

A few thoughts on guaranties inherent to the rule of law as applied to sanctions and the prosecution and punishment of war crimes

Damien Scalia*

Damien Scalia is a teaching assistant at the Geneva Academy of International Humanitarian Law and Human Rights. He is currently working on a Ph.D. thesis.

Abstract

War crimes are among the most serious crimes; that is why international courts and tribunals have jurisdiction to prosecute and punish them. However, serious though they are, it is not legitimate to punish them in such a way as to exceed the bounds of respect for human rights. The author considers that, when the perpetrators of war crimes are prosecuted and punished, criteria inherent to the rule of law like those applied by the European Court of Human Rights (such as legality and proportionality) must be met.

.....

The process of establishing norms governing sanctions is not exempt from the need to satisfy guarantees that are fundamental to the rule of law. Whether these norms enter domestic legal systems by virtue of legislation or case law (as in common-law countries) or whether they remain confined to international law,

* The author would like to thank Professor Christian-Nils Robert most warmly for reading the text and for his very useful comments.

they must comply with the fundamental principles inherent in the concept of legality; otherwise such norms could only be seen as arbitrary and meaningless.

In the context of the prosecution and punishment of war crimes, the rapid development of norms over the past fifteen years (since the establishment of the international criminal courts and tribunals) may give the impression that the fundamental principles of criminal law have been pushed aside. The humanist impetus that helped to bring those crimes, which previously went unpunished in many instances, into the courtroom, at times overlooked some of the guarantees inherent in the rule of law. In the limited space available to me here I shall attempt to review these guarantees, respect for which must be considered a priority.

My analysis will cover four principles: legality, necessity, proportionality and non-retroactivity.

Although it is not the only institution involved in this development, the European Court of Human Rights (ECtHR) in Strasbourg has played a major role in the modern expression of the principles set out above. I shall therefore analyse the various material criteria relating to each of those principles in the light of the relevant case law. The ECtHR also has the advantage of applying to, and covering, both Romano-Germanic and common-law systems. It therefore represents a framework very close to that of international criminal law. Furthermore, it has a very significant influence on the current jurisprudence of the International Criminal Court, as evinced from the latter's recent judgments.¹

The principle of legality

Article 11 of the Universal Declaration of Human Rights defines the principle of legality as follows:

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.

To comply with this principle, the law must precisely define a social act as a crime and prescribe the penalty it carries.² By so doing, it guards against arbitrariness and allows citizens to regulate their social conduct. Legal security is dependent on this condition.

The law defines in advance those acts which are to be prohibited by the criminal law. Its role is to isolate the crime as a social fact, a distinct entity, and to punish the person who commits it. In other words, application of the maxim

1 In this regard see Elizabeth Baumgartner's article in this issue of the *International Review of the Red Cross*.

2 ECtHR, *Achour v. France*, Application No. 67335/01, 29 March 2006, para. 41.

nullum crimen, nulla poena sine lege presupposes that (i) the person concerned is the perpetrator of an act or omission which is objectively defined (an omission may also be a crime); and (ii) that this act or omission is defined as a crime by the law.

When it comes to punishment, the law has the same role to play. It cannot simply state that particular acts are criminal and leave it up to the judges to punish them as they see fit. “These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries.”³ Otherwise the result would be the same as if there were no principle of legality relating to offences, and that would be absurd. So the law must specify the penalty.

Today, specifically material criteria predominate in the definition of the principle of legality. Accordingly, the author and form of the source carry less weight in the interpretation of that principle than was the case when it was first formulated.⁴ It is important to point out at the outset that the “law”, the cornerstone of the principle *nullum crimen, nulla poena sine lege*, today encompasses not only written sources of law but also a more general body of rules which includes case law, and more broadly the law of common-law countries.⁵

Three criteria will be examined: foreseeability, quality and accessibility as applied to the law.⁶ They are closely interconnected, the foreseeability of the law being contingent on its quality and accessibility. Indeed, foreseeability is one of the crucial elements inherent to the principle of legality as applied to offences and penalties. In pursuance of its aim of protecting society and above all individual freedom (and hence legal security), the principle of foreseeability requires that the citizen knows what facts will give rise to criminal proceedings and what penalties are associated with them. That being the case, foreseeability cannot be viewed in isolation from the quality of the law⁷ and its accessibility to the citizen. If the citizen is unable to understand the law or has no access to it, foreseeability must remain an unattained ideal.

