

# Toward a More Lenient Law: Trends in Sentencing from the European Court of Human Rights

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## INTRODUCTION

In the last few years, a trend has emerged from the European Court of Human Rights (ECtHR, the Court) suggesting that the Court's motivation behind the sentencing decisions it reviews may be shifting away from solely punitive measures to focus on fairness, rehabilitation, and release of incarcerated persons. This pattern has crystallized as the Court increasingly decides cases based on determinations of whether or not domestic jurisdictions are upholding their obligations under international law. Established in 1959, the Court rules on alleged violations of the European Convention on Human Rights (ECHR, the Convention),<sup>1</sup> a document that is binding on Member States of the Council of Europe (CoE). ECtHR judgments interpret the Convention in individual cases, making the Court's jurisprudence especially important for CoE Member States, as judgments provide clarity to the ECHR and ultimately aim to harmonize criminal (and other) justice systems.<sup>2</sup> The ECtHR has been sitting as a full-time court to which individuals

can apply directly since 1998,<sup>3</sup> and its decisions are binding on CoE Member States, which have an obligation to execute the decisions.<sup>4</sup>

In the more than 10,000 judgments since its inception, the Court has had the opportunity to consider many aspects of the fairness and legality of trials and sentencing under the requirements of the ECHR.<sup>5</sup> While several articles of the ECHR might potentially have an impact on the ECtHR's interpretation of issues related to trials and sentencing, this article will primarily focus on how the Court's more recent interpretation of Articles 3 and 7 indicate a potential shift in its approach to these topics.<sup>6</sup>

Article 3 of the ECHR concerns the prohibition against torture, stating that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."<sup>7</sup> Article 7 sets out the principle of *nullum crimen, nulla poena sine lege* (no punishment without law), stating that:

(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.<sup>8</sup>

Both Articles have been used by the Court in recent decisions, discussed below, to direct the approach of national laws on sentencing of convicted persons.

The ECtHR has stated that, while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now focused on the rehabilitative aim of imprisonment, particularly as it concerns lengthy prison sentences.<sup>9</sup> This position is reflected in a string of recent cases decided by the Court. Beginning in late 2009, the ECtHR entered several judgments, first in its Sections and then in the Grand Chamber, indicating its general approach on CoE Member States' sentencing policies. These judgments are *Vinter v. United Kingdom*, *Damjanović and Maktouf v. Bosnia and Herzegovina*, *M. v. Germany*, *Del Rio Prada v. Spain*, and *Ocalan v. Turkey*,<sup>10</sup> all of which were decided within the last year. In each case, the Court considered a combination of interpretations of Articles 3, 5, 6, and 7 as they relate to the fairness and legality of sentencing, highlighting the nuance of what appears to be the ECtHR's evolving view on

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both the purpose and implementation of sentencing of convicted persons.

This emerging policy has the potential to influence both the national court systems within CoE Member States and international tribunals. Since ECtHR jurisprudence has precedential power in all CoE Member States, not just those that are the subject of particular applications, the above decisions can affect national law and policy far beyond the country named in the judgment. In addition to their application in domestic courts, ECtHR decisions have been shown to have persuasive authority in international courts and tribunals. For example, the International Criminal Tribunal for Rwanda's (ICTR) Trial Chamber in *Prosecutor v. Barayagwiza* observed that regional human rights treaties, such as the European and the American Conventions on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the law applicable to the Tribunal.<sup>11</sup>

Most of these cases (*Del Rio Prada*, *Damjanović and Maktouf*, and *M. v. Germany*) deal with non-retroactive application of criminal law, some of which even consider the specific types of criminal sanctions. Several important issues can be derived from the jurisprudence presented in the following text, including the Court's emerging tendency to encourage potential rehabilitation of offenders. This article will introduce and analyze the ECtHR's string of recent decisions related to criminal sanctions. It will then consider how these decisions are likely to affect the broader international context, extending beyond the specific countries involved.

