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Inconsistent Deliberations or Deliberate Inconsistencies? The Consistency of the ECtHR's Assessment of Convictions based on International Norms

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1. Introduction

'Who controls the present, controls the past'.[1] This slogan from George Orwell's *1984* epitomizes the fact that the way a society views its history is determined largely by the party in power. Seen from the perspective of history, it is all too easy to determine who was wrong and who was right – especially if we can judge those living in the past according to our own contemporary standards. Greek heroes, Roman emperors and Spanish conquistadors; judgment can easily be passed on them without our ever having to challenge our own beliefs about wrong and right.

This becomes more difficult, however, if those who we call 'wrong' are not just historical figures. In various European countries that have undergone radical regime changes, such as the transition from a totalitarian (national-socialist or communist) system to an open-market democracy, individuals have been prosecuted by governments for supporting preceding governments.

In processes of so-called 'transitional justice', domestic legislation may be inadequate for prosecuting past offenders, since, due to the principle of the non-retrospective application of penal law, transitional governments cannot usually rely on the laws that were in force at the time the acts were committed, as the acts in question were not criminalized under the past regime, or were even consistent with state policy.[2]

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1 G. Orwell, *1984*, 1983, p. 204.

2 B. Rudolf, 'Streletz, Kessler and Krenz v. Germany. App. Nos. 34044/96, 35532/97 & 44801/98.49 ILM 811(2001), and K.-H. W. v. Germany. App. No. 37201/97. 49 ILM 773 (2001)', 2001 *American Journal of International Law* 95, no. 4, p. 909.

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These governments therefore face a tension between respecting the law and respecting justice.[3] Due to the lack of a domestic legal provision incriminating their behaviour, individuals who have committed acts that would currently constitute grave atrocities would have to be released. A possible solution in such cases is to establish criminal responsibility on the basis of a violation of international law *ex post*. Over the course of the last century, many of the most serious violations known to man have been criminalized in international legal instruments.[4]

The European Convention on Human Rights (ECHR) provides for a conviction under 'international law'.[5] While this enables past crimes to be prosecuted, it also raises many questions of criminal law for the European Court of Human Rights (ECtHR). Which sources of international law may be used? How can the ECtHR determine whether these sources provide for a clear legal basis for a conviction, whether they were accessible to the persons involved and whether it was foreseeable that they would later be used as a legal basis for conviction? Can it be expected of the people involved that they could or should have placed these international norms above domestic legislation that was in force at the time they committed these crimes? The questions raised are complex, not in the least because they pit the defendant's right to a fair trial against the options for redressing past abuses, but also because, at the risk of rewriting a nation's history, the Court is expected to decide on what was right and what was wrong.[6]

It may therefore not come as a surprise that much controversy has been raised by the cases that the Court has decided on this topic. As Article 7(1) ECHR possibly offers protection to individuals who have committed heinous offences,[7] one camp of authors and concurring judges defend the position that the Court has rightfully upheld the convictions of many of its applicants,[8] or should even have gone further in its findings.[9] Another camp, consisting of authors and dissenting judges, have identified a number of problems with the Court's reasoning in these cases. They mainly contest the Court's finding that the applicants in these cases *could have foreseen* that their behaviour was criminal.[10]

In legal scholarship, the ECtHR cases have generally only been criticized on a case-to-case basis.[11] Consequently, many such individual cases have provoked rather specific criticism.

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3 R. Teitel, 'Paradoxes in the Revolution of the Rule of Law', 1994 *Yale Journal of International Law* 19, p. 242.

4 R.I. Rotberg, *Mass atrocity crimes: preventing future outrages*, 2010, p. 2.

5 Art. 7, Convention for the Protection of Human Rights and Fundamental Freedoms, as adopted by the Council of Europe in Rome, 4 November 1950. Full text of Art. 7:
'No punishment without law
1. No one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission, which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations'.

6 See e.g. *The Guardian*, 13 March 2000.

7 C. Murphy, 'The Principle of Legality in Criminal Law under the ECHR', 2010 *European Human Rights Law Review*, no. 2, p. 209.

8 W. Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts', 2009 *Journal of International Criminal Justice*, p. 736; J. Labuschange, 'The European Court of Human Rights and the principle of legality in international criminal law', 2002 *South African Yearbook of International Law* 27, p. 247; R. Miller, 'Rejecting Radbruch: The European Court of Human Rights and the Crimes of the East German Leadership', 2001 *Leiden Journal of International Law* 14, p. 11.

9 S.C. Grover, *The European Court of Human Rights as a Pathway to Impunity for International Crimes,* 2010, p. 219.

10 See Rudolf, supra note 2, p. 909; G. Mettraux, 'Current Developments', 2001 *International Criminal Law Review*, p. 271; K.S. Gallant, *The principle of legality in international and comparative criminal law*, 2008, p. 54; Murphy, supra note 7, p. 5; H. Tigroudja, 'Crimes de droit international et principe de légalité des délits et des peines', 2010 *Working Paper Series 15 November 2010*, available at SSRN: <http://ssrn.com/abstract=1720422>, p. 5; A. Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law – The Kolk & Kislyiy v. Estonia Case before the ECHR', 2006 *Journal of International Criminal Justice*, p. 2; H. Lensing & T. Mertens, 'De zaak van de muurschutters', in R. Janse et al., *Rechtsfilosofische annotaties*, 2007, p. 88; G. Pinzauti, 'The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law – A critical discussion of Kononov v. Latvia', 2008 *Journal of International Criminal Justice*, p. 4.

11 Ibid.

Interestingly, despite the high stakes and legal controversy raised by these cases, no attempt has ever been made to explain *how* the Court decides on the application of international law as the basis for a conviction under Article 7(1) *ECHR*, and whether it does so *consistently*. This article therefore sets out to fill this gap in the literature by analyzing the Court's case law from an internal consistency perspective rather than by holding it to an external, normative benchmark. The question which we seek to answer is:

> *Did the ECtHR consistently determine whether convictions for violations of international norms are compliant with Article 7(1) ECHR?*

First, in order to sketch the factual backdrop against which the Court is to make its findings, the types of cases in which the Court draws on international law are identified (Section 2). Second, the steps the Court takes in deciding on the legality of the use of international norms as a legal basis for a conviction and the Court's default approach to these steps are examined (Section 3). Third, the differences are identified between this default approach and the Court's approach in individual cases (Section 4). Before commenting on the Court's consistency in its practice (Section 6) and providing an answer to the research question, a comparison is made between the findings of this research and the criticism levelled at the ECtHR by other authors (Section 5) in order to show how these answers add additional insight to the body of knowledge already developed.

2. The types of cases in which the Court uses international law under Article 7(1) ECHR

This section provides an overview of the cases in which the Court has used international law as a possible legal basis for a conviction in the context of Article 7(1) ECHR. To date, there have been six such cases, which have resulted in seven decisions:

- ECtHR 22 March 2001, nos. 34044/96, 35532/97 and 44801/98 (*Streletz, Kessler & Krenz v. Germany*, henceforth '*Streletz*');
- ECtHR 22 March 2001, no. 37201/97 (*K.-H. W.* v. Germany, henceforth '*K.-H. W.*');
- ECtHR 17 January 2006, no. 23052/04 (*Kolk & Kislyiy v. Estonia*, henceforth '*Kolk & Kislyiy*');
- ECtHR 12 July 2007, no. 70446/01 (*Jorgic v. Germany*, henceforth '*Jorgic*');
- ECtHR 19 September 2008, no. 9174/02 (*Korbely v. Hungary*, henceforth '*Korbely*');
- ECtHR (TS) 24 July 2007, no. 36376/04 (*Kononov v. Latvia*, henceforth '*Kononov* TS');
- ECtHR (GC) 17 May 2010, no. 36376/04 (*Kononov v. Latvia*, henceforth '*Kononov* GC').