In regard to penalties, as confirmed by European case law, these conditions must also be specifically met: “the concept of the legality of a penalty implies not only that the said penalty has a legal basis but that the law itself meets the conditions of accessibility and foreseeability”.⁸

The quality of the law will reside in the clarity and precision of the provision, while accessibility will be determined by more casuistic enquiry (using cases and analogies) and may be of a more limited nature.⁹ These criteria will give rise to foreseeability, which we shall examine subsequently.

3 ECtHR, *Kaŕkaris v. Cyprus*, Application No. 21906/04, 12 February 2008, para. 140.

4 Cesare Beccaria, *Des délits et des peines*, trans. M. Chevallier, preface by R. Badinter, Flammarion, Paris, 1991.

5 ECtHR, *Sunday Times v. United Kingdom*, Application No. 6538/74, 26 April 1979, para. 47.

6 *Ibid.*, para. 49.

7 Léon Julliot de la Morandière, *De la règle nulla poena sine lege*, Sirey, Paris, 1910, pp. 60 ff.; Djoheur Zerouki, “La légalité criminelle: Enrichissement de la conception formelle par une conception matérielle”, doctoral thesis, Université Jean Moulin-Lyon 3, 2001, p. 264.

8 ECtHR, Commission Report, *Gragnic v. France*, 29 June 1994, para. 32 (published in French only, author’s translation).

9 Frédéric Sudre, “Le principe de la légalité et la jurisprudence de la Cour européenne des droits de l’homme”, *Revue pénitentiaire et de droit pénal*, No. 1 (April 2001), pp. 335–56, p. 349.

The quality of the law: clarity and precision

In laying down that any deprivation of liberty must be effected “in accordance with a procedure prescribed by law”, Article 5 para. 1 ... primarily requires any arrest or detention to have a legal basis in domestic law [in accordance with the] *quality of the law* ...

In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies that where a national law authorises deprivation of liberty ... it must be sufficiently ... *precise*, in order to avoid all risk of arbitrariness.¹⁰

The requirement that a criminal law be precise, as set out in the seminal judgment *Sunday Times v. United Kingdom*,¹¹ goes hand in hand with the requirement that an offence must be clearly defined. The ECtHR again expressed this view in the case of *Kokkinakis v. Greece*.¹²

But what constitutes a clear and precise law? The case law of the ECtHR court gives a partial reply to that question when it asserts that the clarity of the law can be evaluated only on condition that the party concerned benefits from “appropriate advice”.¹³ According to the *Cantoni* judgment, this advice must allow the party “to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among other authorities, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, p. 71, para. 37). This is particularly true in relation to persons carrying on a 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.”¹⁴

The axiom “ignorance of the law is no defence” is very extensively accepted on the international level and should be applied in the same way to the states or parties to the European Convention on Human Rights. To understand the law, therefore, it is necessary to benefit from appropriate advice.

The Court considers that the criterion of clarity must also be met when it comes to penalties, as it states that “offences and the relevant penalties must be clearly defined by law”.¹⁵

As for the precision of the law, this is only relative and may be limited. The Court has stated in a number of judgments that it has “already noted that the

10 ECtHR, *Amuur v. France*, Application No. 19776/92, 25 June 1996, para. 50 (emphasis added).

11 *Sunday Times v. United Kingdom*, above note 5, para. 49.

12 ECtHR, *Kokkinakis v. Greece*, Application No. 14307/88, 25 May 1993, para. 52.

13 *Sunday Times v. United Kingdom*, above note 5, para. 49.

14 ECtHR, *Cantoni v. France*, Application No. 17862/91, 15 November 1996, para. 35.

15 ECtHR, *Coëme and others v. Belgium*, Applications No. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, para. 145.

wording of many statutes is not absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague”.¹⁶ It has also mentioned the “impossibility of attaining absolute precision in the framing of laws”,¹⁷ especially in spheres of conduct where the particulars are in constant evolution in line with the conceptions of society.¹⁸ Thus the Court acknowledges that a system of law may have recourse to “one of the standard techniques of regulation by rules [which] is to use general categorisations as opposed to exhaustive lists”.¹⁹

Finally, precision and clarity must be assessed in the overall context of the text in question. A provision which is in itself imprecise may become clear when read together with other articles of the same law.²⁰ In a case where the “law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution”, the ECtHR concluded that Article 7 of the Convention had been violated.²¹ Thus precision and clarity in a legal rule are achieved by the combination of a text and clear case law, which together support the criteria relating to foreseeability. The possibility that the law might not be clear and comprehensible to someone with no legal training cannot be ruled out, as the person concerned is expected to seek appropriate advice in order to foresee the consequences of the law. I therefore take a critical view of such an interpretation of the precision and clarity that a rule has to possess. It would seem evident that understanding of a law should not be dependent on explanation in the form of “appropriate advice”.

