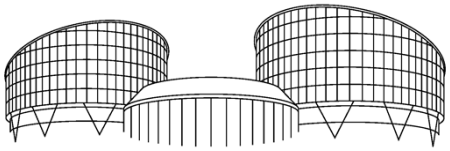

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF ROHLENA v. THE CZECH REPUBLIC

(Application no. 59552/08)

JUDGMENT

STRASBOURG

27 January 2015

This judgment is final.

In the case of Rohlena v. the Czech Republic,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele,
Isabelle Berro,
Elisabeth Steiner,
Päivi Hirvelä,
Mirjana Lazarova Trajkovska,
Işıl Karakaş,
Kristina Pardalos,
Paulo Pinto de Albuquerque,
Aleš Pejchal,
Valeriu Griţco,
Faris Vehabović,
Dmitry Dedov,
Egidijus Kūris,
Robert Spano, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 9 April 2014 and 19 November 2014,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 59552/08) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Czech national, Mr Petr Rohlena ("the applicant"), on 4 December 2008.

2. The applicant was represented by Mr J. Kružík, a lawyer practising in Brno. The Czech Government ("the Government") were represented by their Agent, Mr V.A. Schorm, of the Ministry of Justice.

3. Relying on Article 7 of the Convention, the applicant alleged in particular that, in convicting him of a continuous criminal offence, the domestic courts had applied the criminal law retroactively, to his detriment.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 14 November 2011 the President of the Fifth Section decided to give notice of the application to the Government. On 18 April 2013 a Chamber of that Section, composed of

Mark Villiger, President, Angelika Nußberger, Ganna Yudkivska, André Potocki, Paul Lemmens, Helena Jäderblom, Aleš Pejchal, judges, and Claudia Westerdiek, Section Registrar, gave judgment. They unanimously declared the complaint under Article 7 of the Convention admissible and the remainder of the application inadmissible, and held that there had been no violation of Article 7. Judge Lemmens expressed a separate concurring opinion which was annexed to the judgment.

5. On 9 September 2013, following a request by the applicant dated 11 July 2013, a panel of the Grand Chamber decided to refer the case to the Grand Chamber under Article 43 of the Convention.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. On 16 January 2014 the President of the Court decided to cancel the hearing scheduled in the case and to pursue the written procedure.

8. The applicant and the Government each filed further written observations on the merits (Rule 59 § 1) and replied to the specific questions put to them by the Grand Chamber.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1966 and lives in Brno.

10. On 29 May 2006 the applicant was formally indicted by the Brno municipal prosecutor for having, at least between 2000 and 8 February 2006, repeatedly abused his wife both physically and mentally while he was drunk. He was accused of having subjected her to verbal abuse, hit her on the head with his hand and fist, slapped her, held her by the throat, tried to strangle her, thrown her against the furniture or onto the ground, pushed her down stairs and kicked her. He was further accused of having hit the children, gambled away the household's money on gaming machines and smashed the crockery. As a result, his wife had sustained haematomas, bruising and a fractured nose and had been obliged to seek medical assistance on that account on 26 June 2000, 18 July 2003 and 8 February 2006 following assaults committed on 24 June 2000, 17 July 2003 and 8 February 2006 respectively. The applicant had allegedly sought to undermine his wife psychologically in order to control her. According to the prosecutor, the applicant had thus committed the "continuing" criminal offence *(trvající trestný čin)* of abusing a person living under the same roof within the meaning of Article 215a §§ 1 and 2 (b) of the Criminal Code, given that his conduct prior to the introduction of that offence on 1 June 2004 had amounted to the offence of violence against an individual or group

of individuals under Article 197a of the Criminal Code and assault occasioning bodily harm under Article 221 of the Code.

11. On 18 April 2007 the Brno Municipal Court found the applicant guilty of the offence of abusing a person living under the same roof, committed at least between 2000 and 8 February 2006, as described in the bill of indictment, which also referred to the fact that the abuse had occurred repeatedly. It sentenced him to a suspended term of two and a half years' imprisonment and placed him on probation for five years. The applicant was also placed under supervision and ordered to undergo treatment for alcohol dependency. The court based its decision on the statements given by the applicant, the victim (his wife) and several witnesses, including the couple's two children – who reported, among other incidents, ten instances of the applicant verbally insulting his wife, four instances of the applicant grabbing his wife by the arms and strangling her, and verbal and/or physical assaults committed by the applicant on his wife at monthly intervals – and on documentary evidence and expert reports. It also took into account the fact that the applicant had confessed to quarrels and physical violence in his relationship with his wife; he admitted in particular that he had sometimes slapped his wife or hit her with his fist.

The court adopted the classification of the offence as abuse of a person living under the same roof within the meaning of Article 215a §§ 1 and 2 (b) of the Criminal Code as in force since 1 June 2004, taking the view that this classification also extended to the acts committed by the applicant prior to that date since they had been punishable at the material time and amounted at least to the offence of violence against an individual or group of individuals under Article 197a of the Criminal Code. Lastly, the court considered that, owing to the duration of the conduct in question, the offence committed in the present case presented a relatively high degree of danger which justified a sentence ranging from two to eight years' imprisonment under paragraph 2 of Article 215a of the Criminal Code. Taking into consideration the extenuating circumstances (in particular the fact that the applicant had confessed and that he had no previous convictions), it imposed a suspended sentence situated at the lower end of the range.

12. On 6 September 2007 the Brno Regional Court dismissed an appeal by the applicant in which he contested the facts as established by the Municipal Court and the unilateral assessment of the evidence. The Regional Court found no defects in the previous proceedings and considered that the classification of the applicant's conduct was in conformity with the provisions of the Criminal Code.

13. On 21 February 2008 the Supreme Court dismissed as manifestly ill-founded an appeal on points of law lodged by the applicant in which he complained that the trial court had applied Article 215a of the Criminal Code even to his conduct prior to 1 June 2004, when the offence of abuse

had not yet existed in domestic law. On this point the Supreme Court noted, referring to its ruling Tzn 12/93 of 8 December 1993, that where there was, as in the case at hand, a "continuation of the criminal offence" (*pokračování v trestném činu*), which was considered to constitute a single act, its classification in criminal law had to be assessed under the law in force at the time of completion of the last occurrence of the offence. That law therefore also applied to the earlier acts, provided that these would have amounted to criminal conduct under the previous law. In the instant case the Supreme Court considered that the applicant's conduct prior to the amendment of the Criminal Code on 1 June 2004 had amounted at least to an offence punishable under Article 197a or Article 221 § 1 of the Criminal Code. After examining the file it also concluded that the accused's actions as described in the operative part of the first-instance court's judgment disclosed all the legal elements of the offence of abusing a person living under the same roof within the meaning of Article 215a §§ 1 and 2 (b) of the Criminal Code. Concerning the continuation of the offence, the Supreme Court noted that the abuse itself amounted to ill-treatment characterised by a certain duration. For the offence to be regarded as having continued over a long period of time it had to have lasted for some months. As the applicant had perpetrated the offence in question at least from 2000 until 8 February 2006, that is, over a period of several years, his conduct certainly disclosed the material element of continuation of the offence of abuse under Article 215a § 2 (b) of the Criminal Code.

14. On 10 June 2008 the Constitutional Court dismissed as manifestly ill-founded a constitutional appeal lodged by the applicant in which he complained that the proceedings had been unfair and that the Criminal Code had been applied retroactively, to his detriment. Referring to the ruling of the Supreme Court and to its relevant case-law, the Constitutional Court held that the decisions given by the courts in the present case had been logical and coherent and had not had any retroactive effect prohibited by the Constitution.

15. As the applicant committed another offence while on probation and did not undergo any treatment for his alcohol dependency, he was required to serve the prison sentence imposed by the judgment of 18 April 2007. He began serving his prison sentence on 3 January 2011. According to the Government, he was granted conditional release on 17 May 2012.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal Code (Law no. 140/1961, as in force until 31 December 2009)

16. Pursuant to Article 16 § 1, the criminal nature of an act was assessed under the law in force at the time the act was committed. A subsequent law had to be applied if it was more favourable to the offender.

17. Under Article 34k, when imposing a sentence the court had to consider as an aggravating circumstance in particular the fact that the offender had committed several offences.

18. Article 35 § 1 stated that, when a court sentenced a perpetrator for two or more criminal offences, a concurrent sentence (*úhrnný trest*) was to be imposed on the basis of the legal provision concerning the most serious of the offences. Where the minimum prison terms differed, the longest one constituted the minimum term for the concurrent sentence.

19. Under Article 67 § 1 (d), criminal liability for an offence punishable by a maximum sentence of less than three years became statute-barred on expiry of the limitation period of three years. Pursuant to Article 67 §§ 3 and 4, this period was interrupted and a new period began running (a) when the offender was charged with the offence in question and when subsequent measures were taken with a view to his criminal prosecution (such as a prosecutor's indictment, court summons, and so forth), or (b) if, during that period, the offender committed a further crime punishable by the same or a more severe sentence.

20. Under Article 89 § 3, which was introduced into the Criminal Code by Law no. 290/1993 which came into force on 1 January 1994, the continuation of a criminal offence (*pokračování v trestném činu*) was to be understood as consisting of individual acts (*jednotlivé dílčí útoky*) which were driven by the same purpose, comprised the elements of the same offence and were linked by virtue of being carried out in an identical or similar manner, occurring close together in time and pursuing the same object.

21. Pursuant to Article 197a, a person who threatened to kill another person or to cause him or her bodily harm or other serious harm, in a manner giving reasonable grounds for fear, was liable to a term of imprisonment of up to one year or to a fine.

22. Under paragraph 1 of Article 215a, introduced on 1 June 2004, anyone who abused a relative or other person living under the same roof was liable to a sentence of up to three years' imprisonment. According to paragraph 2, the perpetrator of such an offence faced between two and eight years' imprisonment if (a) he or she acted in a particularly brutal manner or committed the offence against several persons, or (b) he or she continued the conduct in question over a lengthy period.