The *Kononov* case was decided upon in two instances, once by the former Third Section (TS) and once by the Grand Chamber (GC). The Grand Chamber overturned the former Third Section's decision and the approaches of the Court in the two judgments differ. Therefore, both instances are assessed separately below.

2.1. The cases decided by the Court

The landmark case of *Streletz* revolves around the system of deterrence that was in place to prevent citizens of the erstwhile East Germany (the German Democratic Republic) from crossing the border with West Germany. Many of those who attempted to cross the border between 1971 and 1989 were shot by border guards or automatic firing systems. At the material time, the applicants held senior positions in the East German state apparatus.[12] *Streletz* is widely regarded as a landmark judgment, for it was the first ECtHR case to deal with the possibility of holding past regimes accountable for their deeds.[13] Most legal commentators focus on the Court's use of domestic East German law in deciding the case – a legal system that was no longer in place at the time the ECtHR rendered its decision.[14] The Court was required to answer the question whether, at the time they were committed, the offences were defined with sufficient accessibility to and foreseeability in national or international law to constitute a clear legal basis for convicting the applicants.[15]

The Court dealt with the legality of the applicants' conviction under domestic law first, finding that the conviction was legal.[16] Although the use of international norms was not imperative to convict the applicants, the German courts entertained the possibility of doing so, thereby compelling the ECtHR to devote much of its reasoning to the applicability of international norms to the case. The case can therefore be seen as a point of reference for comparable cases. In this case of *Streletz*, the Court ultimately found no violation of Article 7(1) ECHR.[17]

The first comparable case was that of *K.-H. W*, in which the applicant stood trial for shooting a fugitive trying to flee from East Berlin. Unlike the applicants in *Streletz*, this applicant was low in rank, being a twenty-year-old border guard.[18] Again, the Court had to decide whether, at the time it was committed, the crime constituted offences that were defined with sufficient accessibility and foreseeability under national or international law to form a clear legal basis for convicting the applicant.[19] The Court ultimately found no violation of Article 7(1) ECHR.[20]

In another case, *Kolk & Kislyiy*, the applicants were held responsible for the deportation in March 1949 of members of the civilian population from the occupied Republic of Estonia to remote areas of the Soviet Union.[21] The first applicant had been an investigator and had prepared the deportations; the second had been an inspector, and had organized them.[22] The Court was presented with the question whether the deportations constituted crimes against humanity under international law at the material time. It is noteworthy that, at the material time, these acts would not necessarily have constituted crimes under national law.[23] Nonetheless, the Court found the application to be manifestly ill-founded.[24]

The case of *Jorgic* centres on the applicant's conduct in the Doboj region in Bosnia in 1992, where he was suspected of participating in the ethnic cleansing of Muslims during the

12 *Streletz*, Paras. 13, 48.
13 See Rudolf, supra note 2, p. 904.
14 See Lensing & Mertens, supra note 10, p. 88; Rudolf, supra note 2, p. 909.
15 *Streletz*, Para. 51.
16 Ibid., Para. 90.
17 Ibid., Para. 107.
18 *K.-H. W.*, Para. 17.
19 Ibid., Para. 46.
20 *K.-H. W.*, Para. 113.
21 *Kolk & Kislyiy*, 'The Facts', 'A'.
22 Ibid.
23 Ibid., pp. 7-10.
24 *Kolk & Kislyiy*, p. 9.

Yugoslav war.[25] He was suspected of arresting, detaining, assaulting, ill-treating and killing Muslims from three villages, all on the orders of the Bosnian Serb political leaders and the Serb military.[26] The Court had to answer the question whether the conviction of *Jorgic* for acts of genocide by German courts was based on a definition of genocide that had been in accordance with what the applicant could reasonably have foreseen at the material time.[27] The Court ultimately found no violation of Article 7(1) ECHR.[28]

The *Korbely* case took place at the time of the Hungarian Revolution in Budapest in 1956.[29] The applicant, who was in charge of a group of officers, had been ordered to regain control of a local police department that had been taken by several insurgents.[30] Martial law provided that any person bearing arms without authorization was to be punished by death.[31] When the applicant and his group arrived at the police department, one of the insurgents reached inside his coat. The applicant ordered his men to fire, simultaneously firing himself. Several of the insurgents died.[32] The Court explicitly referred to *Streletz* in seeking to determine whether the applicant's behaviour, at the time it was committed, constituted an offence defined with sufficient accessibility and foreseeability under domestic or international law.[33] The Court ultimately found a violation of Article 7(1) ECHR on a different reading of the facts than that of the national courts.[34]

In *Kononov*, the applicant was in charge of a Soviet commando unit that operated behind enemy lines. In 1944, the unit attacked houses in the village of Mazie Bati, where villagers known to collaborate with the German occupiers were living.[35] They killed several farmers and two women, one of whom was pregnant.[36] The question to be answered was whether the acts were war crimes under international law or under general principles of law recognized by civilized nations as a clear legal basis that was accessible and foreseeable.[37] Although the former Third Section found a violation of Article 7(1) ECHR,[38] this decision was overturned by the Grand Chamber.[39]

2.2. Similarities between the cases

Each of the cases discussed in a summary fashion above relates to a time of conflict, war or totalitarian oppression, in which the applicants in some way represented a regime formerly in power, and committed acts that, if judged by today's standards, would constitute crimes under both national and international law. At the time they were committed, however, these acts were simply permitted – and sometimes even encouraged – by the regime in power.

Then, at a certain point, there had been a transition of government, and the new regime sought to vindicate the acts of its predecessor. Due to several technicalities of criminal law, prosecuting the representatives of the old regime is not always straightforward. Because the

25 *Jorgic*, Para. 16.
26 Ibid.
27 Ibid., Para. 103.
28 *Jorgic*, Para. 116.
29 *Korbely*, Para. 9.
30 Ibid., Para. 12.
31 Ibid., Para. 9.
32 Ibid., Paras. 14-15.
33 Ibid., Para. 73.
34 *Korbely*, Para. 94-95.
35 *Kononov* GC, Para. 16.
36 Ibid., Paras. 17 – 20.
37 *Kononov* GC, Para. 236.
38 *Kononov* TS, Para. 149.
39 *Kononov* GC, Para. 245.

principle of non-retrospectivity requires defendants to be held to the – inadequate – laws which were in force at the time they were committed, many acts fall under a statute of limitations. Judges therefore resort to the relevant international law of the material time, which provides for legal bases for conviction that are often not statute-barred.[40]

However, using international law as a basis for a conviction introduces its own problems. The requirements of clarity, accessibility and foreseeability to which legal norms have to adhere in 'regular' cases based on domestic law are all the more relevant, seeing that international law does not always provide the same lucidity, individual applicability and coherence as a domestic criminal code. In all six cases, therefore, a similar question was posed to the Court: did the acts constitute crimes at the time they were committed that had a clear legal basis in international law, which was accessible, and of which the applicants could have reasonably foreseen that they were to serve as a legal basis for a later conviction?

In some of the cases, the Court was asked to consider whether the legal basis used for a conviction did not violate the *nullum crimen, nulla poena sine praevia lege poenali* maxim (*Streletz, K.-H. W.*). In other cases, the Court needed to determine whether, due to matters of prescription in the national criminal law system, certain acts could be classified as 'war crimes' or 'crimes against humanity' (*Kolk & Kislyiy*, *Korbely*, *Kononov*). In yet another case, the Court was asked to verify whether the legal definition used to convict the applicant had not been strained to such an unjustifiable extent that it would unlawfully allow the prosecuting state to assert jurisdiction over the acts committed (*Jorgic*).

