Member States relating to the formulation of the Nürnberg principles prepared by the International Law Commission, *Yearbook of the International Law Commission*, 1951, vol. II, 104–109.

any mention made of a court to try and punish offenders. For many years in the past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature and that such international agreements as the Pact of Paris have to deal with general principles of law and not administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."[19]

Supporting this stance, the International Military Tribunal refers to international legal developments during the League of Nations era. It points out that during the League of Nations Assembly meeting held on September 24, 1927, all delegations present at the time (including German, Italian, and Japanese) unanimously accepted the Declaration on Aggressive War, declaring aggressive war an international crime. The Nuremberg Tribunal also mentions the Resolution of February 18, 1928, adopted at the Sixth Pan-American Conference by 21 American republics, stating that "aggressive war constitutes an international crime against humanity." It then refers to Article 227 of the Treaty of Versailles from 1919, which envisaged the establishment of an international court to try the German Emperor "for a supreme offense against international morality and the sanctity of treaties."[20]

Here, it is essential to distinguish between two things: war crimes and crimes against humanity on the one hand and the crime of aggressive war on the other. The Nuremberg Trials were not the first international trials for war crimes and crimes against humanity, but they were the first trials for the crime of aggressive war. It could be argued that during World War II, there were international rules regarding war crimes and crimes against humanity that were applied before the war. However, aggressive war was not explicitly defined, at least not as an international criminal offence. The Briand-Kellogg Pact of 1928 was a revolutionary turning point in international law. States renounced war as an instrument of foreign policy, previously considered the highest expression of state sovereignty. Most of the international community, including Germany, quickly accepted the

[19] International Military Tribunal, Judgment, 1 October 1946, *American Journal of International Law*, 1947/1, 218.

[20] *Ibid.,* 220.

Pact. Aggressive war was declared a crime by a Declaration of the League of Nations Assembly, but the Declaration did not have a binding force. In the preamble of the League of Nations Assembly Declaration of 1927, preceding the Briand-Kellogg Pact and referred to by the Nuremberg Tribunal, it states: "The Assembly ... convinced that aggressive war can never serve as a means of settling international disputes and, therefore, it is an international crime."[21] In addition, the Nuremberg Tribunal created a particular legal construct regarding the principle of *nullum crimen sine lege, nulla poena sine lege*. Responding to the defense's argument that this is a fundamental principle of all law, international and domestic, and that punishment *ex post facto* is considered abhorrent by all civilized nations, the International Military Tribunal stated that the *maxim nullum crimen sine lege* is not a restriction of sovereignty but rather a general principle of justice. By violating treaties, this Military Tribunal observed, the aggressor must have known that they were committing an offense, and far from being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.[22]

Understanding how general principles of law defined aggressive war as an international criminal act is not straightforward. The approach of the International Military Tribunal resembles a natural law approach: military tribunals apply law developed by jurists from general principles of justice. According to this approach, international treaties merely express and define legal principles. Judges uncover legal principles and derive necessary legal rules from them by analysing international treaties and the development of international law in a certain period. The International Military Tribunal referred to the Briand-Kellogg Pact, in which States renounced war as an instrument of foreign policy. It then relied on the international legal development related to the criminalisation of violations of customary

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[21] 1927 Declaration Concerning Wars of Aggression, Published online by Cambridge University Press: 05 June 2014, https://www.cambridge.org/core/books/abs/travaux-preparatoires-of-the-crime-of-aggression/1927-declaration-concerning-wars-of-aggression/1625748877E59D76DF7C562AF64E9C951. 04. 2023.

[22] The judgment reads: "In the first place, it is to be observed that the *maxim nullum crimen sine lege* is not a limitation of sovereignty but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out the designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts." Judgment of the International Military Tribunal, (Nuremberg), 1 October 1946, *op. cit.*, 217.

laws of war and the rules of the Hague Convention of 1907. It also invoked Article 227 of the Treaty of Versailles from 1919, which provided for the trial of the German Kaiser. Although the Kaiser was not tried, it should be noted that he spent the rest of his life in internment in a Dutch castle. Such developments in international law hinted that a serious breach of the Briand-Kellogg Pact could result in individual criminal responsibility. However, from the perspective of criminal law, this method of identifying the existence of the crime of aggressive war was close to judicial legislation. It was an atypical approach to general principles of law from Article 38 (1, c) of the Statute of the International Court of Justice. We will see later in this text that the UN International Law Commission has accepted such an approach to general principles of law.

