Information Note on the Court’s case-law No. 165

July 2013

Maktouf and Damjanović v. Bosnia and Herzegovina [GC] - 2312/08 and 34179/08

Judgment 18.7.2013 [GC]

Article 7

Article 7-1

Heavier penalty

Retrospective application of criminal law laying down heavier sentences for war crimes than the law in force when the offences were committed: *violation*

Facts – Both applicants were convicted by the Court of Bosnia and Herzegovina (“the State Court”) of war crimes committed against civilians during the 1992-1995 war. War crimes chambers were set up within the State Court in early 2005 as part of the International Criminal Tribunal for the former Yugoslavia’s completion strategy. The State Court, which consists of international and national judges, can decide to take over war crime cases because of their sensitivity or complexity, and can transfer less sensitive and complex cases to the competent courts of the two entities of Bosnia and Herzegovina (the Entity courts”).

The first applicant (Mr Maktouf) was convicted by the State Court in July 2005 of aiding and abetting the taking of two civilian hostages as a war crime and sentenced to five years’ imprisonment under the 2003 Criminal Code of Bosnia and Herzegovina (“the 2003 Criminal Code”). In April 2006, an appeals chamber of the court confirmed his conviction and the sentence after a fresh hearing with the participation of two international judges. The second applicant (Mr Damjanović), who had taken a prominent part in the beating of captured Bosniacs in Sarajevo in 1992, was convicted in June 2007 of torture as a war crime and sentenced to eleven years’ imprisonment under the 2003 Criminal Code.

In their applications to the European Court, both men complained, *inter alia*, that the State Court had retroactively applied to them a more stringent criminal law, the 2003 Criminal Code, than that which had been applicable at the time of their commission of the offences, namely the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (“the 1976 Criminal Code”) and that they had received heavier sentences as a result.

Law – Article 7: The Court reiterated that it was not its task to review *in abstracto* whether the retroactive application of the 2003 Criminal Code in war crimes cases was, *per se*, incompatible with Article 7. That matter had to be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts had applied the law whose provisions were most favourable to the defendant concerned.

The definition of war crimes was the same in both the 1976 and the 2003 Criminal Codes and the applicants did not dispute that their acts had constituted criminal offences defined with sufficient accessibility and foreseeability at the time they were committed. What was at issue was therefore not the lawfulness of their

convictions but the different sentencing frameworks applicable to war crimes under the two Codes.

The State Court had sentenced the first applicant to five years' imprisonment; the lowest possible sentence for aiding and abetting war crimes under the 2003 Code, whereas under the 1976 Code his sentence could have been reduced to one year. Likewise, the second applicant had been sentenced to eleven years' imprisonment, slightly above the ten-year minimum applicable in his case under the 2003 Code. However, under the 1976 Code, it would have been possible to impose a sentence of only five years.

As the applicants had received sentences at the lower end of the sentencing range, it was of particular relevance that the 1976 Code was more lenient in respect of the minimum sentence. In this context, the fact that the 2003 Code may have been more lenient as regards the maximum sentence was immaterial as the crimes of which the applicants had been convicted clearly did not belong to the category to which the maximum sentence was applicable. Further, while the Court accepted that the applicants' sentences were within the latitude of both the 1976 Criminal Code and the 2003 Criminal Code, so that it could not be said with any certainty that either applicant would have received lower sentences had the 1976 Code been applied, the crucial point was that the applicants could have received lower sentences if it had been. Accordingly, since there was a real possibility that the retroactive application of the 2003 Code had operated to the applicants' disadvantage as regards sentencing, it could not be said that they had been afforded effective safeguards against the imposition of a heavier penalty.

Nor was the Court able to agree with the Government's argument that if an act was criminal under "the general principles of law recognised by civilised nations" (Article 7 § 2 of the Convention) at the time it was committed then the rule of non-retroactivity of crimes and punishments did not apply. That argument was inconsistent with the intention of the drafters of the Convention that Article 7 § 1 contained the general rule of non-retroactivity and that Article 7 § 2 was only a contextual clarification, included to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of crimes committed during that war. It was thus clear that the drafters of the Convention had not intended to allow for any general exception to the rule of non-retroactivity.

With regard to the Government's argument that a duty under international humanitarian law to punish war crimes adequately required that the rule of non-retroactivity be set aside in the applicants' case, the Court noted that that rule also appeared in the Geneva Conventions and their Additional Protocols. Moreover, as the applicants' sentences were within the compass of both the 1976 and 2003 Criminal Codes, the Government's argument that the applicants could not have been adequately punished under the former Code was clearly unfounded.

Accordingly, there had been a violation of Article 7 in the particular circumstances of the applicants' cases. However, the Court emphasised that that conclusion did not indicate that lower sentences ought to have been imposed, but simply that the sentencing provisions of the 1976 Code should have been applied.

Conclusion: violation (unanimously).

Article 6 § 1: The first applicant had also complained that the State Court was not independent for the purposes of Article 6 § 1, notably because two of its members had been appointed by the Office of the High Representative in Bosnia

and Herzegovina for a renewable period of two years. The European Court found no reasons to doubt that the international judges of the State Court were independent of the political organs of Bosnia and Herzegovina, of the parties to the case and of the institution of the High Representative. Their appointment had precisely been motivated by a desire to reinforce the independence of the State Court's war crimes chambers and to restore public confidence in the judicial system. The fact that the judges in question had been seconded from amongst professional judges in their respective countries represented an additional guarantee against outside pressure. Although their term of office was relatively short, this was understandable given the provisional nature of the international presence at the State Court and the mechanics of international secondments.

Conclusion: inadmissible (manifestly ill-founded)

Article 14 and/or Article 1 of Protocol No. 12: As regards the applicants' complaint that their trial by the State Court rather than the Entity courts was discriminatory, the Court noted that given the large number of war-crimes cases in post-war Bosnia and Herzegovina, it was inevitable that the burden had to be shared between the State Court and the Entity courts if the respondent State was to be able to honour its Convention obligation to bring to justice those responsible for serious violations of international humanitarian law in a timely manner. Although the Court was aware that the Entity courts imposed in general lighter sentences than the State Court at the time, that difference in treatment was not to be explained in terms of personal characteristics and therefore did not amount to discriminatory treatment. Whether a case was to be heard by the State Court or an Entity court was a matter decided on a case-by-case basis by the State Court itself with reference to objective and reasonable criteria.

Conclusion: inadmissible (manifestly ill-founded).

Article 41: Finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage sustained by the applicants. Claim made by the first applicant in respect of pecuniary damage dismissed.

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