The relevant explanatory report stated that the purpose of introducing the above provision had been to address the lack of specific legislation in this area, since the general criminal-law provisions that were applicable allowed prosecution of only the most serious acts of physical domestic violence (for example, the offences set forth in Articles 197a or 221 which, according to judicial practice, had to result in at least seven days' incapacity to work, which was rarely the case in situations of domestic violence). The new provision required neither physical violence nor any consequences for the victim's health. It also pursued the aim of overcoming the difficulties faced by the prosecuting authorities in view of the specific features of domestic violence.

It was noted that the term "abuse/ill-treatment" was not new since there was already an offence of abuse/ill-treatment of a person in one's care. This was interpreted to mean persistent ill-treatment involving a particularly high degree of cruelty and impassivity and which the victim perceived as a serious wrong. It was not necessarily a systematic course of conduct or conduct spanning a lengthy period.

23. Under Article 221 § 1, the offence of assault with intent to cause bodily harm was punishable by a prison term of up to two years. Paragraph 2 provided for a prison term ranging from one to five years where, among other factors, the perpetrator caused serious bodily harm to the victim; under paragraph 3, where the perpetrator's conduct resulted in death, he or she was liable to a prison sentence of between three and eight years.

B. Legal literature and case-law of the Supreme Court

24. According to the Czech legal literature, the continuation of a criminal offence, that is, a "continuous" criminal offence (*pokračující trestný čin*), was considered to constitute a single act; when one of the elements referred to in Article 89 § 3 of the Criminal Code was absent, the offence in question was characterised as "repeated".

25. As established by the settled and long-standing case-law of the Supreme Court (decisions nos. 3 Tz 155/2000, 3 Tdo 1115/2003, 6 Tdo 1314/2003, 11 Tdo 272/2007, 6 Tdo 181/2012, 11 Tdo 258/2012 and 6 Tdo 1553/2012), a continuous offence was deemed to have come to an end on completion of the last occurrence of the offence. The Government additionally referred to the decisions published in the *Reports of Judicial Decisions and Opinions* under nos. 103/1953, 44/1970 and 7/1994 and to Supreme Court decision no. 5 Tdo 593/2005. Thus, when a continuous offence extended over a period of time during which the applicable legislation changed, it was considered to be covered by the new legislation provided that at least some of the punishable acts had been committed after the entry into force of the new law and that the previous acts had constituted

a criminal offence at the time they were committed (see Supreme Court decision no. Tzn 12/93), even if that offence carried a lighter sentence.

26. By judgment no. 11 Tdo 272/2007 of 27 August 2007 in a factually similar case, the Supreme Court quashed the lower courts' decisions by which the person concerned had been found guilty of two criminal offences (violence against an individual under Article 197a of the Criminal Code committed before 1 June 2004, and abuse of a person living under the same roof committed after that date) and had imposed a concurrent sentence of two years and six months. The Supreme Court held that this interpretation by the courts, distinguishing between acts committed before and after the entry into force of Article 215a of the Criminal Code, was incorrect since the situation amounted to a continuous offence; the court nevertheless upheld the sentence. It stated in particular:

> "The question is whether a continuous criminal offence can encompass conduct the individual occurrences of which were perpetrated partly before and partly after the entry into force of the applicable criminal rules, without infringing the provisions of Article 16 § 1 of the Criminal Code. ... In the case of the continuation of an offence which, from a material point of view, is understood as a single act [*skutek*], the time of its commission is considered to be that of completion of the last occurrence of the offence (which forms a unity with the previous ones). It follows that the continuation of the offence is to be examined under the new law, which may be stricter, as in force at the time when the offence was completed, even if part of the offence (irrespective of its extent) falls within the temporal scope of the older criminal provisions which are more favourable to the offender.
>
> This conclusion is in line with the existing case-law, according to which continuous offences are considered to have been committed under a new (later) law provided that at least part of the offence (that is to say, individual acts) was committed after this new law came into force. Such offences are deemed to have been committed in their entirety under the new, later law ... provided that the conduct in question was also punishable under the previous law."

27. With regard to the application of Article 89 § 3 of the Criminal Code specifically to conduct covered by Articles 197a, 215a and 221 of the Criminal Code or comparable conduct, the Government also referred to Supreme Court decisions nos. 3 Tdo 1431/2006 of 10 January 2007, 6 Tdo 548/2008 of 28 May 2008 and 7 Tdo 415/2013 of 21 May 2013. They pointed out in particular that in those decisions the Supreme Court had confirmed that the notion of a close temporal connection had not been defined precisely and that each particular case therefore required a comprehensive assessment of all its circumstances and of the relevant formal criteria set out in Article 89 § 3. Moreover, the constituent elements of a crime could be made out in various ways; hence, the manner of execution of an offence did not always have to be identical as long as the act was directed against the same protected interest.

III. RELEVANT COMPARATIVE AND INTERNATIONAL LAW

A. Terminology

28. It transpires from the legal systems of the Contracting States that there is a need to distinguish between two situations, the second of which is in issue in the present case:

(a) a "continuing" criminal offence (*trvající trestný čin, Dauerdelikt, infraction continue, reato permanente*), defined as an act (or omission) which has to last over a certain period of time – such as the act of assisting and giving shelter to members of an illegal organisation, dealt with by the Court in *Ecer and Zeyrek v. Turkey* (nos. 29295/95 and 29363/95, ECHR 2001-II); and

(b) a "continuous" criminal offence (*pokračující trestný čin, fortgesetzte Handlung, infraction continuée, reato continuato*), defined as an offence consisting of several acts all of which contain the elements of the same (or similar) offence committed over a certain period of time – such as the intentional, continuous and large-scale concealment of taxable amounts that was in issue in *Veeber v. Estonia (no. 2)* (no. 45771/99, ECHR 2003-I).

29. Moreover, several types of sentence exist in the Contracting States when more than one offence is committed:

(a) a consecutive or cumulative sentence (*peine cumulée ou peines consécutives*), where a separate sentence is imposed in respect of each offence committed and all of these sentences are added up or served one after the other;

(b) a concurrent sentence (*úhrnný trest, peine confondue ou peines simultanées*), where the offender is given the heaviest penalty in accordance with the legal provision concerning the most serious of the offences, or where he or she is given several sentences which are to be served simultaneously;

(c) an aggregate, consolidated or overall sentence (*souhrnný trest, peine globale ou peine d'ensemble*), which is calculated according to different methods depending on whether the sentence is imposed for offences committed simultaneously or consecutively or whether it encompasses other penalties imposed previously; it fluctuates between the sum of all the individual penalties and the heaviest one.

B. Comparative law

30. The notion of a continuous criminal offence as understood in the present case was introduced into European law in the Middle Ages with a view to softening the hard sentencing rule *quod criminae tot poenae* (in other words, material accumulation of all penalties) under Roman law. Two different approaches were developed by scholars and legislatures, based on

a subjective and an objective view of the notion of a continuous criminal offence. According to the subjective view, which existed, for instance, in Italy (see, for example, Article 81 of the 1930 Italian Criminal Code), a continuous criminal offence was a group of acts united by a single intention, by one single criminal plan. According to the objective view, developed mainly in Germany (see, for example, Article 110 of the 1813 Bavarian Criminal Code), a continuous criminal offence was based on the repeated intention of the offender to attack the same or similar object or legally protected interest (*Rechtsgut*). Moreover, the fact that the repetition of the criminal acts and of the criminal intention was facilitated by the material circumstances – involving the offender, the close temporal connection and the identity of the legally protected interest affected – was seen as justifying the imposition of a lighter penalty on the offender. This objective perspective gained support all over Europe, with some countries incorporating it in their legislation. However, in order to avoid excessive leniency towards repeat offenders, certain legislatures restricted the application of this concept to specific categories of crimes.

31. The existence of a European tradition of a continuous criminal offence, understood in an objective sense, is confirmed by the research undertaken by the Court in relation to all forty-seven Council of Europe member States. Indeed, the vast majority of them have introduced the notion of a continuous criminal offence into their legal systems, either by means of specific legal provisions or via the legal literature and/or judicial practice.

32. On the basis of this comparative survey, the Contracting States can be divided into three different groups:

(a) thirty member States where the concept of a continuous criminal offence is enshrined in law: Andorra (Article 59 of the Criminal Code), Armenia (Article 21 § 2 of the Criminal Code), Belgium (Article 65 § 1 of the Criminal Code), Bosnia and Herzegovina (Article 54 § 2 of the Criminal Code), Bulgaria (Article 26 of the Criminal Code), Croatia (Article 52 of the Criminal Code), the Czech Republic (Article 89 § 3 of the Criminal Code), the former Yugoslav Republic of Macedonia (Article 45 of the Criminal Code), Georgia (Article 14 of the Criminal Code), Greece (Article 98 § 1 of the Criminal Code), Hungary (Article 6 § 2 of the Criminal Code), Italy (Article 81 § 2 of the Criminal Code, referring to a continuous offence *stricto sensu*), Latvia (Article 23 of the Criminal Code), Malta (Article 18 of the Criminal Code), the Republic of Moldova (Article 29 of the Criminal Code), Montenegro (Article 49 of the Criminal Code), the Netherlands (Article 56 of the Criminal Code), Norway (Article 219 of the Criminal Code, specifically concerning domestic violence), Poland (Article 12 of the Criminal Code), Portugal (Article 30 § 2 of the Criminal Code), Romania (Article 35 of the new Criminal Code), San Marino (Article 50 of the Criminal Code), Serbia (Article 61 of the Criminal Code), Slovakia (Article 122 § 10 of the Criminal Code), Slovenia (Article 54 § 1 of the

Criminal Code), Spain (Article 74 of the Criminal Code), Sweden (Article 4a of Chapter 4 of the Criminal Code), Turkey (Article 43 of the Criminal Code), Ukraine (Article 32 of the Criminal Code) and the United Kingdom (Rule 14.2(2) of the Criminal Procedure Rules 2013);

(b) fourteen member States where the concept of a continuous criminal offence has been developed by legal theory and practice: Albania, Austria, Azerbaijan, Denmark, Estonia, France, Germany, Iceland, Liechtenstein, Lithuania, Luxembourg, Monaco, Russia and Switzerland;

(c) three member States which do not report the existence either in the law or in legal theory of the notion of a continuous criminal offence as understood in the present case: Cyprus, Finland and Ireland.