The probable discomfort of some actors regarding the principle of legality in the Nuremberg trials manifested itself in two directions: protecting the trials from later legal criticisms and transforming Nuremberg law into general law. The first direction is evident in Article 11, paragraph 2, of the Universal Declaration of Human Rights, Article 7 of the European Convention on Human Rights, and Article 15 of the International Covenant on Civil and Political Rights. The second direction is visible in the efforts of States to transform Nuremberg law into general international criminal law through the United Nations. First, the International Law Commission codified the Nuremberg Principles in 1950, and then in 1954, it adopted a draft Code of Crimes against Peace and Security of Mankind. The Statute of the International Criminal Court was adopted in Rome in 1998, and in Kampala in 2010, a criminal law definition of aggression was adopted, which was incorporated into Article 8 bis of the Statute. The Statute of the International Criminal Court refers to general principles of law, but they do not have the role they had in Nuremberg; they constitute a legal instrument without which no court, including the International Criminal Court, can function. General principles of law from Article 7, paragraph 2, of the European Convention on Human Rights have gone into hibernation, from which the European Court may awaken them in exceptional situations.

3. Legal Life of Article 7 of the European Convention on Human Rights

3.1. Establishing the Foundations of the Principle of Legality in the Case of Sunday Times

The European Court established general standards of legality in the *Sunday Times* case in 1979.[23] The specific circumstances of the

[23] *Sunday Times v. The United Kingdom* (pred. br. 6538/74), Judgment of 26 April 1979.

case and the manner in which the parties and the European Court conducted the case significantly influenced the shaping of these general standards. The case arose from a disputed application of the common law on contempt of court. Contempt of court is a criminal offence in English law that protects the court from interference in the undisturbed exercise of its judicial function, safeguarding it from the influence of the public and protecting alternative dispute resolution mechanisms such as negotiations between offenders and the aggrieved parties.

At that time, this criminal offence was defined in common law, and later, legislation was enacted to address this offence. The Sunday Times wrote about negotiations between pharmaceutical companies and parents whose newborns were severely damaged by the drug thalidomide, which pregnant women had taken. After announcing in an article dated September 24, 1972, that it would publish a new article informing the public of all the pharmaceutical company's shortcomings in relation to the testing of thalidomide effects, citing contempt of court, the competent English court prohibited the publication of that article. Since the higher court affirmed the lower court's decision, Sunday Times appealed to the then European Commission for Human Rights, and the Commission brought the matter before the European Court of Human Rights.

Sunday Times argued that that prohibition violated his freedom of expression because the ban on publishing the article was unlawful. According to the opinion of the Sunday Times, it was illegal because, in his view, common law regarding contempt of court was unclear and uncertain. Additionally, the principle applied in that case was so novel that it could not be considered prescribed by law.[24] Considering the applicant's claim, the European Court examined the legality of the publication ban in the context of Article 10, paragraph 2 of the Convention. This involves the conditions under which authorities are allowed to intervene in freedom of expression rather than in the context of Article 7 of the Convention. Both options were available to the applicant to rely on Article 7 or Article 10-but as a major media house, Sunday Times chose to focus solely on Article 10. The European Court, in its judgment, did not address Article 7, which was mentioned only by Judge Zekia in a separate opinion. The European Court faced several challenges in this case. Contempt of court in English law was provided for in common law, i. e., unwritten law. As the matter reached the House of Lords, then the Supreme Court of the United Kingdom, one of the judges remarked that the House of Lords should attempt to eliminate uncertainty, the main objection to the existing law.[25] Despite that, the judges of the House of Lords could not agree on the interpretation of that provision of common

[24] *Ibid.,* para. 46.
[25] *Ibid.,* para. 29.

law.[26] These were the circumstances of the case that influenced the formulation of general standards of legality.

