

WRITTEN OBSERVATIONS

Submitted by the European Criminal Bar Association (ECBA)

in the case of *Yasak v. Türkiye* (Application no. 17389/20)

Introduction

1. These written observations are submitted by the European Criminal Bar Association (ECBA) pursuant to leave granted by the President of the Court under Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court.
2. The present case concerns fundamental questions regarding the application of Article 7 to terrorism-related prosecutions, particularly the temporal application of criminal laws, foreseeability requirements, and the assessment of individual criminal responsibility in cases involving alleged membership in organizations subsequently designated as terrorist entities.
3. The case raises crucial questions concerning:
 - a. The temporal application of criminal liability where membership is established through conduct predating an organization's terrorist designation;
 - b. *Mens rea* requirements where an organization's criminal nature was not publicly known; and
 - c. The use of *prima facie* lawful activities as evidence in terrorism-related prosecutions
4. These observations draw from comparative jurisprudence and international standards to assist the Court in developing its Article 7 jurisprudence while maintaining consistency with the Convention's object and purpose.

A. Contextual Analysis of Article 7 Principles

1. *Nullum crimen, nulla poena sine lege*

5. The guarantee in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention's system of protection, no derogation therefrom under Article 15 being admissible even in time of war or other public emergency threatening the life of the nation. It should be interpreted and applied,

as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.¹

6. Article 7 of the Convention is not limited to prohibiting the retroactive application of the criminal law to the disadvantage of the accused.² It also embodies, more generally, the principle that a crime may only be defined and a penalty prescribed by the law.³ In particular, while it prohibits the extension of the scope of existing offences to include acts which were not previously criminal offences, it also establishes the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy.⁴
7. It follows that criminal offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual is able to know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation thereof and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account.⁵
8. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was a legal provision in force which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision.⁶

2. The concept of a 'penalty' and its scope

9. The concept of "penalty" in Article 7 is autonomous in scope.⁷ To render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision.⁸
10. The wording of the second sentence of Article 7 § 1 indicates that the starting-point – and thus a very weighty factor⁹ – in any assessment of the existence of a penalty is whether the measure in question was imposed following conviction for a "criminal offence". Other relevant factors are the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity.¹⁰ The severity of the measure is not, however, in itself decisive, since many non-penal measures of a preventive nature may, just as measures which must be classified as a penalty, have a substantial impact on the person concerned.¹¹
11. The specific conditions of execution of the measure in question may be relevant to the nature and purpose, and also for the severity of that measure and thus for the

assessment of whether or not the measure qualifies as a penalty for the purposes of Article 7§1.

12. In order to assess the compliance of a measure with Article 7 § 1 during a given period, the actual manner in which the measure was executed throughout that period must therefore be considered relevant and must be taken into consideration by the Court.

3. Principle that only the law can define a crime and prescribe a penalty

13. Article 7 of the Convention requires the existence of a legal basis in order to impose a sentence or a penalty. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was a legal provision in force which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision.¹²
14. Article 7 also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty.¹³ The concept of “law” within the meaning of Article 7, as in other Convention articles (for instance Articles 8 to 11), comprises qualitative requirements, in particular those of accessibility and foreseeability.¹⁴
15. Law can only perform its task as an authoritative basis for punishability if it describes with sufficient legal certainty both the criminalised act and the consequences thereof. With a view to citizens' interests this serves a double end: guaranteeing both equal application of the law and certainty of the law which in turn is essential for controlling behavior. Such legal certainty is lacking if the facts of the case, due to their formulation, open the door to an arbitrary application, or if the interpretation is not anymore in line with what could be called "*a visible norm of punishment for a layman*".
16. The description of punishability must have such a grade of legal certainty that it determines the behaviour and prevents judicial arbitrariness.¹⁵
17. The principle that offences and sanctions must be provided for by law entails that criminal law must clearly define the offences and the sanctions by which they are punished, such as to be accessible and foreseeable in its effects.¹⁶ This requirement is satisfied where the individual can know from the wording of the relevant provision – if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice – what acts and omissions will make him criminally liable and what penalty he faces on that account.¹⁷ Even when a point is ruled on for the first time in an applicant's case, a violation of Article 7 of the Convention

will not arise if the meaning given is both foreseeable and consistent with the essence of the offence¹⁸.