### RECENT ECtHR JURISPRUDENCE IN SENTENCING APPLICATIONS

In order to understand the shift in Court policy, this article will highlight the Court's four most recent decisions on this topic: *Vinter v. United Kingdom*, *Maktouf and Damjanović v. Bosnia and Herzegovina*, *Del Rio Prada v. Spain*, and *Ocalan v. Turkey*.<sup>12</sup>

The first of these four cases decided by the Grand Chamber of the ECtHR was *Vinter v. United Kingdom*.<sup>13</sup> In *Vinter*, the Grand Chamber considered the UK's "Whole Life Order" which provided convicted persons no possibility of parole or release irrespective of rehabilitation, good behavior, or other changed circumstances. The ECtHR found that the "Whole Life Orders" violated Article 3, not because they were grossly disproportionate, but because of other guiding principles of the Article.<sup>14</sup> It further found that, in order to be compatible with Article 3, the mode of punishment must include both "the prospect of release and a possibility for review."<sup>15</sup> The Court went on to state that without the possibility of release or review, the "punishment becomes greater with time: the longer the prisoner lives, the longer his sentence."<sup>16</sup>

The second of these cases to address sentencing considerations before the ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, was decided on July 18, 2013 and primarily rested on the question of the retroactive application of law and compatibility with Article 7 of the ECHR.<sup>17</sup> Both of these consolidated cases dealt with the application of the 2003 BiH Criminal Code to crimes committed while the 1976 Socialist

Federal Republic of Yugoslavia (SFRY) Criminal Code was in effect. The specific consideration was whether the higher minimum sentence for war crimes would amount to an unlawful retroactive application of less lenient law to the convicted persons. The ECtHR found that, in both *Maktouf and Damjanović*, the Court of BiH acted inappropriately when it retroactively applied law that was detrimental to the defendants in violation of Article 7 as it related to war crimes cases.

In the second half of 2013, the Court considered *Del Rio Prada v. Spain*. Originally heard in the Third Section of the Court on July 10, 2012, the Grand Chamber of the ECtHR ruled on this case on October 21, 2013, finding that Spain violated Article 7 of the ECHR. The Court considered whether the application of a new doctrine that had the effect of



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extending the convicted person's time incarcerated and that was adopted after sentencing amounted to an unlawful retroactive application of law. The ECtHR found that, although the Spanish Supreme Court did not retroactively apply the law in question (no. 7/2003), its actions still amounted to a violation of Article 7.<sup>18</sup> The ECtHR determined that the Spanish Supreme Court aimed to accomplish the same outcome as the above-mentioned law in its actions toward the applicant. It further found that the applicant could not have foreseen the Spanish Court's actions because they departed so far from the Court's own case law. Thus, since these actions were detrimental to the applicant due to their harmful retroactive application of law to a convicted person, the Court found a violation of Article 7.<sup>19</sup>

Finally, on March 18, 2014, the ECtHR adopted a judgment in *Öcalan v. Turkey* (application nos. 24069/03, 197/04, 6201/06, and 10464/07), in which it unanimously held that there had been a violation of Article 3 of the ECHR due to the life sentence without possibility of conditional release. The Court reiterated that the requirements of Article 3 would be satisfied if national law affords a possibility of review of a life sentence with an option of commutation, remission, termination, or conditional release. In other words, a life sentence must be "reducible," providing for both a prospect of release and a possibility of review.

### THE ECtHR'S ANALYSIS OF ECHR ARTICLES 3 AND 7

The four decisions above highlight an emerging trend in the Court's application of the ECHR to broader issues of sentencing and penal policy as considered within a human rights framework. Looking specifically at the implications of Articles 3 and 7 to cases regarding the rights of convicted persons, the ECtHR has made it clear that it intends to follow a policy whereby punishment must not only be fair and proportional to the crime, but must also be crafted in such a way that penal systems aim to also rehabilitate.

In order to make this point clear, the Court has used relevant articles in the Convention to re-emphasize, and perhaps broaden, the well-known principle of *nullum crimen, nulla poena sine lege*, stressing that any punishment must be crafted to incentivize socially desirable behavior. In other words, any punishment that is applied to an accused retroactively without requisite notice serves only to punish. Those punishments do not serve to incentivize the actor's movement away from criminal behavior. Additionally, it is clear that the ECtHR considers any punishment that does not provide convicted persons with the prospect of rejoining society after demonstrating the desired behavior to be not only inappropriately cruel and unusual, but also representative of a failure of society to give the convicted person motive to reform. Through the four recent Court decisions detailed above, the Court is moving toward a model that favors not simply punishment but also incentivizing desired behavior.