3. The default approach in the practice of the Court

Commonly, the Court had to decide whether the sources of international law that were taken into consideration formed a clear legal basis for a conviction at the time the acts were committed. The Court took, in the six cases studied, a number of steps to determine whether the use of international norms that provide a legal basis for a conviction is compliant with Article 7(1) ECHR. Although the Court did not go through all these steps – at least not explicitly – in each and every case, an underlying default approach to its method of dealing with these types of case can be inferred. The Court's default approach can be clarified on a step-by-step basis. In constructing this default approach the landmark case of *Streletz* is taken as a starting point from which each step in each case can be checked for consistency with the other cases. Where multiple approaches were found in the different cases, preference was given to the approach that was most prevalent. If this did not provide a conclusive default approach, recourse was had to the justifications given for the approaches by the Court itself and also to the landmark case of *Streletz*. The resulting overview has been summarized in Annex 1 and is explained in the following sub-sections.

40 Due to the applicability of the Convention on the Non-Applicability of Statutory Limitations to War Crimes, United Nations General Assembly Resolution 2391 of 26 November 1968.

Steps taken by the ECtHR to determine whether the use of international norms to provide a basis for a conviction is compliant with Article 7(1) ECHR.

0. Preliminary step:	Which approach does the Court follow?
1. Legal basis:	Which legal basis in international law covered the acts?
2. Individual responsibility:	Did the legal basis in international law entail individual responsibility?
3. Preceding source:	Did the legal basis in international law precede the acts?
4. Clarity:	Was the legal basis in international law clear?
5. Accessibility:	Was the legal basis in international law accessible?
6. Foreseeability:	Was the legal basis in international law foreseeable?

3.1. Step 0. Which approach does the Court follow?

The Court had firstly determined its approach to cases in which international law is used as a legal basis for a criminal conviction in the landmark case of *Streletz*. A preliminary step that the Court takes is to set out the legal framework within which it seeks to answer the question before it. This preliminary step consists of two elements. First, the Court explains that its task is not to deal with the interpretation of national law or factual errors in domestic proceedings, unless and only in so far as ECHR rights have been infringed.[41] Only national courts can interpret domestic law, and the Court stays outside of that realm.[42]

Second, the Court reiterated the essence of its Article 7(1) ECHR case law, by indicating the importance of Article 7(1) ECHR and calling for a construction, and interpretation, of the Article with effective safeguards against arbitrary prosecution.[43] Acting as an embodiment of the *nullum crimen*, *nulla poena sine lege* maxim, this Convention right requires that the law, both written and unwritten, needs to be clear. This requirement is qualitative, and entails that the law needs to be both accessible and foreseeable.[44] With regard to the foreseeability of the law, the Court remarked that an individual may sometimes need to consult case law to determine the correct interpretation of a provision, and that such an interpretation may always be subject to change to the extent that altering circumstances elucidate or inform the adaptation of these rules.[45]

The Court subsequently deployed this formula in an unaltered form in the cases of *K.-H. W.*[46] and *Jorgic*.[47] In the cases of *Korbely* and *Kononov* (both instances), the Court further clarified the outline of its approach. First, in *Korbely*, the Court added that an individual who wishes to know what acts will make him criminally liable may sometimes need to seek the advice of a lawyer to ascertain for himself the correct interpretation of the law.[48] Then, in the case of *Kononov*, the Court explained how it comes to find that a provision carried enough foreseeability. According to the Court, the scope of foreseeability depends on the 'content of the instrument in

41 *Streletz,* Para. 49.
42 Ibid.
43 Ibid., Para. 50.
44 Ibid.; see also e.g. ECtHR 22 November 1995, no. 20190/92 (*C.R. v. United Kingdom*), Para. 33.
45 Ibid.
46 *K.-H. W.*, Paras. 44-45.
47 *Jorgic*, Paras. 100-102.
48 *Korbely*, Paras. 71-72; see also e.g. ECtHR 15 November 1996, no. 17862/91 (*Cantoni v. France*), Para. 35.

issue, the field it is designed to cover and the number and status of those to whom it is addressed.'[49] Professionals that are used to having to proceed with a high degree of caution can more readily be expected to consult a lawyer about the correct reading of the applicable law.[50]

3.2. Step 1. What legal basis in international law covered the acts?

The Court firstly assesses the content of the legal basis on which the applicant was convicted. It prefers to start its analysis with investigating the applicable norms of domestic law, for these often provide the most secure and clear legal basis. In the cases under consideration, however, domestic law on its own often does not provide a definitive legal basis for a conviction. Therefore, the Court examines international law as either an alternative or sole legal basis for the applicant's conviction. For the assessment whether the national courts correctly applied the international norms, the Court is to determine what legal basis in international law covers the applicant's behaviour.

The Court adopts the legal basis from the national proceedings. In *Streletz*, the Court based its assessment of the international legal basis used by the German courts to reach a conviction. The conviction for the shooting of persons crossing the border is accordingly based upon the right to life and the right to movement, as enshrined in the International Covenant on Civil and Political Rights (ICCPR).[51] This is a direct reproduction of the international legal basis used by the German Federal Court of Justice.[52] The Court comparably reproduced the legal basis in the case of *K.-H. W.*, even though the Court admitted that Germany could only have ratified the ICCPR after the applicant had acted as he did.[53]

The Court equally replicated the international legal basis used by the national court in the cases of *Kolk & Kislyiy*[54] and *Jorgic*, but in the latter the Court not only reproduced the provisions of the law, but also the tools used to interpret the law. The Court referred to the same case law of international tribunals, the practice of the United Nations, and the opinions of scholars as used in the domestic proceedings.[55]

After finding the legal basis in international law on which the case hinges, the Court sets out to test the conformity of that legal basis with Article 7(1) ECHR. The Court therefore tests the legal basis on a number of grounds: whether it entailed individual criminal responsibility (step 2), whether it preceded the acts committed (step 3), whether it was clear (step 4), whether it was accessible to the applicant at the time (step 5) and whether it was foreseeable that the legal basis could be used to convict the applicant in an ensuing criminal procedure (step 6).

3.3. Step 2. Did the legal basis in international law entail individual criminal responsibility?

In the cases of *Streletz* and *K.-H. W.*, the domestic courts convicted the applicants partly upon norms enshrined in international human rights treaties.[56] Since these are not normally used to incriminate the behaviour of individuals, the Court needed to address the question whether the legal basis used by the national courts entailed individual criminal responsibility. The Court therefore constructed this individual criminal responsibility on the basis of domestic law.[57] In the

49 *Kononov* TS, 114 d, GC Para. 235; see also e.g. ECtHR 19 September 2009, no. 10249/03 (*Scoppola v. Italy* (no. 2)), Para. 102.
50 *Kononov* TS, 114 d, GC Para. 235.
51 *Streletz*, Para. 90 onwards.
52 Ibid., Para. 20.
53 *K.-H. W.*, Paras. 102, 104.
54 *Kolk & Kislyiy*, p. 5.
55 *Jorgic*, Paras. 27, 107, 113.
56 *Streletz*, Para. 104, *K.-H. W.*, Para. 103.
57 Ibid.

other cases, this was unnecessary because the convictions by the national courts were based on charges of international crimes, i.e. crimes against humanity (*Korbely*,[58] *Kolk & Kislyiy*[59]), war crimes (*Kononov*[60]) or the crime of genocide (*Jorgic*[61]). In these cases, the criminal law provisions themselves already provided for individual criminal responsibility.