To these criteria must be added the necessary accessibility of criminal law, in particular, which will be interpreted in a more ambivalent or “limited” way.²²

Accessibility of the law

According to the case law of the ECtHR, the condition of accessibility is defined as follows: “the citizen must be able to have an indication that is adequate in the

16 *Kokkinakis v. Greece*, above note 12, para. 40; see also ECtHR, *Müller and others v. Switzerland*, Application No. 10737/84, 24 May 1988, para. 29; ECtHR, *Olsson v. Sweden*, Application No. 10737/84, 24 March 1988, para. 61; *Sunday Times v. United Kingdom*, above note 5, para. 49.

17 ECtHR, *Barthold v. Germany*, Application No. 8734/79, 25 March 1985, para. 47.

18 *Ibid.*

19 *Cantoni v. France*, above note 14, para. 31.

20 European Commission of Human Rights, *G. v. Liechtenstein*, 30 October 1984, cited in Zerouki, above note 7, p. 308.

21 *Kafkaris v. Cyprus*, above note 3, para. 150. In this judgment the Court unfortunately considered that the finding of such violation constituted in itself sufficient equitable satisfaction for any moral damage suffered by the applicant.

22 *Sudre*, above note 9, p. 349.

circumstances of the legal rules applicable to a given case”.²³ Penalties fall within the scope of these “legal rules”, as does the definition of an offence.

Accessibility is assessed in practical terms.²⁴ It appears that the condition is met as long as there is a published text relating to the matter at hand, whether in the form of a law or of case law.²⁵ Finally, as the ECtHR has pointed out, the law does not need to be accessible to everyone; to meet the criterion, it must be accessible to the persons concerned²⁶ and those persons must be able to gain access to it in practice, if need be by taking “appropriate advice”.²⁷ I refer to my earlier critical remarks in this connection.

Foreseeability

To meet the criterion of foreseeability, a law must first meet the criteria examined above. However, it is important to look specifically at the criterion of foreseeability in order to grasp its full implications.

Following the ECtHR, certain authors have qualified foreseeability, specifying that it should be *relative* or *reasonable*. Individuals have to be able to “assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.²⁸ This is a clear indication that foreseeability is not absolute; it must be assessed on a case-by-case basis. As demonstrated by Zerouki, the adjective “reasonable” must be interpreted *a contrario*: anything that is unreasonable, unexpected or surprising cannot fulfil the requirement of foreseeability.²⁹

It follows that, when an interpretation is made by analogy and to the detriment of the applicant, this is unreasonable.³⁰ A “sudden” jurisprudential about-turn which is unfavourable to the accused, and which the applicant could not have expected, is deemed to be a violation of the principle of legality. Such a decision appears logical and respectful of individual freedoms.

However, it would certainly have been too easy to leave it at that. There may be circumstances in which external facts should cause the applicant to be aware that a jurisprudential reversal could occur or that an act that is not a crime and which it might be difficult to conceive of as a crime might nevertheless be criminal in certain circumstances.

23 *Sunday Times v. United Kingdom*, above note 5, para. 49.

24 ECtHR, *K.-H.W. v. Germany*, Application No. 37201/97, 22 March 2001, para. 73; *a contrario* see *Kokkinakis v. Greece*, above note 12, para. 40.

25 *Kokkinakis v. Greece*, above note 12, para. 40.

26 ECtHR, *Groppera Radio AG and others v. Switzerland*, Application No. 10890/84, 28 March 1990, para. 68.

27 ECtHR, *Pessino v. France*, Application No. 40403/02, 10 October 2006, para. 36. *A contrario*, in this case the Court considered that it was impossible even for a professional, who could benefit from appropriate advice, to foresee the Appeal Court’s reversal of case law.

28 *Cantoni v. France*, above note 14, para. 35; *Sunday Times v. United Kingdom*, above note 5, para. 49.

29 Zerouki, above note 7, p. 311.

30 *Pessino v. France*, above note 27.

