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The European Court of Human Rights and the Principle of Foreseeability (*Lex Certa* and *Stricta*)

How to Determine Whether an Offence Is Clearly Defined in Criminal Law

1. Introduction: The scope of this article

The European Court of Human Rights (referred to also as the ECtHR or the Court below) has applied the principle of foreseeability on many occasions to ascertain whether the accused should have foreseen at the time of the act that the act matches the description of an offence in a criminal-law provision and is therefore punishable.[*1] Thus, a question arises that has been decisive for the outcome of many cases: how to determine whether a given wording for an offence is sufficiently clear to be understandable in its substance. The aim behind the preparation of this article was to ascertain what guidelines the ECtHR has given for the use of the principle of foreseeability and whether it is possible to speak of a standard for the wording for an offence and its interpretation so as to ensure that these are in accordance with that principle. The paper also examines what problems have arisen in connection with this and what questions are yet to be answered. Through analysis of the case law, the article examines, in other words, what could serve as a foundation for determining whether a person should have foreseen the punishability of the act in question. To fulfil the aims for the article, I lay out a comprehensive empirical textual analysis of the relevant case law of the ECtHR.[*2]

1 This is examined in more detail below.

2 The author searched for the judgements by using the search facility of the official ECHR Web site (specifically, https://hudoc.echr.coe.int/eng#{%22documentcollectionsid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}). The filters used are 'Case-law', 'Judgments', 'Article 7(1)', and the word 'foreseeability'; the language selected is English. Most of the judgements examined are those available in English or German; the ones whose full text can only be read in French or Italian, or in any other language(s) apart from English and German, are generally not considered. Some of the results returned are for decisions or judgements in which the ECtHR merely stated that the appeal was admissible. The latter are not used as source material for this paper's discussion, and documents that mention foreseeability but neither deal with it in the context of Article 7 nor are discussed at length by the ECtHR have been excluded. The examination covered, in total, 135 ECtHR judgements or decisions. In most of these cases, the ECtHR denied that a violation of Article 7 (paragraph 1) had occurred.

The contribution begins with an explanation of the significance of the case law of the ECtHR for resolving the matter of how to apply the principle of foreseeability in case wherein there is a question of whether it was foreseeable that commission of a particular act brings liability. The first portion of the discussion demonstrates that employing the principle of foreseeability might be decisive for determining what acts are punishable and, thereby, the outcome of the case. Then the article points to the important role of the ECtHR in applying the principle, including its value for the national legislator and the courts. Finally, I analyse how the ECtHR has applied the principle of foreseeability and whether there could be a standard rooted in the case law for how to specify the language for an offence and interpret it accordingly, a standard that the legislator and national courts could apply in order to follow the principle of foreseeability.

2. The significance of the case law in question

2.1. Why it is important to study the principle's use in this connection

The principle of foreseeability is part of a broader principle, fundamental to criminal law: the legality principle, or *nullum crimen sine lege*[*3], which is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[*4] (hereinafter 'the ECHR' or 'the Convention'), titled 'No punishment without law'. This principle is also articulated in Article 49 of the Charter of Fundamental Rights of the European Union[*5] and in many national constitutions, being regarded as a core constitutional principle.[*6] The ECHR's Article 7, in paragraph 1, declares that no-one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when it was committed. The ECtHR has stated numerous times that this guarantee is an essential element of the rule of law and occupies a prominent place in the Convention's system of protection (no derogation from it is permissible under Article 15, on derogations in time of war or other public emergency), and it should be construed and applied in such a manner as to provide effective safeguards against arbitrary prosecution, conviction, and punishment.[*7] It follows that in a case of infringement of Article 7, a person cannot be held liable by the state for the act in question. This underscores the importance of the application of the principle.

The Court has expressed a view that Article 7 embodies the *nullum crimen* principle, holding that only the law can define a crime, implicit in which is the principle that any offence must be clearly defined in the law.[*8] The Court also stands behind the principle that criminal law must not be extensively construed to the accused's detriment – for instance, by analogy, *in malam partem*.[*9] In light of these views, the Court formulated the principle of foreseeability in criminal law in its decision in *Kokkinakis v. Greece*, stating that

3 Rendered in English as 'no punishable act without law'. This article focuses only on offences (punishable acts) and does not deal with penalties; this is why the text makes reference to *nullum crimen sine lege* rather than *nulla poena sine lege* (the latter meaning 'no punishing without law').

4 'Inimõiguste ja põhivabaduste kaitse konventsioon' ['Convention for the Protection of Human Rights and Fundamental Freedoms']. RT II 1996, 11, 34.

5 Charter of Fundamental Rights of the European Union (2012). *OJ C 326, pp. 391–407*.

6 See, for example, paragraph 23 of Section 1 of the Constitution of the Republic of Estonia. See 'Eesti Vabariigi põhiseadus'. RT I, 15.5.2015, 2, and see also Article 103, paragraph 2 of the Basic Law for the Federal Republic of Germany: 'Grundgesetz'. *Federal Law Gazette* I, p. 2048. Since this paper focuses only on the ECHR and the case law of the ECtHR, the discussion here does not deal with the Charter of Fundamental Rights of the European Union or with the member states' constitutions.

7 See, for example, the decisions on ECHR-related applications 20166/91 and 20190/92, of 22 November 1995, in *S.W. and C.R. v. United Kingdom*, paragraphs 34–35, 32–33; 45771/99, of 21 January 2003, in *Veeber v. Estonia*, para. 30; 55103/00, of 10 February 2004, in *Puhk v. Estonia*, para. 24; 9174/02, of 19 September 2008 (General Chamber, GC), in *Korbely v. Hungary*, para. 69; 12157/05, of 25 June 2009, in *Liivik v. Estonia*, para. 92; 36376/04, of 17 May 2010 (GC), in *Kononov v. Latvia*, para. 185; 54468/09, of 6 March 2012 (final 24 September 2012), in *Huhtamäki v. Finland*, para. 41; 26261/05 and 26377/06, of 14 March 2013 (final 14 June 2013), in *Kasymakhunov and Saybatalov v. Russia*, para. 76; 42750/09, of 21 October 2013 (GC), in *Del Rio Prada v. Spain*, para. 77; 35343/05, of 20 October 2015 (GC), in *Vasiliauskas v. Lithuania*, para. 153; 37462/09, of 4 October 2016 (final 4 January 2017), in *Žaja v. Croatia*, para. 90; 22429/07 and 25195/07, of 3 December 2019 (final 3 March 2020), in *Parmak and Bakir v. Turkey*, para. 57; 51111/07 and 42757/07, of 14 January 2020, in *Khodorkovskiy and Lebedev v. Russia* (No. 2), para. 568; 44612/13 and 45831/13, of 28 May 2020 (final 28 August 2020), in *Georgouleas and Nestoras v. Greece*, para. 55.

