

***DEL RIO PRADA V SPAIN***

***Application no. 42750/09***

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**WRITTEN SUBMISSION ON BEHALF OF  
THE INTERNATIONAL COMMISSION OF JURISTS**

*pursuant to the notification dated 17 January 2013 that the President of the  
Grand Chamber had granted permission under Rule 44 § 3 of the Rules of the  
European Court of Human Rights*

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**7 FEBRUARY 2013**

## **I. Introduction**

1. These written comments are submitted on behalf of the International Commission of Jurists (ICJ) pursuant to leave granted by the President of the Grand Chamber on January 17, 2013 in accordance with Rule 44.3 of the Court.

2. The International Commission of Jurists is a non-governmental organisation working to advance understanding and respect for rule of law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva (Switzerland). It is made up of some 60 eminent jurists representing different justice systems throughout the world and has 90 national sections and affiliated justice organisations. The International Commission of Jurists has consultative status at the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Council of Europe and the African Union. The organisation also cooperates with various bodies of the Organisation of American States and the Inter-Parliamentary Union.

3. This intervention analyses the scope of the prohibition on retroactive criminal laws or penalties under Article 7 ECHR, when applied to rules of criminal procedure or sentencing that have a direct, substantial and detrimental impact on the rights of the accused or convicted person. Regarding the application of Article 7 ECHR to rules of criminal procedure or sentencing, it analyses the difference between rules that are primarily concerned with the formalities of criminal procedure or the execution of a sentence, and substantive or material procedural rules, which significantly affect the protection of the rights of the accused or convicted person. In particular, it considers the circumstances in which a new law leading to changes in the nature or severity of the penalty applied to an individual is tantamount to a change in the substantive sentence and therefore attracts the prohibition of retroactive application.

## **II. The principle of legality and the scope of non-retroactivity under Article 7**

### ***The Rule of Law and the Principle of Legality under Article 7***

4. At issue in this case is an important question of the Rule of Law: the extent to which the principle of legality can be applied to ensure real and effective protection from retroactive punishment, regardless of the formal designation of rules in national law.

5. The principle of legality of criminal offences (*nullum crimen sine lege*), enshrined in Article 7 ECHR as well as other principal human rights instruments,<sup>1</sup> is an essential element of the Rule of Law, and is recognised as such in the jurisprudence of this Court, as well as that of the UN Human Rights Committee, and the Inter-American Court of Human Rights.<sup>2</sup> It is recognised in human rights treaties as a right from which no derogation is permitted.<sup>3</sup> The UN Human Rights Committee has stressed that the principle of legality entails “the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or

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<sup>1</sup> International Covenant of Civil and Political Rights Article 15.1; Convention on the Rights of the Child Article 40.2 (a), American Convention Article 9; African Charter Article 7.2; European Union Charter of Fundamental Rights, Article 49; Arab Charter, Article 15.

<sup>2</sup> *Scoppola v Italy* (No.2) Grand Chamber, Application No 10249/03, Judgment of 17 September 2009, para.92. Inter-American Court of Human Rights, *Castillo Petruzzi v Peru*, Series C, No.52, paras.113-121; Absolute nature of the principle: Human Rights Committee, General Comment No.29, States of Emergency, para.7; CCPR/C/21/Rev1/Add.11, 31 August 2001.

<sup>3</sup> ICCPR, Article 4(2); ECHR, Article 15; Arab Charter, Article 4(b); American Convention, Article 27.

omission took place, except in cases where a later law imposes a lighter penalty.”<sup>4</sup>

6. For the Rule of Law to be effective, there must be more than the formal existence of laws, and formal non-retroactivity of laws: there must also be an application of the law that is free from arbitrariness and respects human rights. Article 7 ECHR embodies this interdependence of the Rule of Law and the protection of human rights.

