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Communication No. 1760/2008

<u>Submitted by:</u>	Jean-Pierre Cochet (represented by Antoine Garnon)
<u>Alleged victim:</u>	The author
<u>State party:</u>	France
<u>Date of communication:</u>	4 December 2007 (initial submission)
<u>Document reference:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 27 February 2008 (not issued in document form)
<u>Date of adoption of Views:</u>	21 October 2010

* Re-issued for technical reasons.

** Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Retroactive effect of a law on the existence of an offence, monitoring of compliance and the penalties incurred
<i>Substantive issues:</i>	Principle of the retroactive effect of the less severe criminal statute
<i>Procedural issues:</i>	None
<i>Articles of the Covenant:</i>	15
<i>Articles of the Optional Protocol:</i>	None

On 21 October 2010, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol, in respect of communication No. 1760/2008.

[Annex]

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (one hundredth session)

concerning

Communication No. 1760/2008***

Submitted by: Jean-Pierre Cochet (represented by Antoine Garnon)

Alleged victim: The author

State party: France

Date of communication: 4 December 2007 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 2010,

Having concluded its consideration of communication No. 1760/2008, submitted to the Human Rights Committee on behalf of Mr. Jean-Pierre Cochet under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Jean-Pierre Cochet, born on 22 May 1948 in Saint-Hilaire-le-Petit, France. He claims that France has violated his rights under article 15 of the Covenant. The author is represented by Mr. Antoine Garnon. The Covenant and its Optional Protocol entered into force for France on 4 February 1980 and 17 February 1984, respectively.

*** The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Hellen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Ms. Christine Chanet did not participate in the adoption of the present decision.

An individual opinion signed by Committee members Sir Nigel Rodley and Mr Prafullachandra Natwarlal Bhagwati is appended to the text of the present Views.

The facts as submitted by the author

2.1 Between November 1987 and March 1988, the Coopérative Agricole de l'Arrondissement de Reims (CAAR, which subsequently became the cooperative COHESIS), of which the author was the director, imported over 1 million kilos of protein peas from the Netherlands and the United Kingdom. These peas were classified for tariff purposes as "other than those intended for sowing", a category which benefited from European Community aid. The peas were imported through three customs brokers, including the firm Dalsace Frères, represented by Mr. Eric Dalsace. Since the peas imported by CAAR were actually intended for sowing, a category that did not benefit from European Community aid, the customs administration initiated proceedings against the author and Mr. Dalsace for making false statements with the intent or effect of profiting from the importation. The author was additionally charged with making a false declaration of origin because the customs administration deemed that a portion of the peas had come from Hungary and not the Netherlands. The cooperative CAAR, subsequently renamed COHESIS, and the firm Dalsace Frères were held liable under civil law.

2.2 The Criminal Court of Reims applied the less severe criminal statute and handed down a ruling on 6 February 1996 annulling the proceedings brought by the customs administration, which appealed. All the administration's applications were dismissed on 5 May 1999 by the Court of Appeal of Reims. The Court ruled that the offences referred to in the proceedings had been abrogated by Act No. 92-677 of 17 July 1992, which implemented European directive No. 91-680, stipulating that the Customs Code was no longer to apply to the entry of merchandise from within the Community. The Court of Appeal also stated that article 110 of the Act of 17 July 1992, whereby the Act does not impede the prosecution, under previous legislation, of customs violations committed prior to the Act's entry into force, was applicable only to proceedings under way at the time the Act came into effect. In this case, the proceedings were not instituted until 1 August 1994, in other words, 18 months after the Act came into force. The Court of Appeal ruling was quashed on 18 October 2000 by the Criminal Chamber of the Court of Cassation. The view of this Court was that, under article 110 of the Act of 17 July 1992, the abolition of customs controls and duties as of 1 January 1993 did not impede prosecution, on the basis of previously existing legislation, of customs violations committed prior to the entry into effect of the Act; and that the date upon which such proceedings were instigated had no bearing on the applicability of the Act.