18. In view of the subsidiary nature of the Convention system, it is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention and unless that domestic assessment is manifestly arbitrary.¹⁹
19. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant's conviction and, in particular, it must satisfy itself that the result reached by the national courts was compatible with Article 7 of the Convention. To accord a lesser power of review to the Court would render Article 7 devoid of purpose.²⁰

4. Foreseeability of criminal law

20. When speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability.²¹ These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries.
21. The Court has declared that "*Article 7 cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen*".²²
22. Moreover, the requirement of foreseeability is satisfied "*where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account*".²³
23. Consequently, on the basis of Art. 7 the Court has formulated namely that the application of criminal law must be foreseeable to an individual and that such an application must be in accordance with the "essence of the offence".
24. An individual must know from the wording of the relevant provision and, if necessary, with the assistance of the courts' interpretation of it and after obtaining appropriate legal advice, what acts and/or omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission.

25. It follows that in principle, there can only be a “penalty” within the meaning of Article 7 if an element of personal liability has been established in respect of the perpetrator of the offence. There is a clear correlation between the degree of foreseeability of a criminal-law provision and the personal liability of the offender. Thus Article 7 requires a mental link disclosing an element of liability in the conduct of the actual perpetrator of the offence if a penalty is to be imposed.²⁴
26. Many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.²⁵ However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.²⁶
27. The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States.²⁷
28. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.²⁸ The lack of an accessible and reasonably foreseeable judicial interpretation can even lead to a finding of a violation of the accused’s Article 7 rights.²⁹
29. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.³⁰
30. In view of the subsidiary nature of the Convention system, more generally, the Court points out that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation.³¹ However, the Court points out that its powers of review must be greater when the Convention right itself (Article 7 in the present case) requires that there was a legal basis for a conviction and sentence. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant’s conviction; in particular, it must satisfy itself that the result reached by the relevant domestic courts was compatible with Article 7 of the Convention – even if there were differences between the legal approach and reasoning of this Court and the relevant domestic decisions. To

accord a lesser power of review to this Court would render Article 7 devoid of purpose.³²

31. In the light of the above-mentioned principles, the Court observes that its role is not to call into question the domestic courts' findings but rather to consider, from the standpoint of Article 7 § 1, whether the acts for the commission of which the applicant was sanctioned fell within the definition of a sufficiently foreseeable and accessible criminal offence.
32. 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. 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.
33. 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.³³ The "foreseeability" should normally be appraised from the perspective of the individual; it must be assessed whether it was possible for the applicant – if need be after taking appropriate legal advice – to know from the wording of the relevant provisions what acts and omissions would make him criminally liable.³⁴
34. In the case of *Groppera Radio AG and Others v. Switzerland*³⁵ it was held that: *"the scope of the concepts of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed."*
35. The *Kokkikakis v. Greece* case³⁶ was one of the first in which the Court applied the foreseeability test in relation to the right guaranteed by Article 7. In this case the limitation of his right was found to be "prescribed by law" within the meaning of Article 9 of the ECHR and, from the point of view of Article 7, could serve as a valid basis for criminal responsibility. On the other hand, the Court held that there had been a violation of freedom of religion, since the conviction was not justified in democratic society by "a pressing social need" for criminalization.³⁷
36. The Court offered a similar stance on foreseeability in the case of *Flinkkil. and Others v. Finland*.³⁸ The Court found that the limitation was found to be "prescribed by law" and, accordingly, coherent with the *nullum crimen sine lege* principle (§ 68) At the same time, it was considered to be too excessive in a democratic society, especially due to the severe sanction imposed on the applicants. In other words, the

Court found that “*the domestic courts failed to strike a fair balance between the competing interests at stake*”.³⁹

37. It can be claimed therefore that crimes should not only be prescribed by law but also justified by a need to protect those legal assets that are valuable in democratic society.
38. In the recent case *Yüksel Yalçınkaya v. Turkey* [GC] cited above, the applicant was convicted for membership of an armed terrorist organization based decisively on the use of the encrypted messaging application ByLock, without establishing the constituent material and mental elements of the offence under Article 314 § 2 of the Criminal Code in an individualized manner.⁴⁰
39. In this case the Court has underlined that the fundamental safeguards enshrined in Article 7, might be applied less stringently when it came to the prosecution and punishment of terrorist offences, even when allegedly committed in circumstances threatening the life of the nation. The Convention required the observance of the Article 7 guarantees, including in the most difficult of circumstances. It was up to the States to adapt their terrorism laws to be able to combat effectively the evolving threats of terrorism and non-traditional terrorist organizations, within the bounds of the *nullum crimen, nulla poena sine lege* principle.⁴¹
40. The cases cited above show that Article 7 is an element of a wider approach to criminal justice, where the proportionality of criminalization, i.e. whether a particular conduct should be penalized in a democratic society and how severe a sanction should be provided for its commitment, is also relevant.