8 In the *Kokkinakis v. Greece* decision, on ECHR application 14307/88, of 25 May 1993, para. 52.

9 Ibid.

an offence is clearly defined when a person can know from the wording of the criminal-law provision and, if necessary, via the interpretation of the courts what act or omission renders him liable.[*10] The principle of foreseeability in criminal law is articulated in other terms as the *lex certa*[*11] (*nullum crimen sine lege certa*) and *stricta*[*12] (*nullum crimen sine lege stricta*) principle as part of the *nullum crimen* principle. *Lex certa* requires that a punishable act be defined clearly, and this requirement is met if a person foresees the punishability of the act from the wording for the offence in question or by the interpretation of a court.[*13] The *lex stricta* condition requires criminal law to be precise; more specifically, it implies prohibiting the application of analogy.[*14] This imposes limits on the interpretation of a penal provision for the (national) courts: the court may not interpret such a provision too broadly to the detriment of the individual. The ECtHR has not explicitly used the term 'lex certa' – it speaks instead of *nullum crimen* and foreseeability[*15] – but the Court has relatively recently employed the *lex stricta* notion explicitly, when referring to the prohibition of analogy in criminal law.[*16] By its nature, the principle of foreseeability is a rule with a high degree of abstraction and may be considered difficult to understand in terms of its content and scope. The legislator faces the question of how to describe an offence with sufficient clarity and precision. This is not merely a principle that a legislator must be guided by; it also serves as a basis for the courts' interpretation of the wording for an offence *in casu* to ensure that it is in accordance with the principle.[*17] In the course of the interpretation, a question arises as to whether it is possible to overcome potential vagueness in the definition of an offence if it is unclear (*lex incerta*) and, if so, how. Since the principle's application in the case law of the ECtHR has proved pivotal – as it still is – to ascertaining whether a person can foresee the punishability of his act and therefore can be held liable, examining the application of the principle is of considerable significance.

2.2. Why it is particularly important to examine the relevant ECtHR case law

Firstly, the Court's power to review how the national courts have applied Article 7 of the ECHR is vast. Article 7 speaks of the principle of the legality of criminal law as a human right. The Convention's Article 1 ('Obligation to respect human rights') obliges all parties to it to safeguard this (human) right in the implementation of national criminal law, and Article 13 ('Right to an effective remedy') obliges them to provide an effective remedy in the event of violation of this right. This demonstrates the importance of the *nullum crimen* principle and the need for each state party to honour it in its domestic law.[*18] Per Article 19 ('Establishment of the Court'), adherence to the obligations undertaken under the Convention is to be ensured

10 Ibid. The term 'foreseeability' in criminal law was first mentioned in the *S.W. and C.R. v. United Kingdom* ECHR case (applications 20166/91 and 20190/92), of 22 November 1995, paragraphs 35 and 33 (in actuality, based on case law addressing other Convention articles). It must be specified that the principle of foreseeability was, in fact, created in the context of not Article 7 but Article 10 ('Freedom of expression'). The Court's judgement of 26 April 1979 in *The Sunday Times v. United Kingdom* marks the starting point. In the sense of Article 10, paragraph 2, the exercise of freedom of expression may be restricted only if prescribed by law. In the judgement of *The Sunday Times*, it had been clarified that 'prescribed by law' entails the prerequisite of the law having been formulated with a degree of precision sufficient to enable a person to shape his conduct accordingly: he must be able reasonably to foresee – and, if necessary, then with the appropriate assistance – what the consequences of his conduct might be. See Judgment 6538/74, of 26 April 1979, in *The Sunday Times v. United Kingdom*, para. 49. See also Pieter van Dijk et al. *Theory and Practice of the European Convention on Human Rights*. Intersentia 2018, pp. 656, 658.

11 The word comes from the Latin *certus* or *certo*, which means 'certain or undoubted'. See Jaan Sootak. *Kriminaalpoliitika*. Juura 2015, p. 52.

12 This term is based on the word 'strictus', and it refers to something strict or tight. Ibid.

13 For details on this and also about the *lex certa* principle, see, for example, Winfried Hassemer. *Einführung in die Grundlagen des Strafrechts*. C.H. Beck 1990, pp. 254–255; Gabriel Hallevy. *A Modern Treaties on the Principle of Legality in Criminal Law*. Springer 2010, p. 138. – DOI: https://doi.org/10.1007/978-3-642-13714-3; Mikhel Timmermann. *Legality in Europe: On the Principle Nullum Crimen, Nulla Poena Sine Lege in EU Law and under the ECHR*. Intersentia 2018, p. 27.

14 For example, see Winfried Hassemer (see Note 13), p. 269; Mikhel Timmermann (see Note 13), p. 29.

15 See the materials cited in Note 7.

16 *Pantalon v. Croatia* (application no. 2953/14), ECHR, of 19 November 2020, para. 46.

17 It should be noted that the *lex certa* and *stricta* principles are not the only principles that the courts are guided by when they interpret a criminal-law provision. While the wording for an offence might be sufficiently clear and could be followed in a case, sometimes a person is not held liable for reason of, for example, the *ultima ratio* principle (i.e., the principle that criminal law is the last resort). This might be especially relevant in cases of *bagatelle* offences.

18 David Harris et al. *Law of the European Convention on Human Rights*. Oxford University Press 2014, p. 84.

by the ECtHR, whose decisions on the application and interpretation of the *nullum crimen* principle are, therefore, also crucial for all states that are party to the Convention.[*19] The Court considers its power of review of the application of Article 7 by the national courts wide-ranging because said article requires something with the weight of a legal basis behind any conviction and sentence. To accord it a lesser power of review would, in the Court's opinion, render Article 7 devoid of purpose.[*20] On this basis, the Court sees itself as functioning also to consider whether the act of a person fell within the lines of the definition of the offence for which that person was convicted and, consequently, whether it was foreseeable that the act could constitute such an offence.[*21] Although expressing the view that the Court is not a substitute for domestic instances or charged with addressing alleged errors of fact committed by a national court, the ECtHR nevertheless considers itself to have power to do just that if, for example, the national court's assessment is manifestly arbitrary.[*22] It is no exaggeration to say that the Court's intervention in the application, inclusive of interpretation, of domestic criminal law – more precisely, of the provision describing the punishable act – is relatively extensive.