It seems that two factors may be relevant in this regard. First of all, the court has considered that a change in mores and social attitudes may lead to recognition of a right, even if the rules of criminal law would appear to indicate otherwise. The case of *S.W. v. United Kingdom* is revealing in this respect: “[T]he 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.”³¹ In a case such as this, changes in social attitudes, because they are in conformity with the objectives of the Convention (the protection of fundamental rights), lead to a degree of foreseeability, in accordance with Article 7.

Second, the ECtHR expresses the view that the more serious the offence in objective terms, the more the citizen should expect it to be a crime subject to punishment. The *Pessino v. France* judgment, referring to the case of *S.W. v. United Kingdom*, states, “The Court considers that the present case is clearly different from the *S.W. v. United Kingdom* and *C.R. v. United Kingdom* judgments ... which related to a rape and an attempted rape perpetrated by two men on their wives. The Court observed in those judgments [that] “the essentially debasing character of rape [was] so manifest” that the criminalization of such acts committed by men on their wives was foreseeable, could not be said to be “at variance with the object and purpose of Article 7 (art. 7) of the Convention ...”, and “was in conformity ... with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.”³²

Does this mean that a domestic court could prosecute and punish an offence considered to be serious as a crime without falling foul of the criterion of foreseeability as understood by the ECtHR, even where there was no such provision in the law, and that its perpetrator could therefore be arbitrarily punished? On the basis of these judgments we should be inclined to reply in the affirmative, subject to future case law, for the question of reasonable foreseeability before the ECtHR remains somewhat ambiguous and difficult to categorize. In the case of *S.W. v. United Kingdom*, “the Court appears to state that the applicant should have foreseen that his behaviour would give rise to prosecution and punishment, because he could not have been unaware that this conduct was, if not legally, then morally reprehensible”.³³ If this is so, is it not dangerous to link the law with morality? Indeed, some have associated that link with the legal systems prevailing in certain dictatorships.³⁴

Finally, it should be noted that the principle laid down by the ECtHR amounts to prohibition of an interpretation by analogy which is *in malam partem* – that is, to the detriment of the accused. That prohibition is directly connected

31 ECtHR, *S.W. v. United Kingdom*, Application No. 20166/92, 22 November 1995, para. 44.

32 *Pessino v. France*, above note 27, para. 36.

33 Sébastien Van Drooghenbroeck, *Interprétation jurisprudentielle et non-rétroactivité de la loi pénale*, in *Revue trimestrielle des droits de l'Homme*, 1996, p. 475 (author's translation).

34 Zerouki, above note 7, p. 434.

with respect for the principle of legality. However, as we have seen in the cases cited earlier,³⁵ the preponderant criterion to be applied is not the detrimental nature of the outcome for the convicted person but that of reasonable foreseeability, which consequently applies to the interpretation adopted by the judge. This leads to the conclusion that any new, foreseeable interpretation must meet the criteria of necessity and respect for the principle of legality, and hence the requirements of legal security. As Zerouki points out in this regard, “if the mere possibility of a new legal interpretation suffices to make it reasonably foreseeable, the goal of safety is a long way off”.³⁶ Indeed, in the light of the way in which this reasoning is applied by the Court, it would appear that it is permissible for the sentence of life imprisonment to be mentioned in a law as the penalty for any violation of that law, and that all sentences would thereby become foreseeable. That would be problematic in terms of respect for individual freedoms. However, other criteria besides legality apply, among them that of necessity.

The principle of necessity or consideration of the purpose of the penalty

The matter of necessity must be approached, obviously in response to the offence committed but first and foremost in response to the objectives pursued by the penal sanction. As far back as 1874, J. J. Haus wrote that “[t]he penalty protects Society by the effects it produces; but it cannot be justified by its usefulness alone; it must also be a necessary, indeed indispensable, means of protection; for if by means of less rigorous measures Society could achieve the same result, it would not be entitled to dispense repressive justice.”³⁷

Necessity is defined, both in everyday language and in the context that concerns us, as that which is imperative, which cannot be otherwise, which is an obligation. Yet how can an obligation be judged in relation to the *quantum* of a penalty? That is a delicate undertaking and can be only relatively “arbitrary”, especially if necessity is defined in absolute terms and allows for no comparison. We therefore turn to the aims of the sanction in order to clarify the concept of necessity.