The European Court found, firstly, that even unwritten law, common law, constitutes law within the meaning of the Convention.[27] A different finding was not possible, as it would exclude the United Kingdom from the Convention, which would be meaningless.[28] Then, the European Court formulates the qualities a legal provision should possess, whether written or unwritten. Firstly, says the European Court, the law should be accessible in an appropriate manner. In other words, citizens should be provided with information in an adequate manner, given the circumstances. The term "indication" was used in the judgment regarding the legal rules applied in a given case, probably due to the specificity of common law as customary law derived from judicial practice. Secondly, according to the stance formulated by the European Court here, a rule cannot be considered "law" if it is not formulated with sufficient precision to enable a citizen to regulate their behaviour.[29] This means that citizens must be allowed, if necessary, with appropriate professional advice, to foresee, to a degree that is reasonable in the given circumstances, the consequences they can expect in terms of certain activities.[30] According to the European Court, the consequences do not have to be foreseeable with absolute certainty, as it is unattainable. Security is highly desirable, notes the European Court. Still, it warns that it can lead to excessive rigidity, and the law should allow for evolution or, as the European Court says, "keep pace" with changing circumstances.[31] This Court has observed that many laws are inevitably formulated in more or less unclear terms, and their interpretation and application are matters of practice. The formulation of the second condition — sufficient precision that allows predictability — and the elaboration of this condition — the ambiguity of terms used in laws and the significance of practice in their clarification — are not entirely consistent and likely inspired by what the European Court had before it in this case.

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[26] *Ibid.,* para. 50.

[27] *Ibid.,* para. 47.

[28] B. Lim, "The Normativity of the Principle of Legality", *Melbourne University Law Review*, 2/2013, 372–414.; D. Meagher, "The Common Law Principle of Legality", *Alternative Law Journal*, 4/2013, 209–213; B. Chen, "The French Court and the Principle of Legality", *University of New South Wales Law Journal*, 2/2018, 401–448; Ph. Sales, "Legislative Intention, Interpretation, and the Principle of Legality", *Statute Law Review*, 1/2019, 53–63; R. French, "The Principle of Legality and Legislative Intention", *Statute Law Review,* 1/2019, 40–52; J. N. E. Varuhas, "The Principle of Legality", *Cambridge Law Journal*, 3/2020, 578–614; L. Burton Crawford, "An Institutional Justification for the Principle of Legality", *Melbourne University Law Review*, 2/2022, 511–548.

[29] *Ibid*.

[30] *Ibid*.

[31] *Ibid*.

Despite a certain inconsistency in English judicial practice regarding the criminal offense of contempt of court, as it was then established in common law, the European Court found that in English law, as derived from the judicial practice of English courts, there was sufficient indication of what constituted prohibited behaviour. Therefore, it found that the prohibition on publishing the article was in accordance with the law. The European Court found that there were enough indications in common law based on which the Sunday Times could have known that by publishing the article, it was violating a criminal prohibition, ensuring respect for the court. Weighing the two conflicting public interests — the interest in informing the public about a matter of great public importance and the interest in the undisturbed conduct of dispute resolution processes — the European Court found that the first interest predominated. Therefore, prohibition, although lawful, was not inevitable in a democratic society, and as such, it constituted a violation of the freedom of expression guaranteed by Article 10 of the Convention.

There is the impression that the European Court has laid the foundations for interpreting the term "law" under the influence of common law and the specific circumstances of the case. The concept of legality, as established in this case, involves two fundamental questions — what is considered law and what qualities an act claiming to be law must possess to be law genuinely. Additionally, it includes pointing out the tension inherent in the law, which is the conflict between precision and predictability as a condition of legal certainty on the one hand, and generality, which is inevitable for the application of the law to an unlimited number of variable situations, on the other hand. The Court seeks the resolution of this tension in the practice of law application. The basic elements of the general concept of legality, as set out in the *Sunday Times* case in 1979, remain relevant today and appear in judgments from 2023.[32] Over time, however, they have been supplemented with new content.

3.2. Evolution and Branching of the Principle of Legality in the Practice of the European Court of Human Rights

One evolutionary branch of the practice of the European Court focused on Articles 8–11 of the Convention. These articles guarantee the right to respect for private and family life; freedom of thought, conscience, and religion, freedom of expression; and freedom of assembly and association. These rights are not absolute, and the second paragraph of these articles specifies the conditions under which State intervention in these rights is allowed. One of the conditions is that the intervention must be lawful, based on law or in accordance

[32] *Ovcharenko and Kolos v. Ukraine*, (apps. nu. 27276/15 and 33692/15), Judgment of 12 January 2023, para. 96; *Mustafa Hajili and Others v. Azerbaijan* (apps. nu 69483/13 and 2 others) Judgment of 6 October 2022.

with the law. The English term "law" and the French term "loi" are used in these articles. In the vast majority of national translations of the contracting states, they are translated with the respective national term denoting statutory law. We have seen that in the *Sunday Times* case, the European Court included common law under this term. Over time, the Court, in certain cases, expanded the meaning of the term "law." In the case of *Vavřička v. Czech Republic* in 2021, the Court stated that "'written law' (is) not limited to primary legislation but including also legal acts and instruments of lesser rank."[33] The European Court now understands, therefore, under the term "law," both statutory laws and legal acts of lower rang in the context of Articles 8–11 of the Convention.