33. The comparative-law material available to the Court concerning the existence of a concept of a continuous criminal offence (see paragraphs 31-32 above) shows a high degree of convergence between the domestic legal systems of the Council of Europe member States in this particular area. There appears indeed to be a broad consensus arising out of a long European tradition (see paragraph 30 above) with regard to the following features of a continuous criminal offence, which include both objective (*actus reus*) and subjective (*mens rea*) elements testifying to the legal unity of the acts concerned:

(a) the perpetrator commits a number of identical, similar or different criminal acts against the same legally protected interest (*Rechtsgut, bien juridique, bene giuridico*); in addition, it is often required that the identity of the perpetrator and of the victim be the same on each occasion;

(b) there is at least a similarity in the manner of execution of the individual acts (*modus operandi*), or there are other material circumstances connecting them which constitute a whole (*actus reus*);

(c) there is a temporal connection between the different individual acts, which is to be assessed in the particular circumstances of each case;

(d) there is the same, repeated criminal intent or purpose (*mens rea*) for all the individual acts, although they do not all have to be planned *ab initio*;

(e) the individual acts comprise, either explicitly or implicitly, the constituent elements of the criminal offence(s).

34. There is also agreement on the principle that the law in force at the time of the cessation of the continuous criminal activity is applicable to the facts which occurred prior to its entry into force, provided that these facts satisfy the conditions of the new law, and in most countries also of the previous law. This also applies, in the majority of member States, when the new law is more severe since the perpetrator is presumed to have tacitly agreed to a harsher sentence by continuing his unlawful conduct after the change in the law.

35. Moreover, in all member States a single penalty is imposed on the perpetrator of the continuous criminal offence. When the individual acts comprising a continuous criminal offence are covered by a number of

different provisions, the provision laying down the most severe penalty will apply.

36. Finally, the penalty imposed for a continuous criminal offence is invariably more lenient than the cumulative, consecutive or concurrent sentences imposed for multiple criminal offences.

37. On the basis of the above considerations, the Court notes that the notion of a continuous criminal offence is not only a commonly used legislative and judicial approach to penalising a particular type of conduct, but is also specifically aimed at applying more lenient sentencing rules (see, by way of comparison, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 70, ECHR 2013). It can be said that the concept of a continuous criminal offence confers two benefits on the offender:

(a) he or she is given one single sentence instead of a cumulative, consecutive or concurrent sentence imposed for several offences; and

(b) there is a requirement that the constituent elements of the offence defined by the new law, if any, be made out from the onset of the criminal conduct, that is, also with regard to the facts which occurred before the entry into force of the new law.

C. International law

1. Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted by the Committee of Ministers on 7 April 2011, came into force on 1 August 2014)

38. Under this Convention, which the Czech Republic has not ratified, the State has an obligation to address fully violence against women in all its forms and to take measures to prevent it, protect its victims and prosecute the perpetrators. The Convention provides, *inter alia*, as follows:

Article 46 – Aggravating circumstances

> "Parties shall take the necessary legislative or other measures to ensure that the following circumstances, insofar as they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of internal law, be taken into consideration as aggravating circumstances in the determination of the sentence in relation to the offences established in accordance with this Convention:
>
> ...
>
> b the offence, or related offences, were committed repeatedly;
>
> ..."

39. According to paragraph 237 of the explanatory report on the above-mentioned Convention, the aggravating circumstance mentioned in

Article 46, sub-paragraph b, concerns offences that are committed repeatedly. This refers to any of the offences established by this Convention as well as any related offences which are committed by the same perpetrator more than once during a certain period of time. The drafters thereby decided to emphasise the particularly devastating effect on a victim who is repeatedly subjected to the same type of criminal act. This is often the case in situations of domestic violence, which inspired the drafters to require the possibility of increased court sentences. It is important to note that the facts of an offence of a similar nature which led to the conviction of the same perpetrator may not be considered as a repeated act referred to under sub-paragraph b, but constitute an aggravating circumstance in their own right under sub-paragraph i.

2. Case-law of the General Court of the European Union

40. In its judgment of 17 May 2013 in *Trelleborg Industrie SAS and Trelleborg AB v. European Commission* (joined cases T-147/09 and T-148/09), the General Court dealt with the distinction between a "continuing" and a "repeated" infringement.

THE LAW

ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

41. The applicant complained that the Criminal Code had been applied retroactively in his case, pointing out that he had been convicted of a continuous offence of abusing a person living under the same roof which, according to the courts, encompassed his conduct even before that offence had been introduced into the law. He also alleged that the courts had not duly examined whether his actions prior to that date would have amounted to a criminal offence under the old law. He relied in that regard on Article 7 of the Convention, which reads as follows:

> "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 recognised by civilised nations."

42. The Government contested that argument.

A. The Chamber judgment

43. In its judgment of 18 April 2013, the Chamber found that there had been no violation of Article 7 of the Convention. It accepted that, from the standpoint of Czech law, extending the application of the Criminal Code, as worded after 1 June 2004, to acts committed by the applicant prior to that date had not amounted to retroactive application of the criminal law. It also observed that the interpretation of the general concept of a continuation of a criminal offence as defined in Article 89 § 3 of the Criminal Code had been based on the clear and established case-law of the Supreme Court which had been developed prior to the date on which the applicant had first assaulted his wife. In so far as the applicant disputed the effects of that interpretation, which in his view had in fact resulted in retroactive application of the law, the Chamber held that the interpretation adopted by the courts in the present case had not in itself been unreasonable, given that a continuous offence, by definition, extended over a certain period of time and that it was not arbitrary to consider that it had ceased at the time of the last occurrence of the offence. Moreover, the Czech authorities had observed that the applicant's acts had at all times been punishable as criminal offences. In these circumstances the relevant legal provisions, together with the interpretative case-law, had been such as to enable the applicant to foresee the legal consequences of his acts and adapt his conduct accordingly.

B. The parties' submissions to the Grand Chamber

1. The applicant

44. While admitting that the domestic courts' interpretation of Article 89 § 3 of the Criminal Code was foreseeable and generally accepted, the applicant asserted that it should not have been applied in his case since the conditions for applying the provision in question had not been met. In his opinion, the domestic authorities ought not to have classified his acts as a continuous offence because his assaults had not been driven by the same intent, nor had they been closely connected in time since there had been an interval of several years between the different assaults. He also pointed out that when the proceedings took place before the first-instance court, the prosecution of two individual assaults had already been statute-barred and they could not therefore be the subject of criminal proceedings.

45. Furthermore, the domestic courts had never established that all the constituent elements of the criminal offences defined by the Criminal Code as in force until 1 June 2004 (violence against an individual or group of individuals within the meaning of Article 197a, or assault occasioning bodily harm under Article 221) had been made out. In the applicant's opinion, his acts had not been punishable as criminal offences but simply as regulatory offences. He had thus been convicted of acts which did not

constitute a criminal offence under national or international law at the time they were committed, in breach of Article 7 of the Convention.

46. Finally, the applicant maintained that he did not enjoy sufficient safeguards against the imposition of a heavier penalty than the one applicable at the time of the commission of the offence. On the contrary, had the individual assaults been tried separately it would not have been possible to impose such a heavy sentence on him.

2. The Government

47. The Government noted that both Article 89 § 3 and Article 215a of the Criminal Code had been incorporated into the Czech legal system well before the applicant had ceased his criminal conduct in February 2006. At the relevant time there had also existed a considerable body of case-law in respect of continuous offences and the interpretation of Article 89 § 3 of the Criminal Code which followed the same logic as that applied in the instant case. It was thus clearly established that the conduct should be assessed as a single offence under the law in force at the time it came to an end. Moreover, in the Government's view, the introduction on 1 June 2004 of Article 215a of the Criminal Code had rendered the likelihood of the applicant's being held criminally liable even clearer and more foreseeable. Indeed, the new Article 215a of the Criminal Code dealt with unlawful conduct in a more comprehensive manner than Articles 197a and 221. Since the applicant had continued his unlawful acts after 1 June 2004, he could and should have expected to be held criminally liable under Article 215a of the Criminal Code for all his acts including those that had preceded the change in the legislation.

48. Contrary to what had been suggested by the applicant, the Government asserted that the requirement of a close temporal connection between the assaults constituting the continuous offence had also been satisfied in this case. They conceded that the close temporal connection as defined by domestic judicial practice generally referred to days, weeks or months. However, a maximum limit had never been set and the notion necessarily allowed for flexibility depending on the nature of the offence in question. It followed from the evidence gathered in the case and from the domestic courts' reasoning that the three incidents which occurred on 24 June 2000, 17 July 2003 and 8 February 2006 had been singled out as the most violent. The courts had consistently held that the applicant's unlawful conduct had spanned a period of several years and that the individual assaults perpetrated by him had been of varying intensity and recurrent in nature, occurring within weeks of each other. Furthermore, the bill of indictment as well as the domestic courts' decisions had clearly stated that the applicant was being tried for actions carried out before and after the entry into force of Article 215a, actions which could not be separated from each other. The requirement of legal certainty had thus been met as a result

of the consistent assessment of the case by the prosecution and the courts (the Government cited, to converse effect, *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, §§ 33-35, ECHR 2001-II). It was clear from the conviction itself that the courts were also of the view that the applicant's actions taken as a whole had disclosed the elements of the offence defined by Article 215a of the Criminal Code.

49. The Government therefore concluded that the requirement of a sufficiently clear and foreseeable legal basis had been satisfied, that the new criminal law had not been applied retroactively and that the applicant had not been given a heavier penalty than under the old law. In this regard, they assumed that, had the concept of a continuous offence as understood by the Czech courts been abandoned and the applicant's actions before and after 1 June 2004 been assessed separately, the applicant's possible sentence would have been either the same or more severe than the one actually imposed. Indeed, in that event the applicant would have been tried for multiple offences punishable by a concurrent sentence which would have been defined on the basis of the provision concerning the most serious offence, that is to say, Article 215a of the Criminal Code. Moreover, the existence of multiple criminal offences and the duration of the conduct in question would have constituted aggravating circumstances.