3.4. Step 3. Did the legal basis in international law precede the acts?

The principle of legality prohibits a retrospective application of laws and statutes.[62] The Court must therefore examine whether the international legal instrument used as a legal basis for the applicant's conviction existed at the time when the acts were committed. The Court therefore compared the date of the instrument's creation with the date upon which the applicant committed the acts.[63]

3.5. Step 4. Was the legal basis in international law sufficiently clear?

Once the Court establishes that the applicants could have been convicted upon a legal basis which existed in international law at the time, it must assess whether this basis was sufficiently clear. The Court hitherto had not taken this particular step explicitly, but none of the applicants argued that the law upon which they were convicted lacked clarity. Therefore, the Court had so far dealt with the clarity of the legal basis under the further, indirect, questions of accessibility and foreseeability.[64]

3.6. Step 5. Was the legal basis in international law accessible?

The Court determines whether the legal basis upon which the applicant was convicted was accessible to the applicant using an objective approach. The Court does not endeavour to find out whether the applicant in fact knew about the applicable provisions (as it would under a subjective approach), but instead looks at the position of the applicant (as a political or military leader, for example) and then infers whether an ordinary person under the same circumstances ought to have been aware of the international norms in question. In *Streletz* and *Kolk & Kislyiy*, the Court clearly took this approach where it found that the applicants ought to have known about the international law incriminating their behaviour since they were part of the regimes that co-created the human rights treaties and the Nuremberg Charter, respectively, in which these norms were established.[65] Similarly, the Court found that the applicants in *Korbely* and *Kononov* GC should have consulted the provisions on the basis of which they were convicted owing to their special status as military commanders.[66] Official publication is not a prerequisite for the Court to make a finding of accessibility; in *Korbely*, the relevant norms were published in a brochure that was distributed among the military.[67]

58 *Korbely*, Para. 18, 76.
59 *Kolk & Kislyiy*, C, p. 5.
60 *Kononov* TS, Para. 60, 63; *Kononov* GC, Para. 113, 121.
61 *Jorgic*, Paras. 34, 80.
62 See Murphy, supra note 7, p. 204.
63 See e.g. *Korbely*, Paras. 76 and 81. Instruments that were postdated were discarded by the Court.
64 This was the case in *Streletz*, *K.-H. W.*, *Kolk & Kislyiy*, *Jorgic* and *Kononov* GC.
65 *Streletz*, Para. 103, *Kolk & Kislyiy*, p. 9.
66 *Korbely*, Para. 75; *Kononov* GC, Para. 237.
67 *Kononov* GC, Para. 237.

3.7. Step 6. Was the legal basis in international law foreseeable?

The Court's foreseeability test may well be the most complicated step for the Court to take. The difficulty with testing for foreseeability is that many factors tend to be involved; whether it was foreseeable that certain criminal law defences would not be applied,[68] that crimes would not be statute-barred,[69] that the facts would be so read,[70] and that the accessibility of the international provisions to the applicants would be assumed.[71] In general, the Court attempts to disentangle the different aspects of the foreseeability question so that it can answer the question whether it was foreseeable that the applicant would be convicted on the international legal basis on its own merit. Questions of defences and limitation periods do not enter into the foreseeability discussion.[72] The Court also tends to exclude more factual circumstances of the case,[73] unless they are absolutely necessary for resolving the foreseeability question.[74]

Again, the Court uses an objective test in establishing foreseeability on the basis that those in higher hierarchical positions cannot have been ignorant of the laws applying to their system.[75]

3.8. Conclusion: the Court's default approach

The Court's default approach – firstly established in *Streletz* – has commonly been applied in later cases. Following the approach set out in that case, the Court seeks an applicable legal basis in international law and then subjects that basis to a number of tests. These tests require that the legal basis has preceded the applicant's acts, that it was accessible to the applicant and that it was foreseeable to the applicant as a potential basis for his conviction. The Court need only deploy these tests when the individual criminal responsibility of the applicant is unclear from the provisions themselves. The clarity of the legal basis has thus far not been assessed as an independent factor, because none of the applicants have raised this issue.

4. Differences between the Court's default approach and individual cases

Although the Court has, in law, developed the default approach, the Court does not *apply* the test consistently in each and every case. Sometimes, there are only minor differences in approach because of a gradual elucidation of the law, such as the expanding explanation by the Court as to how it interprets the law under step 1. In other cases, differences arise because of the various factual scenarios with which the Court is presented. The differing reasons as to why international norms were accessible for applicants in different political or military positions under step 5 can serve as an example thereof. This section deals with the differences in the Court's approach that are due to more than simple clarifications or factual variance. The inconsistencies here elaborated upon are those that significantly differ from the Court's default approach. This is not to say that these steps are legally incorrect *per se*, but that the Court does depart from its standard argumentation and does not always provide a proper explanation as to why it does so.

68 *Streletz*, Para. 88.
69 *Kononov* TS, Paras. 143, 146; *Kononov* GC, Paras. 240-244.
70 *Korbely*, Para. 85.
71 *Kolk & Kislyiy*, p. 9.
72 *Streletz, Para. 88*; *Kononov* GC, Para. 233.
73 *Kononov* GC, Para. 200-204.
74 *Korbely*, Para. 85.
75 *Streletz*, Para. 103; *Kolk & Kislyiy*, Para. 104.

4.1. Step 0. What approach does the Court follow?

The Court's approach so far described was consistent until the rendering of the Grand Chamber's decision in *Kononov*. Although in large part replicating the line of argument from *Streletz*, the Court in this case for the first time differentiated between the clarity of the legal basis, on the one hand, and its accessibility and foreseeability, on the other.[76] This foreshadows the atypical application of steps 4 to 6 of the Grand Chamber's decision in *Kononov*.

4.2. Step 1. What legal basis in international law covered the acts?

The Court set out in each case whether the international norms applied by the national courts formed a clear legal basis. For example, in the case of *Streletz*, the Court assessed the German Federal Court of Justice's application of the ICCPR.[77] This would imply that the Court verified the conformity of these norms with Article 7(1) ECHR solely. In the last two cases on the issue, *Korbely* and the second instance of *Kononov*, however, the Court departed from this approach. Instead of testing the application of the international provisions by the national courts, the Court introduced its own legal instruments in its analysis.[78] In *Korbely*, the Court decided of its own motion to consider the provisions of the IMT Charter of 1945, the ICTY Statute of 1993, the ICTR Statute of 1994 and the ICC Statute of 1998 as possible sources of a definition of crimes against humanity.[79] In *Kononov* GC, the Court comparably introduced a number of international legal instruments, including the Lieber Code of 1863, the Draft Brussels Declaration of 1874 and the Oxford Manual of 1880.[80] One could argue that the Court could under its own mandate introduce instruments insofar as they help to interpret the actual legal basis upon which the applicants were convicted. In the case of *Korbely*, this argument is convincing; the IMT Charter helps to interpret whether, at the time of the commission of the acts, the notion of 'crimes against humanity' was defined with sufficient clarity and in a way that captured the applicant's actions.[81] However, in the case of *Kononov* GC, this is only true *prima facie*. The Court introduced legal instruments to interpret certain elements of the 1907 Hague Convention and Regulations.[82] One example of this is the introduction of the Lieber Code as a 'summary of the laws and customs of war existing at the time'.[83] This instrument was introduced without a justification in terms of its accessibility and foreseeability for the applicant. The same can be said for other instruments introduced by the Court. Since none were treaties, Latvia could not have been a party thereto. The Lieber Code, for example, was an American code that was binding on American soldiers only.[84] The Court's repeated reliance on this code suggests that other, more universal instruments were not available and the norms enshrined in the Lieber Code were not as widespread as the Court made out. This is especially worrisome where the Court used the Lieber Code as a justification for the domestic court's conviction of the applicant on one count of war crimes.[85] Apparently, the Court more liberally reinterpreted the legal basis for the applicants' convictions from *Streletz* onwards.

76 *Kononov* GC, Paras. 185-187.
77 *Streletz*, Para. 20.
78 *Korbely*, Para. 74 onwards; *Kononov* GC, footnote 25 and Para. 200 onwards.
79 *Korbely*, Para. 74 onwards.
80 *Kononov* GC, footnote 25 and Para. 200 onwards.
81 *Korbely*, Para. 51.
82 *Kononov* GC, Para. 207.
83 Ibid., Para. 63.
84 Ibid.
85 Ibid., Para. 218.