For example, under dispute in the recent case *Pantalon v. Croatia* was whether a spear gun used for diving, which the police had found on a person with other beach equipment and for the possession of which he was fined, was a weapon within the meaning of Croatian law. The ECtHR found a violation of paragraph 1 of Article 7, holding that the conduct of that person, Pantalon, was not punishable in Croatia because (1) that nation's Weapons Act expressly excluded from the definition of a weapon underwater weapons intended for fishing, including spear guns; (2) there was no dispute over the fact that the spear gun was found with beach equipment indicative of fishing; (3) the national courts did not examine the spear gun or photographs of it to determine what propulsion mechanism it used; and (4) the spear gun did not require a weapons permit. With these arguments as a basis, the Court concluded that the national courts interpreted the law in a manner unforeseeable to the person concerned.[*23]

Secondly, although the European Union has not yet acceded to the Convention, the Convention and the case law of the ECtHR nevertheless play a significant role in the interpretation of European Union law undertaken by the Court of Justice of the European Union (hereinafter 'CJEU'). That includes its application of the principle of foreseeability in criminal law as outlined by the ECtHR. In fact, for its views on the application of the principle of foreseeability, the CJEU has taken the case law of the ECtHR as its main foundation.[*24] Therefore, one can conclude that the case law of the ECtHR on the principle of foreseeability in criminal law has contributed to the interpretation and development of European Union law. Thirdly, the Supreme Court of Estonia, in turn, has expressly applied the perspectives on application of the *lex certa* and *stricta* principle expressed by the ECtHR.[*25]

19 Estonia is a contracting party to the Convention, which entered into force in Estonia on 16 April 1996 (see Note 4).

20 See the GC decision in *Kononov v. Latvia* (application 36376/04), ECHR, of 17 May 2010, para. 198 and in *Rohlena v. Czech Republic* (application 59552/08), ECHR, of 27 January 2015, para. 52; the decision in *Pantalon v. Croatia* (application 2953/14), ECHR, of 19 November 2020, paragraphs 48 and 50; the decision in *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 59. See also the GC decision in *Korbely v. Hungary* (application 9174/02), ECHR, of 19 September 2008, para. 73; the decision in *Žaja v. Croatia* (application 37462/09), ECHR, of 4 October 2016 (final 4 January 2017), para. 92; the decision in *Parmak and Bakir v. Turkey* (applications 22429/07 and 25195/07), ECHR, of 3 December 2019 (final 3 March 2020), para. 61.

21 *Pantalon v. Croatia* (application 2953/14), ECHR, of 19 November 2020, para. 50.

22 See the decisions in, for example, *Kononov v. Latvia* (application 36376/04), ECHR, GC, of 17 May 2010, para. 189; *Custers, Deveaux and Turk v. Denmark* (applications 11843/03, 11847/03, and 11849/03), ECHR, of 3 May 2007, para. 84; *Huhtamäki v. Finland* (application 54468/09), ECHR, of 6 March 2012 (final 24 September 2012), para. 51; *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 58.

23 *Pantalon v. Croatia* (application 2953/14), ECHR, of 19 November 2020, paragraphs 51–52.

24 See, for example, the decision in case C-42/17, *M.A.S. & M.B.*, ECLI:EU:C:2017:936, para. 55; also joined cases C-189/02, C-202/02, C-205/02, C-208/02, and C-213/02, *Dansk Rørindustri and Others v. Commission*, ECLI:EU:C:2005:408, para. 216.

25 See, for example, the decision of the Criminal Chamber of the Supreme Court of 20 November 2015 in case 3-1-1-93-15, pp. 96–97. See also the decision of the same chamber of 9 November 2017 in case 1-16-5792/101, p. 2. The starting point was the decision of the Supreme Court *en banc* of 21 June 2011 in case 3-4-1-16-10, pp. 55–76, in which the Supreme Court expressly adopted the views of the ECtHR about the use of the principle of foreseeability in criminal law.

3. The use of the principle of foreseeability by the Court: Is there a standard?

3.1. The Court's main postulates

As stated above, the ECtHR formulated the principle of foreseeability in criminal law for the first time in the judgement from *Kokkinakis v. Greece*. The Court articulated that, under Article 7's paragraph 1, an offence must be clearly defined in criminal law and that criminal law must not be extensively construed to the accused's detriment by analogy. Then, the Court continued its explanation by stating that '[t]his condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable'.*[26] The Court also stated that 'the wording of many statutes is not absolutely precise and 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'.*[27] The same is true of criminal-law provisions, the interpretation and application of which depends on (court) practice.*[28]

These views were further explained with reference to paragraph 1 of Article 7 in the case *S.W. and C.R. v. United Kingdom*. The Court based its reasoning on that in *Kokkinakis v. Greece* and on its case law on other articles of the Convention, and it stated that Article 7, when speaking of 'law', 'alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of foreseeability and accessibility'.*[29] Also, the ECtHR stressed that, however clearly drafted a legal provision may be, any system of law – with criminal law being no exception – possesses an inevitable element of judicial interpretation, because there will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Therefore, gradual clarification of the rules of criminal liability through judicial interpretation from one case to another is necessary. Still, an essential requirement was articulated whereby the resultant development must in any case be consistent with the essence of the offence and reasonably foreseen.*[30] Such a requirement has long been established in practice and is subject to further discussion below.*[31] It is worth noting in addition that the Court has, in the years since, added a specification that the penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7, 'provided that it proves to be sufficiently clear in the large majority of cases'.*[32]

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26 *Kokkinakis v. Greece* (application 14307/88), ECHR, of 25 May 1993, para. 52. See also the references cited in Note 10.

27 Ibid., para. 40. See also *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, para. 29; *Larissis and Others v. Greece* (application 140/1996/759/958–960), ECHR, of 24 February 1998, para. 34; *Korbely v. Hungary* (application no. 9174/02), ECHR, GC, of 19 September 2008, para. 70; *Liivik v. Estonia* (application 12157/05), ECHR, of 25 June 2009, para. 95; *Huhtamäki v. Finland* (application 54468/09), ECHR, of 6 March 2012 (final 24 September 2012), para. 45; *Kasymakhunov and Saybatalov v. Russia* (applications 26261/05 and 26377/06), ECHR, of 14 March 2013 (final 14 June 2013), para. 78; *Khodorkovskiy and Lebedev v. Russia* (applications 26261/05 and 26377/06), ECHR, of 25 July 2013 (final 25 October 2013), para. 780; *Ashlarba v. Georgia* (application 45554/08), ECHR, of 15 July 2014, paragraphs 33–34; *Vasiliauskas v. Lithuania* (application 35343/05), ECHR, GC, of 20 October 2015, para. 155; *Parmak and Bakir v. Turkey* (applications 22429/07 and 25195/07), ECHR, of 3 December 2019 (final 3 March 2020), para. 59; *Khodorkovskiy and Lebedev v. Russia* (No. 2) (applications 51111/07 and 42757/07) ECHR, of 14 January 2020, para. 569; *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 56.

28 *Kokkinakis v. Greece* (application 14307/88), ECHR, of 25 May 1993, para. 40.

29 *S.W. and C.R. v. United Kingdom* (applications 20166/91 and 20190/92), ECHR, of 22 November 1995, paragraphs 35–36 and 33–34.

