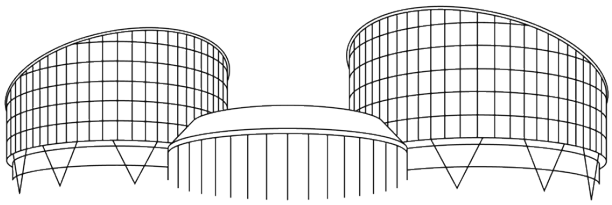

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF MAKTOUF AND DAMJANOVIĆ
v. BOSNIA AND HERZEGOVINA

(Applications nos. 2312/08 and 34179/08)

JUDGMENT

STRASBOURG

18 July 2013

This judgment is final but may be subject to editorial revision.

In the case of Maktouf and Damjanović v. Bosnia and Herzegovina,

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

Dean Spielmann, *President,*
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele,
Mark Villiger,
Isabelle Berro-Lefèvre,
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Mirjana Lazarova Trajkovska,
Nona Tsotsoria,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Kristina Pardalos,
Angelika Nußberger,
Paulo Pinto de Albuquerque,
Johannes Silvis, *judges,*

and Michael O'Boyle, *Deputy Registrar,*

Having deliberated in private on 12 December 2012 and 19 June 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 2312/08 and 34179/08) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Iraqi citizen, Mr Abduladhim Maktouf, and a citizen of Bosnia and Herzegovina, Mr Goran Damjanović, ("the applicants"), on 17 December 2007 and 20 June 2008 respectively.

2. The applicants' complaints related to criminal proceedings in which the Court of Bosnia and Herzegovina ("the State Court") had convicted and sentenced them under provisions of the 2003 Criminal Code of Bosnia and Herzegovina for war crimes against civilians committed during the 1992-95 war. They complained that the failure of the State Court to apply the 1976 Criminal Code of the former Socialist Federal Republic of Yugoslavia ("the former SFRY"), which had been applicable at the time of the commission of the war crimes, had amounted to a violation of the rule of non-retroactivity of punishments, set forth in Article 7 of the Convention. They further relied on Article 14 taken in conjunction with Article 7 of the Convention and

Article 1 of Protocol No. 12. Mr Maktouf also relied on Article 6 § 1 of the Convention.

3. The applications were allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 31 August 2010 the President of that Section decided to give notice of the applications to the Government of Bosnia and Herzegovina ("the Government"). It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1). On 10 July 2012 a Chamber of the Fourth Section, composed of the following judges: Lech Garlicki, David Thór Björgvinsson, Päivi Hirvelä, George Nicolaou, Zdravka Kalaydjieva, Nebojša Vučinić and Ljiljana Mijović, and also of Lawrence Early, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

4. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. Faris Vehabović, the judge elected in respect of Bosnia and Herzegovina, was unable to sit in the case (Rule 28). The Government accordingly appointed Angelika Nußberger, the judge elected in respect of Germany, to sit in his place (Article 26 § 4 of the Convention and Rule 29 § 1).

5. The Grand Chamber decided to join the applications (Rule 42 § 1).

6. The parties filed written observations on the admissibility and merits. In addition, third-party comments were received from the Office of the High Representative, which had been given leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 §§ 3 and 4).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 12 December 2012 (Rule 54 § 3). There appeared before the Court:

(a) *for the Government*
Ms Z. IBRAHIMOVIĆ, *Deputy Agent*,
Ms S. MALEŠIĆ, *Assistant Agent*,
Mr H. VUČINIĆ,
Ms M. KAPETANOVIĆ, *Advisers*;

(b) *for the applicants*
Mr S. KREHO,
Mr A. LEJLIĆ
Mr A. LOZO
Mr I. MEHIĆ *Counsel*,
Mr A. KREHO,
Mr H. LOZO,
Ms N. KISIĆ, *Advisers*.

The Court heard addresses by Ms Ibrahimović and Mr Lejlić.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Relevant background

8. Following its declaration of independence from the former SFRY in March 1992, a brutal war broke out in Bosnia and Herzegovina. More than 100,000 people were killed and more than 2,000,000 others were displaced as a result of "ethnic cleansing" or generalised violence. Numerous crimes were committed during the war, including those committed by the present applicants. The following local forces were the main parties to the conflict: the ARBH[1] (mostly made up of Bosniacs[2] and loyal to the central authorities in Sarajevo), the HVO[3] (mostly made up of Croats) and the VRS[4] (mostly made up of Serbs). The conflict ended in December 1995 when the General Framework Agreement for Peace ("the Dayton Agreement") entered into force. In accordance with that Agreement, Bosnia and Herzegovina consists of two Entities: the Federation of Bosnia and Herzegovina and the Republika Srpska.

9. In response to atrocities then taking place in the territory of the former SFRY, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia ("the ICTY") as an interim institution[5]. In 2002, in order to ensure that its mission was concluded successfully, in a timely way and in coordination with domestic legal systems in the former Yugoslavia, the ICTY began devising a completion strategy[6]. That strategy was endorsed by the UN Security Council[7] and the authorities of Bosnia and Herzegovina (they enacted the necessary statutory amendments and concluded agreements with the High Representative – an international administrator appointed under the Dayton Agreement). A vital component of the strategy was the setting up of war crimes chambers within the State

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1. *Armija Republike Bosne i Hercegovine* (the Army of the Republic of Bosnia and Herzegovina).
2. Bosniacs were known as Muslims until the 1992-95 war. The term "Bosniacs" (*Bošnjaci*) should not be confused with the term "Bosnians" (*Bosanci*) which is used to denote citizens of Bosnia and Herzegovina, irrespective of their ethnic origin.
3. *Hrvatsko vijeće obrane* (the Croatian Defence Council).
4. *Vojska Republike Srpske* (the Army of the Republika Srpska).
5. Resolution 827 (1993) of 25 May 1993.
6. See the report on the judicial status of the ICTY and the prospects for referring certain cases to national courts made by the ICTY in June 2002 (S/2002/678) and the statement of the President of the UN Security Council of 23 July 2002 (S/PRST/2002/21).
7. Resolution 1503 (2003) of 28 August 2003.

Court consisting of international and national judges (see paragraphs 34-36 below).

B. The facts concerning Mr Maktouf

10. Mr Maktouf was born in 1959 and lives in Malaysia.

11. On 19 October 1993 he deliberately assisted a third party to abduct two civilians in order to exchange them for members of the ARBH forces who had been captured by the HVO forces. The civilians were freed several days later.

12. On 11 June 2004 the applicant was arrested.

13. On 1 July 2005 a Trial Chamber of the State Court found him guilty of aiding and abetting the taking of hostages as a war crime and sentenced him to five years' imprisonment under Article 173 § 1 in conjunction with Article 31 of the 2003 Criminal Code.

14. On 24 November 2005 an Appeals Chamber of that court quashed the judgment of 1 July 2005 and scheduled a fresh hearing. On 4 April 2006 the Appeals Chamber, composed of two international judges (Judge Pietro Spera and Judge Finn Lynghjem) and one national judge (Judge Hilmo Vučinić), convicted the applicant of the same offence and imposed the same sentence under the 2003 Criminal Code. As regards the sentence, it held as follows (the translation has been provided by the State Court):

> "Considering the degree of criminal responsibility of the accused and consequences of the criminal offence, as well as the fact that the accused was an accessory to the commission of the criminal offence, and considering the mitigating circumstances in favour of the accused, the Chamber applied the provisions on reduction of punishment and reduced the sentence to the maximum extent possible, applying the provision of Article 50 § 1 (a) of the [2003 Criminal Code], sentencing him to imprisonment for a term of five years, being of the opinion that the pronounced sentence can fully achieve the purpose of punishment and that the pronounced sentence will influence the accused not to commit other criminal offences in future."

15. Following the applicant's constitutional appeal, on 30 March 2007 the Constitutional Court examined the case under Articles 5, 6, 7 and 14 of the Convention and found no violation of the Convention. The decision was served on the applicant on 23 June 2007. The majority decision reads, in the relevant part, as follows:

> "42. The Constitutional Court points out that section 65 of the [State Court Act 2000], the initial text of which was imposed in a Decision taken by the High Representative and subsequently endorsed by the Parliamentary Assembly of Bosnia and Herzegovina, provides that during the transitional period, which may not exceed five years, the Panels of Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption are to be composed of national and international judges. The Criminal and Appellate Divisions may be composed of several international judges. The international judges may not be citizens of Bosnia and Herzegovina or any other neighboring state. International judges are to act as panel

judges in accordance with the relevant provisions of the Criminal Procedure Code of Bosnia and Herzegovina and in accordance with the provisions of the Law on the Protection of Witnesses and Vulnerable Witnesses of Bosnia and Herzegovina and may not be criminally prosecuted, arrested or detained, nor are they liable in civil proceedings for an opinion expressed or decision made in the scope of their official duties.

43. The High Representative '... in the exercise of the powers vested in the High Representative by Article V of Annex 10 (Agreement on Civilian Implementation of the Peace Settlement) to the General Framework Agreement for Peace in Bosnia and Herzegovina, ... under which the High Representative shall facilitate, as the High Representative deems necessary, the resolution of any difficulties arising in connection with civilian implementation..., noting that the communiqué of the Steering Board of the Peace Implementation Council issued at Sarajevo on 26 September 2003 stated that the Board took note of the UN Security Council Resolution 1503, which, *inter alia*, called on the International Community to support the work of the High Representative in setting up the war crimes chamber..., noting the Joint Recommendation for the Appointment of International Judges signed by the Registrar of the Registry ... and President of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina...,, [and] bearing in mind the relevant provisions of the [State Court Act 2000],' on 24 February and 28 April 2005, took Decisions on the Appointment of International Judges Finn Lynghjem and Pietro Spera to Section I for War Crimes of the Criminal and Appellate Divisions of the [State Court].

44. Under the aforementioned Decisions on Appointment, international judges are to serve for a term of two years and are eligible for reappointment as prescribed by law. International judges may not discharge duties which are incompatible with their judicial service. All other requirements concerning the judicial duty referred to in the [State Court Act 2000] apply to these appointments to the greatest extent possible. The international Registrar of the Registry shall inform the High Representative of any event which may prevent the judge from discharging his/her duties. During the mandate, the judge is to comply with all standards relating to professional conduct as prescribed by the [State Court]. The appointed international judge is to discharge his/her duties in accordance with the laws of Bosnia and Herzegovina and take decisions on the basis of his/her knowledge [and] skills and in a conscientious, responsible and impartial manner, strengthening the rule of law and protecting individual human rights and freedoms as guaranteed by the Constitution of Bosnia and Herzegovina and the European Convention.

...

46. The competences of the Divisions of the [State Court] to which international judges are appointed include, beyond any doubt, certain matters derived from international law. The acknowledgment of the supranational nature of international criminal law, established through the case-law of the Nuremberg and Tokyo Military Tribunals, the Tribunal in The Hague and the Tribunal for Rwanda, also includes international criminal tribunals. This certainly includes the situation in which a certain number of international judges are appointed to national courts. The High Representative appointed international judges to the [State Court] in accordance with the powers vested in him according to the UN Security Council's resolutions, adopted in accordance with Chapter VII of the UN Charter and the Recommendation of the Registry pursuant to the Agreement of 1 December 2004, which was also signed by the President of the High Judicial and Prosecutorial Council; it is particularly

important that the High Judicial and Prosecutorial Council, an independent body competent to appoint national judges, was involved in the procedure preceding the appointment.