### ARTICLE 3

Article 3 provides an absolute prohibition on torture, providing that, "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."<sup>20</sup> The Court has analyzed its sentencing principles in light of Article 3 to determine if the challenged sentences violate the categorical pronouncement contained therein. When conducting its analysis, the Court considered whether or not sentences that specifically prohibit the possibility for release are illegal under Article 3.

The ECtHR found that the requirements of Article 3 were not met in relation to any of the three applicants in *Vinter v. United Kingdom*, concluding that "there is . . . clear support in

European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."<sup>21</sup> Thus, when addressing a life sentence, Article 3 must be interpreted as requiring the potential for reducibility of the sentence. There must be a review that "allows the domestic authorities to consider whether any changes in the life [and behavior of the] prisoner are

so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention could no longer be justified on legitimate penological grounds."<sup>22</sup>

The ECtHR set forth a clear pronouncement in *Vinter* that, in order to meet its obligations under the ECHR, a state's domestic sentencing guidelines must ensure that progress toward rehabilitation is always a possibility for convicted persons. This requirement demonstrates that the Court does not view sentencing merely in the penological context, but that it will review guidelines to ensure that sentencing also serves the purposes of encouraging progress toward the behavior that meets society's expectations of its citizens. Based on this analysis, mere punishment does not appear to meet the guidelines prescribed under the Convention.

### ARTICLE 7

Article 7 of the ECHR pronounces the principle of *nullum crimen, nulla poena sine lege*, meaning that there shall be no punishment without law. It also makes clear that no "heavier penalty [shall] be imposed than the one that was applicable at the time the criminal offen[s]e was committed."<sup>23</sup>

On December 17, 2009, the Court ruled in *M. v. Germany* that "the concept of 'penalty' in Article 7 is autonomous in scope and it is thus for the Court to determine whether a particular measure should be qualified as a penalty, without being bound by the qualification of the measure under domestic law."<sup>24</sup> The Court went on to state that in order to "render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a 'penalty' within the meaning of this provision."<sup>25</sup> In other words, the Court must have the

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flexibility to look at both the action and the result of the action proposed.

The wording of Article 7 paragraph 1 indicates, in relevant part, that determination of the presence of a penalty must begin with an assessment of whether the measure in question is imposed following conviction for a criminal offense. “Other relevant factors are the characterization of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity.”<sup>26</sup> When considering the Court’s treatment of Article 7, the ECtHR does not necessarily confine its application “to prohibiting the retroactive application of the criminal law to an accused’s disadvantage.”<sup>27</sup> “It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty,”<sup>28</sup> as well as “the principle that the criminal law must not be extensively construed to an accused’s detriment.”<sup>29</sup>

The Court notes in this connection that the same type of measure may be, and has been, qualified as a penalty in one state and as a preventive measure to which the principle of *nulla poena sine lege* does not apply in another. Thus, placing recidivists and habitual offenders at the government’s disposal in Belgium, for instance, which is in many ways similar to preventive detention under German law, has been considered a penalty under Belgian law.<sup>30</sup> However, the Court concluded that, looking behind appearances and making its own assessment, preventive detention under the German Criminal Code qualifies as a “penalty” for the purposes of Article 7 Section 1, and, as a result, Germany violated this Section of the Convention.

In *Damjanović and Maktouf v. Bosnia and Herzegovina*, the ECtHR reviewed the scope of Article 7. In considering the retroactive application of a law where the minimum sentence was harsher than the original minimum sentence, the Court found that BiH violated Article 7 Section 1 of the ECHR. The ECtHR concluded that the Court of BiH should have applied provisions of the 1976 SFRY Criminal Code, which could have resulted in more lenient sentences for the applicants.<sup>31</sup>

Similarly, in the case of *Del Rio Prada v. Spain* (first instance at ECtHR, affirmed in pertinent part by the Grand Chamber), the Court noted that the applicant’s convictions and the different prison sentences she was given had a legal basis in the criminal law applicable at the material time rather than at the time of conviction.<sup>32</sup> The ECtHR also noted that the Spanish Supreme Court’s new interpretation of a law, as applied in that case, led to the applicant’s sentence, which was retroactively extended by almost nine years. This extension was due to the fact that, up to that date, Spanish law had allowed work completed while incarcerated to count toward a remission of the sentence. Under the new Supreme Court interpretation of Spanish law, all of the remissions to which the accused would have been entitled were lost because of the length of the original sentences pronounced against her.<sup>33</sup>