Another evolutionary branch moves in the framework of Article 7 of the Convention. In the case of *Mørk Jensen v. Denmark* from 2022, the Court reiterated what it had already stated in several previous cases: "...when speaking of "law" ("droit") Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law..."[34] The same sentence is found in earlier cases. Thus, the European Court has encountered terminological confusion, not through its fault. Under the term "law" in Articles 8–11 of the Convention, the Court understands both statutory laws and legal acts of lower rang. However, under the term "national or international law" in Article 7, the Court understands only statutory law and case law but not acts of lower rang. The term "law," which has a clear and precise meaning in the context of Article 8–11, is interpreted broadly to include acts lower rang, while the terms "national or international law," which have broad meanings, are interpreted restrictively to encompass only statutory law and case law. Wanting to leave an impression of consistency, the Court repeats the phrase in several cases: "...when speaking of law (droit), Article 7 refers to the same concept as that to which the Convention refers in other places when using this term..." However, the term "droit" is used only in Article 7. In other articles, the term "loi" is used, but not in the sense that the term "droit" is used in Article 7. Moreover, we have seen that the Court does not attribute the same meaning to this term in Articles 8–11 as it does in Article 7. In principle, a term repeated in a legal text should always have the same meaning. Deviations from this principle sometimes occur. In this case, the main determinant of the term's meaning is the practice of the Contracting States. We have considered that human rights can only be restricted by statutory law. For various reasons, States intervene in human rights through acts of lesser rang, and again, for various reasons, the

[33] *Vavřička and Others v. the Czech Republic*, (apps. nu. 47621/13 and 5 others), Judgment 8 April 2021, para. 269.

[34] *Mørck Jensen v. Denmark*, (app. nu. 60785/19), Judgment of 18 October 2022., para. 37.

European Court accepts this. However, in the European legal family, no State defines criminal offences through legal acts of lower rank, regardless of the terminology of Article 7. Contracting States have, therefore, defined different meanings for these terms through their practices.

The next specificity in the evolution of the legality principle concerns the law's precision and predictability. The European Court has further developed the standard of precision and predictability of the law by determining the factors on which the required level of precision and predictability depends. In the case of *NIT S. R. L. v. Moldova* from 2022, the Court states that the level of precision required from domestic legislation depends to a significant extent on the content of the law, the scope of its application, and the number and status of those to whom it is addressed.[35] This was said in the context of Article 10, paragraph 2 of the Convention, which concerns freedom of expression and pertains to the revocation of a broadcasting license for a television company. The mentioned stance on the factors determining the required level of precision of the law has been used by the Court in earlier cases as well.[36] In the case *of Lindon, Otchakovsky-Laurens, and July v. France* from 2007, the Court does not speak about the precision of the law but rather the scope of the notion of foreseeability. It states that this scope depends to a significant extent on the content of the text in question, the area to which it is intended to apply, and the number and status of those to whom it is addressed.[37]

The European Court of Human Rights had already, in the *Sunday Times* case, recognised the practice of applying the law as a solution to the conflict between precision, which can make the law rigid, and generality, which is necessary for the application of the law to changing circumstances but threatens the predictability of its application. In later cases, the Court further developed this position. In the *Ovcharenko and Kolos v. Ukraine* case from 2023, the Court stated that the existence of a precise and consistent practice of interpreting a legal provision is a factor that can make the provision predictable regarding its effects.[38] The Court goes even further in emphasizing the role of practice in the application of imprecise provisions and highlights the general significance of practice in implementing

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[35] *NIT S. R. L. v. the Republic of Moldova* (app. nu. 28470/12), Judgment of 5 April 2022., para. 160.

[36] *Karácsony and Others v. Hungary* (apps. nu. 42461/13 and 44357/13), Judgment of 17 May 2016., para. 125; *Delfi AS v. Estonia* (app. nu. 64569/09) Judgment of 16 June 2015., para. 122; *Cantoni v. France* (app. nu. 17862/91) Judgment of 11 November 1996., para. 29.

[37] *Lindon, Otchakovsky-Laurens and July v. France,* (apps. nu. 21279/02 and 36448/02), Judgment of 22 October 2007., para 41; *Gorzelik and Others v. Poland* (app. nu. 44158/98), Judgment of 17 February 2004., para. 65.