47. The Constitutional Court holds that the international judges who were members of the Panel which rendered the contested verdict were appointed in a manner and in accordance with a procedure which complied with the standards concerning a fair trial provided for in Article 6 of the European Convention. In addition, the [State Court Act 2000], the Agreement of 1 December 2004 and the decisions on [their] appointment created the prerequisites and mechanisms which secure the independence of [the] judges from interference or influence by the executive authority or international authorities. Judges appointed in this manner are obliged to respect and apply all the rules which generally apply in national criminal proceedings and which comply with international standards. Their term of office is defined and their activities are monitored during this period. The reasoning behind their appointment was the need to establish and strengthen national courts in the transitional period and to support the efforts of these courts in establishing responsibility for serious violations of human rights and ethnically motivated crimes. It is therefore aimed at securing the independence and impartiality of the judiciary and administering justice. Even the fact that the manner of appointment was changed by the subsequent Agreement of 26 September 2006, so that the High Judicial and Prosecutorial Council of Bosnia and Herzegovina has become responsible for the appointment of international judges, does not in itself automatically imply that their original appointments, in the manner provided for at the time of the contested verdicts, were contrary to the principles of independence of the court in terms of Article 6 § 1 of the European Convention. The Constitutional Court holds that the appellant failed to submit convincing arguments and evidence in support of the allegations relating to a lack of independence on the part of the international judges. As to the appellant's allegations concerning the lack of independence of the national judge, on the ground that he is a person with 'insufficient experience', the Constitutional Court finds that these allegations are *prima facie* ill-founded and do not require any extensive examination. Taking all of the above into account, the Constitutional Court concludes that the appellant's allegations concerning the lack of independence and related violation of the standards relating to the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention are unfounded.

...

60. One of the appellant's key arguments refers to the relationship between the criminal proceedings in issue and Article 7 of the European Convention, namely the fact that, as the appellant stated, he was sentenced under the [2003 Criminal Code] rather than under the [1976 Criminal Code], valid at the time of the offence, which provided for a more lenient sanction.

...

65. In this particular case, the appellant acknowledges that, under the regulations applicable at the material time, the offence for which he was convicted constituted a criminal offence when it was committed. However, he expressly refers to the application of the substantive law in his case and examines primarily the concept of a 'more lenient punishment', i.e. 'more lenient law'. He considers that the [1976 Criminal Code], in force when the criminal offence for which he was convicted was committed, and in respect of which, *inter alia*, the death penalty was prescribed for

the severest forms, was a more lenient law than the [2003 Criminal Code], which prescribes a punishment of long-term imprisonment for the severest forms of the criminal offence in question.

...

69. In this context, the Constitutional Court finds that it is simply not possible to 'eliminate' the more severe sanction applicable under both the earlier and later laws, and apply only the other, more lenient, sanctions, with the effect that the most serious crimes would in practice be inadequately punished. However, the Constitutional Court will not provide detailed reasons or analysis of these regulations, but will focus on the exemptions to the obligations arising under Article 7 § 1 of the European Convention, which are regulated, as is generally accepted, by Article 7 § 2.

70. In such a situation, the Constitutional Court notes that Article 7 § 2 of the European Convention refers to 'the general principles of law recognized by civilised nations', and Article III (3) (b) of the Constitution of Bosnia and Herzegovina establishes that 'the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.' It follows that these principles constitute an integral part of the legal system in Bosnia and Herzegovina, even without the special ratification of Conventions and other documents regulating their application, and thus also include the 1993 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former SFRY.

71. Further, the Constitutional Court draws attention to the fact that the Constitution of Bosnia and Herzegovina is part of an international agreement and, while this fact does not diminish the Constitution's importance, it clearly indicates the position of international law within the legal system of Bosnia and Herzegovina, so that a number of international conventions, such as the Convention on the Prevention and Punishment of the Crime of Genocide (1948) and Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) and the Additional Protocols I-II (1977), have a status equal to that of constitutional principles and are directly applied in Bosnia and Herzegovina. It should be mentioned that the former SFRY was signatory to the said Conventions, and that Bosnia and Herzegovina, as an internationally recognised subject which declared its independence on 6 March 1992, accepted all of the Conventions ratified by the former SFRY and, thereby, the aforementioned Conventions, which were subsequently included in Annex 4, that is, the Constitution of Bosnia and Herzegovina.

72. The wording of Article 7 § 1 of the European Convention is limited to those cases in which an accused person is found guilty and convicted of a criminal offence. However, Article 7 § 1 of the European Convention neither prohibits the retrospective application of laws nor includes the *non bis in idem* principle. Further, Article 7 § 1 of the European Convention could not be applied to cases such as those referred to in the United Kingdom's War Damages Act 1965, which amended with retrospective effect the common-law rule granting compensation for private property in certain wartime circumstances.

73. The Constitutional Court notes that Article 7 § 1 of the European Convention concerns criminal offences 'under national or international law'. The Constitutional Court also notes, in particular, the interpretation of Article 7 provided in a number of texts dealing with this issue, which are based on the European Court's position that a

conviction resulting from a retrospective application of national law does not constitute a violation of Article 7 of the European Convention where such a conviction is based on an act which was a crime under 'international law' when committed. This position is particularly relevant in respect of the present case, and of similar cases, given that the main point of the appeal refers to the application of primarily international law, that is, the Convention on the Prevention and Punishment of the Crime of Genocide (1948) and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) and the Additional Protocols I-II (1977), rather than to the application of one or another text of criminal law, irrespective of their content or stipulated sanctions.

74. In addition, with regard to the retrospective application of criminal legislation, the Constitutional Court stresses that Article 7 of the European Convention was formulated immediately after World War II with the particular intention of encompassing the general principles of law recognised by civilised nations, where the notion of 'civilised nations' was adopted from Article 38 of the Statute of the International Court of Justice (ICJ), the case-law of which is generally recognized as the third formal source of international law. In other words, the Statute of the International Court of Justice is applicable in respect of member states of the ICJ, and the rules established by it are regarded as a source of law, which concern even municipal authorities. Both the Statute of the International Court of Justice and Article 7 of the European Convention exceed the framework of national law, and refer to 'nations' in general. Accordingly, the Constitutional Court holds that the standards for their application should be looked for in this context, and not merely within a national framework.

75. The Constitutional Court further notes that the *travaux préparatoires* refer to the wording in paragraph 2 of Article 7 of the European Convention, which is calculated to 'make it clear that Article 7 does not have any effect on the laws which were adopted in certain circumstances after World War II and intended for punishment of war crimes, treason and collaboration with the enemy, and it is not aimed at either moral or legal disapproval of such laws' (see *X v. Belgium*, no. 268/57, Yearbook 1 (1957); ... compare *De Becker v. Belgium* no. 214/56), Yearbook 2 (1958)). In fact, the wording of Article 7 of the European Convention is not restrictive and must be construed dynamically so to encompass other acts which imply immoral behaviour that is generally recognized as criminal under national laws. In view of the above, the United Kingdom's War Crimes Act 1991 confers retrospective jurisdiction on the UK courts in respect of certain grave violations of the law, such as murder, manslaughter or culpable homicide, committed in German-held territory during the Second World War

76. In the Constitutional Court's opinion, all of the above confirms that war crimes are 'crimes according to international law', given the universal jurisdiction to conduct proceedings, so that convictions for such offences would not be inconsistent with Article 7 § 1 of the European Convention under a law which subsequently defined and determined certain acts as criminal and stipulated criminal sanctions, where such acts did not constitute criminal offences under the law that was applicable at the time the criminal offence was committed. On 4 May 2000 the European Court of Human Rights issued a decision in the case of *Naletilić v. the Republic of Croatia* (no. 51891/99). It follows from that decision that the applicant was charged by the Prosecutor's Office of the International Criminal Tribunal for the former Yugoslavia with war crimes committed in the territory of Bosnia and Herzegovina, and that he submitted complaints that were identical to those of the appellant in the present case,

i.e. he called for the application of 'more lenient law'. He argued that the Criminal Code of the Republic of Croatia stipulated a more lenient criminal sanction than the Statute of the International Criminal Tribunal for the former Yugoslavia, and called for application of Article 7 of the European Convention. In its decision, the European Court of Human Rights considered the application of Article 7 and emphasised the following: 'As to the applicant's contention that he might receive a heavier punishment by the ICTY than he might have received by domestic courts if the latter exercised their jurisdiction to finalise the proceedings against him, the Court notes that, even assuming Article 7 of the Convention to apply to the present case, the specific provision that could be applicable to it would be paragraph 2 rather than paragraph 1 of Article 7 of the Convention. This means that the second sentence of Article 7 paragraph 1 of the Convention invoked by the applicant could not apply. It follows that the application is manifestly ill-founded ... and, therefore, must be rejected ...'

77. Finally, the Constitutional Court points out that the Nuremberg and Tokyo War Crimes Trials were conducted in 1945 and 1946, after World War II, in respect of crimes that were only subsequently, i.e. by the Geneva Convention, defined as acts amounting to war crimes, crimes against humanity, crimes of genocide, etc. Aggressive war was defined as an 'international crime', as confirmed by the International Law Commission in its Yearbook of 1957, Vol. II. Related discussions on the principle of *nullum crimen nulla poena sine lege* were also held at that time. This is also valid in respect of the 1993 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former SFRY.

78. It is quite clear that the concept of individual criminal responsibility for acts committed contrary to the Geneva Convention or appropriate national laws is very closely related to that of human rights protection, since human-rights and related conventions concern the right to life, the right to physical and emotional integrity, prohibition of slavery and torture, prohibition of discrimination, etc. In the Constitutional Court's opinion, it seems that an absence of protection for victims, i.e. inadequate sanctions for perpetrators of crime, is not compatible with the principle of fairness and the rule of law as embodied in Article 7 of the European Convention, paragraph 2 of which allows this exemption from the rule set out in paragraph 1 of the same Article.

79. In view of the above, and having regard to the application of Article 4a of the [2003 Criminal Code] in conjunction with Article 7 § 1 of the European Convention, the Constitutional Court concludes that, in the present case, the application of the [2003 Criminal Code] in the proceedings conducted before the [State Court] does not constitute a violation of Article 7 § 1 of the European Convention."

16. The relevant part of the dissenting opinion of Judge Mato Tadić, attached to that decision, reads as follows:

"Pursuant to Article 41 § 2 of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 60/50), I hereby give my separate dissenting opinion, in which I dissent from the opinion of the majority of the Judges of the Constitutional Court of Bosnia and Herzegovina in the aforesaid decision, for the following reasons:

...

It is my opinion that the more lenient law should be applied before the domestic courts, i.e. the law which was in force when the criminal offence was committed. It is not easy to give an answer as to which law is more lenient, and this legal issue is much more complex than it appears. Taking into account around ten criteria that have been developed through theory and practice, one may conclude that in the instant case the prescribed penalty is a key factor which is relevant to the question of which law is the more lenient. Given that the same criminal offence existed (Article 142 of the [1976 Criminal Code]) under the criminal legislation of the former Yugoslavia, which Bosnia and Herzegovina inherited by its 1992 Decree, and which provided for a penalty of five years' imprisonment or the death penalty, while the new criminal legislation applied in the instant case (Article 173 of the [2003 Criminal Code]) provides for a penalty of ten years' imprisonment or long-term imprisonment, the basic question is which law is more lenient. At first sight, the [2003 Criminal Code] is more lenient, since it does not provide for the death penalty. However, taking into account that subsequent to the entry into force of the Washington Agreement and the Constitution of the Federation of Bosnia and Herzegovina in 1994, the death penalty was abolished, as was merely confirmed by the Constitution of Bosnia and Herzegovina from 1995, and taking into account the positions of the ordinary courts in Bosnia and Herzegovina, the Entities and the Brčko District (Supreme Court of the Federation of Bosnia and Herzegovina, Supreme Court of the Republika Srpska and Appellate Court of the Brčko District) that the death penalty was not to be pronounced (this position was also taken by the Human Rights Chamber in the case of *Damjanović and Herak v. Federation of Bosnia and Herzegovina*), it appears that the 1992 law is more lenient. According to the above-mentioned court positions and the law, the maximum term of imprisonment that can be pronounced for this criminal offence is 20 years.