C. The Court's assessment

1. General principles

50. The Court observes that in *Del Río Prada v. Spain* ([GC], no. 42750/09, ECHR 2013), its most recent Grand Chamber judgment concerning Article 7 of the Convention, it stated the following general principles that are relevant to its determination of the present case:

> "**(a)** ***Nullum crimen, nulla poena sine lege***
>
> 77. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United Kingdom*, 22 November 1995, § 34, Series A no. 335-B; *C.R. v. the United Kingdom*, 22 November 1995, § 32, Series A no. 335-C; and *Kafkaris* [*v. Cyprus* [GC], no. 21906/04], ... § 137[, ECHR 2008]).
>
> 78. Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage (concerning the retrospective application of a penalty, see *Welch v. the United Kingdom*, 9 February 1995, § 36, Series A no. 307-A; *Jamil v. France*, 8 June 1995, § 35, Series A no. 317-B; *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, § 36, ECHR 2001-II; and *Mihai Toma v. Romania*, no. 1051/06, §§ 26-31, 24 January 2012). It also embodies, more generally, the principle that only the law can define a crime and

prescribe a penalty (*nullum crimen, nulla poena sine lege* – see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; for an example of the application of a penalty by analogy, see *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, §§ 42-43, ECHR 1999-IV).

79. It follows that offences and the relevant penalties must be clearly defined by law. 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 (see *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996-V, and *Kafkaris*, cited above, § 140).

80. 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 in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see *Coëme and Others*, cited above, § 145, and *Achour v. France* [GC], no. 67335/01, § 43, ECHR 2006-IV).

(b) The concept of a 'penalty' and its scope

...

(c) Foreseeability of criminal law

91. 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 (see *Kokkinakis*, cited above, §§ 40-41; *Cantoni*, cited above, § 29; *Coëme and Others*, cited above, § 145; and *E.K. v. Turkey*, no. 28496/95, § 51, 7 February 2002). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries.

92. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, 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 (see *Kokkinakis*, cited above, § 40, and *Cantoni*, cited above, § 31). 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 (see *Kafkaris*, cited above, § 141).

93. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (ibid.). 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 (see *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A). 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 (see *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], nos. 34044/96 and 2 others, § 50[, ECHR 2001-II]; *K.-H.W. v. Germany* [GC], no. 37201/97, § 85, 22 March 2001; *Korbely v. Hungary* [GC], no. 9174/02, § 71, ECHR 2008; and *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010). 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 (see, concerning the constituent elements of the offence, *Pessino v. France*, no. 40403/02, §§ 35-36, 10 October 2006, and *Dragotoniu and Militaru-Pidhorni v. Romania*, nos. 77193/01 and 77196/01, §§ 43-44, 24 May 2007; as regards the penalty, see *Alimuçaj v. Albania*, no. 20134/05, §§ 154-62, 7 February 2012). Were that not the case, the object and the purpose of this provision – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated."

51. The Court also reiterates that it is not its task to substitute itself for the domestic courts as regards the assessment of the facts and their legal classification, provided that these are based on a reasonable assessment of the evidence (see, *mutatis mutandis*, *Florin Ionescu v. Romania*, no. 24916/05, § 59, 24 May 2011). 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. Its role is thus confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I; *Korbely v. Hungary* [GC], no. 9174/02, §§ 72-73, ECHR 2008; and *Kononov v. Latvia* [GC], no. 36376/04, § 197, ECHR 2010).

52. However, the Court's 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 and, in particular, it must satisfy itself that the result reached by the relevant domestic courts was compatible with Article 7 of the Convention. To accord a lesser power of review to this Court would render Article 7 devoid of purpose (see *Kononov*, cited above, § 198).

53. In sum, the Court must examine whether there was a sufficiently clear legal basis for the applicant's conviction (see *Kononov*, cited above, § 199).

2. Application of the above principles to the present case

54. The Court observes that the core of the applicant's arguments consisted in maintaining, firstly, that his acts prior to 1 June 2004 had not been punishable under the criminal law applicable at the time they were committed, since they had not comprised the constituent elements of the offences referred to by the authorities, namely those covered by Articles 197a and/or 221 of the Criminal Code, but had amounted solely to

regulatory offences; and, secondly, that the different assaults could not be classified as a continuous offence because they had not been driven by the same intent or been closely connected in time, there being no actual evidence to that effect.

55. However, it follows from the limitations referred to in paragraphs 51 and 52 above that the Court is not called upon to rule on the applicant's individual criminal responsibility, that being primarily a matter for assessment by the domestic courts. It was indeed for the domestic authorities to assess the findings of facts and the applicant's intent on the basis of the evidence presented before them and to decide, pursuant to the domestic law as interpreted in judicial practice, whether the applicant's conduct ought to be classified as a continuous offence, a continuing offence or as repeated or cumulative offences. Thus, it is not for the Court to express an opinion on whether the acts committed by the applicant before 1 June 2004 comprised the constituent elements of criminal offences defined by the above provisions (see, *mutatis mutandis*, *Lehideux and Isorni v. France*, 23 September 1998, § 50, *Reports of Judgments and Decisions* 1998-VII) or whether the applicant's conduct was to be classified as a continuous offence under domestic law.

56. Rather, the Court's function under Article 7 § 1 is twofold in the present case. Firstly, it must examine whether, at the time they were committed, the applicant's acts, including those carried out before the entry into force of Article 215a of the Criminal Code on 1 June 2004, constituted an offence defined with sufficient foreseeability by domestic law (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, § 51, ECHR 2001-II; *Veeber v. Estonia (no. 2)*, no. 45771/99, § 33, ECHR 2003-I; and *Korbely*, cited above, §§ 72-73), the question of accessibility not being in issue here. Secondly, the Court must determine whether the application of this provision by the national courts to encompass those acts that were committed before 1 June 2004 entailed a real possibility of the applicant's being subjected to a heavier penalty in breach of Article 7 of the Convention (see, *mutatis mutandis*, *Maktouf and Damjanović* [GC], nos. 2312/08 and 34179/08, § 70, ECHR 2013).

(a) Whether the offence was defined with sufficient foreseeability

57. The Court has previously been called upon to examine the merits of two cases concerning the conviction of an applicant for a continuing or continuous criminal offence, albeit without distinguishing between these two types of offence (see *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, ECHR 2001-I and *Veeber*, cited above). In the aforementioned judgments the Court observed that, by definition, such an offence was a type of crime committed over a period of time (see *Veeber*, cited above, § 35). It further held that, when an accused was charged with a "continuing" offence, the principle of legal certainty required that the acts which went to

make up that offence, and which entailed his criminal liability, be clearly set out in the bill of indictment. Furthermore, the decision rendered by the domestic court also had to make it clear that the accused's conviction and sentence resulted from a finding that the elements of a "continuing" offence had been made out by the prosecution (see *Ecer and Zeyrek*, cited above, § 33).

58. The Court also reiterates that in any system of law it is for the domestic courts to interpret the provisions of substantive criminal law in order to determine, by reference to the structure of each offence, the date on which, all the requirements of the offence being present, a punishable act was committed. The Convention may not act as a bar to this kind of judicial interpretation, provided that the conclusions reached by the domestic courts are reasonably foreseeable within the meaning of the Court's case-law (see *Previti v. Italy* (dec.), no. 45291/06, § 283, 8 December 2009).

59. Turning to the specific circumstances of the present case, the Court notes from the outset that the applicant was convicted as charged, namely for having, at least between 2000 and 8 February 2006, repeatedly abused his wife both physically and mentally while he was drunk (for further details, see paragraph 10 above). As a result, his wife had sustained serious injuries obliging her to seek medical assistance on 26 June 2000, 18 July 2003 and 8 February 2006 (see paragraph 10 above). In its judgment of 21 February 2008, the Supreme Court upheld the lower courts' legal classification of the offence as abuse of a person living under the same roof within the meaning of Article 215a of the Criminal Code, as in force since 1 June 2004, and applied that provision also to the abuse perpetrated by the applicant against his wife before that date. In that connection, the Supreme Court referred to its ruling (Tzn 12/93) of 8 December 1993 to the effect that a continuous criminal offence was to be considered as a single act and that its legal classification in criminal law had to be assessed under the law in force at the time of completion of the last occurrence of the offence. Thus Article 215a also applied to the earlier assaults, provided that these would have amounted to criminal conduct under the previous law, and the applicant's conduct prior to the amendment of 1 June 2004 had amounted at least to an offence punishable under Article 197a or Article 221 § 1 of the Criminal Code. After examining the file, the Supreme Court concluded that the applicant's actions disclosed all the constituent elements of the offence of abusing a person living under the same roof within the meaning of Article 215a §§ 1 and 2 (b) of the Code. Since the offence in question had been perpetrated at least from 2000 until 8 February 2006, the material conditions for considering the offence as aggravated on the ground of its long duration, in accordance with paragraph 2 (b) of Article 215a, had been fulfilled (see paragraph 13 above).

60. The Court further observes that it is implicit in the Supreme Court's reasoning as outlined above, stated with reference to the ruling of

8 December 1993, that its interpretation did have regard to the particular standard contained in Article 89 § 3, by means of which the concept of a continuation of a criminal offence developed by the case-law was introduced into the Criminal Code in 1994 (see paragraphs 20 and 24 above), that is to say, prior to the first assault on his wife of which the applicant was convicted (see, conversely, *Veeber*, cited above, § 37). Indeed, as the applicant confirmed in his pleadings to the Court, he did not dispute the foreseeability of the national courts' application of the Article 89 § 3 standard to his case.

61. Under this provision, a continuation of a criminal offence was defined as consisting of individual acts driven by the same purpose, which constituted the same offence and were linked by virtue of being carried out in an identical or similar manner, occurring close together in time and pursuing the same object. It emerges from the clear and settled case-law of the Supreme Court (see paragraphs 25-27 above) and from the views expressed in the legal literature (see paragraph 24 above) that a continuous offence was considered to constitute a single act, whose classification in Czech criminal law had to be assessed under the rules in force at the time of completion of the last occurrence of the offence, provided that the acts committed under any previous law would have been punishable also under the older law.