Such a liberal interpretation of its task makes the Court vulnerable to criticism of overstepping its boundaries. While the Court itself acknowledges that its task is to verify only whether the national application of international norms is in conformity with Article 7(1) ECHR, it superimposes its own views of international criminal and humanitarian law on that of the national courts by examining whether they applied the international norms to which the Court attaches importance. Such self-invented argumentation did not make matters any easier for the parties before the Court. None of the parties in the *Kononov* proceedings (the respondent Government, the applicant and two third-party intervening Governments) mentioned any of the instruments introduced by the Court.[86] Therefore, the parties themselves may not have considered them of any relevance to the proceedings. Moreover, the Court applied these instruments of its own accord so that the applicant might not even have had an opportunity to challenge or respond to the Court's inclusion in the proceedings. Should they have anticipated that the Court would examine the standard questions – the clarity, accessibility and foreseeability of the norms on basis of which the applicant was convicted – also for legal instruments that the Court introduced, on its own initiative, to aid in its reasoning?

4.3. Step 2. Did the legal basis in international law entail individual responsibility?

The Court was consistent in the application of step 2.

4.4. Step 3. Did the written legal basis in international law precede the acts?

Although step 3 seems a straightforward exercise, there are three instances in which the Court did not attach consequences to the fact that the legal instrument deployed postdated the applicants' behaviour. In the case of *K.-H. W.*, the applicant was held to ICCPR standards that were ratified by the German Democratic Republic only two years after the applicant was convicted for his behaviour.[87] Also in the case of *Jorgic*, the Court relied on a definition of the term 'genocide' that was adopted by the UN General Assembly some months after the occurrence of the acts.[88] Lastly, in the case of *Kononov* GC, one of the Second World War crimes for which the applicant was convicted was partly based on the Geneva Conventions of 1949 (it was also based on the Lieber Code and related documents discussed above).[89]

The Court might not have been expected to allow domestic courts to apply international norms as a legal basis for the applicants' convictions due to its appraisal of their accessibility and foreseeability. The Court offered two different arguments to avoid any consequences for the outcome of its analysis, however. The first is its approach from *K.-H. W.*, which rests on the premise that although the norms had not yet entered into force for the German Democratic Republic, they were universally applicable and the applicant should have recognized them and abided by them *per se*.[90] Regardless of the weight of such an argument, it does seem at odds with the rest of the Court's analysis, which draws its legitimacy from the provisions of the ICCPR rather than universally existing norms.[91] The Court stated that although the ICCPR had not yet been ratified, the applicant should have known that violating its provisions would violate the

86 Ibid., Paras. 32, 60-62, 216 (the applicant was convicted by the Regional Court on the basis of the IMT Charter, the 1907 Hague Convention and Regulations, and the 1949 Geneva Conventions).

87 *K.-H. W.*, Paras. 15, 34.

88 *Jorgic*, Paras. 103 onwards, par. 107, read in combination with Paras. 28 and 47.

89 *Kononov* GC, Para. 218.

90 *K.-H.W.*, Para. 104.

91 Ibid., Paras. 95, 100, 102.

fundamental rights of the victims.[92] It did not explain, however, how the applicant should have known of these rights. Although the Court pointed to the fact that some rights were codified in the legislation of the German Democratic Republic, it did not provide reasons as to why the applicant should have chosen to obey one rule (respecting human life) and not the other (shooting persons fleeing the country). To this extent, the Court could have established whether general principles of law at the time of the behaviour prohibited firing on unarmed persons trying to leave the country even if domestic law required a soldier to do so. The Court could then have used the ICCPR as an example of the gradual formation of general principles in international law creating human rights and outlawing their infringement. As it stands, the Court might as well have refrained from the analysis of international law, as it did not find any authoritative argument therein.[93]

Secondly, the Court sidestepped the requirement of a provision predating the acts by placing the postdated instrument in a gradual development that would ultimately lead to a prohibition of the applicant's conduct. In *Jorgic*, the Court used this method to justify its use of UN Resolution 47/121, which was adopted just months after the applicant committed the acts.[94] Because the Resolution was used to clarify an existing basis in international law rather than form one of its own, this is less problematic. The basis used for the conviction (the German implementation of the Genocide Convention) predated the facts by a wide margin, so that the requirement of step 3 was met. As will be shown under step 6, however, this approach does lead to problems with foreseeability.

In *Kononov*, the Grand Chamber used the Geneva Conventions of 1949 to confirm the applicant's conviction for a specific category of war crimes.[95] The Court's use of the Conventions and of other instruments introduced into the proceedings on its own motion (see step 1) to illustrate a development towards the incrimination of the applicant's acts is, at the very least, questionable. The facts of the case are not as clear-cut as in some of the other cases; rather than defenseless civilians, the applicant's group attacked people whom they had reason to suspect were collaborators, guilty of causing the death of their comrades. The notion of ´civilian´, especially before the Geneva Conventions entered into force, may not have been so well established that it was clear to the applicant that the people his group attacked were ´civilians´ under that definition. Apart from the doubts one can have as to the universality of the instruments introduced by the Court, one can question the linearity of the development which the Court alludes to. Especially after the Second World War, a large number of instruments were created to remedy the lack of international norms apparent during the war.[96] To retrospectively consider these instruments part of a linear development that had already crystallized during the war itself may be overstating the facts to the detriment of the applicant.

4.5. Step 4. Was the legal basis in international law sufficiently clear?

In the first few cases, the Court did not consider the clarity of the legal basis in international law as a separate step. Rather, it considered the provision to be implicitly clear, i.e. if it was accessible and foreseeable.[97] In *Korbely* and the second instance of *Kononov*, the Court started shifting its assessment of the clarity requirement. First, in *Korbely*, it saw the clarity requirement as a

92 Ibid., Para. 104.
93 Ibid., Para. 104.
94 *Jorgic*, Para. 107, read in combination with Paras. 28 and 47.
95 *Kononov* GC, Para. 218.
96 See e.g. the preamble to the 1948 Universal Declaration of Human Rights, and the introduction to the 1949 Geneva Conventions.
97 See *Streletz*, Para. 90-91; *K.-H.W.*, Para 45; *Jorgic*, Para. 100.

component of the foreseeability test.[98] Then, in *Kononov* GC, it distinguished the clarity requirement from the accessibility and foreseeability requirements and assessed them as separate tests.[99] Under the clarity requirement, the Court tested for steps 1 and 2, as well as the clarity of prohibitions on individual crimes, whereas it tested for steps 5 and 6 under the accessibility and foreseeability test. The relationship between the clarity requirement, on the one hand, and the accessibility and foreseeability of a legal basis, on the other, has thus changed slightly. Under *Streletz*, the clarity of a legal basis was composed of its accessibility and foreseeability.[100] Under *Korbely*, the clarity of a legal basis was a component of its foreseeability.[101] Under *Kononov* GC, the clarity requirement is an altogether different aspect, unrelated to accessibility and foreseeability.[102] Whether the Court will retain this separate appraisal remains to be seen. The Court did not explain the reasons for changing its approach, and thus did not elucidate whether it was meant to be a permanent change. This remains to be seen in future cases.

An applicant might expect better scrutiny of the basis of his conviction under the two-pronged *Kononov* GC approach, but in the case of *Kononov* this test did not prove to be beneficial to the applicant. The different approaches may therefore imply nothing more than a theoretical redrawing of the Court's roadmap for these types of cases. As such, the different approaches to the clarity requirement might thus mostly be indicative of the Court's struggle in finding the 'right' approach.

4.6. Step 5. Was the legal basis in international law accessible?

The Court normally infers from the position in the political or military hierarchy of a regime that the applicant must have had access to the law containing the legal basis upon which he is later convicted. The Court's argument is based on the fact that those in power are often 'in the know'. This raises the question whether someone who was not in a powerful position can be held to the same legal fictional standard of knowledge. In *K.-H. W.*, the Court ruled that the international norms on the basis of which the applicant was convicted were so universal that it did not matter that they were not ratified by the German Democratic Republic until some years later.[103] The Court essentially sidestepped the question whether the applicant indeed had access to the legal basis on which the applicant was later convicted, i.e. the ICCPR.