The literature generally agrees that criminal sanctions have four main aims: resocialization, deterrence (or special prevention), neutralization and general prevention. The principle of necessity should not only be observed mainly through the prism of defence of society (general prevention), but also in relation to special prevention. As for neutralization, the relevant principle is that of proportionality, which I shall examine subsequently. In regard to general prevention, I would

35 *S.W. v. United Kingdom*, above note 31.

36 Zerouki, above note 7, p. 433 (author’s translation).

37 Jacques Joseph Haus, *Le fondement du droit de punir*, 1874; available at http://ledroitcriminel.free.fr/la_sciences_criminelle/les_sciences_juridiques/introduction/haus_fondement_punir.htm (last visited 29 May 2008, author’s translation).

simply point out that, *ex hypothesi* and as Professor Robert has argued, it is a principle that is “impossible to prove scientifically and ... impossible to deconstruct ideologically”.³⁸ As it would be impossible to examine the other aims of a penalty in such a brief overview, I shall leave that discussion to others with more expertise than I.³⁹ Although in this brief outline I shall not examine all the implications of resocialization, it would seem important to focus on the sentence of life imprisonment, which is the penalty laid down for war crimes in many domestic legal systems. That being the case, we must ask ourselves whether such a penalty is compatible with the aim of resocialization of the criminal.

Resocialization is indisputably one of the aims of penal sanctions, but it cannot be achieved by a life sentence for the simple reason that the criminal will never be released into society. Many authors nowadays see a life sentence as a form of torture, an inhuman and degrading punishment, and call for its abolition.⁴⁰ At all events, by its very nature it cannot serve to resocialize criminals. As pointed out by P. Poncela, “there is general agreement that after about 15 years in prison an individual begins to disintegrate, and can no longer take part in any reintegration project”.⁴¹ Moreover, a life sentence “kills the detainee by inches”;⁴² it is a penalty that the French Constituent Assembly succeeded in abolishing in 1791 as it was considered to be “worse than death”.⁴³ Life sentences therefore have no justification, especially in an international system that advocates humane values for all human beings, whether or not they are war criminals or perpetrators of genocide. Moreover, certain European states have already abolished the life sentence (Cyprus, Norway, Portugal and Spain). We might have hoped to see the ECtHR support these humanistic and apparently pioneering decisions. Although it has found that the imposition of a life sentence *per se* was not contrary to Article 3 of the Convention,⁴⁴ the Court has on several occasions expressed the view that imposing a life sentence without parole on an adult could raise an issue under Article 3.⁴⁵ Moreover, in its judgment in the case of *Selmouni v. France* of 28 June 1999, when interpreting Article 3, a fundamental provision in the Convention system, the Court gave an interpretation to the effect that “the increasingly high

38 Christian-Nils Robert, “Le rôle de la sanction (dans l’approche intégrée de la justice et de la réconciliation)”, in *Colloque à Sanremo: Justice et Réconciliation*, 7–9 September 2006 (unpublished, author’s translation).

39 Christian-Nils Robert, *L’impératif sacrificiel, Justice pénale au-delà de l’innocence et de la culpabilité*, ed. d’en bas, Lausanne, 1986; A. C. Berghuis, “La prévention générale: limites et possibilités”, in *Les objectifs de la sanction pénale, en hommage à Lucien Slachmuylder*, Bruylant, Brussels, 1989, pp. 23–68; Pierrette Poncela, *Droit de la Peine*, PUF, Paris, 1995.

40 For France: Pierrette Poncela and Pierre Lascoumes, *Réformer le Code pénal*, PUF, Paris, 1998, p. 178. In Germany, this features in the political programme of the Green party: *Fraktion Bündnis 90/Grüne, Lebendig begraben, lebenslange Freiheitsstrafe und Resozialisierung, ein Dauerwiderspruch*, Bonn, 1991.

41 Pierrette Poncela, “Perpétuité, sûreté perpétuelle: la peine de mort à petit feu, entretien accordé à Hommes et Libertés”, *Revue de la ligue des droits de l’homme*, No. 116 (2001) (author’s translation).

42 *Ibid.*

43 *Ibid.*

44 CEDH, *Sawoniuk v. Royaume-Uni*, Application No. 63716/00, Decision on admissibility, 29 May 2005.

45 CEDH, *Nivette v. France*, Application No. 44190/98, Decision on admissibility, 3 July 2001.

standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies”.⁴⁶ We might therefore have expected a judgment finding that life imprisonment is contrary to Article 3 of the Convention. Unfortunately, only very recently, the ECtHR delivered a judgment that ran counter to such hopes: life imprisonment without parole (in the case in question, release would have been possible only by means of a presidential pardon) is not a violation of Article 3.⁴⁷ Let us nevertheless take note of the fact that the decision was adopted by a very narrow majority (ten votes to seven).