Reference to Article 7 § 2 of the European Convention is irrelevant in the instant case. Article 7 § 2 of the European Convention has the primary task of providing a basis for criminal prosecution for violations of the Geneva Conventions before the international bodies established to deal with such cases, for example the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and to provide a legal basis for cases pending before domestic courts where the domestic legislation failed to prescribe the actions in question as criminal offences. In other words, this is the case where the legislature failed to include all of the elements characterising the said offences as referred to in the Geneva Conventions. This case does not raise that issue. The criminal offence in question existed in the domestic legislation, both when the offence was committed and at the time of trial, and therefore all of the mechanisms of criminal law and safeguarded constitutional rights should be consistently applied, including the rights guaranteed under the European Convention. The *Naletelić* case is irrelevant here, because it concerned an international prosecutor who accused [the applicant] before an international tribunal which had been established on a special basis and is vested with the powers defined by the Resolution of the United Nations and its Statute; it does not apply national legislation, but rather its own procedures and sanctions/penalties. If it were otherwise, a very small number of accused persons would respond to summons for proceedings before that court. Thus, I am of the opinion that the position of the European Court of Human Rights in the *Naletelić* case was absolutely correct, but that this position cannot be applied in the instant case.

I consider that extensive reference to an international court is absolutely unnecessary, such as reference to its jurisdiction, etc., since the issue here is simply the domestic court conducting a trial in compliance with national legislation, and does not involve a case which was transferred to an international tribunal.

For the most part, the *Naletelić* decision deals with history (Nuremberg, Tokyo) and, generally, an international aspect which is completely unnecessary in the instant case, because our national legislation, as pointed out above, incorporated this criminal offence and, when the offence was committed, the sanction was already prescribed, unlike the Nuremberg case. Moreover, the appellant is not challenging the aforesaid. It is in fact the appellant himself who pointed out that the national legislation had the incriminated acts coded as a criminal offence and sanctioned, and the appellant is only asking that it be applied. He also stated that, on account of the failure to apply Article 142 of the inherited [1976 Criminal Code] instead of the [2003 Criminal Code], there had been a violation of the Constitution and of Article 7 § 1 of the European Convention.

Wishing to keep this explanation brief, I will recollect the opinion of Mr Antonio Cassese, the esteemed professor of Florence State University, who was appointed President of the International Criminal Tribunal in The Hague. In a 2003 document entitled 'Opinion on the Possibility of Retroactive Application of Some Provisions of the New Criminal Code of Bosnia and Herzegovina', Professor Cassese concluded as follows: 'Finally, let us deal with the issue whether the [State Court] should apply the more lenient sanction in the event of a crime for which the new criminal code prescribes a graver penalty than that envisaged by the former law. The reply to this question can only be affirmative. This conclusion rests on two legal bases: first, there is a general principle of international law according to which, if a single crime is envisaged in two successive provisions with one imposing a less strict penalty, that penalty should be determined according to the *favor libertatis* principle; secondly, this principle is explicitly mentioned in Article 7 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, wherein it is stated that no heavier penalty shall be imposed than the one that was applicable at the time the criminal offence was committed. Accordingly, the [State Court] should always apply the more lenient penalty whenever there is a difference in length of penalty when the former is compared with the new criminal provision. It is clear that retroactive application of criminal code is related to the penalty only and not to other elements of this Article.'

...

For the aforesaid reasons, I could not agree fully with the opinion of the majority which is presented in this decision."

17. On 12 June 2009 the applicant completed his sentence and left the country soon afterwards.

C. The facts concerning Mr Damjanović

18. Mr Damjanović was born in 1966. He is still serving his sentence in Foča Prison.

19. On 2 June 1992, in the course of the war in Bosnia and Herzegovina, he played a prominent part in the beating of captured Bosniacs in Sarajevo, in an incident which lasted for one to three hours and was performed using rifles, batons, bottles, kicks and punches. The victims were afterwards taken to an internment camp.

20. On 17 October 2005 a Pre-Trial Chamber of the State Court decided to take over this case from the Sarajevo Cantonal Court, where it had been pending for years, in consideration of its sensitivity (the case concerned torture of a large number of victims) and the better facilities available for witness protection at the State Court (a higher risk of witness intimidation at the Entity level). It relied on the criteria set out in paragraph 40 below and Article 449 of the 2003 Code of Criminal Procedure.

21. On 26 April 2006 the applicant was arrested.

22. On 18 June 2007 a Trial Chamber of the State Court convicted him of torture as a war crime and sentenced him to eleven years' imprisonment for that crime under Article 173 § 1 of the 2003 Criminal Code. An Appeals Chamber of the same court upheld that judgment on 19 November 2007. The second-instance judgment was served on the applicant on 21 December 2007.

23. On 20 February 2008 the applicant lodged a constitutional appeal. It was dismissed as out of time on 15 April 2009.

II. RELEVANT DOMESTIC LAW AND PRACTICE AND RELEVANT INTERNATIONAL MATERIALS

A. Applicable substantive law in war crimes cases

1. General principles

24. In accordance with its emergency powers[8], on 24 January 2003 the Office of the High Representative imposed the 2003 Criminal Code. The Code entered into force on 1 March 2003. It was subsequently endorsed by the Parliamentary Assembly of Bosnia and Herzegovina[9]. Article 3 thereof provides that no punishment or other criminal sanction may be imposed on any person for an act which, at the time when it was committed, did not constitute a criminal offence under national or international law and for which a punishment was not prescribed by law. Furthermore, in accordance with Article 4 of that Code, the law that was in effect at the time when a criminal offence was committed applies to the offender; however, if the law has been amended after the commission of the offence, the law that is more lenient to the offender must be applied. In January 2005, Article 4a was

8. For more information about those powers, also known as the "Bonn powers", see the Venice Commission's Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative (document CDL-AD(2005)004 of 11 March 2005).

9. Official Gazette of Bosnia and Herzegovina nos. 3/03, 37/03, 32/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07 and 8/10.

added to the 2003 Criminal Code. Like Article 7 § 2 of the Convention, it stipulates that the provisions of Articles 3 and 4 of the Criminal Code must 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 international law.

25. In line with those principles, the domestic courts have, in cases concerning war crimes, been applying either the 1976 Criminal Code[10] or, if it was considered to be more lenient to an offender, the 2003 Criminal Code. Since the intermediate Entities' Codes (the 1998 Criminal Code of the Federation of Bosnia and Herzegovina[11] and the 2000 Criminal Code of the Republika Srpska[12]) have rarely, if ever, been applied in such cases, they are irrelevant to the present applicants.

2. The 1976 Criminal Code

26. During the war in Bosnia and Herzegovina, the 1976 Criminal Code was in force throughout the country. It remained in force in the Federation of Bosnia and Herzegovina until 1998 and in the Republika Srpska until 2000 (when it was repealed and replaced by the Entities' Codes mentioned in paragraph 25 above). Under that Code, war crimes were punishable by imprisonment for a term of 5-15 years or, for the most serious cases, the death penalty; a 20-year prison term could also be imposed instead of the death penalty (see Articles 37, 38 and 142 thereof). Aiders and abettors of war crimes (such as Mr Maktouf) were to be punished as if they themselves had committed war crimes, but their punishment could also be reduced to one year's imprisonment (Articles 24, 42 and 43 of that Code). The relevant Articles read as follows:

Article 24 § 1

"Anybody who intentionally aids another in the commission of a criminal act shall be punished as if he himself had committed it, but the sentence may also be reduced."

Article 37 § 2

"The death penalty may be imposed only for the most serious criminal acts when so provided by statute."

10. Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90.
11. Official Gazette of the Federation of Bosnia and Herzegovina nos. 43/98, 2/99, 15/99, 29/00, 59/02 and 19/03.
12. Official Gazette of the Republika Srpska nos. 22/00, 33/00 and 37/01.

Article 38 §§ 1 and 2

"The sentence of imprisonment may not be shorter than 15 days or longer than 15 years.

The court may impose a sentence of imprisonment for a term of 20 years in respect of criminal acts eligible for the death penalty."

Article 42

"The court may impose a sentence below the limit prescribed by statute, or impose a milder type of sentence:

(a) when it is provided by statute that the sentence may be reduced [as in Article 24 § 1 of this Code];

(b) when it finds that such extenuating circumstances exist which indicate that the aims of punishment can be attained by a lesser sentence."

Article 43 § 1

"Where conditions exist for the reduction of sentence referred to in Article 42 of this Code, the court shall reduce the sentence within the following limits:

(a) if a period of three or more years' imprisonment is prescribed as the minimum sentence for a criminal act, this may be reduced to one year's imprisonment;

..."

Article 142 § 1

"Whoever in violation of the rules of international law effective at the time of war, armed conflict or occupation, orders or perpetrates ... torture, ... taking of hostages, ... shall be punished by imprisonment for a minimum term of five years or by the death penalty."

27. The death penalty could no longer be imposed after the entry into force of the Dayton Agreement on 14 December 1995. In particular, pursuant to Annexes 4 and 6 thereto, Bosnia and Herzegovina and its Entities must secure to all persons within their jurisdiction the rights and freedoms provided in the Convention and its Protocols (including Protocol No. 6 on the Abolition of the Death Penalty) and in the other human rights agreements listed therein (including the Second Optional Protocol to the International Covenant on Civil and Political Rights on the death penalty). The domestic authorities have always taken those provisions to mean that no one may be condemned to the death penalty or executed in

peacetime, even in respect of criminal offences committed during the 1992-95 war[13].

3. The 2003 Criminal Code

28. Under the 2003 Criminal Code, war crimes attract imprisonment for a term of 10-20 years or, in most serious cases, long-term imprisonment for a term of 20-45 years (Articles 42 and 173 thereof). Aiders and abettors of war crimes (such as Mr Maktouf) are to be punished as if they themselves committed war crimes, but their punishment could also be reduced to five years' imprisonment (see Articles 31, 49 and 50 of that Code). The relevant Articles read as follows:

Article 31 § 1

"Anybody who intentionally aids another in the commission of a criminal act shall be punished as if he himself had committed it, but the sentence may also be reduced."

Article 42 §§ 1 and 2

"The sentence of imprisonment may not be shorter than 30 days or longer than 20 years.

For the most serious criminal acts perpetrated with intent, imprisonment for a term of 20 to 45 years may exceptionally be prescribed (long-term imprisonment)."

Article 49

"The court may set the sentence below the limit prescribed by statute, or impose a milder type of sentence:

(a) when it is provided by statute that the sentence may be reduced [as in Article 31 § 1 of this Code];

(b) when it finds that such extenuating circumstances exist which indicate that the aims of punishment can be attained by a lesser sentence."

Article 50 § 1

"Where conditions exist for the reduction of sentence referred to in Article 49 of this Code, the court shall reduce the sentence within the following limits:

(a) if a period of ten or more years' imprisonment is prescribed as the minimum sentence for a criminal act, it may be reduced to five years' imprisonment;

13. See the decision of the Human Rights Chamber CH/97/69 of 12 June 1998 in the *Herak* case, and decision of the Supreme Court of the Federation of Bosnia and Herzegovina Kž-58/99 of 16 March 1999 in a genocide case, reducing a 40-year prison sentence to a 20-year prison sentence.