30 Ibid., paragraphs 36 and 34.

31 See, for example, *Radio France v. France* (application 53984/00), ECHR, of 30 March 2004, para. 20; *Jorgic v. Germany* (application 74613/01), ECHR, of 12 July 2007, para. 103 *ff.*; *Kasymakhunov and Saybatalov v. Russia* (applications 26261/05 and 26377/06), ECHR, of 14 March 2013 (final 14 June 2013), para. 78; *Khodorkovskiy and Lebedev v. Russia* (applications 26261/05 and 26377/06), ECHR, of 25 July 2013 (final 25 October 2013), para. 780; *Navalnyye v. Russia* (application 101/15), ECHR, of 17 October 2017 (final 5 March 2018), para. 55; *Khodorkovskiy and Lebedev v. Russia* (No. 2) (applications 51111/07 and 42757/07), ECHR, of 14 January 2020, para. 569; *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 56.

32 GC decision in *Cantoni v. France* (application 17862/91), ECHR, of 11 November 1996, para. 32. It is noteworthy that the Court has not explained in its practice what it means to 'be sufficiently clear in the large majority of cases'.

Another key facet of the application of the principle of foreseeability in criminal law was pointed out in the case of *Cantoni v. France*. The Court noted (again on the basis of case law dealing with other articles of the Convention) the following[*33]:

> [T]he scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. 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.

According to the case law, special care and great caution are needed in such professional fields as banking, taxation, and the sale of medicines.[*34]

Next, we turn to how the ECtHR has applied these postulates, what problems have arisen from its practice in this regard, and what generalisations one may draw from the analysis of the relevant case law.

3.2. Thoughts for the legislator on wording a criminal-law provision for an offence

As the Court's view on the principle of foreseeability clearly indicates, it is the legislator's wording for an offence that is, or should be, of primary importance.[*35] Interpretation by the courts is to be resorted to only if necessary (per the language 'if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable'), and the courts may not interpret a wording too broadly. The interpretation must be strictly based on the formulation of the criminal-law provision and be consistent with the essence of the offence.[*36] It can be said that, albeit with some inconsistencies, the case law of the Court makes it possible to establish some sort of standard for how precise and unambiguous the wording of the provision for an offence must be.

Although *in principio* the legislator must ensure that the formulation itself enables a person reasonably to foresee the conduct for which he is to be held liable, the standard set for the degree of abstractness acceptable in the wording of a criminal-law provision is actually quite low. There are examples of the case law recognising the possibility of the legislator formulating an offence in a very abstract and vague manner. The complainant in *Cantoni v. France* was a supermarket-owner held liable for selling medicinal products (for example, vitamin C and antiseptic sprays) unlawfully. Cantoni complained that the notion of a medicinal product in French law was overly vague and that he could not determine what acts would incur liability, but the Court, in its response, pointed out that laws are of general application, adding that using general categorisations (as opposed to exhaustive lists) is one of the most typical legislative techniques and does not in itself result in a violation of Article 7 of the ECHR.[*37] In *Soros v. France*, a question arose as to whether

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33 GC decision in *Cantoni v. France* (application 17862/91), ECHR, of 11 November 1996, para. 35. See also the reference made in this judgement to *Groppera Radio AG and Others v. Switzerland* (application 10890/84), ECHR, of 28 March 1990, para. 68. See, among recent judgements, *Navalnyye v. Russia* (application 101/15), ECHR, of 17 October 2017 (final 5 March 2018), para. 56; *Khodorkovskiy and Lebedev v. Russia* (No. 2) (applications 51111/07 and 42757/07), ECHR, of 14 January 2020, para. 570; *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 57.

34 Accordingly, see, for example, *Aras v. Turkey* (application 15065/07), ECHR, of 18 November 2014 (final 18 February 2014), para. 57; *Khodorkovskiy and Lebedev v. Russia* (applications 26261/05 and 26377/06), ECHR, of 25 July 2013 (final 25 October 2013), para. 784; *Isaksson and Others v. Sweden* (application 29688/09), an ECHR decision on the admissibility of an application.

35 From the *Kokkinakis v. Greece* (application 14307/88) ECHR decision, of 25 May 1993). See para. 52. Also see the GC decision in *Cantoni v. France* (application 17862/91), ECHR, of 11 November 1996, para. 35.

36 Ibid. Also *S.W. and C.R. v. United Kingdom* (applications 20166/91 and 20190/92), ECHR, of 22 November 1995, paragraphs 36 and 34.

37 *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, paragraphs 8, 22, 31–32. Other examples include *Khodorkovskiy and Lebedev v. Russia* (applications 26261/05 and 26377/06), ECHR decision of 25 July 2013 (final 25 October 2013), para. 791, and also *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 61.

an understandable definition was employed for insider trading, the offence for which Soros had been convicted. By only a slim majority, the judges deemed the definition clear enough, while the other three (out of seven) judges criticised this stance, saying that the criminal-law provision could have been much more precise and arguing that there is a difference between avoidable and unavoidable inaccuracy (the latter argument gained all the more credence in that the law was amended right after the conviction, and even the relevant authority in France expressed doubt as to whether Soros should be deemed liable).[*38]

The ECtHR seems to be of the opinion that the mere vagueness of a criminal-law provision does not indicate in general that the person could not have reasonably foreseen liability. In the landmark case *Kokkinakis v. Greece*, the notion of proselytism (unlawful conversion of another person), which was punishable under Greek criminal law, came under consideration. Although the Court concluded that the wording for the associated offence was very vague, it nevertheless held that the national courts had explained the notion enough and there was no infringement of Article 7.[*39] It is important to draw attention to the dissenting opinions, though. For example according to one judge, L.-E. Pettiti, the definition of proselytism was so vague as to cover nearly any attempt to persuade another person to change religion, which, in turn, leaves too wide a margin for the courts to decide whether any given act is punishable.[*40] Likewise, Judge S.K. Martens found the notion of proselytism very unclear, stating that this is indicated by the use of the words 'in particular', 'any direct or indirect attempt', and 'to intrude on the religious beliefs'. Since the wording for the offence was so problematic, Martens considered the domestic case law unable to 'cure' such imprecision and apply supplemental guarantees against arbitrariness, which the text of the law in question did not provide.[*41] Despite criticism on such grounds, the Court maintained the views articulated in the *Kokkinakis v. Greece* judgement.[*42]

Moreover, the Court has even implied that if the legislator has formulated a penal provision in a vague and broad manner, the act of doing so might actually express the will of the lawmaker to leave a wide margin of interpretation to the courts.[*43] This manifests itself in the case law with regard to the legislator, in its apparent wish to encompass as many ways of committing the offence as possible, using the expression 'in any way' with regard to the conduct.[*44]

On the other hand, it is obvious that the more precisely the criminal-law provision is formulated, the more likely it is to not violate the principle of foreseeability. For example, in its decision in *Huhtamäki v. Finland*, the Court implied that liability is undoubtedly foreseeable if the criminal-law provision in question does not give rise to any ambiguity or lack of clarity as to its content. The provision itself, from the Finnish Criminal Code, states that 'a person who hides, procures, takes into his or her possession or conveys property obtained from another through, *inter alia*, aggravated debtor's fraud, or otherwise handles such property although he or she knows that the property was thus obtained shall be convicted of a receiving offence'.[*45] This was considered a criminal-law provision with unambiguous foreseeability.[*46]

One could also discuss better ensuring the clarity of a criminal-law provision through the legislator defining the key elements used in the wording for the offence. The Court has considered this decisive in such cases as *Ashlarba v. Georgia*, with the most important reasons for denying the existence of a violation of Article 7 there being that (1) an article in the criminal code clearly outlawed two separate offences related to the institution of a 'thieves' underworld' and (2) a law comprehensively explained to the public

38 *Soros v. France* (application 50425/06), ECHR, of 6 October 2011 (final 8 March 2012), paragraphs 55, 57, 59, and 62. Note also the dissenting opinion of judges M. Villiger, G. Yudkivska, and A. Nussberger.