Necessity is also applied in connection with the principles of proportionality and non-retroactivity, or again that of retroactivity *in mitius*. In regard to proportionality, the link is obvious: to be necessary, a penalty must be proportionate. As for retroactivity, as soon as an accusation is quashed or a penalty reduced, there is certainly no longer any necessity for it – supposing that there ever was.

The principle of proportionality

The principle of proportionality is directly related to the principle of necessity, and forms what Poncela calls the “just moderation”⁴⁸ of the penalty. Proportionality must be examined principally in the relationship between the crime and the penal sanction.⁴⁹ Other factors that have to be taken into consideration are the harm “caused and feared”, the criminal record of the accused, if any, and any aggravating or mitigating circumstances.⁵⁰ Bentham expressed the opinion that “the value of the punishment must ... outweigh that of the profit of the offence”,⁵¹ but also that the greater the crime, the greater the justification for hazarding a severe penalty in the hope of preventing it.⁵² Subsequently this principle came to occupy an important place in penology, even though it is obviously difficult to apply clear arithmetic to the question of what punishment a crime should entail. According to this theory, the quantum is fixed on an arbitrary basis by the law, which may apply various criteria such as the gravity of the crime and the suffering of the victims, but also aggravating and mitigating circumstances relating to the perpetrator or to the crime itself.

Several criteria connected with proportionality are applied by the ECtHR. Proportionality is regularly expressed in terms of “appropriate and adequate”

46 *Kafkaris v. Cyprus*, above note 3, partially dissenting opinion of judges Tulkens, Cabral Barreto, Fura-Sandström and Spielmann, para. 101.

47 *Kafkaris v. Cyprus*, above note 3, para. 140.

48 Poncela, above note 39, p. 38.

49 Maurica Cusson, *Pourquoi punir?*, Dalloz, Paris, 1987, pp. 87–8.

50 *Ibid.*, pp. 157–69.

51 *Ibid.*, p. 170.

52 *Ibid.*, p. 171.

measures to be taken by national authorities.⁵³ Disproportion is found in the quantitatively immoderate, excessive, unjustified nature of a sanction as compared with the objective pursued. In some cases, the Court has considered as disproportionate measures which could have been replaced by less restrictive solutions.⁵⁴

Finally, in the context of legality as defined by the case law of the ECtHR (using the criteria of foreseeability, accessibility and clarity), proportionality is becoming a key concept. Indeed, as the “foreseeability of the law” is assuming rather “extra-ordinary” forms in terms of the foreseeability of its application in case law, it is becoming necessary for this rule, or should we say this law, to respect the principle of proportionality in the effects it generates. This appears all the more important when it comes to the jurisprudential mode of enforcing the law. In various decisions the Court has thus applied the principle of proportionality when assessing the foreseeable or “non-accomplished” enforcement of the law by domestic courts. Without again going into the details of this “foreseeability” of case law which we examined earlier, it should be borne in mind that the courts must not go beyond that which could reasonably be expected in the circumstances of the case,⁵⁵ the aim for the court being to “be satisfied that ... there exist adequate and effective guarantees against abuse”⁵⁶ or “arbitrary interference”.⁵⁷

Proportionality is already established in the very text of the Convention, but it has also given rise to abundant and wide-ranging case law. In the majority of cases, proportionality tends to emerge from cases relating to Articles 8 to 11 of the Convention, which guarantee the right to respect for private and family life and respect for home and correspondence, and the right to freedom of thought, conscience and religion, freedom of expression and freedom of association.

Apart from these various rights to which proportionality has become attached, the ECtHR has had occasion to lay down the principle of proportionality in criminal matters, in association with Article 3 of the Convention, which prohibits inhuman or degrading treatment or punishment. This context is of particular interest, as it is very closely connected with my research. The Court’s jurisprudence, however, has two facets which need to be clarified.