..."

Article 173 § 1

"Whoever in violation of the rules of international law effective at the time of war, armed conflict or occupation, orders or perpetrates ... torture, ... taking of hostages, ... shall be punished by imprisonment for a minimum term of ten years' or long-term imprisonment."

4. Sentencing practices

29. The Entity courts and the State Court have interpreted the principles outlined in paragraph 24 above differently in war crimes cases. With a few exceptions[14], the Entity courts generally apply the 1976 Code. In contrast, the State Court initially held that the 2003 Code was always more lenient and applied it in all cases. In March 2009, however, the State Court began applying a new approach, which was to establish on a case-by-case basis which of the Codes was more lenient to the offender[15]. It has since applied the 1976 Code to less serious instances of war crimes[16]. At the same time, it has continued to apply the 2003 Code to more serious instances of war crimes, which were punishable by the death penalty under the 1976 Code[17], and whenever it held that the 2003 Code was more lenient to the offender for any reason[18]. It should be noted that the new approach concerns only the appeals chambers of the State Court; the trial chambers have continued to apply the 2003 Code in all war crimes cases. According to figures provided by the Government (see paragraph 63 below), appeals chambers rendered 21 decisions in war crimes cases between March 2009, when the new approach was first applied, and November 2012. They applied the 1976 Code in five of them and the 2003 Code in 16 of them. However, the application of the 1976 Code by an appeals chamber did not always lead to a reduction of penalty (in two cases[19], the appeals chamber imposed the same penalty under the 1976 Code as the trial chamber had done under the 2003 Code; in one case[20], the penalty imposed by the appeals chamber

14. See, for instance, the judgment in the *Vlahovljak* case of September 2008, in which the Supreme Court of the Federation of Bosnia and Herzegovina applied the 2003 Code.
15. Decision X-KRŽ-06/299 of 25 March 2009 in the *Kurtović* case.
16. Decisions X-KRŽ-09/847 of 14 June 2011 in the *Novalić* case; X-KRŽ-07/330 of 16 June 2011 in the *Mihaljević* case; *S1* 1 K 002590 11 Krž4 of 1 February 2012 in the *S.L.* case; S1 1 K 005159 11 Kžk of 18 April 2012 in the *Aškraba* case; and S1 1 K 003429 12 Kžk of 27 June 2012 in the *Osmić* case.
17. Decisions X-KRŽ-06/431 of 11 September 2009 in the *Kapić* case; and X-KRŽ-07/394 of 6 April 2010 in the *Đukić* case.
18. Decisions X-KRŽ-08/488 of 29 January 2009 in the *Vrdoljak* case; and X-KRŽ-06/243 of 22 September 2010 in the *Lazarević* case.
19. Decisions X-KRŽ-06/299 of 25 March 2009 in the *Kurtović* case; and *S1* 1 K 002590 11 Krž4 of 1 February 2012 in the *S.L.* case.

under the 1976 Code was even heavier than that imposed by the trial chamber under the 2003 Code).

5. Observations by other international human rights agencies

30. It would appear that the application of different Criminal Codes in war crimes cases, as described in the previous paragraph, has led to diverse sentencing practices. According to a report published by the Organisation for Security and Cooperation in Europe (OSCE) in 2008 ("Moving towards a Harmonised Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina"), the Entity courts generally imposed lighter sentences than the State Court. The relevant part of that report reads as follows:

> "Usage of different criminal codes also leads to marked discrepancies between the sentences delivered in state and entity courts for war crimes. This stems from the wide variances in the sentences enforceable under these codes. For instance, an entity court has sentenced a defendant convicted of cruel treatment of prisoners to a term of one year and eight months' imprisonment even as the State Court has sentenced another defendant charged with a comparable act to imprisonment for a period of ten-and-a-half years. On average, sentences delivered by the [State Court] in war crimes cases have been almost double the length of those delivered by entity courts."

31. In a 2011 report ("Delivering Justice in Bosnia and Herzegovina"), the OSCE held that the application of different Criminal Codes at the State- and Entity-levels could be problematic in certain types of war crimes cases. The relevant part of that report reads as follows:

> "Certainly, it is acceptable that the issue of which criminal code should be applied to war crime cases is assessed on a case-by-case basis. In many cases before entity courts, the application of the [1976] Code does not represent a serious problem in practice. In general, the cases in which the application of different codes undermines the principle of equality before the law are those in which the court, by applying the [2003] Code, could sentence the accused to a sentence higher than the 15 or 20 years maximum sentence prescribed under the [1976] Code. In these cases, the application of the [1976] Code arguably does not allow the court to deliver a sentence which is proportional to the gravity of the crimes. Nor are the sentences in those cases harmonized with practice at the state level. Another category of cases in which the application of the [1976] Code is problematic are those in which the accused's conduct is arguably best captured under the concept of crimes against humanity or under the theory of command responsibility, which are expressly prescribed only under the [2003] Code."

32. The UN Human Rights Committee, in its "concluding observations" on Bosnia and Herzegovina in 2012 (CCPR/C/BIH/CO/1), expressed similar concerns (at § 7):

> "While appreciating efforts to deal with war crime cases such as the implementation of the National War Crimes Processing Strategy, the Committee remains concerned at the slow pace of prosecutions, particularly those relating to sexual violence, as well as

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20. Decision X-KRŽ-09/847 of 14 June 2011 in the *Novalić* case.

> lack of support to victims of such crimes. The Committee is also concerned at the lack of efforts to harmonise jurisprudence on war crimes among entities, and that entity-level courts use the archaic criminal code of the former Socialist Federal Republic of Yugoslavia (SFRY) that does not, *inter alia*, define crimes against humanity, command responsibility, sexual slavery and forced pregnancy. The Committee is concerned that this might affect consistency in sentencing among entities (arts. 2 and 14). The State party should expedite the prosecution of war crime cases. The State party should also continue to provide adequate psychological support to victims of sexual violence, particularly during the conduct of trials. Furthermore, the State party should ensure that the judiciary in all entities strongly pursues efforts aimed at harmonising jurisprudence on war crimes and that charges for war crimes are not brought under the archaic criminal code of the former SFRY, which does not recognise certain offences as crimes against humanity."

33. In its Opinion on Legal Certainty and the Independence of Judiciary in Bosnia and Herzegovina (no. 648/2011), issued on 18 June 2012, the Venice Commission noted that the existence of several legal orders and the fragmentation of the judiciary made it difficult for Bosnia and Herzegovina to fulfil the requirements of, *inter alia*, consistency in its legislation and case-law.

B. State Court

34. In accordance with its emergency powers, on 12 November 2000 the Office of the High Representative imposed the State Court Act 2000[21] establishing the State Court. The Act entered into force on 8 December 2000. It was subsequently endorsed by the Parliamentary Assembly of Bosnia and Herzegovina.

35. As part of the ICTY's completion strategy mentioned in paragraph 9 above, war crimes chambers were established within the State Court in early 2005. During a transitional phase which ended on 31 December 2012, some international judges were included in the composition of those chambers. Initially, they were appointed by the Office of the High Representative in accordance with its 2004 agreement with the authorities of Bosnia and Herzegovina[22]. The mandate of those judges was two years and was renewable. A typical decision appointing an international judge read, in the relevant part, as follows:

> "...
>
> *Noting* the joint recommendation for the appointment of an International Judge of 22 April 2005 signed by the Registrar of the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the [State Court] and [Special Departments of the

21. A consolidated version thereof published in Official Gazette of Bosnia and Herzegovina no. 49/09, amendments published in Official Gazette nos. 74/09 and 97/09.
22. Official Gazette of Bosnia and Herzegovina, International Treaty Series, nos. 12/04, 7/05 and 8/06.

Prosecutor's Office of Bosnia and Herzegovina], President of the [State Court] and President of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina;

The High Representative hereby issues the following decision on appointment of an International Judge to Section I for War Crimes of the Criminal and Appellate Divisions of the [State Court]

1. As provided by section 65 § 4, as amended, of the [State Court Act 2000] the following person is hereby appointed as International Judge of Section I for War Crimes of the Criminal and Appellate Divisions of the [State Court]:

Pietro Spera

2. The initial term of appointment ... shall be for two years, subject to reappointment pursuant to the [State Court Act 2000]. The [appointee] is required to reside in Bosnia in Herzegovina during the term of his appointment and cannot perform any other function that is incompatible with the judicial service or that can impede his performance of the judicial function on a full time basis. To the extent applicable, all other requirements for judicial service as set forth in the [State Court Act 2000] shall apply...

3. The International Registrar of the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the [State Court] and [Special Departments of the Prosecutor's Office] shall notify the High Representative of any occurrence, including the ones as referred to in paragraph 2 [above], that may cause the inability of the [appointee] to perform his mandate. In the event of resignation by or inability of the [appointee] to complete his mandate, the High Representative will appoint a successor to complete the above-mentioned term of office.

4. During the term of appointment, the appointee shall complete all training programs as directed by the President of the [State Court] and adhere to all professional conduct standards as established by the [State Court].

5. The [appointee] shall perform the duty of judge in accordance with the Constitution and laws of Bosnia and Herzegovina, take decisions upon his best knowledge, conscientiously, responsibly and impartially to uphold the rule of law, and shall protect the freedoms and rights of individuals granted by the Constitution and the European Convention on Human Rights. Before taking up his official function, which occurs not later then 6 May 2005, the International Judge shall take a solemn declaration before the President of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina to that effect.

6. This Decision shall enter into force forthwith and shall be published without delay in the Official Gazette of Bosnia and Herzegovina."

36. In September 2006 the Office of the High Representative and Bosnia and Herzegovina revised the procedure for the appointment of international judges to the State Court[23]: international judges were thereafter appointed

23. Official Gazette of Bosnia and Herzegovina, International Treaty Series, nos. 93/06 and 3/07.

by a specialised professional body, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, also for a renewable period of two years.

C. Jurisdiction over war crimes cases

37. Domestic war crimes cases can be divided into two categories.

38. Old cases (reported before 1 March 2003) remain with Entity courts if an indictment entered into force before 1 March 2003. If an indictment did not enter into force before 1 March 2003, they remain with Entity courts unless the State Court decides to take over any such case in accordance with the criteria set out in paragraph 40 below (see Article 449 of the 2003 Code of Criminal Procedure[24]).

39. New cases (reported after 1 March 2003) fall under the jurisdiction of the State Court, but the State Court may transfer any such case to the competent Entity court in accordance with the criteria set out in paragraph 40 below (see Article 27 of the 2003 Code of Criminal Procedure).

40. In accordance with the Book of Rules on the Review of War Crimes Cases of 28 December 2004[25] the following types of cases were, as a rule, to be heard before the State Court: (a) cases concerning genocide, extermination, multiple murders, rape and other serious sexual assaults as part of a system (such as in camps), enslavement, torture, persecution on a widespread and systematic scale, mass forced detention in camps; (b) cases against past or present military commanders, past or present political leaders, past or present members of the judiciary, past or present police chiefs, camp commanders, persons with a past or present notorious reputation, multiple rapists; (c) cases with insider or suspect witnesses; (d) if there was a risk of witness intimidation; and (e) cases involving perpetrators in an area which is sympathetic to them or where the authorities have a vested interest in preventing public scrutiny of the crimes. All other war crimes cases were, as a rule, to be heard before the Entity courts. In December 2008 the authorities adopted the National War Crimes Strategy, providing, among other things, a new set of criteria. They are, however, almost identical to those outlined above.

24. Official Gazette of Bosnia and Herzegovina nos. 3/03, 36/03, 32/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09 and 93/09.