5. Non retroactivity of criminal law

41. Article 7 unconditionally prohibits the retroactive application of the criminal law where it is to an accused’s disadvantage.⁴²
42. Article 7 § 1 of the Convention guarantees not only the principle of the non-retroactivity of the harsher criminal law, but also, implicitly, the principle of the retroactivity of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favorable to the defendant.⁴³ The principle of retrospective application of the more

lenient criminal law also applies in the context of an amendment relating to the definition of the offence.⁴⁴

43. In *Scoppola v. Italy* (No. 2), the Court’s Grand Chamber referred — in the section on international texts and documents — to Art. 24, para 2 of the ICC Statute, which stipulates that the most favorable law applicable to a person being investigated, prosecuted or convicted must be applied in the event of a change in the law (Ibidem § 40). The Court concluded that *a consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law [...]* (Ibidem § 105).
44. It is not the Court’s task to review *in abstracto* whether the alleged failure to retroactively apply the new criminal law is, *per se*, incompatible with Article 7 of the Convention. This matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case, and notably whether the domestic courts have applied the law whose provisions are most favorable to the defendant.⁴⁵ What is crucial is whether, following a concrete assessment of the specific acts, the application of one criminal law rather than the other has put the defendant at a disadvantage as concerns the sentencing.⁴⁶
45. The prohibition of the retroactive application of criminal law is a vital safeguard against abuse of power and arbitrary prosecution. The Court has played a critical role in clarifying and enforcing this principle, ensuring that individuals are only held accountable under laws that are clear, accessible, and in force at the time of their actions. It is clear that criminal law must evolve to address new societal realities, but this evolution must respect the principles of foreseeability and legal certainty.

B. Comparative Analysis on the Application of Criminal Law Regarding Terrorist Organizations

46. The Court’s jurisprudence has established important principles regarding the criminalization of membership in terrorist organizations, particularly concerning temporal application, standards of proof, and the evaluation of seemingly legitimate activities. This analysis examines these key aspects through the lens of comparative jurisprudence.

1. Temporal Application of Terrorist Organization Designations

47. The principle of non-retroactivity of criminal law, enshrined in Article 7 of the Convention, poses particular challenges when applying terrorist organization designations. The Court has established that criminal liability cannot attach to activities conducted before an organization's formal designation as terrorist, unless there is clear foreseeability of criminal consequences.
48. In *Yalçınkaya v. Türkiye* (cited above Note 40 - 41) the Grand Chamber emphasized that the mere fact that an organization is subsequently designated as terrorist does not automatically render previous membership criminal. The Court noted that "F. Gülen's earlier acquittal of the charge of founding an armed terrorist organisation did not *per se* exclude the possibility of a different verdict regarding the nature of the FETÖ/PDY at a later time on the basis of subsequent developments" (§ 253). However, this requires concrete evidence of the individual's awareness of the organization's terrorist nature at the time of their involvement.
49. Similarly, in *Parmak and Bakır v. Turkey*, the Court held that "where domestic courts are confronted with assessing for the first time whether an organisation can be classified as terrorist, they must carry out a thorough investigation and examine the nature of the organisation by scrutinising its purpose, whether it has adopted an action plan or similar operational measures, and whether it has resorted to violence".⁴⁷

2. Standards for Proving Knowledge

50. The Court has consistently held that conviction for membership in a terrorist organization requires proof of both *actus reus* and *mens rea*, with particular emphasis on establishing the accused's knowledge of the organization's true nature.
51. In *Del Río Prada v. Spain* (cited above), the Court emphasized that criminal liability must be based on "clear and explicit" legal provisions that enable individuals to foresee the consequences of their actions. This requires demonstrable proof that the accused was aware of the organization's terrorist nature and willingly participated in its activities with that knowledge.