On the one hand there is older jurisprudence which holds that the Convention does not recognize as such any right to call into question the length of a sentence regularly imposed by a competent court,⁵⁸ and holding that the mere fact that an offence is dealt with more severely in one country than in another is insufficient to establish inhuman or degrading punishment.⁵⁹ The ECtHR has also found that the length of a sentence could raise an issue under Article 3 only in the

53 ECtHR, *New Verlags Gmbh & CoKG v. Austria*, Application No. 31457/96, 11 January 2000, para. 54.

54 ECtHR, *Informationsverein Lentia and others v. Austria*, applications No. 13914/88;15041/89;15717/89, 24 November 1993; para. 39.

55 *Barthold v. Germany*, above note 17, para. 48.

56 ECtHR, *Klass and others v. Germany*, Application No. 5029/71, 6 September 1978, para. 50.

57 ECtHR, *Kruslin v. France*, Application No. 11801/85, 24 April 1990, para. 30.

58 ECtHR, *X. v. United Kingdom* (inadmissible), Application No. 5871/71, 30 September 1974, p. 54.

59 ECtHR, unpublished, Application No. 11615/85, 10 December 1985.

most exceptional circumstances.⁶⁰ A certain dichotomy already seems to be emerging between these terms, sometimes within one and the same decision.⁶¹ In fact, although such circumstances mainly concern conditions of imprisonment, there is no reason to believe that they might not lead back to the offence or the surrounding circumstances and to the sentence pronounced.

On the other hand, in some more recent judgments the ECtHR seems to leave a measure of latitude to consider the appropriateness of the duration of a penal sanction, even if the statement of reasons is far from clear:

The Court notes first of all that a person may be humiliated by the mere fact of being criminally convicted. However, what is relevant for the purposes of Article 3 (art. 3) is that he should be humiliated not simply by his conviction but by the execution of the punishment which is imposed on him. In fact, in most if not all cases this may be one of the effects of judicial punishment, involving as it does unwilling subjection to the demands of the penal system.

However, as the Court pointed out in its judgment of 18 January 1978 in the case of *Ireland v. the United Kingdom* (Series A no. 25, p. 65, para. 163), the prohibition contained in Article 3 (art. 3) of the Convention is absolute: no provision is made for exceptions and, under Article 15 (2) (art. 15-2) there can be no derogation from Article 3 (art. 3). It would be absurd to hold that judicial punishment generally, by reason of its usual and perhaps almost inevitable element of humiliation, is “degrading” within the meaning of Article 3 (art. 3). Some further criterion must be read into the text. Indeed, Article 3 (art. 3), by expressly prohibiting “inhuman” and “degrading” punishment, implies that there is a distinction between such punishment and punishment in general.

In the Court’s view, in order for a punishment to be “degrading” and in breach of Article 3 (art. 3), the humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation referred to in the preceding subparagraph. The assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the *nature* and *context* of the punishment itself and the manner and method of its execution.⁶²

Furthermore, in the *Soering* judgment, in regard to the death penalty and the so-called “death row” syndrome, which the condemned person risked being exposed to in case of his extradition to the United States, the ECtHR court stated as follows:

That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3 (art. 3). The manner in which it is imposed or executed, the personal circumstances of the condemned person *and a disproportionality to the gravity of the crime committed*, as well as the

60 ECtHR, *X. v. FRG* (inadmissible), Application No. 7057/75, 13 May 1976, p. 127.

61 ECtHR, *V. v. FRG*, Application No. 11017/84, 13 March 1986, p. 178.

62 ECtHR, *Tyrer v. United Kingdom*, Application No. 5856/72, 25 April 1978, para. 30 (emphasis added).

conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (art. 3).⁶³

Finally, in reference to the application of Article 10 (freedom of expression), the ECtHR has also had occasion to apply the principle of proportionality, in some cases even condemning a state for imposing a sanction which, in the eyes of the Court, was out of proportion to the legitimate aim pursued. In the *Thorgeir Thorgeirsson* case the Strasbourg judges considered that “the reasons advanced by the Government do not suffice to show that the interference complained of [the penal sanctions] was proportionate to the legitimate aim pursued”.⁶⁴

The ECtHR places emphasis on proportionality, which must be respected by legislation and the way it is applied by the relevant jurisdictions. Life imprisonment, examined in connection with the principle of necessity, should therefore be viewed in the light of proportionality; and it does not appear to respect those principles, whatever the crime committed.