[38] *Ovcharenko and Kolos v. Ukraine* (apps. nu. 27276/15 and 33692/15), Judgment of 12 January 2023., para. 179.

regulations. In the *Gorzelik v. Poland* case, the Court states that the application of any legal provision, regardless of its clarity, inevitably involves judicial interpretation.[39] The Court notes that there is always a need to clarify doubtful points and adapt to specific circumstances. Therefore, according to the Court's opinion, the margin of doubt regarding borderline facts itself does not make a legal provision unpredictable in its application. According to the Court, predictability is not eliminated by the fact that such a provision can be interpreted in various ways. The role of justice is precisely, concludes the Court, to dispel such misunderstandings in interpretation, taking into account changes in everyday practice.[40] The European Court goes further regarding Article 7 and asserts that the progressive development of criminal law through judicial law-making is firmly rooted in the legal tradition of the Contracting States and constitutes an essential part of that tradition.[41] The Court interprets Article 7 of the Convention in a way that does not prohibit the gradual clarification of rules of criminal responsibility through judicial interpretation from case to case, provided that the result of the development is in line with the essence of the criminal offence and has been reasonably foreseeable.[42]

3.3. Article 7, Paragraph 2 of the European Convention on Human Rights in the Practice of the European Court

The European Court has affirmed the specific character of paragraph 2 of Article 7. It considers that the general rule of legality is contained in paragraph 1, and that paragraph 2 is a result of specific historical circumstances. In the case of *Kononov v. Latvia*, the Court noted:

"that the travaux préparatoires to the Convention indicate that the purpose of the second paragraph of Article 7 was to specify that Article 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, inter alia, war crimes so that Article 7 does not in any way aim to pass legal or moral judgment on those laws."[43]

In the *Maktouf and Damjanović* case, the Court is even clearer when stating that paragraph 2 was inserted into Article 7 "to ensure that there was no doubt about the validity of prosecutions after the Second World War regarding the crimes committed during that war."[44] However, in some cases related to the trials for crimes

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39 *Gorzelik and Others v. Poland, op. cit.*, para. 65.
40 *Ibid.*
41 *Norman v. the United Kingdom* (app. nu. 41387/17), Judgment of 6 July 2021., para. 60.
42 *Ibid.*
43 *Kononov v. Latvia*, (app. nu. 36376/04), Judgment of 17 May 2010., para. 186.
44 *Maktouf and Damjanović v. Bosnia and Herzegovina*, (apps. nu. 2312/08 and 34179/08) Judgment of 18 July 2013., para. 72.

committed during the Second World War or in the 1950s in the Baltic States, the European Court confirmed that crimes against humanity were incriminated by general principles of law.[45] In two cases, the European Court rejected the petitions concerning the retroactive application of crimes against humanity by Estonian courts after Estonia gained independence. Crimes against humanity were not provided for by the Estonian criminal law in the 1950s. By invoking paragraph 2 of Article 7, the European Court found that, at that time, such crimes were prohibited by general principles of law. The Court referred to Article 6 of the Nuremberg Charter, which incriminates crimes against humanity, and to United Nations General Assembly Resolution nu. 95 of 1946, confirming the Nuremberg principles, as well as the codification by the International Law Commission.[46] In the case of *Kolk and Kislyy v. Estonia*, the European Court of Human Rights stated:

"Although the Nuremberg Tribunal was established for trying the major war criminals of the European Axis countries for the offences they had committed before or during the Second World War, the Court notes that the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, inter alia, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission."[47]

Thus, the position of the European Court of Human Rights is that the principles applied by the Nuremberg Tribunal did not have general validity at the time of the trial but acquired it later through confirmation by the United Nations General Assembly. Such a stance raises questions about the existence of Nuremberg principles in the form of general principles of law at the time of the Nuremberg Trials.

4. General Principles of Law from Article 7(2) of the European Convention on Human Rights

The United Nations International Law Commission began working on general principles of law in 2017 and adopted Draft Conclusions in 2022. In his second report, Marcelo Vázquez-Bermúdez, the Special Rapporteur for this topic in the Commission, referred to the Nuremberg principles. Inspired, probably, by the above-mentioned stance of the European Court of Human Rights, he states that it appears that States later considered the Nuremberg principles as general principles of law in the sense of Article 38, paragraph 1(c) of the

[45] *Touvier v. France*, (app. nu. 29420/95), Decision of the Commission of 13 January 1997.; *Papon v. France* (no. 2), (app. nu. 54210/00), Decision of 15 November 2001.