52. The US Supreme Court's approach in *Holder v. Humanitarian Law Project (2010)* establishes that the knowledge requirement can be satisfied through either specific awareness of an organization's formal terrorist designation or general knowledge of the organization's terrorist activities, even when restricting otherwise lawful activities. This dual approach to proving knowledge demonstrates how legal systems can balance due process protections with effective counter-terrorism measures while maintaining foreseeability requirements.
53. The UK Supreme Court's decision in *R v. Jogee [2016] UKSC 8* provides valuable comparative insight on standards of knowledge and intent in cases of joint criminal enterprise. In overturning *Chang Wing-Siu v R [1984] UKPC 27* and three decades of precedent, *Jogee* established that mere foresight of a principal's potential criminal actions is insufficient for secondary liability - the prosecution must prove actual intention to assist or encourage criminal conduct within the scope of the joint venture. While *Jogee* specifically addressed joint enterprise in domestic criminal law, its emphasis on proving actual knowledge and intent, rather than mere foresight, suggests a more rigorous evidential standard than that sometimes applied in recent cases concerning organizational liability by this Court.

3. Evaluation of Seemingly Legitimate Activities

54. One of the most challenging aspects in terrorism-related cases is distinguishing between legitimate activities and those that constitute criminal conduct. The Court has provided important guidance on this matter.
55. In *Selahattin Demirtaş v. Turkey*⁴⁸, the Court emphasized that “such a broad interpretation of a provision of criminal law cannot be justified where it entails equating the exercise of the right to freedom of expression with belonging to, forming or leading an armed terrorist organisation, in the absence of any concrete evidence of such a link”.
56. The Court has also warned against the dangers of criminalizing activities that benefit from the “presumption of legality”. In *Yasin Özdemir v. Turkey*⁴⁹, the Court noted that at the material time, there was no definitive conviction of members of the movement for being leaders or members of an illegal or terrorist organization, emphasizing the importance of temporal context in evaluating seemingly legitimate activities.

C. The Balance Between Counter-Terrorism Measures and Fundamental Rights

57. The international legal framework governing counter-terrorism measures recognizes the fundamental need to strike a balance between national security and the protection of human rights. Various international instruments, including the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), and United Nations Security Council Resolutions (UNSCRs), establish crucial limitations on state power in the fight against terrorism.
58. As former President of the Israeli Supreme Court Aharon Barak notably observed, "Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security." This principle captures the essential challenge facing democratic societies: maintaining fundamental rights while effectively combating terrorism.
59. The strength of Rule of Law lies in its unwavering commitment to legal norms and human rights, even when confronting severe security threats. If a democratic state disregards its core values—such as due process, the presumption of innocence, principle of legality and the prohibition of torture—it risks undermining the very foundations of its legitimacy.
60. The principles of proportionality, the acknowledgment of non-derogable rights, legal certainty, and fair trial rights serve as fundamental safeguards against the misuse of anti-terrorism laws and constitute core principles essential for preserving justice in any emergency situation.
61. A key principle in assessing counter-terrorism laws' impact on human rights is proportionality. Restrictions on rights must be necessary and proportionate to the aim pursued. The Court has consistently held that even in emergencies, the extent of restrictions must not exceed what is strictly required⁵⁰.
62. Proportionality requires that counter-terrorism measures:
- serve a legitimate security purpose.
 - use the least intrusive means possible.
 - do not impose an excessive burden on individuals or minority groups.