62. Since the applicant's conduct before 1 June 2004 amounted to punishable criminal offences under Article 197a or Article 221 § 1 of the Criminal Code and comprised the constituent elements of the Article 215a offence, the Court accepts that the fact of holding the applicant liable under the said provision also in respect of acts committed before that date did not constitute retroactive application of more detrimental criminal law as prohibited by the Convention. Moreover, in its judgment of 10 June 2008, the Constitutional Court held that the national courts' decisions in the applicant's case had been logical and coherent and had not had any retroactive effect prohibited by the Constitution. The Court finds nothing to indicate that this stance was in any way tainted with unforeseeability as proscribed by Article 7 of the Convention.

63. In these circumstances, and bearing in mind the clarity with which the relevant domestic provisions were formulated and further elucidated by the national courts' interpretation, the Court is of the view that since the applicant's conduct continued after 1 June 2004, the date on which the offence of abusing a person living under the same roof was introduced into the Criminal Code, he could and ought to have expected, if necessary with the appropriate legal advice, to be tried for a continuous offence assessed according to the law in force at the time he committed the last assault, that is to say, Article 215a of the Criminal Code. It finds no reason to doubt that the applicant was in a position to foresee, not only as regards the period after the entry into force of this provision on 1 June 2004 but also as regards

the period from 2000 until that date, that he might be held criminally liable for a continuous offence as described above, and to regulate his conduct accordingly (see, *mutatis mutandis*, *Streletz, Kessler and Krenz*, cited above, § 82, and *Achour v. France* [GC], no. 67335/01, §§ 52-53, ECHR 2006-IV).

64. Against this background, the Court is satisfied that the offence of which the applicant was convicted not only had a basis in the relevant "national ... law at the time when it was committed" but also that this law defined the offence sufficiently clearly to meet the quality requirement of foreseeability flowing from the autonomous meaning of the notion of "law" under Article 7 of the Convention.

(b) Whether the penalty imposed on the applicant under Article 215a was more severe

65. The Court is moreover unable to accept the applicant's argument that the national courts' imposition of a penalty under Article 215a also in respect of acts committed before 1 June 2004 had resulted in a more severe penalty than would otherwise have been the case.

66. As already mentioned above, on the basis of the reasoning of the domestic courts, and in particular that of the Supreme Court in its judgment of 21 February 2008, it can be concluded that all the constituent elements of the offence set forth in Article 215a §§ 1 and 2 (b) of the Criminal Code were made out also with regard to the acts committed by the applicant prior to the entry into force of that provision on 1 June 2004. With reference to those acts, the courts also expressly stated that they would have been punishable under the old law.

67. There is nothing to indicate that the above-mentioned approach by the domestic courts had the adverse effect of increasing the severity of the applicant's punishment (see, conversely, *Veeber*, cited above, § 36). On the contrary, had the acts perpetrated by him prior to 1 June 2004 been assessed separately from those he committed after that date, the relevant sentencing rule in Article 35 § 1 of the Criminal Code would have resulted in sentence being passed on the basis of the legal provision concerning the most serious of the offences, namely Article 215a of the Criminal Code. In that event, as pointed out by the Government, he would have received at least the same sentence as the one actually imposed, or even a harsher one, on the ground that the existence of multiple offences was likely to be deemed an aggravating circumstance under Article 34k of the Criminal Code.

68. The Court also finds unpersuasive the applicant's suggestion that, had his assaults been considered separately, the prosecution of two of them (presumably those of 24 June 2000 and 17 July 2003) would have been statute-barred. Under Article 67 § 1 (d) of the Criminal Code, the statutory limitation period was three years in respect of offences punishable by a maximum sentence of less than three years. Therefore, even if he had been

prosecuted only in respect of the three incidents highlighted by the domestic courts, he could in any event have been tried at least for the assault committed under the old law on 17 July 2003 and the one committed under the new law on 8 February 2006.

69. In the light of the above, the Court is convinced that the fact that the acts committed before the entry into force of the new law were assessed under the latter did not operate to the applicant's disadvantage as regards sentencing. Indeed, he was given one single sentence which he would have incurred in any event for the acts committed after the entry into force of the new law (see paragraph 37 above, and, conversely, *Maktouf and Damjanović*, cited above, § 70).

(c) Conclusion

70. The foregoing considerations are sufficient to enable the Court to conclude that the sentence imposed on the applicant, who was found guilty of the continuous criminal offence of abusing a person living under the same roof, was applicable at the time when this offence was deemed to have been completed, in accordance with a "law" which was foreseeable as to its effect. There was no retroactive application of the criminal law and the applicant was not subjected to more severe sentencing rules than those that would have been applicable had he been tried for several separate offences.

71. The Court is satisfied that the approach followed by the Czech courts in the instant case is consonant with the object and purpose of Article 7 of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 50 above). In addition, by reinforcing the national legal protection against domestic violence – such violence perpetrated against women being still a matter of grave concern in contemporary European societies (see paragraph 38 above, and *Opuz v. Turkey*, no. 33401/02, ECHR 2009) – it also conforms to the fundamental objectives of the Convention, the very essence of which is respect for human dignity and freedom (see, *mutatis mutandis*, *C.R. v. the United Kingdom*, 22 November 1995, § 42, Series A no. 335-C).

72. In reaching the above conclusions, the Court has examined from the standpoint of Article 7 of the Convention the application in the applicant's case of the continuous offence under Czech law of abuse of a person living under the same roof. By way of comparison it is worth noting in this context that the notion of a continuous criminal offence as defined in Czech law is in line with the European tradition reflected in the national laws of the vast majority of Council of Europe member States (see paragraphs 31 and 33 above) and that, accordingly, the situation as regards the issue of foreseeability raised in the present case appears not to be markedly different from that obtaining in relation to such offences in the national legal systems of other Contracting Parties to the Convention. As can be seen from the domestic authorities' description of the applicant's conduct, his acts were

directed against a specific victim, namely his wife, and particularly against her legal interests of physical and mental integrity as well as honour. It is also clear that the *modus operandi* was the same, consisting of attacks committed under the same roof; that there was a temporal connection between the various acts, which spanned several years; that each assault committed during this period of time was driven by the same criminal intent; and that the applicant's conduct was on each occasion in breach of the criminal law. In other words, the offence of which the applicant was convicted shared a number of characteristics common to such offences elsewhere in the Convention community, as did the response of the criminal justice system, in the form of a sentence handed down for one single offence (see paragraphs 33-37 above).

73. In sum, there has been no violation of Article 7 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

Holds that there has been no violation of Article 7 of the Convention.

Done in English and French, and delivered in writing on 27 January 2015.

Michael O'Boyle	Dean Spielmann
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Ziemele;

(b) concurring opinion of Judge Pinto de Albuquerque.

D.S.
M.O'B.

CONCURRING OPINION OF JUDGE ZIEMELE

1. I fully agree with the outcome in the present case. However, I believe that readers, when studying the Court's reasoning and the information that the Court considered relevant for the purposes of this case, will ask the question whether pronouncing on the existence of a *European consensus* concerning the notion of a continuous criminal offence was at all necessary in this case. They may ask: if only the Czech Republic recognised this notion, would the Court have found it problematic in the light of the applicable principles of Article 7?

2. This is yet another case in which the Court is tempted to engage in a discussion on the existence of a European consensus. The notion remains controversial, and the controversy is not limited to the term "consensus" itself, which would, at least in the ordinary meaning, require agreement on the part of those concerned (see L. Wildhaber, A. Hjartarson and S. Donnelly, "No consensus on consensus", *Human Rights Journal*, 2013, pp. 248-63, and S. Besson and A.-L. Graf-Brugère, "Le droit de vote des expatriés, le consensus européen et la marge d'appréciation des États", *Revue trimestrielle des droits de l'homme*, 2014, pp. 942 et seq.). I have noted elsewhere that a more orthodox way for the Court to proceed would have been to rely on the tools that international law offers anyway (see I. Ziemele, "Customary International Law in the Case Law of the European Court of Human Rights", in *The Judge and International Custom*, Council of Europe, 2012). In my view this means that the Court, when it examines domestic laws and practices and the positions which European States may have expressed on the issue in question in other international fora, is in fact looking for a particular regional practice that the States consider it necessary to follow, in other words, regional custom. (Incidentally, the notion of custom has also evolved in international law and is most likely no longer as rigid as may have been the case some time ago.) If the Court establishes the existence of a practice which the European States by and large follow (for instance, soft custom), there is no question but that it needs to keep that State practice in mind when interpreting the Convention in the light of modern-day developments. However, there is nothing new about applying the law over time and assessing the applicability of the right in issue then and now. Had the Court better linked its use of the consensus and living-instrument doctrines to analogous concepts in international law, there might have been less ground for discussion on the Court's expansive interpretation of the Convention.

3. There are, however, instances in which there is no need to search for the existence of a binding regional practice. In my view the case at hand is one such case. For the purposes of the present case it is instructive to note that the notion of a continuous criminal offence has long been known to European criminal-law systems. There are probably many common

approaches to this notion in domestic criminal law (see paragraph 33 of the present judgment). However, there are certainly also differences. It is not necessary in the comparative-law part of the judgment to make a statement as to the existence of a broad consensus among States. Taking into consideration the specific use of the notion of consensus in the case-law as normally applied in cases in which States enjoy a margin of appreciation, one may wonder what the purpose of the statement in paragraph 33 is in an Article 7 case.

I would submit that the statement in this paragraph is not to be equated with the Court's efforts to establish the existence or otherwise of a consensus with a view to identifying the boundaries of the margin of appreciation in some new societal circumstances. I would have preferred the Court not to pronounce on the existence of a broad consensus in this part of the judgment.

4. This case is about the foreseeability of domestic criminal law and the potential for a more severe penalty to be imposed. In the light of Article 7 case-law, the Court's task is very clearly defined in paragraph 55, namely to ascertain whether prior to 1 June 2004 domestic law provided for the punishment of the acts committed by the applicant. The Court examines the domestic legislation and the practice of the domestic courts and in this case does not find the domestic practice, which has been the subject of in-depth reasoning by the domestic courts, arbitrary or indeed unlawful for the purposes of Article 7. The fact that in other countries such facts may have received similar treatment in domestic criminal law is interesting but not really pertinent for the kind of assessment for which Article 7 provides. In sum, I have difficulty seeing how a European consensus could be relevant for the assessment of the individual features of certain notions in domestic criminal law. There are certainly similarities rooted in Europe's history, but there must also be differences linked to the choices of the respective legislatures.