2.3 The case was remanded to the Court of Appeal of Paris, which on 14 November 2001 judged the defendants, including the author, to be guilty as charged and sentenced them, jointly with the companies deemed civilly liable, to a fine of approximately 2 million French francs to the customs administration as well as another sum of about 2 million French francs in lieu of confiscation of the imported goods. That sentence was overturned by the Criminal Chamber of the Court of Cassation on 5 February 2003 on the grounds that the defendants had not had the last word. Before the Court of Appeal of Paris, the designated remand court, COHESIS and the author explicitly cited the abolition of the criminal offence and invoked article 15 of the Covenant. In its ruling of 6 July 2006, the Court of Appeal of Paris took the view that article 110 of the Act of 17 July 1992 did not contradict the provisions of article 15 of the Covenant and, finding the defendants, including the author, guilty as charged, sentenced them, jointly with the companies held civilly liable, to a fine of approximately €300,000 and an additional sum of approximately €300,000 in lieu of confiscation of the imported goods.

2.4 In its ruling of 19 September 2007, the Criminal Chamber of the Court of Cassation declared, *inter alia*, that the Act of 17 July 1992 had a bearing only on the procedures for monitoring compliance with the rules governing aid for protein pea imports and the origin of such imports and not on the existence of the offence or the severity of the penalties and

rejected the appeal, which had also been based on the provisions of article 15 of the Covenant.

The complaint

3.1 The author considers that the State party violated article 15 of the Covenant by misinterpreting the Act of 17 July 1992 on the cessation of the application of the Customs Code within Community territory. The author notes that, under the principle of the retroactive effect of a less severe criminal statute, only acts constituting an offence on the date they were committed are punishable and only those penalties legally applicable on that date may be imposed. New legal provisions do apply, however, to offences committed before they entered into force and that are not yet subject to a final sentence, when those provisions are less severe than the old ones.¹ The author also cites article 112-4 of the French Criminal Code, which states that the immediate application of a new statute has no bearing on the status of actions carried out under the old legislation. Execution of a penalty, on the other hand, ceases where it was imposed for an act that ceases to be a criminal offence under legislation that post-dates the judgement.

3.2 The author refutes the argument put forward by the Court of Cassation that, in this case, the changes introduced by the Act of 17 July 1992 have a bearing only on the procedures for monitoring compliance with the rules governing aid for protein pea imports and the origin of such imports and not on the existence of the offence or the severity of the penalties. According to the author, this argument is flawed because, under article 110 of the Act, the offence ceased to exist the moment the Customs Code ceased to apply within Community territory. The author interprets article 15, paragraph 1, of the Covenant as referring not only to the principle of the retroactive effect of the lighter penalty, but also, by extension, the principle that a law abolishes an offence inasmuch as it abolishes all penalties.

3.3 By failing to apply the less severe statute, the author claims, the State violated the principle of the primacy of international law over domestic law. The author refers to the jurisprudence of the Court of Justice of the European Communities (CJEC), which upholds the principle of the retroactive effect of the lighter penalty, which should be applied in the national laws that implement Community law.² CJEC subsequently ruled that the same principle must be applied by domestic courts where they have to impose penalties established in Community regulations.³ CJEC invoked the principle in a case in which the change in the law affected not only the penalties, but also the conditions for bringing proceedings. The author notes that the Court of Cassation has always held that the lighter penalty principle applies only to penalties and not to offences.⁴

3.4 The author recalls that the Act of 17 July 1992 implements the Community directive on the abolition of border controls. This directive specifically provides that, from 1 January 1993, controls for tax purposes at internal borders are eliminated for all operations carried out by member States. The Act of 17 July 1992 thus had a bearing on the existence of the offence because it resulted in the abolition of the legal provision contained in the Community directive, and not just of the procedures for monitoring compliance with the rules governing aid for protein pea imports, as maintained by the Court of Cassation.

¹ French Criminal Code, art. 112-1.

² The author cites CJEC ruling of 3 May 2005, Berlusconi, case C-387/02.

³ The author cites the ruling of 8 March 2007, Campina, case C-45/06.

⁴ The author cites two rulings of the Court of Cassation: Cass 6 October 2004, application No. 0384827; and Cass 5 December 2001, application No. 0181228.

State party's observations

4.1 After declaring in a letter dated 28 April 2008 that it did not question the admissibility of the complaint, the State party submitted its observations on the merits of the case on 27 August 2008. With reference to the facts, the State party explains that the acts which the author was accused of constituted an offence of importing prohibited goods without declaring them and a category 1 customs violation, offences that are specified and sanctioned by the Customs Code, the Code of Criminal Procedure and the regulations of the European Council and the European Commission. In light of the pertinent legal provisions on the subject and the constitutional status of the principle of the retroactive effect of a less severe statute, the State party notes that article 15, paragraph 1, of the Covenant provides, *inter alia*, that if, subsequent to the commission of an offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit.