D. Reopening of a criminal trial

41. Article 327 of the 2003 Code of Criminal Procedure provides that a criminal trial may be reopened in favour of the offender where the European Court of Human Rights has found that human rights were violated during the trial and that the verdict was based on these violations. An application for the reopening of a criminal trial is not subject to deadlines. It may even be lodged after the sentence has been served (Article 329 § 2 of this Code).

Pursuant to Article 333 § 4 of this Code, in any new trial the verdict may not be modified to the detriment of the accused (prohibition of *reformatio in peius*).

E. International humanitarian law

42. Pursuant to the 1949 Geneva Conventions (see, for example, Article 146 of the Convention relative to the Protection of Civilian Persons in Time of War), the High Contracting Parties must enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of those Conventions. At the same time, the accused persons must in all circumstances benefit from safeguards of proper trial and defence that are not less favourable than those provided by the Convention relative to the Treatment of Prisoners of War.

43. Pursuant to Article 99 of the Convention relative to the Treatment of Prisoners of War no prisoner of war may be tried or sentenced for an act which is not forbidden, at the time the said act was committed, by the law of the Detaining Power or by international law. The rule of non-retroactivity of crimes and punishments also appears in the Additional Protocols I and II of 1977 in almost identical terms. Article 75 § 4 (c) of the Additional Protocol I reads as follows:

> "No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby"

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

44. The first applicant, Mr Maktouf, complained that he had not been afforded a fair hearing by an independent tribunal, in violation of Article 6 § 1 of the Convention. He submitted that the adjudicating tribunal had not been independent within the meaning of that provision, notably because two of its members had been appointed by the Office of the High Representative for a renewable period of two years. Article 6 § 1, in the relevant part, reads:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. The parties' submissions

1. The Government

45. The Government maintained that Bosnia and Herzegovina could not be held responsible for the conduct of the High Representative (they relied on *Berić and Others v. Bosnia and Herzegovina* (dec.), nos. 36357/04 *et al*., ECHR 2007-XII). They therefore invited the Court to declare this complaint inadmissible as being incompatible *ratione personae*. Even if the Court had jurisdiction *ratione personae* to deal with this complaint, the Government submitted that it was manifestly ill-founded. The Convention did not require that judges be appointed for their lifetime, as illustrated by *Sramek v. Austria*, 22 October 1984, Series A no. 84, in which the Court regarded appointment for a renewable period of three years as sufficient. Moreover, the international members of the State Court had been appointed as judges in their countries of origin by independent bodies and had been seconded to the State Court as a means of international assistance to war-torn Bosnia and Herzegovina.

2. The applicant

46. The applicant responded that Bosnia and Herzegovina had a duty to organise its legal system in such a way as to ensure the independence of the judiciary. He submitted that the short duration of the international judges' mandate (two years) with the possibility of reappointment cast serious doubt on their ability to make decisions independently. He added, without relying on any particular authority, that according to accepted criteria, mandates of less than six years were not satisfactory as a guarantee of judges' independence. Further, the international judges of the State Court were appointed, at the relevant time, by the Office of the High Representative,

which could be compared to a national government. In view of all of the above, the applicant concluded that the adjudicating tribunal had not been independent within the meaning of Article 6 § 1 of the Convention.

3. The third party

47. The Office of the High Representative, in its third-party submissions of November 2012, asserted that the presence of international judges in the State Court had been aimed at promoting independence and impartiality, as well as the transfer of required legal knowledge. It also submitted that its decisions on appointments of international judges had been a formality, due to the fact that no domestic authority had had powers to appoint non-nationals prior to late 2006 (see paragraph 36 above). As to the duration of their mandate, the Office of the High Representative contended that this had been due to funding restrictions in the redeployment of foreign judicial officials: namely, budgetary projections and restrictions had disallowed a funding guarantee for a longer period. Lastly, the third party maintained that the international judges' terms had been duly regulated and that they could not have been dismissed arbitrarily.

B. The Court's assessment

48. The Court notes from the outset that the establishment of war crimes chambers within the State Court consisting of international and national judges was an initiative of international institutions (see paragraph 9 above). However, it is not required in the instant case to decide whether the respondent Government could nevertheless be held liable for the alleged breach of Article 6 § 1 of the Convention, since it finds that this complaint is in any event manifestly ill-founded for the reasons set out below.

49. By way of general observation, the Court reiterates that in determining in previous cases whether a body could be considered as "independent" – notably of the executive and of the parties to the case – it has had regard to such factors as the manner of appointment of its members, the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (see, for example, *Campbell and Fell v. the United Kingdom*, 28 June 1984, § 78, Series A no. 80, and *Brudnicka and Others v. Poland*, no. 54723/00, § 38, ECHR 2005-II). The irremovability of judges by the executive during their term of office is in general considered as a corollary of their independence and thus included in the guarantees of Article 6 § 1 (see *Campbell and Fell*, cited above, § 80). Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV), appointment of judges by the executive or the

legislature is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role (see *Flux v. Moldova (no. 2)*, no. 31001/03, § 27, 3 July 2007).

50. Turning to the present case, the Court notes that the independence of the national member of the adjudicating tribunal was not challenged. As to its international members, there is no reason to doubt their independence of the political organs of Bosnia and Herzegovina and the parties to the case. Their appointment was indeed motivated by a desire, *inter alia,* to reinforce the appearance of independence of the State Court's war crimes chambers (in view of remaining ethnic bias and animosity in the population at large in the post-war period) and to restore public confidence in the domestic judicial system.

51. Although they were appointed by the High Representative, the Court finds no reason to question that the international members of the State Court were independent of that institution. Their appointments were made on the basis of a recommendation from the highest judicial figures in Bosnia and Herzegovina (see the decision cited in paragraph 35 above). Like the national members whose independence was undisputed, once appointed, the judges in question had to make a solemn declaration before the High Judicial and Prosecutorial Council of Bosnia and Herzegovina and were required to perform their judicial duties in accordance with national law and to respect the rules of professional conduct established by the State Court. All of the requirements for judicial service as set forth in the State Court Act 2000 applied to them by analogy (see paragraph 35 above). 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. Admittedly, their term of office was relatively short, but this is understandable given the provisional nature of the international presence at the State Court and the mechanics of international secondments.

52. Against this background, the Court sees no reason for calling into question the finding of the Constitutional Court of Bosnia and Herzegovina in this case that the State Court was independent within the meaning of Article 6 § 1 of the Convention (see paragraph 15 above; contrast *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, §§ 45-53, 30 November 2010).

53. Accordingly, this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

54. Both applicants complained under Article 7 of the Convention that a more stringent criminal law had been applied to them than that which had been applicable at the time of their commission of the criminal offences. Article 7 provides:

"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."

A. Introductory remark

55. Serious violations of international humanitarian law falling under the State Court's jurisdiction can be divided into two categories. Some crimes, notably crimes against humanity, were introduced into national law in 2003. The State Court and the Entity courts therefore have no other option but to apply the 2003 Criminal Code in such cases (see the international materials cited in paragraphs 31 and 32 above). In this regard, the Court reiterates that in *Šimšić v. Bosnia and Herzegovina* (dec.), no. 51552/10, 10 April 2012, the applicant complained about his 2007 conviction for crimes against humanity with regard to acts which had taken place in 1992. The Court examined that case, *inter alia*, under Article 7 of the Convention and declared it manifestly ill-founded. It considered the fact that crimes against humanity had not been criminal offences under national law during the 1992-95 war to be irrelevant, since they had clearly constituted criminal offences under international law at that time. In contrast, the war crimes committed by the present applicants constituted criminal offences under national law at the time when they were committed. The present case thus raises entirely different questions to those in the *Šimšić* case.

B. Admissibility

56. The Government argued that Mr Damjanović's complaint should be dismissed in view of his failure to lodge a constitutional appeal in a timely manner. They had no objections with regard to the admissibility of Mr Maktouf's complaint.

57. Mr Damjanović alleged that a constitutional appeal was not an effective remedy in respect of this complaint, as it did not offer reasonable prospects of success (he relied on the Constitutional Court's decision in the *Maktouf* case, finding no breach of Article 7, and many subsequent cases in which the same reasoning had been applied).

58. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the domestic remedies, thus dispensing States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the

assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible and capable of providing effective and sufficient redress in respect of the applicant's complaints. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, among other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-69, *Reports of Judgments and Decisions* 1996-IV; *Mirazović v. Bosnia and Herzegovina* (dec.), no. 13628/03, 6 May 2006; and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, §§ 68-71, 17 September 2009).

59. The Court notes that on 30 March 2007 the Constitutional Court of Bosnia and Herzegovina found no breach of Article 7 of the Convention in nearly identical circumstances in the *Maktouf* case, and has since applied the same reasoning in numerous cases. Indeed, the Government did not produce before the Court any decision by the Constitutional Court finding a violation of Article 7 in a similar case. Furthermore, the State Court referred in the *Damjanović* case to the Constitutional Court's decision in the *Maktouf* case.

60. The Court concludes that a constitutional appeal did not offer reasonable prospects of success for Mr Damjanović's complaint under Article 7 of the Convention and dismisses the Government's objection. As this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and it is not inadmissible on any other grounds, it must be declared admissible.

C. Merits

1. The parties' submissions

(a) The applicants

61. The prohibition of the retroactive application of the criminal law to the disadvantage of an accused was, according to the applicants, a well-established rule of both international and domestic law. The 2003 Criminal Code, being more severe than the 1976 Code with regard to the minimum sentences for war crimes, should not therefore have been applied in their case. In this regard, they referred to a small number of cases in which the State Court had considered the 1976 Code to be more lenient (see paragraph 29 above), criticising at the same time the State Court for not

applying that Code consistently. Given that their convictions had been based exclusively on national law, they submitted that the Government's reliance on the "general principles of law recognised by civilised nations" within the meaning of Article 7 § 2 was misleading. They further submitted that their case should be distinguished from the cases to which the Government and the third party had referred (namely *S.W. v. the United Kingdom*, 22 November 1995, Series A no. 335-B, and *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II). In particular, the *S.W.* case concerned the gradual development of the criminal law through a line of case-law, over the course of several years, in order to take account of society's changing attitudes. This was clearly different from the enactment of new legislation prescribing heavier penalties for some criminal offences, as in the present case. The applicants added that the States should not change their laws after an event so as to punish perpetrators, no matter how controversial the offence in question.

(b) The Government

62. The Government maintained that the 2003 Criminal Code was more lenient to the applicants than the 1976 Criminal Code, given the absence of the death penalty (they referred to *Karmo v. Bulgaria* (dec.), no. 76965/01, 9 February 2006). That was indeed the opinion of the Constitutional Court of Bosnia and Herzegovina in the present case (see paragraph 15 above). They further argued that even if the 2003 Code was not more lenient to the applicants, it was still justified to apply it in this case, for the following reasons. First, the Government claimed that Article 7 § 2 of the Convention provided an exception to the rule of non-retroactivity of crimes and punishments set out in Article 7 § 1 (they referred to *Naletilić v. Croatia* (dec.), no. 51891/99, ECHR 2000-V). In other words, if an act was criminal at the time when it was committed both under "the general principles of law recognised by civilised nations" and under national law, then a penalty even heavier than that which was applicable under national law might be imposed. It was clear that the acts committed by the present applicants were criminal under "the general principles of law recognised by civilised nations". As a result, the rule of non-retroactivity of punishments did not apply and, in the Government's opinion, any penalty could have been imposed on the applicants. Secondly, the Government submitted that the interests of justice required that the principle of non-retroactivity be set aside in this case (they referred in this connection to *S.W.*, cited above; *Streletz, Kessler and Krenz*, cited above; and a duty under international humanitarian law to punish war crimes adequately). The rigidity of the principle of non-retroactivity, it was argued, had to be softened in certain historical situations so that this principle would not be to the detriment of the principle of equity.