63. However, governments frequently justify disproportionate counter-terrorism laws by citing national security concerns. Courts often defer to executive decisions, and oversight mechanisms may be insufficient to prevent abuses. States must therefore ensure independent judicial review of counter-terrorism measures and adopt clear legislative safeguards to prevent the erosion of civil liberties
64. Despite allowances for derogation under Article 15 of the ECHR during public emergencies, certain fundamental rights remain inviolable. These include the right to life, requiring that extrajudicial executions and targeted killings comply with international humanitarian law; the absolute prohibition of torture, acknowledging no exceptional circumstances that justify inhuman treatment; freedom from slavery, which remains protected even in national security contexts; and the principle of legality, ensuring no person faces prosecution for acts that were not criminal when committed⁵¹.
65. Legal certainty stands as a cornerstone of the rule of law, requiring that laws be clear, precise, predictable, and consistently applied. It is a fundamental the rule of law principle, ensuring that laws are clear, precise, predictable, and consistently applied. In the area of counter-terroris measyre, vague or overly broad laws can lead to arbitrary enforcement and undermine fundamental rights. Many counter-terrorism laws employ vague definitions of “terrorism” and “extremism”, raising concerns about arbitrary application⁵²: broad and vague legal provisions risk infringing upon fundamental human rights.
66. The overreach of counter-terrorism laws, often justified under the pretext of national security, can lead to arbitrary enforcement, wrongful prosecutions, and erosion of civil liberties. As a result, legal certainty serves as an essential safeguard against the misuse of antiterrorism measures.
67. The *nullum crimen sine lege* principle ensures that no one can be prosecuted under a law that was not in force at the time of the alleged offense. However, some counter-terrorism laws have raised serious concerns about retrospective criminalization. The EU Directive 2017/541 on Combating Terrorism broadens the definition of terrorist offenses to include preparatory acts and glorification of terrorism, which may not have been explicitly criminalized at the time of the alleged conduct⁵³.
68. Such expansive interpretations risk violating Article 7 of the ECHR, which prohibits retroactive criminal laws (see above)⁵⁴.

69. Fair trial rights, enshrined in international human rights treaties, face particular challenges in face of counter-terrorism legislation. Key provisions include Article 14 of the ICCPR, Article 6 of the ECHR, and Article 47 of the EU Charter of Fundamental Rights, all guaranteeing the right to fair and public hearings, equality before courts, and access to legal representation⁵⁵.
70. Governments argue that enhanced security measures are necessary to combat terrorism effectively. While national security is a legitimate concern, the erosion of fair trial rights can lead to arbitrary detentions, secret trials, and coercive interrogations, violating fundamental legal principles and potentially exacerbating radicalization and mistrust in the justice system⁵⁶.
71. To ensure compliance with international human rights obligations, states must maintain several critical safeguards: first, ensuring independent judicial oversight of all counter-terrorism measures to prevent abuses⁵⁷; second, limiting the use of secret evidence and requiring disclosure to defendants to protect the right to an adversarial trial⁵⁸; third, prohibiting indefinite detention by establishing clear time limits for pre-trial detention and ensuring periodic judicial review⁵⁹; fourth, guaranteeing access to legal representation at all stages of detention and trial⁶⁰.
72. To ensure legal certainty in counterterrorism legislation and to prevent the misuse of antiterrorism laws, states must:
- Define Terrorism Precisely: the definition of terrorism must be clear, excluding general political opposition or dissent.
 - Require a Direct Nexus to Violent Acts: Criminal liability should be linked to concrete acts of violence rather than vague ideological affiliations.
 - Strengthen Judicial Oversight : Independent judicial review mechanisms should be established to prevent abuse.
 - Ensure Compliance with Human Rights Standards: Counterterrorism laws should be aligned with international human rights treaties to prevent overreach⁶¹.

Conclusion

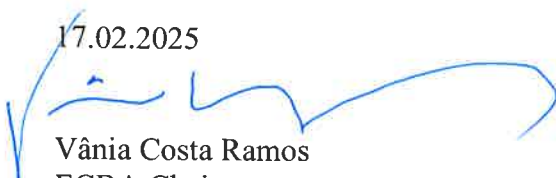
73. Based on the foregoing analysis of the application of Article 7 to terrorism-related prosecutions, the ECBA respectfully submits that three fundamental principles must govern the Court's approach:
- a. First, the principle of foreseeability requires clear and convincing evidence that the accused could reasonably anticipate if actions

would constitute membership in a terrorist organization at the time they were committed. This assessment must be made from the perspective of the individual, considering the legal framework and information available when the acts occurred.

- b. Second, establishing criminal liability requires concrete proof of both *actus reus* and *mens rea*. Mere participation in activities that carry a presumption of legality cannot suffice; rather, the prosecution must demonstrate the accused's actual knowledge of the organization's terrorist nature and their intentional participation with such knowledge.
 - c. Third, when evaluating conduct predating an organization's terrorist designation, courts must carefully consider the temporal context and ensure that retroactive application of criminal law does not violate the fundamental principles of legal certainty and individual culpability.
74. These requirements serve the dual purpose of Article 7: protecting individuals against arbitrary prosecution while enabling states to combat terrorism effectively through clear and foreseeable legal measures. The balance between security imperatives and fundamental rights can only be maintained through rigorous adherence to these principles, also according also to the principle of proportionality.
75. The Court's determination in this case will have profound implications for legal certainty and the protection of fundamental rights across Member States. It will establish crucial parameters for evaluating terrorist organization membership in an era of evolving security challenges.