4.2 The State party asserts that, contrary to what the author claims in his communication, the Court of Cassation's interpretation of the principle of the retroactivity of a less severe criminal law under article 15, paragraph 1, of the Covenant is not relevant in this case. What is relevant is the interpretation of the scope of the Act of 17 July 1992 in this case, in view of the customs violations committed by the author. The disagreement between the author and the State party basically revolves around whether article 110 of the Act of 17 July 1992 should be considered to have abolished the criminal offence invoked by the French domestic courts. The applicability of article 15 hinges on the answer to this question. The State party recalls that the Court of Cassation's rejection of the author's argument of misinterpretation of article 15 of the Covenant was based not on the case law challenged by the author but on the fact that the changes introduced by the Act of 17 July 1992 had a bearing only on the procedures for monitoring compliance with the rules governing aid for protein pea imports and the origin of such imports and not on the existence of the offence or the severity of the penalties.

4.3 The author's argument that the Court of Cassation's case law contradicts article 15 of the Covenant was flawed because it was not applied in this case. The State party recalls the Human Rights Committee's view that it is not the Committee's task to decide in the abstract whether or not the national law of a State party is compatible with the Covenant, but only to consider whether or not there has been a violation of the Covenant in the particular case submitted to it.⁵ The prejudgement report for the Court of Cassation, presented on 9 May 2007, clearly proposed the solution adopted by the Court in its ruling of 19 September 2007. The ruling set out the issue that the court would need to resolve: namely, if the Criminal Chamber of the Court of Cassation decided that the principle established by both article 15 of the Covenant and the Court of Justice covers not only situations in which the penalty is lighter but also those in which the offence is abolished, then the court would have to determine whether the latter situation is the one that applies in this case. The State party notes that, prior to the passing of the Act of 17 July 1992, the Customs Code provided for the control of merchandise imported by the author, i.e., peas packed in new 12.5 kg packages. The Act of 17 July 1992 did away with such controls. The question then is whether the principle of the retroactivity of a less severe criminal statute applies to provisions governing controls and not the substance of the infractions. In this case the Court of Cassation's ruling of 19 September 2007 did not consider article 15 of the Covenant to apply only to the penalties but was based on the fact that the changes made by the Act of 17 July 1992 had a bearing only on the procedures for monitoring compliance with the rules governing aid for protein pea imports and the origin of such imports and not on the existence of the offence or the severity of the penalties.

⁵ Communication No. 55/1979, *MacIsaac v. Canada*, Views adopted on 14 October 1982, para. 10.

4.4 In the alternative, the State party points out that the Court of Cassation rigorously upholds the principle of the less severe criminal statute, even in financial and tax law, which means that all sanctions are lifted when the violated legislation is repealed, suspended or amended. However, the principle applies in the absence of specific provisions to the contrary. The State party stresses that a provision such as that set forth in article 110 of the Act of 17 July 1992 constitutes, not an exception to the principle of the retroactive effect of the less severe criminal statute, but a means of implementing a transitional or short-term rule. The rationale for the provision is the desire to preserve the deterrent effect and efficacy of the criminal penalty in a field where the regulations are contingent and temporary. Even legal opinion that is critical of the case law of the Court of Cassation on this point acknowledges that article 110 of the Act of 17 July 1992 was useful, or even necessary. Alerted in November 1991 to the elimination of borders from 1 January 1993, smugglers could count on over a year of what would be not just lucrative but clearly, by virtue of the retroactive less severe statute principle, unpunishable illegal trade. It is understandable, then, that the legislature would wish to impede such schemes even at the risk of coming into conflict with the Constitutional Court or the Covenant. The State party also points out that not all opinion is critical of the Court of Cassation's position: some recognize the importance of a literal interpretation of article 15 of the Covenant, which, strictly speaking, refers only to penalties and not to offences or to non-criminal laws that simply define concepts used in upholding criminal law.