In *Kononov*, the Grand Chamber concluded the same as in the aforementioned case of *K.-H. W.* Even though the Latvian Criminal Code did not contain a reference to international norms (whereas it did in the case of *K.-H. W.*) and those norms had not been published in Latvia or the USSR (whereas they had been in Hungary at the time in the case of *Korbely*), the Court found that their *customary nature* would have been sufficient for the applicant to have been aware of them.[104] Apart from the issue whether the norms in question had indeed attained customary status at the time of the commission of the offences, a comparison with the case of *K.-H. W.* indicates another problem. While the Court's assessment of the accessibility of the norms on the basis of which *K.-H. W.* was convicted was already debatable, it could be stated that the applicant in the case of *Kononov* was in an even more difficult position to make correct judgments. As a soldier behind enemy lines, the applicant was detached from the developments of international law that

98 *Korbely*, Para. 77-78.
99 *Kononov* GC, Para. 187.
100 *Streletz*, Para. 90-91.
101 *Korbely*, Para. 77-78.
102 *Kononov* GC, Para. 187.
103 *K.-H.W.*, Para. 104.
104 *Kononov* GC, Para. 236.

were taking place.[105] The applicant in *K.-H. W.*, however, had had much more time to consider the legality of his actions (according to the Court, even from before enlisting for military service).[106] More problematic, however, is that the Court seemed to apply a similar standard to *Kononov* as to *K.-H. W.* when it comes to having to gauge the status of customary law. First, the laws and customs of war are more difficult to read correctly than those in times of peace, as acceptable and prohibited behaviour in times of war are less clearly separated and are contingent upon several factual circumstances.[107] Second, the acts of *K.-H. W.* were committed almost thirty years after those of *Kononov*. In the meantime, a hefty body of international instruments had been developed, especially after the Second World War.[108] As difficult as it would have been for *K.-H. W.* to recognize the international rules that applied to his situation, he at least had the advantage of almost thirty additional years of legal developments to aid him in his assessment. To hold *Kononov* to the same, already stringent requirements seems to neglect the development of international law that occurred during the three decades after the facts in the *Kononov* case took place.

4.7. Step 6. Was the legal basis in international law foreseeable?

Two inconsistencies become apparent when looking at the practice of the Court under step 6. First, the Court failed to explain the foreseeability requirement in the case of *K.-H.W.*, a decision which is nonetheless treated as a landmark case and was used as a frame of reference in the later decision in *Kononov* GC. Second, the Court used conflicting concepts of foreseeable future events in the case of *Jorgic*.

The lacking well-reasoned grounds in *K.-H. W.* becomes apparent when compared to the Court's argumentation in *Streletz*. While in *Streletz* the foreseeability of international norms is based on the fact that these norms were in part created by the applicants themselves, as heads of state, the applicant in *K.-H.W.* had no such status. Despite the fact that there was no international provision on the basis of which the applicant could have been convicted, the Court ruled that he should simply have known that his actions were a violation of international legal norms.[109] Since violating international norms was criminalized under domestic law, the applicant was found to have been rightly convicted of international crimes.[110] The Court did not enter into a discussion of the foreseeability of these particular norms, but merely stated more generally that the foreseeability requirement had been met.[111]

The lack of a justification for the finding of foreseeability was subsequently carried over to the case of *Kononov*. In this case, the Grand Chamber used its reasoning from *K.-H.W.* as a benchmark against which the foreseeability of legal provisions needs to be tested.[112] Apart from the question whether the *K.-H.W.* case can be used as a benchmark because of factual reasons (see step 5), the benchmark is questionable in itself. As the Court admitted, the accessibility and foreseeability of norms in *K.-H.W.* was mostly based on *domestic* law.[113] The fact that this undercuts the ability of the *K.-H.W.* case to serve as a frame of reference in a situation where *international* law forms the basis for the conviction was not recognized by the Court. Whereas

105 Ibid., Para. 234.
106 *K.-H. W.*, Para. 74.
107 D. Fleck & M. Bothe, *The handbook of humanitarian law in armed conflicts*, 1999, p. 455.
108 P. Malanczuk & M.B. Akehurst, *Akehurst's modern introduction to international law*, 1997, p. 26.
109 *K.-H. W.*, Para. 104.
110 Ibid., Para. 103.
111 Ibid., Para. 105.
112 *Kononov* GC, Para. 236.
113 Ibid.

a different argumentation would have been expected in the *Kononov* case, the Court imported the unsuitable argumentation from *K.-H.W.* and treated it as an essential foundation for its line of argument in a case which had a different factual nature.

In *Jorgic*, the Court found that the definition of genocide also encompassed the applicant's actions, which would formerly have amounted to the lesser crime of ethnic cleansing. It based its finding on a gradual development of the law (see step 3) in which UN Resolution 47/121, adopted after the occurrence of the acts, was one of those steps towards forming the broader definition of genocide.[114] At the time of Jorgic' actions, this development was in its infancy, with only a minority of scholars supporting the widened genocide definition.[115] Essentially, the Court expected the applicant to foresee future developments of international law and to anticipate these potential developments when planning his actions. This finding of the Court is in stark contrast with the earlier recognition that the applicant could not rely on future ICTY decisions favourable to his position. The ICTY itself opposed applying the broadened definition on the basis that it violated the *nullum crimen sine lege* maxim, with the legal rule that the most favourable law for the applicant will be applied so as not to punish him any harsher than expected as a rule of legal certainty.[116] It is somewhat odd that the Court expected the applicant to, selectively, take some future developments into account, but not others. This becomes even more peculiar when one realizes that the Court forbids the application of norms beneficial to the applicant and only applies those that are detrimental to the applicant. The strange differentiation between norms is the result of the Court's practice of allowing norms to be used of which their interpretation is part of an ongoing development (step 3) and which has not yet been firmly established, but amount to disfavouring the person to whom they are applied in criminal law.

4.8. Conclusion: inconsistencies in the Court's approach

Several inconsistencies exist within the Court's case law on the use of international norms as a basis for the applicants' conviction. The most striking inconsistencies are the application of international norms introduced *ex officio* (step 1), the redrawing of the Court's approach with regard to the clarity of a legal basis (step 0 and step 4), the sidestepping of the requirement of a legal instrument preceding in time (step 3), the reliance on the tenuous accessibility and foreseeability argumentation of the *K.-H.W.* case in other cases that predated it (step 5 and step 6) and the inconsistent expectation of calculating 'foreseeable' events in the future (step 6). It is noteworthy that none of these inconsistencies are to benefit the applicants, while doubts in criminal proceedings are normally, as a matter of law, required to be resolved in favour of the defendant.

5. Differences between these findings and the findings of other authors

In the former section, the inconsistencies in the case law of the Court were identified. These inconsistencies do not fully correspond with the critique levelled at the Court by judges in their dissenting opinions and by scholars in their articles (see Annex 2). The bulk of the criticism levelled at the Court is spread over three categories: arguments that the requirement of individual

114 *Jorgic*, Para. 107-108.
115 Ibid., Para. 111.
116 Ibid., Para. 42.

criminal responsibility was not met at all (step 2), the absence of a legal basis preceding the acts (step 3) and disapproval of the way in which the foreseeability requirement was construed (step 6).