5. The notion of European consensus needs careful reflection and fine-tuning in the Court's future case-law. I would like to hope that this will be done keeping the relevant elements of international law in mind. The use of this notion should not be unpredictable.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. I wholeheartedly support the Grand Chamber's judgment in the present case and its methodology. In fact, it is the very first time that the Court has addressed in a single judgment *ex professo* the accuracy of the terminology used with regard to an important concept of criminal law, the historical background to that concept and its current regulation in the forty-seven legal systems of the Council of Europe. A linguistic, historical and comparative-law survey of such dimensions has never been carried out before and is most welcome. Yet precisely in view of the rich history of this concept and its manifold variations in the national legal systems surveyed, I feel obliged to make a few additional remarks aimed at clarification of the principle established by the Grand Chamber and its practical impact on the definition of the criminal-law policies of the member States.

According to the Grand Chamber, there is a broad consensus arising out of a long European tradition with regard to the particular features of a continuous offence. The Court considers that the application of domestic provisions to deal with offences of this type does not, in principle, infringe Article 7 of the Convention, so long as the individual acts in question are directed against the same legally protected interest, there is at least a similarity in the manner of execution, a temporal connection exists between the different acts, the same, repeated criminal purpose underlies all the acts and the individual acts comprise, either explicitly or implicitly, the constituent elements of the criminal offences. The present opinion will seek to clarify the substantive scope of this principle and its practical implications, in the light of the past and present status of the concept of a continuous offence in European law[1].

1. This opinion does not deal with the treatment of *concursus delictorum* in international criminal law. In view of the silence of the *ad hoc* criminal courts' statutes on this issue and the limited scope of the rules set out in Article 78 § 3 of the Rome Statute of the International Criminal Court (ICC) and Common Rule 87 (C) of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) Rules of Procedure and Evidence, international criminal law today affords courts considerable discretion when it comes to sentencing. The almost unfettered discretion that today still characterises the practice of international courts, based on the "totality principle" of the ICTY, the ICTR, the Special Court for Sierra Leone, the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia, and the power to impose sentences which are either global, concurrent or consecutive, or even a mixture of concurrent and consecutive, provide little assistance to the specific topic of this opinion.

The history of the continuous offence

2. Roman law did not recognise the concept of a continuous offence. It was only during the Middle Ages that scholars like Bartolus de Saxoferrato[2], Baldus de Ubaldis[3] and Prosperus Farinacius[4] introduced the concept with the purpose of softening the hard sentencing rule of strict accumulation of penalties or consecutive sentences (*quod criminae tot poenae*) under Roman law[5]. According to these scholars, there were two major criteria for the punishment of a succession of individual criminal acts as a continuous offence: a short period of time between the different individual criminal acts committed by the offender (*cum temporis intervallo*, as Baldus said) and the existence of a single intention or purpose underlying those individual acts (*ad eundem finem*, as Bartolus put it). In fact, the close temporal connection between the individual acts was considered as evidence of that same intention. A continuous offence was a group of individual acts united by the same intention and the same criminal purpose, and committed within a short period of time, which was punishable by a single prison term[6].

3. The concept of a continuous offence was enshrined in statute for the first time in Tuscany by the Law of 30 August 1795, which punished as a continuous offence all thefts committed to the detriment of one or more persons as long as they had been committed within a twenty-four hour period. Article 80 of the 1853 Criminal Code of Tuscany included a general provision extending this concept to crimes other than theft[7]. This provision was adopted, with minor changes, in Article 79 of the first unified Criminal Code of the Kingdom of Italy, the 1889 Criminal Code, known as the *Codice Zanardelli.*

In his well-known *Programa del corso di diritto penale*, Francesco Carrara provided the definitive wording for the concept of a continuous offence[8], the one that would be included in Article 81 of the 1930 Criminal Code, known as the *Codice Rocco*. As Carrara had proposed, Article 81

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2. Bartolus de Saxoferrato, *Lucernae Juris. Additio I. Ad Librum Nonum Digest. Lex XXXII*, 1585.

3. Baldus de Ubaldis, *Perusini iurisconsulti ... In sextum codicis librum commentaria*, 1599.

4. Prosperus Farinacius, *Praxis et theoriae criminalis. Quaestio CLXVII*, 1597.

5. For the sake of clarity, the Anglo-American expressions "consecutive" and "concurrent" sentences are used in this opinion with the meaning attributed to them in paragraph 29 of the judgment, which equates to the classical meaning (see, for example, 18 USC § 3584 (a), and sections 718.2 and 718.4 of the Canadian Criminal Code).

6. For an analysis of the Italian scholars, see Giovanni Leone, *Del Reato Abituale, Continuato e Permanente*, 1933, pp. 193 et seq.

7. Article 80 read as follows: "*Più violazioni della stessa legge penale, commesse in uno stesso contesto di azione, o, anche in tempi diversi, con atti esecutivi della medesima risoluzion criminosa, si considerano per un solo delitto continuato: ma la continuazione del delitto accresce la pena entro i suoi limiti legali*."

8. *Programa del corso di diritto penale*, 1874, paragraph 536.

referred to the "same criminal design" (*medesimo disegno criminoso*). According to Carrara, it was not the voluntary element of the *dolus* that unified the various criminal acts of the offender, but its intellectual element, that is to say, the existence of the same odious idea underlying all his or her acts. Manzini talked about the same criminal project, Carnelutti about the same interest and Leone about the same desire, these diverse formulations being nothing more than variations of the subjective doctrine of Carrara[9]. Seen as a mere sentencing rule imposed by the principle of justice, the broadness of this subjective doctrine would permit, for example, the unification of different acts committed against the life and limb of different persons.

4. In France, Article 365 of the Code of Criminal Investigation provided for an overall solution in cases where various criminal acts were committed by the same offender: the most severe penalty was always to be applied, regardless of how many acts had been committed or the relationship between them (*delictum majus absorvet minus*). In view of the principle of absorption, the punishment of a continuous offence was less problematic. The discussion of the problem was transferred to the domain of criminal procedure. When faced with the problem of successive criminal acts committed with the same purpose, the French doctrine, spearheaded by the general prosecutor at the Court of Cassation, Faustin Helie, reiterated the point of view of the Italian scholars. The novelty of Helie's approach lay in the procedural inference he drew from the Italian doctrine: when an offender was charged with one or more individual acts making up the continuous offence, he or she could not be charged a second time with a view to being tried for other individual acts making up the continuous offence which had not been taken into account in the first trial[10]. The principle of *non bis in idem* acted as a bar to such a second trial.

5. The doctrinal discussion took a dramatic turn in Germany, owing to the efforts of some enlightened scholars and open-minded legislatures. Paragraph 110 of the 1813 Bavarian Criminal Code, paragraph 106 of the 1840 Hanover Criminal Code, paragraph 56 of the Braunschweig Criminal Code, Article 112 of the 1841 Hessen Criminal Code, Article 180 of the 1845 Baden Criminal Code, and others, introduced a new concept that would spread slowly across all of Europe.

The Bavarian Criminal Code, under the influence of Feuerbach, made a distinction between *wiederholtes Verbrechen*, a "repeated crime" punished by several penalties when the acts of the offender related to different objects, and *fortgesetztes Verbrechen*, a "continuous crime" punished by a single penalty when the offender's acts related to a single object (*an demselben Gegenstände oder an einer und derselben Person*)[11].

9. For an analysis of these positions, see Gian Domenico Pisapia, *Reato continuato*, 1938, pp. 111 et seq.

10. *Traité de l'instruction criminelle*, volume III, 1848, pp. 587 et seq.

Mittermaier's famous critique of the terms of this distinction had the immense value of opening up a theoretical discussion on the meaning of the concept of "one and the same object", a discussion which is not yet closed[12]. It was not, as Feuerbach claimed, the sole fact that the object of the offence was the same, nor, as the Italian scholars taught, the intellectual element alone that unified the various individual acts committed by the offender, but rather the unity of the offender's overall resolve to commit the crime, the homogeneity of the various individual acts and the violation of the same legally protected interest (*Rechtsgut*)[13]. Mittermaier was correct in his intuition that imposing a lighter punishment for a continuous offence was justified by the fact that the repetition of the individual criminal acts and the offender's renewed criminal purpose were "facilitated" by the material circumstances involving the offender[14]: it is the favourable external situation surrounding the offender which leads him or her to violate the same or similar legal interest on two or more occasions within a short period of time. The justification for imposing a more lenient punishment lies precisely in the lesser guilt of the offender, who is driven by favourable external circumstances to repeat the crime. This perspective gained support in the German Imperial Court, which acknowledged the concept of a continuous offence in spite of the silence of the Imperial Criminal Code of 1871 and the partial abolition of the rule of strict accumulation of penalties[15].

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11. This distinction had been presented in the *Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts*, 1801, § 152. In the following paragraph Feuerbach also advocated the Roman rule of the strict accumulation of penalties. It is worth mentioning that the first edition of the *Lehrbuch* only mentioned "*an einem und demselben Object*", but later editions also contained the words "*oder an einer und derselben Person*". In fact, Feuerbach adopted the views of Koch in his *Institutiones Iuris Criminalis*, 1758, who had made similar propositions. In his *Grundsätze des Deutschen Peinlichen Rechts*, 1794, Quistorp was the first to use the terminology of *delictus continuatus* (*fortgesetzes Delikt*), in the singular, since the expression had been used until then in the plural (*delicta continuata, fortgesetze Delikte*).

12. Mittermaier presented his critique in *Über den Unterschied zwischen fortgesetztem und wiederholtem Verbrechen*, in the *Neues Archiv des Criminalrechts*, 1818, which was followed by his *Über den Begriff fortgesetzter Verbrechen und die Aufstellung derselben in einem Strafgesetzbuch*, in the *Annalen der deutschen und ausländischen Criminalrechtspflege*, 1837.

13. Of course, Feuerbach did not mention explicitly the concept of *Rechtsgut*, nor did Mittermaier, since it was Birnbaum who first introduced this concept in his *Über das Erforderniß einer Rechtsgutverletzung zum Begriff des Verbrechens*, 1834. In that article, Birnbaum criticised Feuerbach's view of a criminal offence as a violation of the rights of individual victims, pointing out that this perspective was too narrow because it could not account for victimless criminal offences. But Mittermaier's critique of Feuerbach laid the foundations for a future, mixed concept of a continuous offence detached both from the Italian scholars' strictly subjective perspective and Feuerbach's strictly objective counterproposal.