Submitted on behalf of the ECBA

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ANNEX OF SOURCES

- ¹ *S.W. v. the United Kingdom*, no. 20166/92, 22 November 1995, §34; *C.R. v. the United Kingdom*, no. 20190/92, 22 November 1995, §32; and *Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008, §137 *Del Río Prada v. Spain* [GC], no. 42750/09, 21 October 2013, §77, *Rohlena v. Czech Republic*, no. 59552/08, 27 January 2015, § 50; *Vasiliauskas v. Lithuania* [GC], no. 35343/05, 20 October 2015 §153; *Ilmseher v. Germany* [GC], nos. 10211/12 and 27505/14, 4 December 2018, § 202, and *Cesarano v. Italy*, no. 71250/16, 17 October 2024.
- ² Concerning the retrospective application of a penalty see *Welch v. the United Kingdom*, no. 17440/90, 9 February 1995, §36,; *Jamil v. France*, no. 15917/89, 8 June 1995, § 35; *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, §36, and *Mihai Toma v. Romania*, no. 1051/06, 24 January 2012, §§26-31.
- ³ *Nullum crimen, nulla poena sine lege* – see *Kokkinakis v. Greece*, no. 14307/88, 25 May 1993, §52.
- ⁴ *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, §145; for an example of the application of a penalty by analogy, see *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, 8 July 1999, §§ 42-43; *Vasiliauskas v. Lithuania* [GC], no. 35343/05, 20 October 2015, §154; and *Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, 26 April 2022, § 67.
- ⁵ *Cantoni v. France*, no. 17862/91, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996-V, and *Kafkaris*, cited above, §140.
- ⁶ *Coëme and Others*, cited above, § 145, and *Achour v. France* [GC], no. 67335/01, 29 March 2006 § 43, ECHR 2006-IV.
- ⁷ *G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], nos. 1828/06 and 2 others, 28 June 2018, §210
- ⁸ *Welch v. the United Kingdom*, cited above; *Jamil v. France*, cited above, § 30, and *Del Río Prada*, cited above, §81.
- ⁹ *Glien v. Germany*, no. 7345/12, 28 November 2013, §121; and *Bergmann v. Germany*, no. 23279/14, 7 January 2016, §150.
- ¹⁰ *Welch*, cited above, §28; *Van der Velden v. the Netherlands* (dec.), no. 29514/05, 7 December 2006 and *Kafkaris* [GC], cited above, §142; *Linseher v. Germany* [GC], 2018, § 204.
- ¹¹ *Welch*, cited above, §32; *Del Río Prada v. Spain* [GC], cited above, §82; and *Bergmann v. Germany*, cited above, §150; *G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], cited above, §§212-233.
- ¹² *Coëme and Others v. Belgium*, cited above, §145; *Del Río Prada v. Spain* [GC], cited above, §80.
- ¹³ *Kokkinakis v. Greece*, cited above, §52,
- ¹⁴ *G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], cited above, §§242; *Cantoni v. France*, cited above, §29; *Kafkaris v. Cyprus* [GC], cited above, §140; *Del Río Prada v. Spain* [GC], cited above, §91; *Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015 §134,
- ¹⁵ The ECtHR found for example that “It is . . . essential that the conditions for deprivation of liberty under domestic law should be clearly defined and that the law itself be foreseeable in its application”; it must be possible to “foresee, to a degree that is reasonable in the circumstances, the consequences with agiven action may entail”. *Baranowski v. Poland*, no. 28358/95, 28 March 2000 §52; *Kawka v. Poland*, no. 25874/94, 9 January 2001 § 49; *Steel and others vs United Kingdom*, no. 24838/94, 23 September 1998 § 54; *Laumont v. France*, no. 43626/98, 8 November 2001 § 45.
- ¹⁶ *G.I.E.M. S.R.L. and Others v. Italy* [GC], cited above, § 242.
- ¹⁷ *Del Río Prada v. Spain* [GC],, cited above, §79; *G.I.E.M. S.R.L. and Others*, cited above, §242; and *Cantoni v. France*, cited above, §29,
- ¹⁸ *Khodorkovskiy and Lebedev*, nos. 11082/06 and 13772/05, 25 October 2013, §570; and the *Advisory opinion concerning the use of the “blanket reference” or “legislation by reference” technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal*

law [GC], request no. P16-2019-001, Armenian Constitutional Court, §62, 29 May 2020; and *Saakashvili v. Georgia*, no. 6232/20 and 22394/20, 23 August 2024, §141.