[46] *Penart v. Estonia*, (app. nu. 14685/04), Decision of 24 January 2006.; *Kolk and Kislyiy v. Estonia,* (apps. no. 23052/04 and 24018/04), Decision of 17 January 2006.

[47] *Kolk and Kislyiy v. Estonia, op. cit.* para. 8.

Statute of the International Court of Justice.[48] Regarding the legal nature of the principles, he notes that States drew attention, among other things, to the fact that they were contained in the Charter of the International Military Tribunal and confirmed in General Assembly Resolution 95 (I), and that they were in line with the purposes of the United Nations Charter, Resolution 96(I) of the General Assembly, which affirms genocide as a crime under international law, and the Convention on the Prevention and Punishment of the Crime of Genocide.[49]

Considering the Nuremberg principles and the statement of the Special Rapporteur regarding them, the members of the International Law Commission have noted that general principles of law can be derived from international law. "It is clear that, for example, the Nuremberg principles constitute 'principles of international law' formed within the framework of the international legal system, as they were not derived from national legal systems..." This observation emphasises the international character of these principles and their origin within the realm of international law, distinguishing them from the principles derived from national legal systems. The Nuremberg principles, established in the aftermath of World War II to address war crimes and crimes against humanity, indeed hold a unique place as foundational principles in international law.[50] Here, the Commission refers to Principle II as a specific example. Principle II states that the fact that domestic law does not impose a penalty for an act that constitutes a crime under international law does not exempt the individual who committed that act from responsibility under international law. The Commission notes that interpreting Article 38, paragraph 1(c) of the Statute of the International Court of Justice allows for such a conclusion. The text of this paragraph, preparatory work, and the history of the paragraph suggest that general principles of law extend beyond principles derived solely from national legal systems.[51]

The Commission, thus, in Draft Conclusion Nu. 3, distinguishes two categories of general principles of law: a) those derived from national legal systems and b) those that can be formed within the framework of the international legal system.[52] Draft Conclusion Nu. 7 is dedicated to identifying general principles of law formed within

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[48] International Law Commission, Seventy-second session Geneva, 27 April–5 June and 6 July–7 August 2020 *Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, 9 April 2020, para 125.

[49] *Ibid*.

[50] International Law Commission Seventy-third session Geneva, 18 April–3 June and 4 July–5 August 2022, *Third report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, 18 April 2022, para 28.

[51] *Ibid*.

[52] International Law Commission Seventy-third session Geneva, 18 April–3 June and 4 July–5 August 2022, *Consolidated text of draft conclusions 1 to 11 provisionally adopted by the Drafting Committee*, 21 July 2022.

the framework of the international legal system. It is essential to establish that the international community has affirmed these principles as intrinsic to the international legal system, as stated in the first paragraph of this draft conclusion. However, the second paragraph clarifies that the first paragraph does not prejudge the possible existence of other general principles of law formed within the framework of the international legal system.[53] This contradiction between the two paragraphs reflects some uncertainty about the existence of Nuremberg principles as general principles of law before the General Assembly confirmed them.

There are two schools regarding the relationship between general principles of law and principles of international law: a school of strict approach and a school of hybrid approach. The first school includes *inter alia* William Friedmann, C. Wilfred Jenks, A. D. McNair and Hersch Lauterpacht and is based, as remarked by Michelle Biddulph and Dwight Newman, on the strict textual interpretation of Article 38(1)(c) of the Statute of the International Court of Justice.[54] The Article refers to general principles of law as recognised by "civilised" nations. It does not refer to the principle of international law. This school is in line with the original concept advocated by Lord Phillimore while the provision was drafted. While the Advisory Committee of Jurists was drafting the Statute of the Permanent Court of International Justice in 1920, the members agreed that general principles were the appropriate source of international law that enabled to avoid a *non liquet* situation, but disagreed about the principles.[55] The president of the Committee, Belgian representative Edward Descamps, proposed the naturalist approach in the sense that the "legal conscience of civilised nations," originated in "objective justice," contained general principles.[56] The English representative, Lord Phillimore, argued that general principles of law are the principles accepted by States in *foro domestico* and that they could only be derived from municipal law.[57] Thus, the school of strict approach advocates that the method of identifying general principles of law is a comparative assessment of municipal legal systems.[58] Theoretically, this approach is close to the concept of legal certainty and predictability. The existence of a general principle may be objectively and impartially proved by comparative analysis of the internal legal systems of countries in various regions of the world.