39 *Kokkinakis v. Greece* (application 14307/88), ECHR, of 25 May 1993, paragraphs 16–20 and 40–41. The following definition of proselytism was given: 'By "proselytism" is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (eterodoxos), with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety.'

40 See the dissenting opinion of Judge Pettiti.

41 See the dissenting opinion of Judge Martens, para. 5.

42 See *Larissis and Others v. Greece* (application 140/1996/759/958–960), ECHR, of 24 February 1998, paragraphs 34–35.

43 *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), paragraphs 61–62.

44 Ibid., para. 62.

45 *Huhtamäki v. Finland* (application 54468/09), ECHR, of 6 March 2012 (final 24 September 2012), para. 47.

46 Other examples include *G. v. France* (application 15312/89), ECHR, of 27 September 1995, paragraphs 7 and 25 (pertaining to indecent assault with violence or coercion) and *Flinkkilä v. Finland* (application 25576/04), ECHR, of 6 April 2010 (final 6 July 2010), para. 66 (involving invasion of privacy).

the definition of several terms already in colloquial use: 'thieves' underworld', 'being a member of the thieves' underworld', 'settlement of disputes using the authority of a thief in law', 'being a thief in law', and so on.[*47] Likewise, the Court based a finding on the rationale that liability under criminal law for belonging to a terrorist organisation is reasonably foreseen on the basis of a detailed definition of 'terrorist organisation', 'terrorism', and 'terroristic activities' in another legal act.[*48] The ECtHR considers it sufficient if the combination of several provisions makes it possible to answer the question of what act is punishable.[*49] In such a case, the margin for interpretation granted to the national courts in applying a criminal-law provision remains limited and the possibility of the courts interpreting that provision arbitrarily in such a way as to ultimately deviate from the legislature's intention in creating the provision would be considerably reduced. Were a provision to leave the courts with too wide a margin for interpretation, the foreseeability of liability would be highly debatable. In the *Kokkinakis v. Greece* and *Soros v. France* cases, the dissenting judges found that if the penal provision is too vague, it leaves the courts too much leeway to determine the precise limits of the notion of the offence in question.[*50] It would be preferable for the legislator to define key elements of the offence, should the scope for interpretation otherwise be too great. Of course, this must not necessitate rigidity and inflexibility in the wording of a criminal-law provision, but it could be argued that such definition would help preclude possible difficulties of interpretation by the courts and violation of the principle of foreseeability.

For deciding whether a person should have reasonably foreseen from the wording for an offence whether the act was punishable, it is important to take into account the seriousness of the act (how obvious its illegality and the threat of punishment could be considered), the field in which the act was committed, and the status of the person committing it. The Court has indicated that the more flagrant the offence, the lower the standard required (especially in international criminal law – for example, the crime of genocide).[*51] The more specifically delimited the field, the more a person operating in that field should be able to foresee the punishability of the act, irrespective of any vagueness of the criminal law.[*52] The more important the position held by the person (manager, shareholder, etc.), the more detailed that person's knowledge of the regulation of that field is generally required to be.[*53]

Finally, the Court seldom considers it decisive that the specific person himself be able to reasonably foresees the punishability of an act on the basis of his knowledge. Rather, the Court's understanding as expressed in many decisions is that it must be foreseeable with legal assistance.[*54] The Court's case law therefore seems to suggest that criminal law is written primarily for the understanding of the lawyer, who must be able to understand the conduct for which liability may arise. If even the lawyer has difficulty in determining the scope of the offence, there is a relatively strong argument in favour of the conclusion that foreseeability is lacking. However, this is not always true: sometimes the ECtHR has articulated arguments that the punishability of an act is common knowledge and already obvious through common sense (as in the case of belonging to the 'thieves' underworld' or falsifying a private company document).[*55] The value

47 *Ashlarba v. Georgia* (application 45554/08), ECHR, of 15 July 2014, paragraphs 38–39.

48 *Kasymakhunov and Saybatalov v. Russia* (applications 26261/05 and 26377/06), ECHR, of 14 March 2013 (final 14 June 2013), para. 82.

49 Ibid., para. 88. See also *Parmak and Bakir v. Turkey* (applications 22429/07 and 25195/07), ECHR, of 3 December 2019 (final 3 March 2020), paragraphs 63 and 65.

50 See the references in notes 38 and 41.

51 See, for example, the decisions in *Jorgic v. Germany* (application 74613/01), ECHR, of 12 July 2007, paragraphs 113 and 116; *Ashlarba v. Georgia* (application 45554/08), ECHR, of 15 July 2014, paragraphs 37 and 40; *Berardi and Mularoni v. San Marino* (applications 24705/16 and 24818/16), ECHR, of 10 January 2019 (final 10 April 2019), paragraphs 53–54.

52 For example, see *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, paragraphs 31–32; *Khodorkovskiy and Lebedev v. Russia* (applications 11082/06 and 13772/05), ECHR, of 25 July 2013 (final 25 October 2013), para. 784; *Aras v. Turkey* (application 15065/07), ECHR, of 18 November 2014 (final 18 February 2015), para. 57.

53 See *Khodorkovskiy and Lebedev v. Russia* (applications 11082/06 and 13772/05), ECHR, of 25 July 2013 (final 25 October 2013), para. 810.

54 See, for example, the decisions in *Achour v. France* (application 67335/01), ECHR, GC, of 29 March 2006, para. 54; *Jorgic v. Germany* (application 74613/01), ECHR, of 12 July 2007, para. 113; *Kasymakhunov and Saybatalov v. Russia* (applications 26261/05 and 26377/06), ECHR, of 14 March 2013 (final 14 June 2013), paragraphs 78 and 82; *Ashlarba v. Georgia* (application 45554/08), ECHR, of 15 July 2014, para. 40.