7. The application of Article 7 in the jurisprudence of this Court reflects this need for a dynamic interpretation of the principle of legality. Article 7 is to be interpreted and applied, not only to formally ensure that crimes and penalties do not have retroactive effect, but also, in accordance with its object and purpose, to provide effective safeguards for the individual against arbitrary prosecution, conviction and punishment.<sup>5</sup> It requires that offences and penalties be clearly prescribed by law and prohibits extensive construction of the law to the detriment of an individual.<sup>6</sup> It has also been found to require the application of the law most favourable to the individual, where two or more different laws were applicable in the period between the commission of an offence and delivery of a final judgment.<sup>7</sup>

### ***The Scope of the Article 7 prohibition on retroactive laws and penalties***

8. The principle of legality enshrined in Article 7 ECHR requires that neither crimes nor penalties be retroactively imposed to the disadvantage of an individual. The Article 7 jurisprudence recognises that it would be contrary to the principle of legality for the law governing the substance of a penalty to be applied retroactively, so as to impose a change in the law to the detriment of a convicted person.<sup>8</sup> By contrast, this Court has held that rules that by their nature and purpose concern only the enforcement of a penalty may be retroactively imposed.<sup>9</sup>

9. The term “law”, to which the principle of non-retroactivity applies, must be construed essentially in its substantive sense. Law is “the provision in force as the competent courts have interpreted and applied it”<sup>10</sup> Although progressive clarification of law through judicial interpretation is not proscribed by Article 7, this is subject to a requirement of reasonable foreseeability.<sup>11</sup> A change in practice or interpretation may, if it is sufficiently significant and is not foreseeable, amount to an effective change in the law. In such instances, any change should not be applied retrospectively where it would be to the detriment of the concerned individual.

10. At issue in this case, are the circumstances in which a change to domestic law regarding a penalty that is retroactively imposed will, by its nature and purpose, amount to a change to the law and to the substantive penalty itself, rather than to the enforcement of the penalty, for the purposes of Article 7. As clearly established in the jurisprudence of the Court, the classification of the provision in national law is not decisive.<sup>12</sup> The concept of penalty under the

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<sup>4</sup> UN Human Rights Committee, General Comment 29, CCPR/C/21/Rev.1/Add.11 para.7

<sup>5</sup> *Strelitz, Kessler and Krenz v Germany*, Applications nos. 34044/96, 35532/97 and 44801/98, Grand Chamber, para.50; *Kokkinakis v Greece*, Applications nos. 34044/96, 35532/97 and 44801/98, para.52

<sup>6</sup> *Coeme v Belgium*, Applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96 para.145

<sup>7</sup> *Scoppola v Italy (No.2)* Grand Chamber, Application No.10249/03

<sup>8</sup> *Kafkaris v Cyprus*, Application No.21906/04, para. 138-140

<sup>9</sup> *Hogben v UK*, Application No. 11653/85

<sup>10</sup> *Kafkaris v Cyprus op cit*, para.139

<sup>11</sup> *ibid*; *S.W. v. the United Kingdom*, Application no. 20166/92, para.36

<sup>12</sup> *Scoppola v Italy (No.2)*, *op cit*, para.111

Convention is an autonomous one, independent from the interpretations derived from national law. It is informed by the Court's established principle that the rights and guarantees enshrined in the Convention must be considered in a way that makes their protection practical and effective rather than illusory.<sup>13</sup>

11. In regard to retroactive application of such laws, it is submitted that effective protection of rights under Article 7 precludes a rigid distinction between substance and procedure or between punishment and the administration or enforcement or punishment. There is a need to avoid disguised retroactive law that imposes a measure more restrictive of rights, or a harsher penalty, in the guise of a mere administrative, procedural or enforcement measure. A distinction can therefore be drawn between purely procedural or enforcement measures, and measures that, while formally of a secondary or procedural nature, have a significant and substantive effect on the nature or severity of a sentence and on Convention rights.

**12. In particular, it is submitted that a change to the law or the interpretation of the law that entails the revision of a sentence or its remission, which substantially recalculates the sentence in a way that could not have been foreseen at the time of the initial sentence, to the detriment of the convicted person and his or her enjoyment of the Convention rights, is by its nature a change to the substance of the penalty rather than to the procedure or mechanism for its enforcement, and merits the application of the prohibition on retroactivity. This is in contrast to rules that amend the terms of enforcement of a sentence within foreseeable parameters of existing national law and practice.**

### **III. Retrospective application of criminal procedure rules: comparative analysis**

13. Rules of procedure and evidence of the international criminal courts on the application *ratione temporis* of criminal procedural norms, as well as the national legislation of certain Contracting Parties and the jurisprudence of national courts, support a wide application of the principle of non-retroactivity to certain rules of procedure or of enforcement of sentences that have significant detrimental consequences for the rights of the accused or convicted person.