As mentioned above, the ECtHR found that it would have been difficult, if not impossible, for the applicant to foresee the Supreme Court’s departure from precedent. Thus, it was also impossible for the applicant to know at the material time, and also at the time when all the sentences were combined into one, that the *Audiencia Nacional*<sup>34</sup> would calculate the reductions of sentence in respect to each sentence individually and not the total term to be served, thereby substantially lengthening the time she would actually serve. Consequently, the ECtHR found that it was required to reject the government’s preliminary objection and the application of the “Parot doctrine,”<sup>35</sup> thus concluding that there was a violation of Article 7 of the Convention.<sup>36</sup>

This particular case demonstrates a situation where the Court found it necessary to emphasize that the applicant could not possibly have foreseen the Spanish government’s interpretation of her sentence and remission of that sentence for behavior while incarcerated. The inability to foresee this action removes any incentive the accused might have otherwise had for progressive, desired behavior.

### IMPACT BEYOND THE EUROPEAN COURT

The ECtHR is not the only non-domestic court where this trend is observed. When the European Court of Justice (ECJ) decided *Berlusconi and Others*, it prominently held that the principle of the retroactive application of the more lenient penalty formed part of the constitutional traditions common to the EU Member States.<sup>37</sup> Where the law in question was found to be retroactively applied, the ECJ stated that “[a] consequence of that kind would be contrary to the limits which flow from the essential nature of any directive, which . . . preclude[s] a directive from having the effect of determining or increasing the liability in criminal law of accused persons.”<sup>38</sup>

If this trend is to ultimately have real impact, it must be felt at the domestic level where the vast majority of decisions are made. The following decisions demonstrate national courts falling in line with ECtHR jurisprudence related to retroactive application of sentencing. Both Norway and Bosnia and Herzegovina (BiH) are members of the CoE, and as discussed above, BiH was the direct recipient of an ECtHR decision on this point.

### NORWAY

One example of domestic courts adopting the same reasoning exhibited by the ECtHR, albeit before the aforementioned decisions were announced, was the domestic trial court in *Norway v. Breivik*. In this case, the defendant detonated a car bomb in the Government District in Oslo killing eight people and injuring nine others. He later killed sixty-nine people and injured thirty-three in a shooting rampage at Utoya Island, most of whom were youths attending a summer camp.<sup>39</sup>

In light of the nature of the crimes, the defendant received a punishment that has been widely discussed as being too lenient. However, in determining the sentence, the court in Norway made

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it clear that it was required to follow the penal code as it was written at the time of the crime. In *Breivik*, the Court found that there was no doubt that the acts were done with premeditation and under especially aggravating circumstances.<sup>40</sup> The defendant was sentenced to preventive detention for a term of twenty-one years, the maximum sentence allowed under the Norwegian penal code, despite international criticism of the punishment's perceived leniency.

## BOSNIA AND HERZEGOVINA

On October 22, 2013, the Constitutional Court of Bosnia and Herzegovina adopted a number of decisions on appeals filed against verdicts from the Court of BiH.<sup>41</sup> These appeals stemmed from cases in which the appellants were sentenced to prison for war crimes, which are identically proscribed in the 1976 SFRY Criminal Code and the 2003 BiH Criminal Code as war crimes against civilians and genocide.<sup>42</sup>

In these specific cases, the Constitutional Court consistently applied the standards set forth in the ECtHR's judgment of *Damjanović and Maktouf v. Bosnia and Herzegovina*.<sup>43</sup> As discussed above, that decision addressed the application of Article 7 of the ECHR, which prohibits the retroactive application of the law without exception and imposes the obligation to apply the more lenient criminal law in any case, regardless of the nature and gravity of the offense.<sup>44</sup>

In all of these decisions, the Constitutional Court found that the verdicts of the Court of BiH violated the appellant's rights arising from Article 7 Section 1 of the ECHR because there was a real possibility that the retroactive application of the 2003 BiH Criminal Code operated to their detriment in terms of sentencing. Consequently, the Constitutional Court overturned the judgments of the Appeals Chamber of the Court of BiH. It found in all cases that the Court of BiH violated the stated constitutional rights of the appellants and remanded the cases to the lower court to adopt new decisions in accordance with Article 7 of the Convention.<sup>45</sup>