The first category of criticism entails that individual criminal responsibility was required under international law, not under domestic law in the cases of *Streletz*[117] and *K.-H. W.*[118] In the second category, authors question the legal bases used for the conviction of *K.-H. W.*,[119] *Jorgic*,[120] and *Kononov*,[121] since they were only drawn up *after* the facts. This is not a problem, however, if these legal bases are only used to clarify existing norms.[122] The third category of criticism is by far the largest. Many scholars argue that it was not foreseeable that the acts of the applicants would amount to criminal acts in the cases of *Streletz*[123] and *K.-H. W.*,[124] because the whole system under which the applicants functioned was perverted. For the latter, the additional argument is made that the applicant should not have to choose between two 'legal' obligations[125] and that a consultation with a lawyer would not have 'solved' what behaviour, i.e. behaviour in conformity with domestic law or with international law, would have been lawful.[126] Similarly, it has been remarked that, due to the circumstances of the case, the applicant in *Kononov* could not have foreseen the criminality of his acts.[127] A different point of criticism levelled at the *Kononov* case is that it would have been unforeseeable to the applicant himself that he would not be barred from prosecution by statutory limitation.[128] A similar argument, related to material defences under domestic law, is made concerning the cases of *Streletz* and *K.-H. W*; the applicants could not have foreseen that justifications for their behaviour under domestic law would not apply when they would ultimately be brought before a court.[129] Finally, the Court is accused of not respecting the principle of subsidiarity by overruling the Hungarian courts on matters of fact in the case of *Korbely*, thereby effectively becoming a fourth-instance court.[130]

These scholarly points of critique do not fully correspond with the inconsistencies found in this article. A possible explanation may be found in the observation that these authors often write on a case by case basis, as is the case with dissenting opinions and case notes. These texts zoom in on the individual case, having only the case published as its frame of reference. This makes it difficult to identify the Court's default approach and the inconsistencies present *between the cases*. Most of the articles were written before the Grand Chamber's ruling in *Kononov*, the decision that demonstrates the most inconsistency with the Court's default approach.[131] Also, a large amount has been written on the cases of *Streletz* and *K.-H.W.* This is not surprising, since these were the first groundbreaking decisions and serve as landmark cases on the subject. Lastly, most of the criticism is aimed at the findings of the Court under step 6, the foreseeability requirement. An explanation for the attention that this 6th step has attracted might be that the way

117 See Tigroudja, supra note 10, p. 5; Concurring Opinion of Judge Loucaides in *Streletz*.
118 Ibid.
119 Concurring Opinion of Judge Loucaides in *Streletz*.
120 Pinzauti, supra note 10, p. 4.
121 Dissenting Opinion of Judges Costa, Kalaydjieva and Poalelungi in *Kononov* GC.
122 Pinzauti, supra note 10, p. 4.
123 See Lensing & Mertens, supra note 10, p. 88; Rudolf, supra note 2, p. 909.
124 Ibid.
125 Partly Dissenting Opinion of Judge Pellonpää, joined by Judge Zupančič in *K.-H. W*.
126 Partly Dissenting Opinion of Judge Barreto in *K.-H. W*.
127 Dissenting Opinion of Judges Costa, Kalaydjieva and Poalelungi in *Kononov* GC.
128 Ibid.
129 See Gallant, supra note 10, p. 287.
130 See Tigroudja, supra note 10, p. 5.
131 See Annex 1.

in which the foreseeability step is taken, more than any other step, depends on the notion of justice to which the author attaches. Depending on an affiliation with either victims or with the applicant, or possibly even criminal law knowledge itself, the conviction will appear foreseeable. The authors that disagree with the Court's findings emphasize that some of the cases are brought against the applicants decades after the occurrence of the facts. The fact that none of the inconsistencies identified are beneficial to the applicants could invoke the more cynical belief that the Court deliberately reasons incongruently in order to uphold the convictions at the cost of even clear and consistent reasoning.[132]

6. Conclusion

To conclude, above, an assessment was made of the ECtHR case law concerning the use of international norms as a legal basis for the applicants' conviction and its conformity with Article 7(1) ECHR. A comparison has been made of the Court's development and application of the norms under Article 7(1) ECHR across the different cases. From this analysis, the Court's default approach to these cases is identified as a roadmap. The individual cases are assessed in light of this same roadmap.

The comparison made above shows that the Court is not always consistent in the manner in which it assesses the use of international norms as a basis for a conviction and the rule against retrospectivity. These inconsistencies are most prevalent with regard to the Court's application of its own international norms (step 1), the redrawing of the Court's approach regarding the clarity of a legal basis (step 0 and step 4), the sidestepping of the requirement of a preceding legal instrument as a basis for a conviction (step 3), the reliance on the questionable arguments for the accessibility and foreseeability of *K.-H.W.* in subsequent case law (step 5 and step 6) and the inconsistent expectation of calculating foreseeable events in the future (step 6). Of these inconsistencies, only the sidestepping of the requirement of a preceding legal instrument as a basis for the applicants' conviction was mentioned earlier by other legal scholars.

This dissimilarity in problems found between this article and those of other writers can be explained by the fact that a different test is applied; dissenting judges and scholars assess the practice of the Court by contrasting it with an external concept of justice that does not derive from the cases at hand, whereas the analysis in this article delineates the inconsistencies in the Court's case law itself. Because under this internal analysis inconsistencies were encountered, the conclusion is drawn that the practice of the Court can be criticized regardless of any external moral or legal frame of reference. A less observer-related criticism allows for a more objective assessment of the Court's case law and is all the more relevant given the fact that the Court only diverges from its standard approach to the applicants' detriment. Inconsistency is thus twofold: not only does the Court divert between cases, it also changes its application with the result that the applicants suffer. Such a result may be unintended, but raises the following question: inconsistent deliberations or deliberate inconsistencies?

132 A. Buyse, *Kononov Revisited: No Violation of ECHR*, 18 May 2010, available on <http://echrblog.blogspot.com/2010/05/kononov-revisited-no-violation-of-echr.html> (last visited 28 March 2011).

Annex 1 – Overview of the cases analyzed

Green: default approach by the Court
Yellow: inconsistent with the default approach by the Court

	Streletz	*K.-H. W.*	*Kolk & Kislyiy*	*Jorgic*	*Kononov* TD	*Korbely*	*Kononov* GC
0. Setting out the way the court deals with these matters	Court is not to deal with errors in fact and law in domestic proceedings unless and in so far as Convention rights have been infringed. Interpretation of national law is for national authorities. Article 7 is to be constructed offering effective safeguards against arbitrary prosecution, conviction and punishment. Requirement of clear definition in the law (written and unwritten) that is accessible and foreseeable. This clarity needs to appear from the wording of the provision or a consultation of the court's interpretation thereof. This does not take away the inevitable element of judicial interpretation that is always necessary for the elucidation of rules and the adaptation of rules to changing circumstances (49, 50).	Idem to Streletz (44, 45).	Court is not to deal with errors in fact and law in domestic proceedings unless and in so far as Convention rights have been infringed. Interpretation of national law is for national authorities (p. 9).	Idem to Streletz (100-102).	Idem to Streletz, plus: the possible requirement of gaining informed legal advice to aid in interpreting the relevant provisions and the court's interpretation thereof, especially for professionals. The scope of foreseeability depends on the content of the instrument, the field the instrument is intended to cover and the number and status of those to whom it is addressed. Article 7(2) is intended to enable the prosecution of WWII crimes (114, a-d).	Idem to Streletz, plus: the possible requirement of gaining informed legal advice to aid in interpreting the relevant provisions and the court's interpretation thereof. (71-72).	Idem to TD, plus: Article 7(1) calls for two tests: whether there was a clear legal basis at the material time with regard to the state of the law, and whether this legal basis was accessible and foreseeable to the applicant (185-187).