14. Mittermaier, *Über den Unterschied*, cited above, p. 242.

15. The Prussian Law of 9 March 1853 tempered the principle of strict accumulation of penalties (*Kumulationsprinzip*) contained in paragraph 56 of the Prussian Criminal Code

Subsequently, the concept spread all over Europe, in some countries even being converted into statute law. Understood as a case of legal unity of the offender's conduct (*juristische Handlungseinheit*) in criminal responsibility theory, the continuous offence is based on the renewed purpose of the offender to take advantage of a constant set of favourable external circumstances in order to attack the same or similar legal interest and not necessarily the same criminal provision.

6. It is noteworthy that Germany, the birthplace of this new, mixed substantive concept of a continuous offence, never took the additional step of enshrining it in criminal statute and almost abandoned the concept in a guideline issued by the Federal Supreme Court in 1994, which reserved the application of the continuous offence for exceptional cases[16]. Criminal-policy reasons explain this move[17]. The frequent criticism heard in the political arena was that the concept of a continuous offence favoured recidivism and weakened the legal force of social rules, since it treated offenders who committed various criminal acts within a short period of time in an excessively lenient way. In line with this criticism, a harsh criminal policy prevailed that was incompatible with the liberal rationale behind the concept of a continuous offence.

It is not a minor achievement of this Grand Chamber judgment to prove that this rhetoric has not been heard in most European countries, which have kept their legislation as it was prior to the 1994 German judgment and even established the concept of a continuous offence in codes which were approved and came into force after that judgment[18].

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with the "mitigation principle" (*Milderungsprinzip*), which was the precursor to paragraph 74 of the Imperial Criminal Code. This paragraph introduced the "absorption principle" (*Asperationsprinzip*), which still applies in German law today (Article 52 § 2 of the German Criminal Code).

16. Judgment of the Criminal Division of the Federal Supreme Court of 30 May 1994. On the causes and consequences of this judgment, see Guido Miller, *Neuere Entwicklung zur fortgesetzten Handlung*, Dissertation, Tübingen, 1997; Volker Brähler, *Die rechtliche Behandlung von Serienstraftaten und –ordnungswidrigkeiten*, Dissertation, Köln, 1998, published by Duncker & Humblot, 2000; and Ulrike Jasper, *Die Entwicklung des Fortsetzungszusammenhangs*, Dissertation, Tübingen, 2003.

17. In Germany, the government's 1958, 1960 and 1962 draft versions of a new Criminal Code and the 1969 alternative draft rejected the insertion of a provision on continuous offences, on the basis that the features of the concept were not yet clearly determined in the case-law and doctrine, which should be free to further elaborate on them (*Entwurf eines Strafgesetzbuches, Allgemeiner Teil*, 1958, p. 70, and *Alternativentwurf eines Strafgesetzbuches, Allgemeiner Teil, 2. Auflage*, 1969, p. 123). Ultimately, the decisive criminal-policy argument against the insertion of such a provision was the consideration that it would entail the "danger of broadened application" (*Gefahr einer erweiterten Anwendung*) of the concept, which for reasons of material justice (*materielle Gerechtigkeit*) and detrimental procedural effects (*prozessuale Unzuträglichkeiten*) was not desirable (Bundesrat-Drucksache 270/60, p. 181, 200/61, p. 191, and Bundestags-Drucksache, III, 2150, p. 181).

18. In any case, the political criticism of the concept of a continuous offence had an impact

The continuous offence in the present day

7. In European legal tradition, the rules on *concursus delictorum* are strictly dependent on (a) the principle of legality, both in its *nullum crimen sine lege praevia* and *nulla poena sine lege praevia* components, which requires the prosecutor to charge the offender with the exact offence committed under the law in force at the material time, and, once its constituent elements have been made out, requires the court to convict the offender of that offence and sentence him or her to the corresponding penalties set out in the law in force at that time, and thus precludes, in principle, alternative, cumulative or multiple charges and convictions for the same violation of a legally protected interest and unforeseeable, indeterminate sentencing[19]; (b) the purposes of criminal penalties, and in particular the purpose of resocialisation, in so far as open-ended, indeterminate sentences, fixed-term sentences that exceed a normal life span or extremely long determinate sentences are at odds with that purpose and therefore the limitation of the strict accumulation of penalties is warranted by it[20]; and (c) the principle of *non bis in idem*, which prevents an offender from being subjected to multiple prosecutions or punishments for the same offence and thus applies to repeated punishment of the same offence in the course of one or successive trials. The continuous offence is a case of *concursus delictorum* and therefore the rules regulating continuous offences must defer to the principles referred to above.

8. Bearing these principles in mind, the features characterising the concept of a continuous offence, as established by the Grand Chamber, can be further elucidated.

A continuous offence may be established where the perpetrator commits a number of identical or similar criminal offences against the same legally protected interest (*Rechtsgut, bien juridique, bene giuridico, bem juridico*) and not necessarily against the same criminal-law provision. Hence, according to the Grand Chamber's reasoning, a continuous offence may include the basic criminal offence, lesser and aggravated forms of that same offence or similar offences against the same legal interest. By contrast, a succession of criminal acts and non-criminal acts affecting administrative interests (such as *Ordnungswidrigkeiten*) may not be unified, and punished,

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in some countries, since some legislatures restricted the application of this concept with regard to certain categories of crimes (see, for example, Article 52 § 2 of the Croatian Criminal Code, Article 30 § 3 of the Portuguese Criminal Code and Article 43 § 3 of the Turkish Criminal Code).

19. The principle of the legality of penalties should not be circumvented by imposing concurrent and/or consecutive custodial sentences on a discretionary basis. On the principle of legality in international human rights law, see my separate opinion in *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, ECHR 2013.

20. On the purposes of criminal penalties, see my separate opinion in *Öçalan v. Turkey (no. 2)*, nos. 24069/03 and 3 others, 18 March 2014.

as a continuous offence. In the case of highly personal legally protected interests (*höchtspersönlicher Rechtsgut*), the individual acts must infringe the same legally protected interest, thus excluding punishment as a continuous offence in cases involving, for example, the killing of several persons or sexual assault of different victims[21].

Furthermore, there must be at least a similarity in the manner of execution of the individual acts, or other material circumstances connecting them which constitute a whole. This objective requirement, pertaining to the *actus reus* in the formulation of the Grand Chamber, excludes the punishment as a continuous offence of successive criminal acts and omissions by the same offender, or of a succession of acts committed as a principal offender, an inciter or an accomplice, since the manner of execution of the offences is fundamentally different, but does not exclude punishment as a continuous offence of a succession of accomplished and attempted criminal acts.

Moreover, the individual acts must be driven by the same, renewed criminal purpose, in the sense that the repetition of the criminal intent must be determined by external circumstances that favour the commission of the offence. Here, the Grand Chamber touches upon the subjective core of the concept, and two main conclusions derive from this subjective requirement. Firstly, it is not necessary for all the individual acts to form part of an initial plan or "overall intention" (*Gesamtvorsatz*)[22]. It suffices for each new individual act to be understood as a purposeful sequel to the preceding one or ones (*Fortsetztungsvorsatz* or *erweiterter Gesamtvorsatz*)[23]. As a matter

21. See, for instance, section 6(2) of Hungarian Act. No. C of 2012 on the Criminal Code, section 49 of the Montenegro Criminal Code, Article 12 of the Polish Criminal Code, Article 30 § 3 of the Portuguese Criminal Code, Article 35 of the Romanian Criminal Code and Article 61 of the Serbian Criminal Code. Article 59 of the Andorran Criminal Code allows some offences against highly personal interests, that is, offences against honour or sexual liberty, to be included in a continuous offence.

22. According to this subjective standard, the offender's intention should include the most important features of the sequence of individual acts and the final "overall result" (*Gesamterfolg*). An example is the planned piecemeal theft of a motorbike from a factory by a night security officer over the course of an entire week. The significance of each of the offender's individual acts can only be understood in the light of the intended overall result. This strict subjective standard has met with criticism. It has even been argued that the concept of a continuous offence which is limited to the planned achievement of a result through successive acts committed over a short period of time adds very little to criminal responsibility theory, since the execution of such a plan represents a single and not a continuous offence.

23. According to this broader subjective standard, the offender's intention to commit additional criminal acts should be connected with the previous ones, as a sequel to them, in a continuing psychological line. For example: in different interviews and hearings forming part of the same criminal proceedings and before different prosecutorial and judicial authorities, the witness repeats the same false version of the facts while testifying under oath. The interconnection of each of the offender's individual acts does not depend on an "overall result", but on the progressive weakening of the offender's capacity to resist the

of principle, a cold-blooded offender who plans the commission of a series of criminal acts in advance does not deserve to be treated better, in terms of the imputation of criminal liability and sentencing, than an offender who did not plan to commit the successive criminal acts but could not resist the temptation to commit them in the same favourable external context. As the Grand Chamber puts it clearly, "the individual acts do not have to be planned *ab initio*", which means that the overall *mens rea* underlying the various individual acts need not be present at the commission of the first individual act or even when each individual act forming part of the legally unified conduct is committed, and may not arise until the final individual act is committed[24].

Secondly, negligent criminal offences are not *per se* excluded from punishment as a continuous offence. There may be a continuous offence made up of individual negligent acts[25], as well as a continuous offence comprising intentional and negligent individual acts, in view of the subjective broadness of the *erweiterter Gesamtvorsatz*[26].

The need for a temporal connection between the individual acts has also been asserted by the Grand Chamber. This element is certainly to be examined in the circumstances of each case, without any predefined

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temptation of crime.

24. An example: a cashier withdraws a certain amount of money from the cash register one day with the purpose of returning it the next day, but the next day does not do so because he cannot find the necessary funds, and withdraws the same amount from another cash register to cover the missing money in the first one, expecting that the following day he will be able to cover the second loss; he repeats this stratagem several times until he is discovered. Another example: knowing that the owners are away, a thief breaks into a holiday house and removes all the valuables with the exception of a wall safe, which he discovers but cannot open. He decides to return two days later to break the safe with the appropriate tools, which he does.