Author's comments on the State party's observations

5.1 On 22 September 2008, the author, through counsel, rejected the arguments of the State party. To begin with, he refers to the initial summons to appear before the Criminal Court which he received on 11 August 1994. According to this summons, he was charged with importing prohibited goods without declaring them and a category 1 customs violation, punishable under articles 410, 426-4, 435, 414, 399, 382 and 404 to 407 of the Customs Code. In accordance with article 2 bis of the Customs Code, as derived from articles 111 and 121 of the Act of 17 July 1992, the Code does not apply to Community merchandise entering the customs territory. As it happens, only the articles mentioned above, specifying the penalties incurred, were referred to in the summons of 11 August 1994, so, since these provisions were no longer applicable from 1 January 1993, the author takes the view that the Court of Cassation's ruling misinterpreted article 110 of the Act of 17 July 1992 in finding that the article has a bearing only on the monitoring procedure and not on the penalties, when it is undeniable that the legal definition of the offence no longer exists. The author adds that, even though article 110 indeed refers only to the procedures for monitoring violations, articles 111 and 121 of the Act effectively provide for abolition of the legal definition of the offence. Under these conditions, it was impossible to hand down a conviction.

5.2 Having highlighted once again the contradictions in the case law of the Court of Cassation, the author insists that customs matters are criminal matters, as demonstrated by the referral of the case to the criminal courts, and that, consequently, the principle of the retroactivity of the less severe criminal statute is applicable in this case. The author notes that the State party itself has acknowledged that the Court of Cassation's interpretation of article 110 of the Act of 17 July 1992 contravened the Covenant, since it said that it was understandable that the legislature would wish to impede such schemes even at the risk of coming into conflict with the Constitutional Council or the Covenant. As the author sees it, this clearly constitutes an acknowledgement of a violation of article 15 of the Covenant by the State party. He also recalls that the damages he has suffered to date have been considerable because his bank accounts have been blocked by the customs administration.

5.3 On 3 October 2008, the author referred once more to the arguments put forward by the Court of Cassation in its ruling of 19 September 2007 in which it declared that

European Economic Community directive EEC 91/680 mandated the elimination of customs controls and that it was in order to implement this directive that article 111 of the Act of 17 July 1992 stated that the provisions of the Customs Code no longer applied to Community merchandise. With this finding, the Court of Cassation established a close link between customs controls and the existence of the offence, and the offence had ceased to exist because the articles of the Customs Code relating to the offence no longer applied. The author therefore claims that the Court of Cassation had resorted to subterfuge to avoid contradicting its previous ruling of 18 October 2000 on the same matter. For a long time the Court has stated that a less severe statute has retroactive effect unless it contains a specific provision to the contrary. However, this distortion of constitutional principle was in practice not serious because, prior to the Act of 17 July 1992, no less severe statute had ever actually ruled out retroactive application. Then, when the Act of 17 July 1992 stipulated the opposite, the Court of Cassation, in its ruling of 19 September 2007, chose not to directly contravene the principle of the retroactivity of criminal law by disregarding it, but did in fact do so by claiming that the Act had a bearing only on monitoring procedures and not on the offence itself.

5.4 The author closes by citing the reference made by the rapporteur in the Cochet case to the Court of Justice of the European Communities decision of 3 May 2005 in the Berlusconi case, recalling the principle of the retroactive application of the lighter penalty. The author notes that the wording of the Berlusconi decision shows that what CJEC calls the principle of the application of the lighter penalty covers not only laws that establish penalties but also laws that abolish offences. On the one hand, the decision states that article 2 of the Italian Criminal Code establishes the principle of the retroactive application of the lighter penalty, whereas in fact it gives retroactive effect to a law whose provisions are more favourable to the person found guilty; on the other hand, it invokes the principle of the application of the lighter penalty in general, even though the preliminary rulings referred in part to Italian legal provisions that in some cases abolished offences. Therefore, if CJEC uses the expression “the lighter penalty” to refer in general to a criminal statute that is less severe both in terms of the magnitude of the penalty and because it narrows or even abolishes the offence, the wording of article 15 of the Covenant should no longer be understood to refer strictly to laws that reduce the penalty. The author therefore insists that the principle of the retroactive effect of a less severe criminal statute must be applied *a fortiori* to cases in which a law does not merely reduce the penalty but actually abolishes the offence.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 Regarding the exhaustion of domestic remedies, the Committee notes that, according to the information provided by the author, all available domestic remedies have been exhausted. In the absence of any objection by the State party, the Committee finds that the conditions referred to in article 5, paragraph 2 (b), of the Optional Protocol have been met.