55 See *Ashlarba v. Georgia* (application 45554/08), ECHR, of 15 July 2014, para. 40; *Martirosyan v. Armenia* (application 23341/06), ECHR, of 5 February 2013 (final 5 May 2013), paragraphs 59–63. See also *Moiseyev v. Russia* (application 62936/00), ECHR, of 9 October 2008 (final 6 April 2009), para. 241; *Berardi and Mularoni v. San Marino* (applications 24705/16 and 24818/16), ECHR, of 10 January 2019 (final 10 April 2019), para. 54.

of those arguments should be considered questionable, though, because discerning their applicability is difficult and, hence, the arguments can be used to the detriment of the accused. On the other hand, it can probably be argued that reliance on them is confined to cases wherein the punishability of the act appears perfectly obvious.

3.3. Thoughts for the national courts: Guidelines for ascertaining whether the punishability of an act was reasonably foreseeable

On the basis of the Court's case law, the role of the national courts in ensuring the clarity of a criminal-law provision is generally decisive and, accordingly, important for the outcome of the case. The process consists of interpreting the wording for an offence and thereby dispelling any ambiguities.[*56] The case law shows that there are quite a few statements by the Court that the national courts can consult when determining whether liability could have been foreseen.

First of all, one of the most important observations is that the punishability of an act must be assessed from the point of view of the individual at the time of the act.[*57]

Secondly, the ECtHR has set a rule in place that it applies in almost all of the decisions in which it decides on the question of the foreseeability of the punishability of an act: the interpretation by the Court, as well as that of the national courts, must always, without exception, be consistent with the essence of the offence and reasonably foreseen at the time of the act.[*58] By articulating such a highly abstract rule, the Court has not laid down precise criteria for assessment of whether an interpretation is consistent with the nature of the offence and is reasonably foreseeable; instead, the Court has approached this on a case-by-case basis. If trying to find some guidance from the Court, one can state that the ECtHR has considered it necessary in some cases to identify the key elements (central characteristics) of the punishable act (for instance, in the *Parmak and Bakir v. Turkey* case, the Court found the key element of membership of a terrorist organisation to consist of the organisation's use of violence or the will to use violence, and this was decisive for the outcome of the case) and has taken this, in effect, as a foundation for assessing whether the interpretation is consistent with the essence of the offence.[*59] Still, the Court has not specifically laid down any other noteworthy guidelines. This state of affairs was quite rightly criticised by Judge P.P. de Albuquerque in his dissenting opinion in *Ilnseher v. Germany*: it makes application of the principle of foreseeability highly dependent on the particular circumstances of each case, which somewhat obscures the scope of this principle.[*60]

The need for courts' interpretation of some criminal-law provisions is clearly unavoidable.[*61] A requirement for interpretation does not in itself show that the liability was not foreseeable, however.[*62] Every criminal-law provision contains, to a greater or lesser extent, elements the content of which, being not entirely unambiguous or wholly precise, requires interpretation. Criminal law is in a state of constant development, so the institutions can gradually clarify a provision by delimiting it, even reinterpreting it as is necessary,

56 See the decision from *Kokkinakis v. Greece* (application 14307/88), ECHR, of 25 May 1993, para. 52.

57 See, for example, *Streletz, Kessler and Krenz v. Germany* (applications 34044/96, 35532/97, and 44801/98), ECHR, of 22 March 2001, para. 78; *Jorgic v. Germany* (application 74613/01), ECHR, of 12 July 2007, paragraphs 111–113; *Korbely v. Hungary* (application 9174/02), ECHR, GC, of 19 September 2008, paragraphs 90–94; *Huhtamäki v. Finland* (application 54468/09), ECHR, of 6 March 2012 (final 24 September 2012), para. 51; *Žaja v. Croatia* (application 37462/09), ECHR, of 4 October 2016 (final 4 January 2017), paragraphs 102–105; *Parmak and Bakir v. Turkey* (applications 22429/07 and 25195/07), ECHR, of 3 December 2019 (final 3 March 2020), para. 63.

58 See, for example, *S.W. and C.R. v. United Kingdom* (applications 20166/91 and 20190/92), ECHR, of 22 November 1995, paragraphs 36 and 34; *Radio France v. France* (application 53984/00), ECHR, of 30 March 2004, para. 20; *Kasymakhunov and Saybatalov v. Russia* (applications 26261/05 and 26377/06), ECHR, of 14 March 2013 (final 14 June 2013), para. 78; *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 56.

59 See *Parmak and Bakir v. Turkey* (applications 22429/07 and 25195/07), ECHR, of 3 December 2019 (final 3 March 2020), para. 68. See also *Korbely v. Hungary* (application 9174/02), ECHR, GC, of 19 September 2008, paragraphs 81–83; *Navalnyye v. Russia* (application 101/15), ECHR, of 17 October 2017 (final 5 March 2018), paragraphs 63–68.

60 See the dissenting opinion of Judge de Albuquerque in *Ilnseher v. Germany* (applications 10211/12 and 27505/14), ECHR, GC, of 4 December 2018, para. 127.

61 *Kokkinakis v. Greece* (application 14307/88), ECHR, of 25 May 1993, para. 40.

62 See, for example, *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, para. 32.

while always bearing in mind at the same time the essence of the offence and the foreseeability of the interpretation that is relevant at the time of the act.[*63]

Analysis reveals that the Court has set some limits to the interpretation of an offence. The scope for interpretation depends firstly on the text of the relevant penal provision (the description of the offence) and on the text of any further provisions that assist in interpreting it.[*64] Only this approach can ensure that the interpretation is consistent with the essence of the offence and is reasonably foreseen. A *contra legem* interpretation of a provision (in this sense, a provision that aids in understanding the penal provision) by the national court indicates that the punishability of the act could not have been foreseeable.[*65] Also, liability for an act is not foreseeable if the quality of the law as a whole is poor – that is, in cases wherein the legal order is unclear with regard to the regulation of an area in general (this scenario manifested itself in *Vyerentsov v. Ukraine*: the state could not lay down clear legislation on the rules for holding peaceful demonstrations).[*66] The possibilities for interpreting a provision depend on ascertaining the legislator's intention, which makes it possible, in turn, to ascertain the (basic) nature of the punishable act as set out in the law and the reasonable foreseeability of its punishability.[*67] It could be argued that interpreting a criminal-law provision in a manner contrary to the will of the legislator constitutes an argument against the foreseeability of the act's punishability. The more serious and long-term or persistent the offence, the easier it is to be sure, by means of interpretation, that the person should have reasonably foreseen conviction and punishment for the offence.[*68] In some cases, the Court has stressed the need to specify the purpose of the criminal-law provision before one can ascertain its content (what, more precisely, the provision is intended to protect).[*69] Also, it may be necessary to weigh conflicting legal interests (e.g., in cases of invasion of privacy, freedom of expression *versus* the right to respect for one's private life in relation to the publication of information about another person) when one is assessing the punishability of an act.[*70]

The Court has put emphasis on the narrowness of the field: if the field is specific, the person must exercise extensive care or even, in the event of doubt, abstain. Also important is the status of the person: someone who holds a position of leadership must know the details of the relevant regulation and quite possibly be familiar with possible different interpretations.[*71] In almost all cases, the person concerned may be required to seek legal advice before the act in order to ascertain reliably whether that act is punishable at the time of its commission, both in the case of professionals and in other cases.[*72]

It is evident from the approach of the ECtHR that the Court has developed a test to answer the question related to interpretation of a criminal-law provision.[*73] Before interpretation by the court charged with

63 See the sources mentioned in notes 27 and 30.

64 *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, para. 35. See also the decision in *Kasymakhunov and Saybatalov v. Russia* (applications 26261/05 and 26377/06), ECHR, of 14 March 2013 (final 14 June 2013), para. 82; *Khodorkovskiy and Lebedev v. Russia* (applications 26261/05 and 26377/06), ECHR, of 25 July 2013 (final 25 October 2013), para. 780; *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 65.