¹⁹ *Streletz, Kessler and Krenz v. Germany* [GC] and 2 others, nos. 34044/96, 35532/97 and 44801/98, 22 March 2001 § 49; *Vasiliauskas v. Lithuania* [GC], cited above, § 160, and unless the assessment conducted by the domestic courts is manifestly arbitrary *Kononov v. Latvia* [GC], no. 36376/04, 17 May 2010 § 189.

²⁰ *Kononov v. Latvia* [GC], cited above, §198; *Vasiliauskas v. Lithuania* [GC], cited above §161.

²¹ *Kokkinakis v. Greece*, cited above, §§ 40-41; *Cantoni v. France*, cited above, § 29; *Coëme and Others*, cited above, § 145; and *E.K. v. Turkey*, no. 28496/95, 7 February 2002, § 51.

²² *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, 5 October 2013, §780.

²³ *Kafkaris v. Cyprus* [GC], cited above, §140; *Cantoni v. France*, cited above, §29.

²⁴ *G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], cited above, §§ 242 and 246; *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, 26 September 2023, §239.

²⁵ *Kokkinakis v. Greece*, cited above, §40, and *Cantoni v. France*, cited above, §31.

²⁶ *Kafkaris v. Cyprus* [GC], cited above, § 141; *Del Rio Prada v. Spain* [GC], cited above, §92, and *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 59, 3 December 2019.

²⁷ *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A.

²⁸ *S.W. v. the United Kingdom*, cited above, §36; *C.R. v. the United Kingdom*, cited above, §34; *Streletz, Kessler and Krenz v. Germany* [GC], cited above, §50; *K.-H.W. v. Germany* [GC], no. 37201/97, 22 March 2001, §85; *Korbely v. Hungary* [GC], no. 9174/02, 19 September 2008 § 71; and *Kononov v. Latvia* [GC], cited above, §185.

²⁹ See, concerning the constituent elements of the offence, *Pessino v. France*, no. 40403/02, 10 October 2006, §§35-36, and *Dragotoniū and Militaru-Pidhorni v. Romania*, nos. 77193/01 and 77196/01, 24 May 2007, §§43-44; as regards the penalty, see *Alimuçaj v. Albania*, no. 20134/05, 7 February 2012, §§154-62.

³⁰ *S.W. v. the United Kingdom*, cited above, §36, and *Streletz, Kessler and Krenz v. Germany* [GC], cited above, §50.

³¹ *Rohlena v. the Czech Republic* [GC], cited above, § 51, and *Jidic v. Romania*, no. 45776/16, 18 February 2020, § 83.

³² See *Kononov*, cited above, §198; *Rohlena*, cited above, § 52; and *Vasiliauskas*, cited above, § 161.

³³ See, for example, *Streletz, Kessler and Krenz v. Germany*, cited above, § 78; *March Jorgic v. Germany*, no. 74613/01, 12 July 2007, § 11-113.

³⁴ *Saakashvili v. Georgia*, cited above, §144.

³⁵ *Groppera Radio AG and Others v. Switzerland*, no. 10890/84, 28 March 1990, § 68.

³⁶ *Kokkikakis v. Greece*, cited above, § 52. The case concerned a citizen of Greece, who, as a practicing Jehovah's Witness, had been accused and convicted of the crime of proselytism. In his application to the ECtHR he maintained that the definition of proselytism was so broad that even the slightest discussion of religious subjects might be considered as an indirect attempt to illegally intrude on someone's beliefs. Moreover, he claimed that it was not only the lack of definitiveness of the offence that was contrary to the ECHR, but also that the law was a violation of the freedom to manifest one's religion guaranteed by Article 9 of the ECHR. 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.

³⁷ See *Kokkikakis v. Greece*, cited above, partly concurring opinion of judge Pettiti: "The vagueness of the charge and the lack of any clear definition of proselytism increase the misgivings to which the Greek Law gives rise. Even if it is accepted that the foreseeability of the law in Greece as it might apply to proselytes was sufficient, the fact remains that the haziness of the definition leaves too wide a margin of interpretation for determining criminal penalties."