14. The principle of non-retroactivity of procedural rules to both accused and convicted persons, where those rules have a detrimental effect on the rights of the individual, is guaranteed under Article 51(4) of the Rome Statute of the International Criminal Court, which affirms that "(...) *Amendments to the Rules of Procedure and Evidence as well as provisional rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.*"<sup>14</sup> In the same vein, Rule 6(D) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia provides that: "*An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case.*"<sup>15</sup> Rule 6(C) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda also

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<sup>13</sup> *Welch v UK Application No.17440/90, para.27; Coeme v Belgium, op cit, para.145; Scoppola v Italy (No.2), op cit, para.111*

<sup>14</sup> International Criminal Court (ICC), Rome Statute, A/CONF.183/9 of 17 July 1998, and the Rules of Procedure and Evidence, ICC-ASP/1/3 (Part II-A) of 9 September 2002. The general principle of non-retroactivity of laws and penalties are set out in Articles 22 – 24 of the Statute.

<sup>15</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY), Rules of Procedure and Evidence, IT/32/Rev. 48 of 11 February 1994.

affirms that: “An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.”<sup>16</sup>

15. Similar principles apply in the law of several Contracting States. Article 2 of the Portuguese Criminal Code lays down the general principle of application *ratione temporis* of the criminal laws, which prohibits the retroactive application of crimes and penalties, unless more favourable to the accused.<sup>17</sup> Article 5 of the Portuguese Code of Criminal Procedure extends the principle of legality to the criminal procedural rules, and prohibits their application whenever they worsen the position of the accused or interfere with the harmony of the various acts in the case.<sup>18</sup>

16. Article 112-1 of the French Criminal Code states that: “*Sont seuls punissables les faits constitutifs d'une infraction à la date à laquelle ils ont été commis./ Peuvent seules être prononcées les peines légalement applicables à la même date./ Toutefois, les dispositions nouvelles s'appliquent aux infractions commises avant leur entrée en vigueur et n'ayant pas donné lieu à une condamnation passée en force de chose jugée lorsqu'elles sont moins sévères que les dispositions anciennes.*” Article 112-2 of the French Criminal Code prohibits the retroactivity of norms pertaining to the regime of execution and application of penalties when in practice they render a heavier penalty to the convicted than the one attributed at the time of the sentencing.<sup>19</sup>

17. Jurisprudence of the above-mentioned Contracting Parties has further developed the nature of the criminal procedural norms in connection with the principle of non-retroactivity. In interpreting article 29(4) of the Constitution of the Republic of Portugal,<sup>20</sup> the Constitutional Court has held that the criminal rules, even if procedural, are governed by the principle of legality whenever they aggravate the position of the accused,<sup>21</sup> as opposed to purely procedural rules that do not affect the essential rights of the accused. It has also found that the immediate application of new criminal procedural rules is justified where they give better effect to the rights concerned, in contrast to rules that worsen the procedural position of the accused.<sup>22</sup> This exception to the immediate application of the procedural law includes not only the rules that affect the application of penalties such as those relating to the statute of limitations, exercise, expiry and waiver of the right to complaint but also rules that might affect the right to liberty of the accused and that guarantee his right of defence, all considered in the opinion of the Court to be substantive criminal procedural rules.<sup>23</sup>

18. In France, the Criminal Chamber of the *Cour de Cassation* has applied the same principle and held that the rules pertaining to the execution and application of penalties could not be applied to acts committed after their entry into force

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<sup>16</sup> The International Criminal Tribunal for Rwanda (ICTR), Rules of Procedure and Evidence, of 29 June 1995.

<sup>17</sup> Article 2 of the Portuguese Criminal Code (Decree no. 48/95, of 15 Mars): “(1) Penalties and security measures are determined by the law in force at the time of the commission of the act or the fulfillment of the conditions which they depend on (...) (4) If the laws in force at the time of the commission of the punishable act are different from those established in posterior laws, the more favourable regime to the agent is always applicable, except when the agent has already been condemned by a definitive sentence.”