25. The usual example in the literature is that of a doctor who inadvertently and repeatedly prescribes the same, incorrect, medicine for his or her patient. As psychology has shown, the impulse to repeat a wrongful action in the same set of circumstances may even be stronger in the case of a negligent offender than that of an offender with a criminal intention.

26. Albeit worded in a somewhat restrictive way, the subjective element was emphasised by the General Court of the European Union in its judgment of 17 May 2013 in Joined Cases T-147/09 and T−148/09, *Trelleborg Industrie SAS and Trelleborg AB v. European Commission*, paragraphs 56-63, 83, 88 and 89, according to which the Commission may assume that the infringement of EU law or the participation of an undertaking in the infringement of EU law is a continuous offence provided that the various actions which form part of the infringement pursue a "single purpose". Such a finding must be supported by objective and consistent indicia showing that an "overall plan" exists. If those conditions are satisfied, the concept of continuous infringement therefore allows the Commission to impose a fine in respect of the whole of the period of infringement taken into consideration and establishes the date on which the limitation period begins to run, namely the date on which the continuous infringement ceased. The General Court has not demonstrated that administrative infringements warrant a stricter approach to the concept of a continuous offence than the one prevailing in criminal law.

time-limit[27]. Nevertheless, according to the Grand Chamber's own logic, an inherent time-limit must be inferred from the fact that the individual acts must be interconnected to such a degree that they disclose the continuing existence of the same external favourable context for the commission of the offences and of the overall criminal purpose, and concomitantly disclose a homogenous, lesser degree of guilt on the part of the offender. In any case, the longer the timespan between the individual acts, the looser the psychological relationship between them, the greater the offender's guilt and therefore the less likely that the acts will be dealt with as a continuous offence.

Finally, in the Grand Chamber's view, in order to treat several successive criminal acts as a continuous offence, the individual acts must fulfil, either explicitly or implicitly, the constituent – objective and subjective – elements of the criminal offence(s). To put it negatively, acts in respect of which there are grounds for excluding criminal responsibility, such as mental illness, intoxication, self-defence, necessity, duress or a conflict of duties, cannot be part of a continuous offence, but acts committed as a result of an error of fact or law may be part of it when the error is imputable to and can be blamed on the offender.

9. Among others, four major practical consequences follow from the unified treatment of individual acts as a continuous offence. Subject to the existence of an external situation that facilitates the repetition of the violation of the same legally protected interest and hence diminishes the offender's guilt, it is a requirement of the principle of justice that the successive individual acts be seen in legal terms as a unified whole and be punished by a single sentence rather than a cumulative sentence. This is the major practical consequence of legal unification. If various criminal acts of different degrees of gravity are involved, the offender may be punished for the most serious of the acts, with the sentencing court taking into account the legally unified conduct as whole[28].

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27. For example, Article 52 of the Croatian Criminal Code refers to the "temporal connection" between the offender's acts, Article 12 of the Polish Criminal Code mentions "short intervals" and Article 61 of the Serbian Criminal Code makes reference to "temporal continuity".

28. This rule is applicable even in Cyprus and Ireland, the only two common-law member States of the Council of Europe that do not report the existence in law and practice of the concept of a continuous offence. The civil-law country in a similar situation, Finland, introduced in 1992 the principle of global sentencing of offences when the offender is convicted on more than one count, without separate sentences being handed down on each count, and abandoned the previous system of continuous offences. In Cyprus and Ireland, the general principle is that offences arising from the same incident should be sentenced concurrently (the one-transaction rule), while those constituting or arising from separate incidents should be sentenced consecutively. Where sentences are concurrent, the aggregate term is the longest of the individual penalties. Where sentences are consecutive, the aggregate term is the total of the individual penalties. In this case, the overall term should not be disproportionate. The essence of the one-transaction rule appears to be that all the

The second practical consequence is that the law in force at the time of the cessation of the continuous offence is applicable to the individual acts which occurred prior to its entry into force, provided that these acts fulfil the conditions of the new law. There is a requirement that the constitutive elements of the offence defined by the new law be fulfilled from the very beginning of the criminal behaviour, that is to say, also with regard to the acts which occurred before the entry into force of the new law[29]. One caveat must be added to this: should the continuous conduct in question not be subject to any criminal sanctions under the earlier law, only acts perpetrated after the entry into force of the law criminalising the conduct are to be taken into account and punished.

The third consequence is that the continuous offence is initiated with the first individual act, but is only completed once the last individual act forming part of the offence has been committed. From this two logical consequences follow. Firstly, any relevant limitation periods will start running only once the offence is completed, that is, once the last individual act has been committed, and, secondly, statute-barred individual acts are not excluded from punishment as part of a continuous criminal offence[30].

The fourth consequence, of a procedural nature, is that the *non bis in idem* effect of a judgment concerning a continuous offence precludes a fresh trial on charges relating to any new individual act included in the succession of criminal acts. To subject the sentenced offender to a new trial would be tantamount to exposing him or her to the risk of being punished twice for the same legally unified offence. This holds true not only for individual acts

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offences taken together constitute a single invasion of the same legally protected interest, which justifies, for example, the imposition of a concurrent sentence in the case of successive incidents of sexual assault against the same victim and of a consecutive sentence in the case of various incidents of sexual assault against different victims (see, for example, *DPP v. M* [1994], 2 IRLM 541). If the court fails to determine when passing sentence whether a term is to be served concurrently with or consecutive to another term, sentences are presumed to be concurrent. In England and Wales, the legal framework on *concursus delictorum* has evolved recently. The reform of Rule 14.2 § 2 of the Criminal Procedure Rules 2013, which allows a single count to allege more than one incident of the commission of the same offence in certain circumstances, seems to have heard Ashworth's long-standing complaint that the English sentencing process was a "disgrace to the common-law tradition".

29. Thus, the Grand Chamber clearly endorsed, in paragraph 62 of the present judgment, Judge Lemmens's concurring opinion, which coincides with the Belgian Court of Cassation's long-standing case-law (see, among others, the judgments of 25 October 2006, Pasicrisie 2006, no. 514; 5 April 2005, Pasicrisie 2005, no. 198; 24 September 1974, Pasicrisie 1975, I, 8; 17 May 1983, Pasicrisie 1983, I, no. 513; 27 January 1943, Pasicrisie 1943, I, 32; and 8 August 1924, Pasicrisie 1924, I, 518).

30. The argument that the unification of individual acts could defer the limitation period indefinitely and therefore render it worthless, which would be contrary to the principle of legal certainty, must be rejected, since the limitation period would in any case start running from the last individual act.

committed before the final act forming part of the continuous offence that has already been tried, but also for individual acts which occur after it[31].

In the light of the principles set out above, it will be for the domestic courts to interpret and apply these rules to the particular facts of a case. Nevertheless, member States have an obligation under Article 7 of the Convention not to provide for arbitrary or uncertain penalties. The punishment of *concursus delictorum* must therefore occur within the boundaries outlined above.

The present case in the light of the European concept of a continuous offence

10. The facts and the national legal framework of this case are clear. At least between 2000 and February 2006, the applicant abused his wife both physically and mentally on various occasions while drunk. As a result, his wife sustained haematomas, bruising and a fractured nose and was obliged to seek medical assistance on that account in June 2000, July 2003 and February 2006. The applicant was found guilty of the continuous offence of abusing a person living under the same roof, committed between 2000 and 8 February 2006, under a provision, Article 215a, which had been introduced into the Criminal Code on 1 June 2004. Under Czech law, a continuous offence is considered to constitute a single act and its classification in criminal law has to be assessed under the law as in force on completion of the last occurrence of the offence (the last assault). In the instant case the applicant was of the opinion that his conviction and sentence pursuant to a penal provision that had come into force on 1 June 2004 had involved retroactive application of the Criminal Code and had operated to his detriment, in breach of Article 7 § 1 of the Convention. He argued that the domestic courts had not examined whether he had actually committed the offences punishable before that date under Articles 197a and 221 § 1 of the Criminal Code.

11. Thus, the Grand Chamber's task in this case was mainly to determine whether the domestic courts' decision to apply Article 215a of the Criminal Code, which had come into force on 1 June 2004, also to the applicant's actions committed prior to that date entailed negative consequences for him, for instance in terms of his punishment. In the light of the Government's observations and the sentencing rules defined by Czech law, the domestic courts' approach could not, and did not, have any detrimental effect on the severity of the applicant's punishment. Albeit summarily, the domestic courts did consider, correctly, that all the legal

31. The guarantee of *non bis in idem* embraces both the facts that were submitted to trial and those that should have been submitted, in accordance with the principle of legality. Prosecutors are not allowed to circumvent the principle of legality by breaking down the charging of a continuous offence into multiple accusations.

ingredients of the offence set forth in Article 215a §§ 1 and 2 (b) of the Criminal Code were fulfilled also with regard to the assault committed prior to the entry into force of that provision.

Conclusion

The concept of a continuous offence is not dead. On the contrary, this hallmark of a liberal criminal-law policy is still at the heart of the European law on *concursus delictorum*, if not of a universal system of criminal law, a "grammar of criminal law", as George Fletcher put it (*Verbrechenslehre, théorie des éléments de l'infraction, teoria del reato, teoria del delito, teoria do crime*)[32]. Legislatures and courts may make use of it as an instrument to attenuate the severity of punishment in cases where the offender was driven to commit successive criminal acts by favourable external circumstances and his or her guilt was therefore considerably diminished. This instrument may be applied even in those national systems where a rule of strict accumulation of penalties or consecutive sentences is absent, but is particularly called for in those national systems where such a rule exists. The resocialisation purpose of criminal penalties and the principles of legality and *non bis in idem* favour that use. Where successive criminal laws are enacted, the offender may be punished under the new law when the conditions laid down in it are fulfilled also by the acts committed prior to the entry into force of that law.

32. I refer, of course, to George Fletcher's "The Grammar of Criminal Law: American, Comparative, and International", 2007, and to his earlier works as a laudable example of those scholars who through their long-standing efforts have contributed to the emergence of a universal system of criminal law.