Speaking on the school of hybrid approach, M. Biddulph and D. Newman observed that among the scholars, there is no consensus

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53 *Ibid.*

54 Michelle Biddulph, Dwight Newman, "A Contextualized Account of General Principles of International Law," *Pace International Law Review*, vol. 26, no. 2, 2014, 298, 299.

55 *Ibid.,* 291.

56 *Ibid.,* 292.

57 *Ibid.*

58 *Ibid.* 299.

on how a principle emerges from international law and that a methodology for deriving general principles of law from the international legal system has not been developed.[59] They referred to some attempts, such as Thomas Franck's explanation that "a general principle should be recognised as a legitimate norm when the common sense of the interpretative community (government, judges, scholars) coalesces around the principle and regards it as applicable".[60] Another approach attempts to borrow methodology for the identification of customary international law, but that would blur the distinction between principles and customary rules.[61]

Ian Brownlie wrote that general principles of international law may appear as rules of customary law, general principles of law or "logical propositions resulting from judicial reasoning on the basis of existing pieces of international law and municipal analogies."[62] It might be that Nuremberg principles should be qualified partly as rules of customary law and partly as judicial reasoning on the basis of existing pieces of international law and practice rather than general principles of law.

Conclusions

The encounter between international criminal law and criminal law in Article 7 of the European Convention on Human Rights from 1950 has resulted in an unexpected and surprising choice of key terms in this article. In the contemporary context, the formulation that requires an act or omission to constitute a criminal offence "according to internal or international law," rather than using the term "law," can be considered overly broad and not entirely precise in light of the principles of legality in criminal law. This is also surprising considering that outside the criminal law context, the term "law" is used in other articles of the Convention. It is still surprising when Article 7, paragraph 2, speaks of a criminal offence "according to general principles of law." The established circumstances in the context of the Second World War and the Nuremberg Trials significantly influenced the choice of such terminology. This formulated terminology was motivated by a desire to prevent later legal challenges to the legality of the Nuremberg Trials and other local trials.

This choice of terminology has led to a certain terminological confusion regarding the principle of legality in the practice of the European Court of Human Rights. The confusion is evident in the fact that the Court, under the term "law" in Articles 8–11 of the European Convention on Human Rights, includes statutory law but also,

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[59] M. Biddulph, D. Newman, *op. cit*., 300.
[60] *Ibid*., 301.
[61] *Ibid*.
[62] Ian Brownlie, *Principles of Public International Law*, third ed. Oxford, 1979, 19.

legal acts of lower rang, significantly broadening the meaning of the term "law" as used in the context of these articles. On the other hand, under the expression "internal law" in Article 7, the Court understands only the statutory law and case law, significantly narrowing the meaning of that phrase. Thus, in interpreting these terms, the Court deviates from their ordinary meanings, led by the practice of the Contracting States and some other particular reasons.

Article 7, paragraph 2 of the Convention has been used in a few cases related to trials for criminal acts committed in the Baltic Republics of the former Soviet Union in the 1950s after they gained independence. However, even when invoking Article 7, in those few cases, the Court did not use general principles of law in the same way the International Military Tribunal in Nuremberg did in 1946. The Nuremberg Tribunal used them *inter alia* as an instrument by which the crime of aggressive war was derived from the Kellogg-Briand Pact of 1928 and the development of international criminal law during that period. Thus, it derived the crime of aggressive war, as a general principle of law, from international law and the corresponding international legal development. The European Court of Human Rights used them as an instrument through which crimes against humanity from the Charter of the Nuremberg Tribunal, confirmed by the UN General Assembly resolutions and further elaborated by the UN International Law Commission, were promoted in universal criminal law.

The way in which general principles of law were used by the Nuremberg Tribunal and the European Court of Human Rights influenced the International Law Commission in preparing its Draft conclusions on general principles of law in 2022. The Commission opted to include principles derived from international law, which have been confirmed by the international community, in general principles of law. Thus, it added to general principles of law, derived from domestic law of States belonging to different legal systems, principles that are abstracted from international law and are usually referred to as principles of international law.

Literature

1. Avramov S., Kreća, M., *Međunarodno javno pravo*, Naučna knjiga, Beograd, 1988.
2. Biddulph, M., Newman, D. A Contextualized Account of General Principles of International Law, *Pace International Law Review*, vol. 26, no. 2, 2014.
3. Brownlie, I, *Principles of Public International Law*, third ed. Oxford, 1979.
4. Burton Crawford L., An Institutional Justification for the Principle of Legality, *Melbourne University Law Review*, 2/2022.