63. As to the question whether the State Court had changed its practice with regard to sentencing in war crimes cases, the Government accepted that the 1976 Code had been applied on several occasions since March 2009 (see paragraph 29 above). However, they contended that the 2003 Code was still applied in most cases. Specifically, the State Court issued 102 decisions between March 2009 and November 2012 (59 by trial chambers and 43 by appeals chambers). The trial chambers had always applied the 2003 Code. The appeals chambers had applied that Code in all the cases concerning crimes against humanity and genocide. As to war crimes, the appeals chambers had applied the 1976 Code in five cases and the 2003 Code in 16 cases. The Government criticised the approach adopted in those first five cases and argued that the State Court should always have applied the 2003 Code in war crimes cases.

(c) The third party

64. The third-party submissions of the Office of the High Representative of November 2012 were along the same lines as the Government's submissions. Notably, the third party claimed, like the Government, that the acts committed by the present applicants were criminal under "the general principles of law recognised by civilised nations" and that therefore the rule of non-retroactivity of punishments did not apply in this case. The Office of the High Representative also emphasised that although the 2003 Code had been applied in this case, the applicants' sentences were nevertheless within the latitude of both the 1976 Code and the 2003 Code. Lastly, the third party referred to the UN Human Rights Committee's "concluding observations" on Bosnia and Herzegovina (CCPR/C/BIH/CO/1), cited in paragraph 32 above.

2. The Court's assessment

65. At the outset, the Court reiterates that it is not its task to review *in abstracto* whether the retroactive application of the 2003 Code in war crimes cases is, *per se*, incompatible with Article 7 of the Convention. This matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts have applied the law whose provisions are most favourable to the defendant (see *Scoppola*, cited above, § 109).

66. The general principles concerning Article 7 were recently restated in *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010:

> "The guarantee enshrined in Article 7, an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, so as to provide effective safeguards against arbitrary prosecution, conviction and punishment. Accordingly, Article 7 is not confined to prohibiting the

retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable.

When speaking of 'law', Article 7 alludes to the same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written and unwritten law and which implies qualitative requirements, notably those of accessibility and foreseeability. As regards foreseeability in particular, the Court recalls that however clearly drafted a legal provision may be in any system of law including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in certain Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (*Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II; *K.-H.W. v. Germany* [GC], no. 37201/97, § 85, ECHR 2001-II (extracts); *Jorgic v. Germany*, no. 74613/01, §§ 101-109, 12 July 2007; and *Korbely v. Hungary* [GC], no. 9174/02, §§ 69-71, 19 September 2008)."

67. Turning to the present case, the Court notes that the definition of war crimes is the same in Article 142 § 1 of the 1976 Criminal Code, which was applicable at the time the offences were committed, and Article 173 § 1 of the 2003 Criminal Code, which was applied retroactively in this case (see paragraphs 26 and 28 above). Moreover, the applicants did not dispute that their acts constituted criminal offences defined with sufficient accessibility and foreseeability at the time when they were committed. The lawfulness of the applicants' convictions is therefore not an issue in the instant case.

68. It is further noted, however, that the two Criminal Codes provide for different sentencing frameworks regarding war crimes. Pursuant to the 1976 Code, war crimes were punishable by imprisonment for a term of 5-15 years or, for the most serious cases, the death penalty (see Article 142 § 1 in conjunction with Articles 37 § 2 and 38 § 1 of the 1976 Code). A 20-year prison term could have also been imposed instead of the death penalty (see Article 38 § 2 thereof). Aiders and abettors of war crimes, like Mr Maktouf, were to be punished as if they themselves had committed the crimes, but their punishment could be reduced to one year's imprisonment (see Article 42 of the same Code in conjunction with Articles 24 § 1 and 43 § 1 thereof). Pursuant to the 2003 Code, war crimes attract imprisonment for a term of 10-20 years or, for the most serious cases, long-term imprisonment for a term of 20-45 years (see Article 173 § 1 of the 2003 Code in conjunction with Article 42 §§ 1 and 2 of that Code). Aiders and abettors of

war crimes, such as Mr Maktouf, are to be punished as if they themselves had committed the crimes, but their punishment could be reduced to five years' imprisonment (Article 49 in conjunction with Articles 31 § 1 and 50 § 1 of that Code). While pointing out that his sentence should be reduced as far as possible (see paragraph 14 above), the State Court sentenced Mr Maktouf to five years' imprisonment, the lowest possible sentence under the 2003 Code. In contrast, under the 1976 Code he could have been sentenced to one year's imprisonment. As regards Mr Damjanović, he was sentenced to 11 years' imprisonment, slightly above the minimum of ten years. Under the 1976 Code, it would have been possible to impose a sentence of only five years.

69. As regards the Government's argument that the 2003 Code was more lenient to the applicants than the 1976 Code, given the absence of the death penalty, the Court notes that only the most serious instances of war crimes were punishable by the death penalty pursuant to the 1976 Code (see paragraph 26 above). As neither of the applicants was held criminally liable for any loss of life, the crimes of which they were convicted clearly did not belong to that category. Indeed, as observed above, Mr Maktouf received the lowest sentence provided for and Mr Damjanović a sentence which was only slightly above the lowest level set by the 2003 Code for war crimes. In these circumstances, it is of particular relevance in the present case which Code was more lenient in respect of the minimum sentence, and this was without doubt the 1976 Code. Such an approach has been taken by at least some of the appeals chambers in the State Court in recent cases (see paragraph 29 above).

70. Admittedly, the applicants' sentences in the instant case were within the latitude of both the 1976 Criminal Code and the 2003 Criminal Code. It thus cannot be said with any certainty that either applicant would have received lower sentences had the former Code been applied (contrast *Jamil v. France*, 8 June 1995, Series A no. 317-B; *Gabarri Moreno v. Spain*, no. 68066/01, 22 July 2003; *Scoppola*, cited above). What is crucial, however, is that the applicants could have received lower sentences had that Code been applied in their cases. As already observed in paragraph 68 above, the State Court held, when imposing Mr Maktouf's sentence, that it should be reduced to the lowest possible level permitted by the 2003 Code. Similarly, Mr Damjanović received a sentence that was close to the minimum level. It should further be noted that, according to the approach followed in some more recent war crimes cases referred to in paragraph 29 above, the appeals chambers of the State Court had opted for the 1976 Code rather than the 2003 Code, specifically with a view to applying the most lenient sentencing rules. Accordingly, since there exists a real possibility that the retroactive application of the 2003 Code operated to the applicants' disadvantage as concerns the sentencing, it cannot be said that they were

afforded effective safeguards against the imposition of a heavier penalty, in breach of Article 7 of the Convention.

71. The Court is unable to accept the Government's suggestion that its decision in *Karmo*, cited above, offers guidance for its assessment of the case now under consideration. The circumstances are significantly different. Whilst the present applicants were sentenced to relatively short terms of imprisonment, the applicant in *Karmo* had been sentenced to death and the issue was whether it was contrary to Article 7 to commute the death penalty to life imprisonment following the abolition of the death penalty in 1998. The Court considered that it was not and rejected the complaint under Article 7 as manifestly ill-founded.

72. Furthermore, the Court is unable to agree with the Government's argument that if an act was criminal under "the general principles of law recognised by civilised nations" within the meaning of Article 7 § 2 of the Convention at the time when it was committed then the rule of non-retroactivity of crimes and punishments did not apply. This argument is inconsistent with the *travaux préparatoires* which imply that Article 7 § 1 can be considered to contain the general rule of non-retroactivity and that Article 7 § 2 is only a contextual clarification of the liability limb of that rule, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war (see *Kononov*, cited above, § 186). It is thus clear that the drafters of the Convention did not intend to allow for any general exception to the rule of non-retroactivity. Indeed, the Court has held in a number of cases that the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner (see, for example, *Tess v. Latvia* (dec.), no. 34854/02, 12 December 2002, and *Kononov*, cited above, § 186).

73. The Government's reliance in this regard on *S.W.* and *Streletz, Kessler and Krenz* (cited above) likewise cannot be accepted. The present case does not concern an issue of progressive development of the criminal law through judicial interpretation, as in the case of *S.W*. Nor does the case at hand concern a State practice that is inconsistent with the State's written or unwritten law. In *Streletz, Kessler and Krenz*, the applicants' acts had constituted offences defined with sufficient accessibility and foreseeability in the criminal law of the German Democratic Republic at the material time, but those provisions had not been enforced for a long time prior to the regime change in 1990.

74. The Court sees no need to examine in any detail the Government's further argument that a duty under international humanitarian law to punish war crimes adequately required that the rule of non-retroactivity be set aside in this case. It suffices to note that the rule of non-retroactivity of crimes and punishments also appears in the Geneva Conventions and their Additional Protocols (see paragraph 43 above). 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 is clearly unfounded.

75. Lastly, while the Court in principle agrees with the Government that States are free to decide their own penal policy (see *Achour v. France* [GC], no. 67335/01, § 44, ECHR 2006-IV, and *Ould Dah v. France* (dec.), no. 13113/03, ECHR 2009), they must comply with the requirements of Article 7 in doing so.

D. Conclusion

76. Accordingly, the Court considers that there has been a violation of Article 7 of the Convention in the particular circumstances of the present case. This conclusion should not be taken to indicate that lower sentences ought to have been imposed, but simply that the sentencing provisions of the 1976 Code should have been applied in the applicants' cases.

III. THE APPLICANTS' DISCRIMINATION COMPLAINT

77. Lastly, the applicants argued, without going into any detail, that the fact that their cases had been heard before the State Court, while many other war crimes cases had been heard before Entity courts, amounted to a breach of Article 14 of the Convention and/or Article 1 of Protocol No. 12 to the Convention.

Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 1 of Protocol No. 12 provides:

> "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

78. The Government invited the Court to follow its *Šimšić* case-law, cited above. They added that the distribution of war crimes cases between the State Court and Entity courts was not arbitrary: it was done by the State Court on the basis of objective and reasonable criteria. As regards Mr Maktouf's case, the Government argued that it was sensitive and complex, as it had been one of the first cases dealing with crimes committed by foreign mujahedin (the ICTY had dealt with that issue for the first time in 2006 in *Hadžihasanović and Kubura*). In addition, ritual beheadings,

carried out at their camps, had caused alarm among the local population. The Government asserted that Mr Damjanović's case was also sensitive given, *inter alia*, that it concerned the torture of a large number of victims. Another reason for the transfer of Mr Damjanović's case to the State Court was that better facilities were available for the protection of witnesses at the State Court; there was thus a higher risk of witness intimidation at the Entity level.

79. The applicants disagreed with the Government. They maintained that their cases were neither sensitive nor complex. Mr Maktouf also argued that his Iraqi nationality and his religion had been the key reason for the State Court's decision to retain jurisdiction.

80. The Office of the High Representative, in its third-party submissions of November 2012, agreed with the Government.

81. The notion of discrimination has been interpreted consistently in the Court's case-law with regard to Article 14 of the Convention. This case-law has made it clear that discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. The same term, discrimination, is also used in Article 1 of Protocol No. 12. Notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 55, ECHR 2009).

82. In the present case, the Court first notes that given the large number of war crimes cases in post-war Bosnia and Herzegovina, it is inevitable that the burden must be shared between the State Court and Entity courts. If not, the respondent State would not be able to honour its Convention obligation to bring to justice those responsible for serious violations of international humanitarian law in a timely manner (see *Palić v. Bosnia and Herzegovina*, no. 4704/04, 15 February 2011).