The principle of non-retroactivity *in mitius*

The principles of non-retroactivity and retroactivity *in mitius* are directly related to the criterion of foreseeability, since they are the direct causes of its application. Indeed, foreseeability demands that a law cannot be applied to acts committed before it came into force. The criterion of foreseeability, as defined above, has to be given concrete expression in legislative and jurisprudential practice. Now we must look at the explicit prohibition on retroactivity of a criminal law, and hence on the lawfulness or otherwise of retroactivity *in mitius*.

The ECtHR, applying the Convention and, in particular, its Article 7(1), expressly lays down the prohibition on retroactivity. A distinction should be drawn, however, between two forms of retroactivity: the “direct” form, which corresponds to the coming into force of a new law after the offence has been committed, and the “indirect” form, which corresponds to interpretation of the law.

As regards the former, as already mentioned, the ECtHR merely takes up in different terms the principle of non-retroactivity, saying that it is an inviolable principle of law.⁶⁵ Thus when a law is applied retroactively, the Court sees this as a violation of Article 7(1).⁶⁶ As for the latter, although a degree of retroactivity may appear through the interpretation of laws, the Court has underlined the criteria

63 ECtHR, *Soering v. United Kingdom*, Application No. 14038/88, 7 July 1989, para. 104 (emphasis added).

64 ECtHR, *Thorgeir Thorgeirsson v. Iceland*, Application No. 13778/88, 25 June 1992, para. 69.

65 ECtHR, *Kokkinakis v. Greece*, above note 12, para. 52; *K.-H.W. v. Germany*, above note 24, para. 45; ECtHR, *Streletz, Kessler and Krenz v. Germany*, applications No. 34044/96, 35532/97, 44801/98; and *K.-H.W. v. Germany*, Application No. 37201/97, 22 March 2001, para. 50.

66 ECtHR, *Jamil v. France*, Application No. 15917/89, 8 June 1995, para. 35.

that must be met if such interpretation is not to be synonymous with retroactivity pure and simple. However, there is no need to review here the various criteria that we examined earlier in connection with foreseeability.

Furthermore, the stated principle of non-retroactivity admits of one possible exception, namely retroactivity *in mitius*, whereby a law may apparently be applied retroactively as long as it is more lenient than the one applicable at the time of the offence.⁶⁷ In this connection, the ECtHR has declared inadmissible complaints from applicants who argued that the principle of non-retroactivity had been violated by the imposition of a life-sentence where only the death sentence was provided for in the legislative texts governing the offences for which they had been condemned. The Court considered that life imprisonment was more lenient than the death sentence.⁶⁸

Thus a more lenient law may be applied retroactively, as a departure from the strict principle of the non-retroactivity of a penal law. The principle of *lex mitior* is therefore recognized on the European level, as it is on the international level by virtue of Article 15(1) of the 1966 International Covenant on Civil and Political Rights.

Conclusion

This brief review of the criteria that must be met by the law demonstrates that those criteria constitute essential guarantees for the observance of fundamental freedoms.

If we follow the case law of the ECtHR, the principle of legality must be given effect by ensuring that the law is characterized by clarity, accessibility and foreseeability. The principles of necessity and proportionality are more limited and subject to casuistic enquiry, even though their observance is an obligation in criminal law. Finally, retroactivity is absolutely prohibited when it is to the detriment of the accused, but may and indeed must be applied in his or her favour.

The ECtHR has had the merit of addressing in detail the various criteria inherent in criminal law. However, it would appear from its case law that it has begun to attribute to some of those criteria an interpretation that could be seen as moving away from the protection of those very individual liberties it was set up to protect. Two examples illustrate this risk. The first is the need for the citizen to seek “appropriate advice”. Taken to its logical conclusion, this could be construed as meaning that the man in the street does not need to understand the law. It is therefore important that the criterion not be interpreted too expansively. The second example is the definition of foreseeability. There too, unless safeguards are put in place, any sentence may be construed as foreseeable either if it is contained

67 *Kokkinakis v. Greece*, above note 12, para. 52; *Convention, G. v. France*, Application No. 15312/89 (Lack of jurisdiction), judgment of 27 September 1995, para. 26.

68 ECtHR, *Karmo v. Bulgaria*, Application No. 76965/01, Decision on admissibility, 9 February 2006; *Ivanov v. Bulgaria*, Application No. 76942/01, Decision on admissibility, 5 January 2006.

in the law, in the broad sense of the word, or if it is in keeping with developments in society. This example serves to demonstrate that the criteria inherent in criminal law must be strictly defined if the prosecution and punishment of crimes, including war crimes, is to remain circumscribed by fundamental guarantees.