5. Carić, S., Načelo zakonitosti u praksi Evropskog suda za ljudska prava, tekst objavljen 6. 9. 2019, dostupan na https://www.paragraf.rs/100pitanja/strazbur/nacelo-zakonitosti-u-praksi-evropskog-suda-za-ljudska-prava.html, 4. 3. 2023.
6. Chen B., The French Court and the Principle of Legality, *University of New South Wales Law Journal*, 2/2018.
7. Etinski R., Đajić S., Tubić B., *Međunarodno javno pravo*, Pravni fakultet u Novom Sadu, Novi Sad, 2021.
8. Flick G. M., The Principle of Legality, *New Journal of European Criminal Law*, 4/2015.
9. French R., The Principle of Legality and Legislative Intention, *Statute Law Review,* 1/2019.
10. Krstulović Dragičević, A., Načelo zakonitosti u praksi Evropskog suda za ljudska prava, *Hrvatski ljetopis za kaznene znanosti i praksu* (Zagreb), 2/2016.
11. Lim B., The Normativity of the Principle of Legality, *Melbourne University Law Review*, 2/2013.
12. Meagher D., The Common Law Principle of Legality, *Alternative Law Journal*, 4/2013.
13. Mitrović D. M., Načelo zakonitosti, *Anali Pravnog fakulteta u Beogradu*, 1/2004.
14. Sales Ph., Legislative Intention, Interpretation, and the Principle of Legality, *Statute Law Review*, 1/2019.
15. Sima C., Principle of Legality, *Revista Pro Lege*, 1/2016.
16. Stojanović Z., Garantivna funkcija krivičnog prava, *Kaznena reakcija u Srbiji*, (ur. Đ. Ignjatović), VI deo, Pravni fakultet Univerziteta u Beogradu, 2016.
17. Stojanović Z., *Komentar Krivičnog zakonika*, Misija OSCE u Crnoj Gori, Podgorica, 2010.
18. Škulić M., Bajović V, *Istorija međunarodnog krivičnog pravosuđa i osnovne odlike postupka pred stalnim Međunarodnim krivičnim sudom*, Dosije, Beograd, 2016.
19. Tomić I., Tumačenje, pravne praznine i načelo zakonitosti, *Zbornik radova Pravnog fakulteta Sveučilišta u Mostaru*, 2020.
20. Varuhas J. N. E., The Principle of Legality, *Cambridge Law Journal*, 3/2020.
21. Velarde R., Jaime A., Principle of Legality in Criminal Law, *LEX — Journal of the Faculty of Law and Political Science / Revista de la Facultad de Derecho y Ciencia Politica*, 13/2014.
22. Wright Q., The Law of the Nuremberg Trial, *American Journal of International Law*, 1/1947.

Dr Rodoljub Etinski

Nelagodan susret krivičnog prava i međunarodnog krivičnog prava u članu 7 Evropske konvencije o ljudskim pravima

Krivično pravo i međunarodno krivično pravo susreli su se na terenu načela zakonitosti u članu 7 Evropske konvencije o ljudskim pravima 1950. godine. Međunarodne okolnosti, koje su postojale posle Drugog svetskog rata i, naročito, Nirnberško suđenje, dakle tadašnji razvoj međunarodnog krivičnog prava, presudno su uticali na

taj susret preko nesrećnog tekstualnog uobličavanja člana 7 Evropske konvencije o ljudskim pravima, odnosno preko neočekivanog izbora termina u tom članu. U drugim propisima Konvencije korišćen je termin „zakon" ili izrazi „na osnovu zakona" ili „u skladu sa zakonom". Samo je u članu 7 predviđeno da krivično delo može da bude predviđeno unutrašnjim ili međunarodnim pravom, čak i opštim pravnim načelima. Tekst ukazuje na istorijski razvoj koji je doveo do ovog neočekivanog izbora termina u članu 7. Taj izbor termina je uzrokovao, zajedno sa drugim činiocima, stvaranje izvesne terminološke konfuzije u pogledu načela zakonitosti u praksi Evropskog suda. Međunarodnopravni razvoj, koji se dogodio u vezi sa tim susretom, podstakao je, takođe, Komisiju UN za međunarodno pravo da, radeći na opštim pravnim načelima, izabere manje prihvaćenu opciju u literature prema kojoj načela međunarodnog prava čine deo opštih pravnih načela.

Ključne reči: načelo zakonitosti, opšta pravna načela, načela međunarodnog prava