83. The Court is aware that the Entity courts imposed in general lighter sentences than the State Court at the relevant time (see paragraph 30 above), but that difference in treatment is not to be explained in terms of personal characteristics and, therefore, does not amount to discriminatory treatment. Whether a case was to be heard before the State Court or before 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 outlined in paragraph 40 above (contrast *Camilleri v. Malta*, no. 42931/10, 22 January 2013, in which such a decision was dependent only on the prosecutor's discretion). Accordingly, in the particular circumstances of this case, there is no appearance of a violation of either Article 14 taken in conjunction with Article 7 of the Convention or of Article 1 of Protocol No. 12 (see *Magee v. the United Kingdom*, no. 28135/95, § 50, ECHR 2000 VI, and *Šimšić*, cited above).

84. The applicants' discrimination complaint is therefore manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

85. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

86. Mr Maktouf claimed that he had been unable to run his company as a result of his trial and punishment and that he had suffered damage in the amount of 500,000 euros (EUR).

87. The Government considered the claim to be unsubstantiated.

88. The Court agrees with the Government and rejects this claim for lack of substantiation.

B. Non-pecuniary damage

89. Mr Maktouf claimed EUR 100,000 under this head. Mr Damjanović also claimed compensation for non-pecuniary damage, but failed to specify an amount which in his view would be equitable.

90. The Government considered Mr Maktouf's claim to be excessive.

91. Since it is not certain that the applicants would indeed have received lower sentences had the 1976 Code been applied (contrast *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, ECHR 2001-II, and *Scoppola*, cited above), the Court holds in the particular circumstances of this case that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicants.

C. Costs and expenses

92. Mr Maktouf further claimed EUR 36,409 for the costs and expenses incurred before the domestic courts. Mr Damjanović was granted legal aid under the Court's legal-aid scheme in the total amount of EUR 1,545 for his counsel's appearance at the hearing before the Grand Chamber. He sought reimbursement of additional costs and expenses incurred before the Court in the amount of EUR 13,120.

93. The Government considered the claims to be unsubstantiated.

94. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. That is, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the violation found or to obtain redress. The Court requires itemised bills and invoices that are sufficiently detailed to enable it to determine to what extent the above requirements have been met. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicants EUR 10,000 each, plus any tax that may be chargeable to them, under this head.

D. Default interest

95. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* inadmissible, by a majority, the complaint concerning Article 6 of the Convention;

2. *Declares* inadmissible, by a majority, the complaint concerning Article 14 taken in conjunction with Article 7 of the Convention and Article 1 of Protocol No. 12;

3. *Declares* admissible, unanimously, the complaint concerning Article 7 of the Convention;

4. *Holds*, unanimously, that there has been a violation of Article 7 of the Convention;

5. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicants within three months EUR 10,000 (ten thousand euros) each, plus any tax that may be chargeable to them, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 18 July 2013.

Michael O'Boyle	Dean Spielmann
Deputy Registrar	President

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

(a) concurring opinion of Judge Ziemele;

(b) concurring opinion of Judge Kalaydjieva;

(c) concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić.

D.S.*.
M.O'B.*.

CONCURRING OPINION OF JUDGE ZIEMELE

1. I agree with the outcome in this case. At the same time, I do not share some of the reasoning adopted by the Grand Chamber. The essence of the problem is whether the fundamental principle of criminal law as regards application of the more lenient sentence where courts have a lawful choice between two sentencing options applies also in the event of conviction for war crimes and whether the relevant courts in Bosnia and Herzegovina examined their sentencing options in the light of this principle.

2. In particular, I am concerned about the language used in paragraph 72 of the judgment. Admittedly, the respondent Government submitted that since the applicants were prosecuted and convicted for war crimes, as recognised under international law, the *nulla poena sine lege* principle did not apply. The Court refutes this proposition, holding that it provides far too broad a reading of the Article 7 § 2 exception. Firstly, even if the respondent Government submitted such an argument in their defence, the case does not really concern the retroactive application of law in the circumstances of this case. It is clear that the actions imputed to the applicants were crimes under both the 1976 and 2003 Criminal Codes. It is also clear that they were international crimes at the time they were committed (see paragraph 67 of the judgment). The principles clarified in the context of the *Kononov v. Latvia* [GC] case (no. 36376/04, ECHR 2010), which concerned crimes committed during World War II that were prosecuted several decades later, and where the question thus clearly arose whether the applicant could have foreseen that his actions would be prosecuted under international or national law, are really not challenged in the case at hand.

3. I would point out that the question of the scope and nature of the principle of *nulla poena sine lege* in international criminal law is particularly complex and cannot be dismissed in a few lines (see e.g. Ch. Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers Inc., 2003, p. 202; and A. Cassese, *International Criminal Law*, Oxford University Press, 2009, p. 442). Suffice it to notice that the major Conventions in the field refer back to the sanctions provided for in domestic criminal law. The ICC Statute defined for the first time the penalties that the Criminal Court could determine. The authorities in the field have generally commented that "the principles of legality in international criminal law are different from their counterparts in the national legal systems ... They are necessarily *sui generis* because they must balance between the preservation of justice and fairness for the accused and the preservation of world order ..." (Bassiouni, cited above, p. 202). The Court has already had to address this complex dichotomy in several cases.

4. More recently, in view of a growing consensus as regards a general obligation to prosecute perpetrators of the most serious international crimes in accordance with States' international obligations and the relevant

requirements of national law and to combat impunity (Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, United Nations, 8 February 2005), the Court has had to bear in mind this international-law background in applying the relevant articles of the Convention (see, for example, *Association "21 December 1989" and Others v. Romania*, nos. 33810/07 and 18817/08, 24 May 2011). It is in this context that the Government's argument regarding the importance of the sentence imposed reflecting the gravity of the crime is pertinent. However, this case does not concern all these difficult questions and the Government's main line of reasoning does not address the crux of the matter in the applicants' case.

5. The Government acknowledge that since 2009 the State Court has applied either the 1976 or the 2003 Code in determining the sentences to be imposed (see paragraph 63) and claim that they do not approve of such an approach. It is here that the real problem lies. The main question for the Court is whether, in determining the applicants' cases, the State Court examined which Code provided for a more lenient sentence, given the crimes imputed to these applicants. As far as I can see the State Court was not in the habit of conducting such an assessment, at least at the time of the adjudication of these cases and prior to 2009, and it is on this limited ground that I find a violation of Article 7. I consider that the Court's speculation as to what the sentence might have been had the 1976 Code been applied goes beyond the scope of Article 7.

CONCURRING OPINION OF JUDGE KALAYDJIEVA

I agree with the majority's conclusion that there has been a violation of Article 7 of the Convention. In my opinion, the circumstances which give rise to this finding are limited to the uncertainty generated by the applicability of two parallel Criminal Codes, which were operative at the time of the applicants' trials in the absence of any rules clarifying which Code was to be applied to their cases. As I understand Article 7, that provision requires foreseeability not only as to whether a certain act was punishable at the time when it was committed, but also as concerns the imposable punishment at the time when the perpetrator is tried. The parallel existence of two Codes with different sentencing brackets failed to provide such clarity.

However, in so far as the applicants' punishment in the present cases remained within the brackets foreseen by both of the operating Criminal Codes (see paragraph 69 of the judgment), the argument that "*what is crucial* (for the assessment of compatibility with Article 7) *is that the applicants could have received lower sentences had the [1976] Code been applied in their cases*" (paragraph 70) appears to be as speculative as any contemplation as to whether the domestic courts could in fact have acquitted the applicants. In this regard the majority's reasoning may be interpreted as embarking on a fourth-instance assessment as to what punishment might have been more appropriate. Moreover, the arguments as to the appropriateness of the imposed punishment seem more pertinent to the Article 6 complaints concerning the fairness of the domestic proceedings and their outcome. The Court declared these complaints manifestly ill-founded. There is nothing in these cases to indicate that the domestic courts would have not imposed the same punishments as they did in applying the 2003 Criminal Code.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE, JOINED BY JUDGE VUČINIĆ

1. The prohibition on retroactive penal law and the retroactivity of a more lenient penal law (*lex mitior*) are perennial questions of human justice. In view of the structural characteristics of the prosecutorial and judicial organisation of Bosnia and Herzegovina (BiH), and the particular nature of the War Crimes Chamber of the State Court of BiH, the *Maktouf* and *Damjanović* cases warrant a broader discussion of these issues within the context of international human rights law, taking also into account recent advances in international criminal and humanitarian law and the current status of State practice. Only then will I be in a position to reach a finding on this case.

The prohibition on retroactive application of penal law

2. The guarantee of the preventive function of penal law, the separation of State powers and the avoidance of State arbitrariness are the purposes of the principle *nullum crimen sine lege praevia*. Criminal behaviour can only be deterred if citizens are aware of the criminalising law prior to commission of the censured conduct. Since retroactive punishment cannot hinder an action or omission which has already occurred, it reflects arbitrary State intrusion in citizens' liberties and freedoms[1].

The prohibition on retroactive application of new penal offences logically implies the prohibition on retroactivity of a more stringent penal law (*lex gravior*). If a penal law cannot be applied to facts which occurred before it came into force, a criminal offence may not be punished by means of penalties which did not exist at the material time or through penalties more stringent than those applicable at the material time. In both cases, retroactive sentencing would be arbitrary in respect of the innovative or increased penalty[2].

3. The universal acceptance of the principle of non-retroactivity of penal law with regard to criminalisation and sentencing in times of peace is

1. Article 8 of the Declaration of the Rights of Man and of the Citizen (1789): "The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense." Ultimately this principle results from the principle of liberty set out in Article 4: "Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law."

2. Beccaria, *On Crimes and Punishments*, 1764, Chapter 3: "But as a punishment, increased beyond the degree fixed by the law, is the just punishment with the addition of another, it follows that no magistrate, even under a pretence of zeal, or the public good, should increase the punishment already determined by the laws."

evidenced by Article 11 § 2 of the Universal Declaration of Human Rights (UDHR)[3], Article 7 of the European Convention on Human Rights (ECHR)[4], Article 15 of the International Covenant on Civil and Political Rights (ICCPR)[5], Article 9 of the American Convention on Human Rights (ACHR)[6], Article 7 § 2 of the African Charter on Human and Peoples' Rights (ACHPR)[7], Article 40 § 2 (a) of the Convention on the Rights of the Child (CRC)[8], Articles 11 and 24 of the Rome Statute of the International Criminal Court (Rome Statute)[9], Article 49 of the Charter of Fundamental Rights of the European Union (CFREU)[10] and Article 15 of the revised Arab Charter on Human Rights (ArCHR)[11].

4. Moreover, two other factors clearly underline the cogent nature of the principle. Firstly, the principle is not derogable in time of war or other public emergency, as stated in Article 15 § 2 of the ECHR, Article 4 § 2 of the ICCPR, Article 27 of the ACHR and Article 4 of the revised ArCHR[12].

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3. The Declaration was adopted by a United Nations General Assembly Resolution on 10 December 1948, by forty-eight votes to nil, with eight abstentions. Some years before, in its ground-breaking Advisory Opinion on the Consistency of certain Danzig legislative decrees with the Constitution of the Free City, 4 December 1935, PCIJ, Series A/B, no. 65, p. 57, the Permanent Court of International Justice expressed itself as follows: "It must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment." This was the very first declaration of the principle by an international court.

4. The ECHR was opened for signature on 4 November 1950 and now counts forty-seven States Parties. See, with regard to this principle, *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A; *C.R. v. the United Kingdom*, 22 November 1995, §§ 34 and 40-42, Series A no. 335-C; and *Cantoni v. France*, no. 17862/91, §§ 33 and 35, 15 November 1996.