<sup>18</sup> Article 5 of the Portuguese Code of Criminal Procedure (Decree no. 78/87, of 17 February): “(1) The law of criminal procedure is applied immediately, without prejudice to the validity of acts performed in the presence of the former law. (2) The law of criminal procedure does not apply to proceedings initiated prior to its validity when from its immediate applicability may result: (a) a sensitive and yet avoidable worsening of the procedural situation of the accused, including a limitation of their right to defence, or (b) a break on the harmony and unity of the various acts of the case.”

<sup>19</sup> French Criminal Code, 1 Mars 1994.

<sup>20</sup> Article 29 (4) of CRP (application of the criminal law): “(4) Nobody can suffer a more stringent penalty or security measure than the one envisaged at the time the correspondent act was committed or the elements verified, applying retroactively to the accused the more lenient criminal laws.”

<sup>21</sup> Constitutional Court of Portugal, decision no. 236/2009, case no. 81/2009, judgement of 12 May 2009.

<sup>22</sup> Constitutional Court of Portugal, decision no. 247/2009, case no. 16/09, judgment of 12 May 2009.

<sup>23</sup> Constitutional Court of Portugal, decision no. 590/2012, case no. 543/12, judgement of 5 December 2012.

whenever they would impose a heavier penalty on the accused.<sup>24</sup> The same Court in another judgement quashed a first instance decision that refused to apply the more lenient procedural rule to the accused, which in that case would have implied a change from a penalty of imprisonment to a penalty of fine.<sup>25</sup>

19. In the Netherlands, article 1 of the Penal Code sets forth the principle of legality as follows: “*No conduct constitutes a criminal offence unless previously statutorily defined in criminal statutes.*” The same wording is found in article 16 of the Dutch Constitution. This principle sets forth the prohibition of *nullum crimen sine lege nulla poena sine lege*, of analogous interpretation and of retroactivity of laws concerning the prohibited conduct and the sanction applicable. Pursuant to article 1 of the Code of Criminal Procedure, new legislation in the field of execution of sanctions can be applied immediately, as long as the law is clear at the time of the commission of the act on whose actor is responsible and in which manner this responsibility shall take place.

20. The Dutch Courts have interpreted the scope of application of the principle of legality in article 1 of the Penal Code in such a way as to include procedural rules that could have a significant impact on the penalty of the convicted person. In a case on the civil imprisonment for debt resulting from a measure to confiscate illegally obtained profits, the Supreme Court held that rules regarding the execution of this sanction could not be regarded as merely being of a procedural character, therefore, determining that the immediate application of stricter rules was not allowed.<sup>26</sup> In another judgment, the Supreme Court ruled that the immediate application of the legislation concerning conditional execution of a previously imposed conditional prison sentence violated neither article 1 of the Penal Code nor Article 7 of the ECHR.<sup>27</sup> The Attorney General considered, however, that the situation would be different if the immediate application of the new rules resulted in the executed sanction being heavier than the one imposed by the Court or if the changes in the execution amended the content and nature of the sentence.<sup>28</sup>

#### **IV. Conclusion**

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**21. It is submitted that, in accordance the Rule of Law, of which the principle of legality is an essential element, and in light of the object and purpose of Article 7 ECHR to prevent arbitrary application of the law, the scope of the prohibition on retroactivity under Article 7 ECHR:**

**(a) entails autonomous definitions of “law” and “punishment” which are sufficiently wide to prevent disguised retroactive application of a criminal law or penalty to the detriment of an individual;**

**(b) in particular, entails that certain rules designated in national law as rules of criminal procedure or rules on the enforcement of a penalty should be subject to the prohibition on retroactivity where they have a substantial, unforeseeable and detrimental effect on the rights of an individual, that by their nature amount to, or are equivalent to, a retroactively imposed criminal law or penalty.**

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<sup>24</sup> French Cour de Cassation, Bulletin no. 307, judgment of 13 April 2000.

<sup>25</sup> French Cour de Cassation, Bulletin no. 69, judgement of 13 April 2010.

<sup>26</sup> Dutch Supreme Court, December 20, 2011, *NJ* 2012/237.

<sup>27</sup> Dutch Supreme Court, September 25, 2012, LJN: BX5063;

<sup>28</sup> Attorney-General’s Conclusions in Supreme Court, September 25, 2012, LJN: BX5063.