6.4 In the Committee’s View, the author has sufficiently substantiated, for purposes of admissibility, the claims made under article 15, paragraph 1, of the Covenant and therefore proceeds to its examination of the merits.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 With regard to the claim made under article 15, paragraph 1, of the Covenant, the Committee notes that, according to the summons submitted by the author, the acts committed between November 1987 and March 1988 constituted an offence of importing prohibited goods without declaring them and a category 1 customs violation, offences specified and penalized under articles 410, 426-4, 435, 414, 399, 382 and 404 to 407 of the Customs Code, article 750 of the Code of Criminal Procedure, and EEC Council regulations No. 1431/82 and No. 2036/82 and Commission regulation No. 3540/85. The Committee notes, as the author stated, that these provisions ceased to be applicable after 1 January 1993, the date upon which the regime established by the Act of 17 July 1992 entered into force. It also notes that the criminal proceedings brought against the author on the basis of those violations were instituted 18 months after the entry into force of the said regime, on 1 August 1994. The Committee observes that these facts are not disputed by the State party. The issue here is therefore clearly the disappearance of an offence and the corresponding penalties, since the acts that were the subject of the charges brought by the State party ceased to constitute criminal offences on 1 January 1993. The Act of 17 July 1992 therefore clearly refers to a regime of offences and the associated penalties and not just monitoring procedures as claimed by the State party.

7.3 As regards the scope of the application of article 15, paragraph 1, of the Covenant, the Committee finds that the article should not be interpreted narrowly: since the article refers to the principle of the retroactive effect of a lighter penalty, it should be understood to refer *a fortiori* to a law abolishing a penalty for an act that no longer constitutes an offence. Moreover, reference is made to article 112-4 of the French Criminal Code, which provides that execution of a penalty ceases where it was imposed for an act that ceases to be a criminal offence under legislation that post-dates the judgement.

7.4 The Committee finds that the principle of the retroactive effect of the lighter penalty and, in this case, the non-existence of a penalty, is applicable in this case and that, consequently, article 110 of the Act of 17 July 1992 violates the principle of the retroactive effect of the less severe criminal statute under article 15 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation of article 15, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Appendix

Individual opinion of Committee members Sir Nigel Rodley and Mr Prafullachandra Natwarlal Bhagwati

We agree that there was a violation of the Covenant, involving article 15, but not for the reasons given by the Committee, which we believe go well beyond what was necessary to decide the case and which over-interpret article 15.

The committee's reasoning, particularly in paragraph 7.3, would make it possible for the gravest violations of, say, United Nations Security Council sanctions or rules adopted within the framework of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) to enjoy impunity just as long as their acts or their responsibility for the acts remained undetected until the sanctions were eventually lifted once the situation justifying them had been resolved or the previously endangered species no longer required protection.

We find this preposterous and suspect that not many national customs laws would be consistent with it. Nor is it dictated by the plain terms of the third sentence of article 15, paragraph 1. This refers to the 'criminal offence', rather than the acts or omissions constituting the criminal offence (see article 15, paragraph 1, first sentence). The criminal offence of making a false customs declaration persists.

Rather, for us the crux of the case lies in the fact that, *as a matter of French law*, the normal situation in the event of a change in the customs regulations in question would have been that the author would indeed have benefited from the application of the 'less severe criminal statute' (see paragraph 4.4). The fact that the Act of 17 July 1992 expressly excluded such a benefit, however understandable the purpose – to exclude abuse during the transitional period between the passage of the Act and its entry into force – hardly justifies including the authors in the same category. Accordingly, it seems to us that the law as it applied to the author was incompatible with article 15, paragraph 1, read together with article 26 (equality under the law).

However, if French law had not, in general, taken the expansive view of article 15, paragraph 1, third sentence, we should have had no difficulty in finding a non-violation. For the alternative, at least if one follows the approach of the Committee, would mean that impunity of the sort we have mentioned would flourish.

[signed] Nigel Rodley

[signed] Prafullachandra Natwarlal Bhagwati

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]