The crux of the Constitutional Court's decisions was the fact that the SFRY Criminal Code was more lenient with respect to the maximum possible sentence imposed in these cases. Although the Criminal Code of SFRY prescribed sentences of



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five to fifteen years and the death penalty that could be mitigated to twenty years imprisonment for war crimes, it is notable that the death penalty was an available punishment under the SFRY Criminal Code, whereas it was not available under subsequent laws.<sup>46</sup> Because BiH signed Protocol 6 to the ECHR in 2002<sup>47</sup> and Protocol 13 to the ECHR in 2003,<sup>48</sup> the death penalty could not be imposed in subsequent cases, making the maximum possible penalty under SFRY harsher than the maximum possible penalty under the codes of BiH.

While these cases represent just the beginning, they do demonstrate the initial trickle down of the trends from the ECtHR into the practice of the national courts. It will be important to watch for developments in this field as the ECtHR shows no signs of reversing the trend in its decision-making, and all CoE Member States will be held to its standard.

## CONCLUSION

The above analysis demonstrates what appears to be an emerging trend within the jurisprudence of the ECtHR. In its pattern of emphasizing the importance of rehabilitation of offenders and societies while routinely applying the more lenient law, the ECtHR has repeatedly rejected the arguments from several governments that the gravity of the crime should be the primary determining factor in the punishment. This approach, seen not only at the ECtHR, but also in domestic courts and tribunals, should signal to practitioners the need to carefully analyze these considerations in the application for and defense of criminal sentences.

## ENDNOTES

<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. no. 5; 213 U.N.T.S. 221, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (hereinafter "European Convention").

<sup>2</sup> Authors note that the European Court of Justice (ECJ) has an equally important influence on EU countries. However, as this article focuses on ECtHR jurisprudence and its influence, ECJ jurisprudence is noted only in passing (*Berlusconi* case). ECJ juris-

prudence follows ECtHR jurisprudence, and all EU Member States are also members of the Council of Europe. There are, however, some differences regarding ratifications of certain protocols to the ECHR.

<sup>3</sup> EUROPEAN COURT OF HUMAN RIGHTS & COUNCIL OF EUROPE, THE COURT IN BRIEF, available at [http://www.echr.coe.int/Documents/Court\\_in\\_brief\\_ENG.pdf](http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf).