³⁸ *Flinkkil and Others v. Finland*, no. 25576/04, 6 July 2010, §§ 67-68, 94. The applicants were charged with spreading data depicting the private life of another person. They claimed it had not been clear from the penal provision that their conduct might be punishable, because the scope of private life was not clarified. They claimed that the provision constituted a restriction on the right to freedom of expression, and they also argued, based on Article 10 of the ECHR, that the limitation was not "prescribed by law" and not "necessary in a democratic society."

³⁹ *Ibidem*, § 92.

⁴⁰ *Yüksel Yalçınkaya v. Türkiye* [GC], cited above, §§ 270-271. The Court considered that the relevant question as it had been in the *Yüksel Yalçınkaya* case, was not whether the FETÖ/PDY had already been proscribed as a terrorist organization at the time when the applicant was deemed to have committed the acts for which he had been convicted, but whether his conviction had been sufficiently foreseeable given the requirements of the domestic law, in particular as regarded the cumulative constituent material and mental elements of that offence such as they appeared in the relevant legal framework.

⁴¹ *Yüksel Yalçınkaya v. Türkiye* [GC], cited above, §§270-271.

⁴² *Del Río Prada v. Spain* [GC], cited above, §116; *Kokkinakis v. Greece*, cited above, §52. This principle applies to the provision defining the offence and to those setting the penalty *Jamil v. France*, cited above, §§34-36; *M. v. Germany*, n. 19359/04, 10 Mai 2010, §§ 123 and 135-137.

⁴³ *Cesarano v. Italy*, cited above, §62; *Scoppola v. Italy* [GC], no. 10249/03, 17 September 2009, § 109; *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law*, [GC], request no. P16-2019-001, Armenian Constitutional Court, § 81, 29 May 2020 ("*Advisory opinion P16-2019-001*"); and *Jidic v. Romania*, no. 45776/16, § 80, 18 February 2020.

⁴⁴ *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, 3 December 2019, § 64, , and *Advisory opinion P16-2019-001*, cited above, § 82.

⁴⁵ *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, 18 Juli 2013, § 65, and *Jidic v. Romania*, cited above, § 82.

⁴⁶ *Maktouf and Damjanović v. Bosnia and Herzegovina (GC)*, cited above, §§ 69-70, and *Jidic v. Romania*, cited above, §85.

⁴⁷ *Parmak and Bakır v. Turkey*, cited above, § 71

⁴⁸ *Selahattin Demirtaş v. Turkey* [GC] no. 14305/17, 22 December 2020, § 280.

⁴⁹ *Yasin Özdemir v. Turkey*, no. 14606/18, 7 March 2022, § 40.

⁵⁰ Counterterrorism Policies, Measures and Tools in the EU, Julia Burchett & Anne Weyembergh, op. cit.

⁵¹ OSCE, *Countering Terrorism, Protecting Human Rights*, op. cit. p. 88.

⁵² Handbook on Criminal Justice Responses to Terrorism, Yvon Dandurand, op. cit. see OSCE, *Countering Terrorism, Protecting Human Rights*, p. 60, as well. In *Sakharov v. Russia*, this Court ruled that any restriction on rights must be "prescribed by law," meaning that the law must be sufficiently precise to avoid arbitrary application (reference made by Handbook on Criminal Justice Responses to Terrorism, p. 36).

⁵³ Burchett & Weyembergh, *Counterterrorism Policies, Measures, and Tools in the EU*, p. 40.

⁵⁴ OSCE, *Countering Terrorism, Protecting Human Rights*, p. 130.

⁵⁵ *Id.*, p. 165.

⁵⁶ UNODC, *Handbook on Criminal Justice Responses to Terrorism*, p. 33.

⁵⁷ *Id.*, p. 140.

⁵⁸ OSCE, *Countering Terrorism, Protecting Human Rights*, p. 195.

⁵⁹ UNODC, *Counter-Terrorism in the International Law Context*, p. 75.

⁶⁰ Burchett & Weyembergh, *Counterterrorism Policies, Measures, and Tools in the EU*, p. 150.

⁶¹ United Nations Handbook on Criminal Justice Responses to Terrorism, p. 22.