65 *Pantalon v. Croatia* (application 2953/14), ECHR, of 19 November 2020, para. 51.

66 See the *Vyerentsov v. Ukraine* (application 20372/11), ECHR, decision of 11 April 2013 (final 11 July 2013), paragraphs 54–55 and 66–67.

67 See, for example, *Flinkkilä v. Finland* (application 25576/04), ECHR, of 6 April 2010 (final 6 July 2010), para. 67; *Haarde v. Iceland* (application 66847/12), ECHR, of 23 November 2017 (final 23 February 2018), para. 128.

68 *Jorgic v. Germany* (application 74613/01), ECHR, of 12 July 2007, paragraphs 113 and 116; *Ashlarba v. Georgia* (application 45554/08), ECHR, of 15 July 2014, para. 40.

69 For an example involving the notion of commercial fraud (and, more precisely, the element of non-compliance with contractual obligations), see the decision in *Navalnyye v. Russia* (application 101/15), ECHR, of 17 October 2017 (final 5 March 2018), paragraphs 60–68. One pertaining to membership of a terrorist organisation can be found in the decision in *Parmak and Bakir v. Turkey* (applications 22429/07 and 25195/07), ECHR, of 3 December 2019 (final 3 March 2020), paragraphs 72 –73.

70 See, for example, the *Flinkkilä v. Finland* decision (application 25576/04), ECHR, of 6 April 2010 (final 6 July 2010), paragraphs 66–67 (pertaining to invasion of privacy).

71 See, for example, *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, paragraphs 31–32; *Khodorkovskiy and Lebedev v. Russia* (applications 26261/05 and 26377/06), ECHR, of 25 July 2013 (final 25 October 2013), paragraphs 784 and 810; *Aras v. Turkey* (application 15065/07), ECHR, of 18 November 2014 (final 18 February 2015), para. 57. See also references 52 and 53.

72 See, specifically, *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, para. 35; *Ashlarba v. Georgia* (application 45554/08), ECHR, of 15 July 2014, para. 40.

73 Explicit mention is made in the decision in *Parmak and Bakir v. Turkey* (applications 22429/07 and 25195/07), ECHR, of 3 December 2019 (final 3 March 2020), in para. 62 onward.

resolving the case, it is necessary to ask whether there was already, at the time of the act, any case law addressing interpretation of the punishable act. If such court practice exists and if it can be considered consistent and acceptable, then this is sufficient for stating that liability for the act in question was reasonably foreseeable. In all other cases, however, the court needs to interpret the provision and answer the question of whether considering the conduct at issue in this particular case to be encompassed by the penal provision corresponds to the essence of the offence and was reasonably foreseeable at the time of the conduct. In most cases, the ECtHR has not found a violation of paragraph 1 of Article 7, which indicates that states have a fairly wide margin of discretion to ensure that liability is sufficiently foreseeable. On one hand, the Court recognises relatively broad and vague wording of criminal-law provisions as valid, with leeway for interpretation left to the national courts; on the other hand, the Court requires an interpretation that is consistent with the essence of the offence, which may still remain relatively unclear on the basis of the provision. In principle, the interpretation may even change over time. The interpretation on the basis of which a person is convicted may be stated after the event (and, hence, might not have been foreseeable at the time of the act at all), although in such cases the question of relevance depends on the extent to which the case law has evolved since the act.[*74] If the case law indeed has developed significantly in the time since, the Court finds that infringement of paragraph 1 has taken place (e.g., in cases of persistent tax evasion).[*75] The existence of contradictory interpretations at the time of the act may imply both that the punishability of the act was not foreseeable and simultaneously that the person, when considering the act, had to take account of an interpretation unfavourable for him being applied.[*76] It should be pointed out also on the basis of the case law that the most important role in the interpretation of criminal law lies with the highest national court.[*77] The case law of the first- and second-instance courts does not have the same significance, and such case law may not suffice for speaking of foreseeability.[*78]

Not only the case law but also the opinions of legal scholars or other authorities may be taken into account when one is interpreting a criminal-law provision and settling the issue of its relevance. Even where such opinions exist, the person still must have been aware of them before committing the offence, though legal assistance may justifiably be considered incumbent on a person in his situation. That said, the Court has explicitly regarded case law as more important than the opinions of legal experts.[*79] Consistent national case law on the punishability of the act in question or a similar act indicates that the act is punishable, irrespective of whether the interpretation of the law offered by legal scholars (and, hence, obviously, by some other authorities) is consistent with the interpretation of the courts. On the other hand, when the court undertakes the first interpretation of the wording for the given offence (as relevant for the case) and relies on conflicting opinions among legal scholars, this might indicate that the punishability of the act could not have been reasonably foreseeable at the time of the act.[*80]

Finally, the Court seems to have had recourse to a wide variety of source types in its efforts to ascertain the possible interpretations of the relevant criminal law at the time of the act.[*81] Where interpretations have differed, it has expressed relative uncertainty as to the punishability of the act (unless there was consistent case law). In sum, where the court relies on a relevant source for its interpretation, that source can be said to be relevant, as a rule, only in that such a source existed at the time of the offence and (if such a person could have not reached the same conclusion by some other means) was in principle available to the accused. It can be concluded that the interpretation by the national courts should be aligned, firstly, with domestic case law, then (if necessary) other sources (such as opinions of legal scholars). In general, it should be con-

74 *S.W. v. United Kingdom* (application 20166/91), ECHR, of 22 November 1995, para. 43; *Radio France v. France* (application 53984/00), ECHR, of 30 March 2004, para. 20.

75 *Veeber v. Estonia* (application 45771/99), ECHR, of 21 January 2003, para. 36; *Puhk v. Estonia* (application 55103/00), ECHR, of 10 February 2004, para. 32.

76 See, for example, *Jorgic v. Germany* (application 74613/01), ECHR, of 12 July 2007, paragraphs 111–112.

77 For example, see *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, paragraphs 7 and 25; *Baskaya and Okçuoglu v. Turkey* (applications 23536/94 and 24408/94), ECHR, of 8 July 1999, para. 39.