- <sup>4</sup> EUROPEAN COURT OF HUMAN RIGHTS & COUNCIL OF EUROPE, THE EUROPEAN COURT OF HUMAN RIGHTS IN 50 QUESTIONS (2012), *available at* [http://www.echr.coe.int/Documents/50Questions\\_ENG.pdf](http://www.echr.coe.int/Documents/50Questions_ENG.pdf).
- <sup>5</sup> See, European Convention, *supra* note 1 (noting that the European Convention is further bolstered by its subsequent additional Protocols).
- <sup>6</sup> See, e.g., *id.* art. 5 (detailing the right to liberty and security).
- <sup>7</sup> *Id.* art. 3.
- <sup>8</sup> *Id.* art. 7.
- <sup>9</sup> See, e.g., *Dickson v. the United Kingdom*, 2007-V Eur. Ct. H.R. § 75; *Boulois v. Luxembourg*, App. No. 37575/04, Eur. Ct. H.R., § 83 (2012).
- <sup>10</sup> *Del Río Prada v. Spain*, App. No. 42750/09, Eur. Ct. H.R. ¶¶ 21, 116, 118 (2013), *available at* [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112108#{"itemid":\["001-112108"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112108#{); *Vinter v. United Kingdom*, App. Nos. 66069/09, 130/10, 3896/10, Eur. Ct. H.R. (2013), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122664>; *Maktouf and Damjanovic v. Bosnia and Herzegovina*, App. Nos. 2312/08, 34179/08, Eur. Ct. H.R. (2013), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122716>.
- <sup>11</sup> *Prosecutor v. Barayagwiza* (Appeals Chamber Judgment), ICTR-99-52-T, ¶ 40 (Nov. 3, 1999).
- <sup>12</sup> As of May 2014, the Court's March 2014 judgment in *Ocalan v. Turkey* is not final: "Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution." Further information about the execution process can be found here: Press Release, Council of Europe, Execution of Judgments of the European Court of Human Rights (March 7, 2014), [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).
- <sup>13</sup> Eur. Ct. H.R., App. Nos. 66069/09, 130/10, 3896/10 (2013), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122664>.
- <sup>14</sup> *Id.* ¶ 130.
- <sup>15</sup> *Id.* ¶ 110.
- <sup>16</sup> *Id.* ¶ 112.
- <sup>17</sup> App. Nos. 2312/08, 34179/08, Eur. Ct. H.R. (2013), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122716>.
- <sup>18</sup> *Del Río Prada v. Spain*, App. No. 42750/09, Eur. Ct. H.R., ¶¶ 21, 116, 118 (2013).
- <sup>19</sup> *Id.* ¶¶ 21, 116.
- <sup>20</sup> European Convention, *supra* note 1, arts. 3, 4.
- <sup>21</sup> App. Nos. 66069/09, 130/10, 3896/10, Eur. Ct. H.R. ¶ 114 (2013), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122664>.
- <sup>22</sup> *Id.* ¶ 119.
- <sup>23</sup> European Convention, *supra* note 1, art. 7(1).
- <sup>24</sup> App. No. 19359/04, Eur. Ct. H.R. ¶¶ 1, 37 (2009), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96389>.
- <sup>25</sup> *Id.* at 35 (citing *Welch v. United Kingdom*, 307 Eur. Ct. H.R. (ser. A) at ¶ 27 (1995), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57927>; *Jamil v. France*, 317 Eur. Ct. H.R. (ser. A) at ¶ 30 (1995), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57929>; *Uttley v. United Kingdom*, 2005 Eur. Ct. H.R. 1, *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-71689>).
- <sup>26</sup> *Id.* (citing *Welch v. United Kingdom*, 307 Eur. Ct. H.R. (ser. A) at ¶ 28 (1995), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57927>; *Jamil v. France*, 317 Eur. Ct. H.R. (ser. A) at ¶ 31 (1995), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57929>; *Adamson v. United Kingdom*, App. No. 42293/98, Eur. Ct. H.R. (1999), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-78858>; *Van der Valden v. Netherlands*, 2006-XV Eur. Ct. H.R., *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-78858>; *Kafkaris v. Cyprus*, App. No. 21906/04, Eur. Ct. H.R., ¶ 142 (2008), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85019>).
- <sup>27</sup> *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) at ¶ 52 (1993), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57827>.
- <sup>28</sup> *Id.*
- <sup>29</sup> *Id.* Any analogy in criminal law may not be made to the accused's detriment. For example, an accused cannot be held retroactively responsible for behaviors he could not have reasonably foreseen as illegal. This has been seen in cases of tax fraud, where certain practices were not prescribed by the law as criminal at the time when the accused applied them, but were later included.
- <sup>30</sup> *Van Droogenbroeck v. Belgium*, App. No. 7906/77, Eur. Ct. H.R., ¶¶ 19, 24 (1982).
- <sup>31</sup> *Maktouf and Damjanovic v. Bosnia and Herzegovina*, App. Nos. 2312/08, 34179/08, Eur. Ct. H.R., ¶ 76 (2013), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122716>.
- <sup>32</sup> *Del Río Prada v. Spain*, App. No. 42750/09, Eur. Ct. H.R. ¶ 49 (2012) *available at* [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112108#{"itemid":\["001-112108"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112108#{).
- <sup>33</sup> *Id.* ¶ 58.
- <sup>34</sup> See *The Spanish National Court: An Overview of La Audiencia Nacional*, Ctr. for Justice & Accountability, <http://www.cja.org/article.php?id=342> (last visited Apr. 14, 2014). The *Audiencia Nacional* is the Spanish National Court located in Madrid with jurisdiction throughout all of Spain. *Id.*
- <sup>35</sup> See *Del Río Prada v. Spain*, App. No. 42750/09, Eur. Ct. H.R. ¶ 27 (2012) (highlighting the Supreme Court's reasoning, which stated that "a joint interpretation of rules one and two of Article 70 of the Criminal Code of 1973 leads us to consider that the thirty-year maximum term *does not become a new sentence*, distinct from those successively imposed on the convict, or *another sentence resulting from all the previous ones*, but is the maximum term of imprisonment a prisoner should serve. . . . Thus, the method for the discharge of the total term to be served [*condena*] is as follows: it begins with the heaviest sentences imposed. The relevant benefits and remissions are applied to each of the sentences the prisoner is serving. When the first [sentence] has been served, the prisoner begins to serve the next one and so on, until the limits provided for in Article 70 § 2 of the Criminal Code of 1973 have been reached. At this stage, all of the sentences comprised in the total term to be served [*condena*] will have been extinguished. For example, in the case of an individual given three prison sentences, 30 years, 15 years and 10 years. The second rule of Article 70 of the Criminal Code of 1973 . . . limits the actual term to be served to three times the most serious sentence or a maximum of 30 years' imprisonment. In this case, it would be the maximum term of thirty years. The successive serving of the sentences (the total term to be served) begins with the first sentence, which is the longest one (30 years in this case). If [the prisoner] were granted a ten-year remission for whatever reason, he would have served that sentence after 20 years' imprisonment, and the sentence would be extinguished; next, [the prisoner] would start to serve the next longest sentence (15 years), and with a remission of 5 years that sentence will have been served