	Streletz	*K.-H. W.*	*Kolk & Kislyiy*	*Jorgic*	*Kononov* TD	*Korbely*	*Kononov* GC
1. Legal basis in international law covers the acts	Court copies the international norms as provided by the national proceedings. Source: international human rights treaties (90 onwards).	Court copies the international norms as provided by the national proceedings. Source: international human rights treaties (92 onwards).	Court copies the international norms as provided by the national proceedings. Source: IMT charter (Nuremberg principles) and general principles of civilized nations (C., p. 5).	Court copies the international norms as provided by the national proceedings. Source: Genocide Convention, as implemented in the German Criminal Code (103, 106).	Court copies the international norms as provided by the national proceedings. Source: Hague Convention and Regulations and Geneva Conventions and Protocols, IMT Charter (117 onwards).	Court partially replaces the international norms provided by the national proceedings. Source: IMT charter, Geneva Conventions (74 onwards).	Court replaces the international norms provided by the national proceedings for individual criminal responsibility. Source: Lieber Code, Brussels Declaration, Oxford Manual, IMT Charter (footnote 25). Court copies the international norms as provided by the national proceedings for the specific crimes. Source: Hague Regulations.(200 onwards).
2. Legal basis in international law entails individual responsibility	Yes (104), based on a combination of international law and domestic law. Another possibility would be by looking at crimes against humanity as a way to construct individual responsibility.	Yes (103), based on a combination of international law and domestic law. Another possibility would be by looking at crimes against humanity as a way to construct individual responsibility.	Not necessary, since crimes against humanity are charged (C., p. 5).	Not necessary, since the crime of genocide is charged (34, 80).	Not necessary, since war crimes are charged (60, 63).	Not necessary, since crimes against humanity are charged (18, 76).	Not necessary, since war crimes are charged and the IMT Charter proclaimed the customary nature of the provisions (113, 121).
3. Written legal basis in international law preceded the acts	Yes, UNDHR since inception, ICCPR since 1974 (93).	Yes, UNDHR since inception, no, ICCPR since 1974 (93).	Yes, Nuremberg principles 1946 (p 9).	Provision yes, but interpretation not. UN resolution 47/121 December 1992 (107).	Yes, Hague Regulations 1907 (121).	Yes, Geneva Conventions since 1949 (76) and Hague Regulations 1907 (81). Other instruments that are postdated are discarded.	Yes, Lieber Code, Draft Brussels Declaration, Oxford Manual, Hague Regulations (footnote 25). No, 1949 Geneva Conventions (218).

	Streletz	*K.-H. W.*	*Kolk & Kislyiy*	*Jorgic*	*Kononov* TD	*Korbely*	*Kononov* GC
4. Legal basis in international law clear?	Not investigated on its own.	Not investigated on its own.	Not investigated on its own.	Not investigated on its own.	Not investigated on its own.	Investigation of whether there was a clear legal basis with regard to the state of the law at the material time. Part of the 'foreseeability' test (78).	Yes (199), including an investigation into the elements of war crimes (200), individual responsibility for war crimes (205) and the specific crimes alleged (214).
5. Legal basis in international law accessible?	Yes, as these norms were part of internationally available treaties that the applicants should have been aware of (103).	No, but the applicant should have known actions were wrong based on domestic law (104).	Yes, as Soviet authorities the applicants should have been aware of the international treaties that they were a party to (p. 9).	Not investigated on its own, as it falls within the accessibility of the genocide provision in the German Criminal Code.	Not necessary since the Hague Regulations only reproduce customary rules (122).	Yes, Geneva Conventions were promulgated in a brochure in 1955 and a teaching synopsis in 1956 (75).	Reference back to the standard in *K.-H. W.* Although no formal publications existed, the laws and customs of war were sufficient in themselves to found individual criminal responsibility (237).
6. Legal basis in international law foreseeable?	Yes, when combined with national provisions (104).	Yes, when combined with national provisions (103) (yellow colour based on accessibility).	Yes, p. 9.	Yes, 1. the applicant had no earlier case law on which he could rely that proves the inverse, 2. a significant (although minor) number of scholars took the view that the ethnic cleansing constituted genocide, 3. later case law cannot be relied upon by the applicant, 4. the applicant, with the aid of a lawyer, could have reasonably foreseen the risk of being charged with genocide (108-116) (yellow colour based on inconsistent use of foreseeable future events).	No on two occasions. First, the acts are not war crimes *per se*. Therefore, no legal basis (137). Second, foreseeability tied in with the fact that crimes were statute-barred (143, 146).	Yes, as long as the factual elements of the crime were fulfilled (85).	Yes. The *K.-H. W.* test shows that also single soldiers can be held to the standard of having to foresee the fact that they could be prosecuted for their acts. International laws and customs of war were sufficient in themselves to found individual criminal responsibility. The applicant can be expected to have assessed these risks as commander. It is foreseeable that successor states can hold their citizens to different standards than current regimes (241) (yellow colour based on reliance on *K.-H. W*).

Annex 2 – Overview of the criticism of the Court's approach by dissenting judges and scholars

Green: no criticism
Yellow: criticism by indicated author
Bold author name: dissenting opinion from ECtHR judge
Normal author name: scholarly article

	Streletz	*K.-H. W.*	*Kolk & Kislyiy*	*Jorgic*	*Kononov* TD	*Korbely*	*Kononov* GC
0. Setting out the way the court deals with these matters							
1. Legal basis in interna-tional law covers the acts in question							
2. Legal basis in interna-tional law entails individual responsibility	Tigroudja 5: Only looked at whether a human right existed, not at whether there was individual criminal responsibility. **Loucaides**: Individual criminal responsibility under international law is required, not only domestic law. This can still be construed, however.	Tigroudja 5: Only looked at whether a human right existed, not at whether there was individual criminal responsibility. **Loucaides**: Individual criminal responsibility under international law is required, not only domestic law. This can still be construed, however.					
3. Written legal basis in international law preceded the acts		**Loucaides**: UN Resolution was one year after the acts, but it was part of a sequence of resolutions on the same subject-matter.		Pinzauti 4: About later interpretation of the term 'civilian' by Latvian courts in *Kononov*: A distinction should be made between the retroactive application of law (inadmissible in criminal matters), and			**Costa**, **Kalaydjieva** and **Poalelungi**: Only the Nuremburg principles were sufficiently clear, and they were formed after the facts occurred.

	Streletz	*K.-H. W.*	*Kolk & Kislyiy*	*Jorgic*	*Kononov* TD	*Korbely*	*Kononov* GC
				resorting to instruments enacted later in time in order to clarify and spell out a notion that already existed at the time when the facts occurred (which is instead fully admissible).			
4. Legal basis in international law clear?							**Costa**, **Kalaydjieva** and **Poalelungi**: No, not clear. Those instruments could not, in 1944, have formed a sufficiently sound and acknowledged legal basis for war crimes to be regarded as having been precisely defined at that time.
5. Legal basis in international law accessible?			Cassesse 4: Leaders and diplomats in Moscow had to have been aware; this was not necessarily the case for *Kolk & Kislyiy*. Estonia did not criminalize the conduct at the time.				
6. Legal basis in international law foreseeable?	Gallant 287: Not foreseeable since the retroactive abolition of defences would be a violation. Rudolf 909: Not taken into consideration that it was not the application of the law, but the whole legal system as such that was perverted. Lensing, Mertens 88: Court only looked at	Gallant 287: Not foreseeable since the retroactive abolition of defenses would be a violation. Rudolf 909: Not taken into consideration that it was not the application of the law, but the whole legal system as such that was perverted. Lensing, Mertens 88: Court only looked at			**Fura-Sandstrom**, **Njorgvinsson** and **Ziemele**: The essence of the crime was defined with enough accessibility and foreseeability. Applicant, in his capacity as commander, must have been aware thereof.	Tigroudja 5: Court did not respect principle of subsidiarity.	**Costa**, **Kalaydjieva** and **Poalelungi**: No, the rules of international law were not sufficiently clear to be foreseeable. In addition, the matter of non-prescriptibility was also not foreseeable.

	Streletz	*K.-H. W.*	*Kolk & Kislyiy*	*Jorgic*	*Kononov* TD	*Korbely*	*Kononov* GC
	positive law, which accords the rules a different meaning than the one they had in the legal system of East Germany.	positive law, which accords the rules a different meaning than the one they had in the legal system of East Germany. Mettraux 11: Can it be expected of a foot soldier to make a legal assessment as to the law to which he is bound to give priority, even if this means setting aside the law with which he is most familiar? **Barreto**: Although statutes were present, different conduct was expected of the applicant by the government. If he would have consulted a lawyer, it is clear what the answer would have been. If the applicant would not have acted in the way he did, he would have been punished. **Pellonpaa**: It cannot be expected of the applicant to choose between two 'legal ' obligations.					