78 See, for example, *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, para. 34.

79 *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 64.

80 *Jorgic v. Germany* (application 74613/01), ECHR, of 12 July 2007, paragraphs 111–112.

81 Ibid. See also the *Streletz, Kessler and Krenz v. Germany* decision (applications 34044/96, 35532/97, and 44801/98), ECHR, of 22 March 2001, para. 78; the GC decision in *Korbely v. Hungary* (application 9174/02), ECHR, of 19 September 2008, para. 79 *ff*.

sidered necessary – and even beyond any question – that the interpretation be based on reliable, verifiable sources only and on views and conclusions that were foreseeable at the time of the act and that do not deviate from the essence of what constitutes an offence. Only then can the principle of foreseeability be said to be respected.

Lastly, it should be pointed out that the accessibility of the criminal-law provision and also of the sources (whether case law or other reliable sources) on which the court bases its interpretation of the wording for the offence is another qualitative requirement, alongside foreseeability and standing in close relationship to it.[*82] Judge de Albuquerque was right in maintaining that accessibility is presumed to be a rule in the case law, with it being subject to debate only where it is in dispute.[*83] The requirement of accessibility means that the criminal law must be published and accessible to the person, as must sources that aid in the interpretation of criminal law. This entails publication in an official location and not merely, for example, media coverage.[*84] The case law of the Court suggests that even if, for example, there is relevant case law of the first or second instance, this on its own is not necessarily sufficient for considering accessibility to exist and, therefore, also for meeting of the criterion of foreseeability of the act's punishability.[*85] It must have been published – the person must have had access to it.

4. Conclusions

The ECtHR's role both in directly applying the principle of foreseeability (i.e., the *lex certa* and *stricta* principle) and in explaining the use of this principle – mainly for the national courts' benefit but also for the national legislator – has been rather significant. In addition, the Court holds considerable power to review whether a state has acted in accordance with the principle and thus complied with the ECHR's Article 7, paragraph 1, in this regard. The importance of applying the principle of foreseeability is accentuated by the fact that whether a person may be held liable for a particular act (i.e., may be convicted and punished for it) may hinge on the use of this principle.

Therefore, I posed the question of whether a standard could be found on the basis of the case law of the ECtHR for the wording for an offence and the corresponding interpretation that the national legislator and courts could adhere to so as to follow the principle of foreseeability.

As the case law indicates, the legislator's articulation for the offence should be accorded primary importance, but the standard as to the degree of abstractness deemed acceptable for the wording of a criminal-law provision is low, and, according to the ECtHR, the legislator can formulate a criminal-law provision in a very abstract manner without violating the *lex certa* principle. Although the Court has stressed the importance of this principle on many occasions, its application in practice appears to have been somewhat less important. The mere vagueness of a criminal-law provision does not generally attest in itself that the person could not have reasonably foreseen the liability. Nevertheless, it can be argued on the basis of the case law that the wording should be rather precise and, moreover, that the legislator should define in law the key elements used in the wording for any offence. Otherwise the courts might have too broad a margin for interpretation, which could lead to potential for interpretation difficulties. This creates the possibility of the interpretation extending beyond the actual wording and, in consequence, the intention of the legislator and therefore violating the principle of foreseeability. The precision of the wording for a particular offence may be affected by the seriousness of the act, the field in which the act may be committed (recall that the more specialist the field, the more a person operating in that field is responsible for foreseeing the punishability of the act, irrespective of the vagueness of the provision), and the status of the person who committed it (again, the more important the position held by the person, the deeper that person's knowledge of the regulation applicable to the field is generally required to be). The punishability of an act may even be considered obvious irrespective of the law's specificity, by virtue of common knowledge or common sense, although this is

82 See, for example, *S.W. and C.R. v. United Kingdom* (applications 20166/91 and 20190/92), ECHR, of 22 November 1995, paragraphs 35 and 34; *Korbely v. Hungary* (application 9174/02), ECHR, GC, of 19 September 2008, paragraphs 74–75.

83 See the dissenting opinion of Judge de Albuquerque in *Ilnseher v. Germany* (applications 10211/12 and 27505/14), ECHR, GC, of 4 December 2018, para. 91.

84 *Kasymakhunov and Saybatalov v. Russia* (applications 26261/05 and 26377/06), ECHR, of 14 March 2013 (final 14 June 2013), paragraphs 88–95.

85 *Kokkinakis v. Greece* (application 14307/88), ECHR, of 25 May 1993, para. 40.

questionable. It seems that the accused need not always know from the wording whether the act is punishable; rather more important is that the person should have known if having sought legal assistance. When a lawyer has difficulty in determining the scope of the offence's articulation, this is a significant argument pointing to lack of foreseeability.

In most cases, the role of the national courts in ensuring that the wording for an offence is in accordance with the principle is decisive. It is very important to stress that the courts have to decide whether the punishability of the act was reasonably foreseeable from the point of view of the individual at the time of the act. When the court is interpreting a criminal-law provision, the outcome always must be consistent with the essence of the offence. The importance of the latter is particularly evident in borderline cases. Although this rule is an abstract one, might be hard to follow, and depends on the particulars of each specific case, the Court has implied that identifying the key elements of the offence and the scope they have may be important for assessment of whether a given act falls within the definition of the offence in question. The courts always have to proceed from the text of the law and cannot deviate from it. The only criteria they may turn to for assistance are the legislator's intention and the purpose of the relevant criminal-law provision (i.e., which legal interest it protects and to what extent). It bears reiterating that if the field of law concerned is specific (for instance, banking or medical law), a high degree of care is required of a person, with another vital factor being the above-mentioned consideration that a person in a leadership position must not only be intimately familiar with the regulation but also be aware of possible alternative interpretations. In almost all situations, a person can be expected to have sought legal assistance before carrying out the act, whether acting in a professional capacity or not.

The punishability of an act is foreseeable if there is relevant case law at the time of the conduct. While interpretations might change later, with some being officially issued after the act, this is not to be considered in isolation; it is important to note how much the case law has developed too. Connected with this is the issue that uncertainty arises with contradicting interpretations: their existence might mean that the punishability of the act was foreseeable, since there was an interpretation not in favour of the person, but it may indicate the opposite by the same token (the person might not have known which interpretation would get used). The most important element is the case law of the highest national court. Consistency in this demonstrates the foreseeability of liability. Other instances' case law is of rather secondary importance. If there is no case law, the courts have to interpret the offence's articulation (if this is possible and the wording is not too vague). For the courts to be able to state that the outcome of the interpretation (produced after the act) is something that the person should have foreseen when committing the act, it is vital that they rely on reliable and verifiable sources (these may include opinions of legal experts, but any other type of reliable source may be just as relevant) that were accessible at the time of the act in question.