after 10 years.  $20 + 10 = 30$ . [The prisoner] would not have to serve any other sentence, *any remaining sentences being extinguished*, as provided for in the applicable Criminal Code, *once those already imposed cover that maximum, which may not exceed thirty years.*") (emphasis in original).

<sup>36</sup> *Id.* ¶ 64.

<sup>37</sup> See *Berlusconi v. Italy*, ECJ, Joined Cases Nos. C-387/02, C-391/02 and C-403/02, ¶ 68 (2005).

<sup>38</sup> See *id.* ¶ 77.

<sup>39</sup> *Norway v. Breivik*, OSLO-2011-188627-24E § 4.2.1 (2012) (Norway).

<sup>40</sup> *Id.* at 47-48.

<sup>41</sup> Appeals of Milenko Trifunović, Nikola Andrun, Slobodan Jakovljević et al. (including Branislav Medan, Brano Džinić and Aleksandar Radovanović), Mile Pekez et al. (including another individual named Mile Pekez and Milorad Savić), and Petar Mitrović. Since October 22, 2013, the Constitutional Court of BiH subsequently adopted similar decisions in the cases of Suad Kapić, Zrinko Pinčić, Novak Đukić and others.

<sup>42</sup> Currently, the majority of war crimes are tried before the Court of Bosnia and Herzegovina, and, increasingly, before Cantonal courts (in Federation of BiH) and District courts (in Republika Srpska), as well as the courts in District of Brčko. For the purposes of this article, only the Court of BiH's jurisprudence is relevant, as all the other levels applied Criminal Code of SFRY in ninety-nine percent of cases. It is important to note that Court of BiH is composed of trial chambers that try the cases in first degree and appeals chambers dealing with appeals. There is a possibility in certain cases to appeal this decision to the third instance (in cases where

first instance judgment was acquittal and second instance a conviction).

<sup>43</sup> *Maktouf and Damjanović v. Bosnia and Herzegovina*, App. Nos. 2312/08 and 34179/08, Eur. Ct. H.R. (2013).

<sup>44</sup> *Id.* ¶ 2.

<sup>45</sup> In doing so, the Constitutional Court did not decide whether the proceedings as a whole need to be repeated, did not decide on the termination of the imprisonment and release of the appellants, nor did it decide on the procedure by which the Court of BiH is to issue a new decision in each case, as those are the matters within the jurisdiction of the Court of BiH and are regulated by the substantive and procedural laws at the state level.

<sup>46</sup> Criminal Code of the Socialist Federal Republic of Yugoslavia (adopted Sept. 28, 1976), arts. 34, 37, July 1, 1977.

<sup>47</sup> See *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty*, April 28, 1983, ETS No. 114, available at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=&DF=&CL=ENG> (last visited Apr. 25, 2014) (Signed by BiH on Apr. 24, 2002, ratified on Jul. 12, 2002, and entered into force on Aug. 1, 2002).

<sup>48</sup> See *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in all Circumstances*, May 3, 2002, ETS No. 187, available at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=&DF=&CL=ENG> (last visited Apr. 25, 2014) (Signed by BiH on May 3, 2002, ratified on Jul. 29, 2003, and entered into force on Nov. 1, 2003).



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