5. The ICCPR was adopted by a United Nations General Assembly Resolution of 16 December 1966 and has 167 States Parties, including the respondent State. No reservation was made with regard to the principle of non-retroactivity of crimes and penalties.

6. The ACHR was adopted on 22 November 1969 and has 23 States Parties. See, with regard to this principle, *Castillo Petruzzi et al. v. Peru*, Inter-American Court of Human Rights judgment of 30 May 1999, § 121.

7. The ACHPR was adopted on 27 June 1981 and has 53 States Parties. See AComHPR, communications nos. 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Constitutional Rights Project v. Nigeria* (1998), § 59: "It is expected that citizens must take the laws seriously. If laws change with retroactive effect, the rule of law is undermined since individuals cannot know at any moment if their actions are legal. For a law-abiding citizen, this is a terrible uncertainty, regardless of the likelihood of eventual punishment."

8. The CRC was adopted by a United Nations General Assembly Resolution on 20 November 1989 and has 193 States Parties, including the respondent State. Only two members of the United Nations did not ratify it and no specific reservation to the referred provision was made by the ratifying States.

9. The Rome Statute was adopted on 17 July 1998 and has 122 States Parties, including the respondent State.

10. The CFREU has become legally binding on the European Union with the entry into force of the Treaty of Lisbon, in December 2009.

11. The second, updated version of the ArCHR was adopted on 22 May 2004 and has 12 States Parties. This is a revised edition of the first Charter of 15 September 1994.

Secondly, the principle is also mandatory in international humanitarian law, as is clear from Article 99 of the Geneva Convention (III) relative to the Treatment of Prisoners of War ("the Third Geneva Convention")[13], Articles 65 and 67 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War ("the Fourth Geneva Convention")[14], Article 75 § 4 (c) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Protocol I to the Geneva Conventions")[15] and Article 6 § 2 (c) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts ("Protocol II to the Geneva Conventions")[16].

5. The emergence of international criminal law does not change the essence of the above-mentioned principles. While, on the one hand, the possible entry into play of international law in criminal adjudication represents a complex challenge in a realm that is traditionally reserved for the sovereign power of the national legislature and the domestic courts, international law, on the other hand, is a crucial instrument in filling the *lacunae* of national law and remedying the most serious shortcomings of domestic prosecutorial and judicial systems. This has been acknowledged in the provision of criminalisation based on "international law" in Article 11 § 2 of the UDHR, which has also been inserted in Article 7 § 1 of the ECHR, Article 15 § 1 of the ICCPR and Article 40 § 2 (a) of the CRC, and in some national constitutions[17]. In accordance with those provisions,

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12. The CRC and the ACHPR do not provide for any possibilities of derogation.

13. The Third Geneva Convention was adopted on 12 August 1949 and today numbers 195 States Parties. It replaced the Prisoners of War Convention of 27 July 1929. No reservation was made with regard to non-retroactivity of criminal law.

14. The Fourth Geneva Convention was adopted on 12 August 1949 and now has 195 States Parties. It supplements the provisions of the Hague Regulations of 1907. No reservation was made with regard to non-retroactivity of criminal law.

15. Protocol I to the Geneva Conventions was adopted on 8 June 1977 and has 173 States Parties, including the respondent State. No reservation was made with regard to non-retroactivity of criminal law.

16. Protocol II to the Geneva Conventions was adopted on 8 June 1977 and has 167 States Parties, including the respondent State. No reservation was made with regard to non-retroactivity of criminal law.

17. See, for instance, Article 29 § 1 of the Albanian Constitution, Article 31 of the Croatian Constitution, Article 42 § 1 of the Polish Constitution, Article 20 of the Rwandan Constitution and Article 35 § 3 (1) of the South African Constitution. The principle of criminalisation based on international law was also set out in the first and the second Nuremberg Principles. Principle I states: "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment"; Principle II states: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law" (*Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries*, 1950).

international criminal law may supplement national law in the following three scenarios: (1) the conduct was criminal under international customary law at the time of its commission[18], but national law did not provide for such a crime at that time; (2) the conduct was criminal under treaty law applicable to the facts, but national law did not provide for such a crime; or (3) both international and national law did indeed provide for such a crime at the material time, but the national law was systematically not applied, for political or other similar reasons[19]. In such cases, the adjudicatory body does not exceed its subject-matter jurisdiction when it applies international criminal law to past conduct and the principle of *nullum crimen, nulla poena sine lege praevia* is not breached. On the contrary, impunity would amount to moral endorsement of the offences committed.

The principle of retroactive application of *lex mitior* in criminal law

6. If, subsequent to the commission of a criminal offence, the law imposes a lighter penalty, the offender is to benefit thereby. This applies to any law providing for reduction or mitigation of a penalty and *a fortiori* to an *ex post facto* decriminalising law. The difference resides in the temporal scope of *lex mitior*: while an *ex post facto* decriminalising law applies to offenders until complete service of their sentences, a new penal law reducing or mitigating the applicable penalties applies to offenders until their convictions become *res judicata*[20].

Logically, the principle of the retroactive application of a more lenient penal law (*lex mitior*) is the reverse side of the prohibition on retroactivity of a more stringent penal law. If a more stringent penal law cannot apply to conduct that occurred prior to that law's entry into force, then a more lenient penal law must apply to conduct that occurred prior to its entry into force but which is tried after that date. The continued applicability of a more stringent penal law after it has been replaced by a more lenient one would infringe the principle of the separation of powers, in that courts would continue to impose a more stringent penal law when the legislature had itself changed its evaluation of the degree of wrongfulness of the conduct and the corresponding degree of severity of the applicable penalties. Furthermore, were the legislature itself to impose the continued applicability

18. Undisputed examples of such crimes are piracy, the slave trade and attacks upon diplomats, which are subject not only to conventional, but also to customary law.

19. This includes cases where acts were punishable under international law binding the respondent State at the material time, regardless of the fact that they formed part of a repressive government policy (see *Streletz, Kessler and Krenz v. Germany*, nos. 34044/96, 35532/97 and 44801/98, §§ 56-64, ECHR 2001-II, and, by the same token, the Human Rights Committee's views in *Baumgarten v. Germany*, Communication No. 960/2000, 31 July 2003, § 9.5).

20. See my separate opinion in *Hıdır Durmaz v. Turkey (no. 2)*, no. 26291/05, 12 July 2011.

of a more stringent penal law after it had been replaced by a more lenient one, this would give rise to a contradictory, and therefore arbitrary, double-standards assessment of the wrongfulness of the same censured conduct.

7. The principle of retroactive application of *lex mitior* in criminal law is enshrined in Article 15 § 1 of the ICCPR[21], Article 9 of the ACHR, Article 24 § 2 of the Rome Statute[22], Article 49 of the CFREU[23] and Article 15 of the ArCHR[24] and, in international humanitarian law, in Article 75 § 4 (c) of Protocol I to the Geneva Conventions and Article 6 § 2 (c) of Protocol II to the Geneva Conventions. State practice has endorsed the principle, both at constitutional and statutory level[25].

8. In spite of Article 7 of the ECHR being silent on the matter, the European Court of Human Rights ("the Court") acknowledged this principle as one of the guarantees of the principle of legality in European human rights law in *Scoppola v. Italy (no. 2)*. The Court has adopted a clear

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21. The United States reserved the right not to apply the Article; Italy and Trinidad and Tobago reserved the right to apply it only in proceedings pending at the time the law is changed, and Germany reserved the right not to apply it in extraordinary circumstances.

22. In the *Dragan Nikolic* judgment (no. IT-94-2-A) of 4 February 2005, § 85, the Appeals Chamber of the ICTY held that the principle of *lex mitior* applied to its Statute.

23. In *Berlusconi and Others*, the Court of Justice of the European Union held that the principle of the retroactive application of the more lenient penalty formed part of the constitutional traditions common to the member States (see the judgment of 3 May 2005 in joined cases C-387/02, C-391/02 and C-403/02).

24. The previous version of the Arab Charter of 1994, in its Article 6, was more incisive: "The accused shall benefit from subsequent legislation if it is in his favour."

25. State practice confirms this principle, both at the constitutional level (for example, Article 29 § 3 of the Albanian Constitution, Article 65 § 4 of the revised Angolan Constitution, Article 22 of the Armenian Constitution, Article 71 (VIII) of the Azerbaijani Constitution, Article 5 § 4 of the Brazilian Constitution, Article 11 (i) of the Canadian Constitution, Article 30 § 2 of the Cape Verde Constitution, Article 19 § 3 of the Chilean Constitution, Article 29 of the Colombian Constitution, Article 31 of the Croatian Constitution, Article 31 § 5 of the East Timor Constitution, Article 42 § 5 of the Georgian Constitution, Article 33 § 2 of the Guinea Bissau Constitution, Article 89 of the Latvian Constitution, Article 52 of the Macedonian Constitution, Article 34 of the Montenegrin Constitution, Article 99 § 2 of the Mozambique Constitution, Article 29 § 4 of the Portuguese Constitution, Article 15 § 2 of the Romanian Constitution, Article 54 of the Russian Constitution, Article 36 § 2 of the São Tomé and Príncipe Constitution, Article 197 of the Serbian Constitution, Article 50 § 6 of the Slovakian Constitution, Article 28 of the Slovenian Constitution, Article 35 § 3 of the South African Constitution, and Article 9 § 3 of the Spanish Constitution) and at the statutory level (Article 1 of the Austrian Penal Code, Article 2 of the Belgian Criminal Code, Article 4 of the Bosnian Criminal Code, Article 2 of the Bulgarian Criminal Code, Article 12 of the Chinese Criminal Code, Article 4 of the Danish Criminal Code, Article 2 of the German Criminal Code, Article 2 of the Hungarian Criminal Code, Article 2 of the Icelandic Penal Code, Articles 4 to 6 of the Israeli Penal Code, Article 6 of the Japanese Criminal Code, Article 3 of the Lithuanian Penal Code, Article 2 of the Luxembourg Penal Code, Article 1 § 2 of the Dutch Penal Code, Article 25 (g) of the New Zealand Bill of Rights and Article 2 § 2 of the Swiss Penal Code). It can be said that the vast majority of the world's population benefits from this principle.

position on the definition of *lex mitior* for the purpose of the application of successive penal laws: *lex mitior* is the one which is more favourable to the defendant, taking into account his or her characteristics, the nature of the offence and the circumstances in which the offence was committed[26]. This means that Article 7 § 1 of the ECHR presupposes a comparison *in concreto* of the penal laws applicable to the offender's case, including the law in force at the material time (the old law) and the law in force at the time of the judgment (the new law)[27]. Hence, the ECHR does not take into account the maximum limit of the penalty *in abstracto*. Nor does it take into consideration *in abstracto* the minimum limit of the penalty[28]. Equally, it does not consider the maximum or minimum limits of the penalty on the basis of the domestic court's intention to impose a sentence closer to the maximum or the minimum[29]. Instead, in the light of *Scoppola*, the *lex mitior* must be found *in concreto*, in other words the judge must test each of the applicable penal laws (the old and new laws) against the specific facts of the case in order to identify what would be the presumed penalty in the light of the new and the old law. After establishing the presumed penalties resulting from the applicable laws, and in view of all the circumstances of the case, the judge must effectively apply the one more favourable to the defendant[30].

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26. [GC], no. 10249/03, § 109, 17 September 2009, and already *G. v. France*, no. 15312/89, § 26, 27 September 1995; and, under the ICCPR, Communication No. 55/1979, *MacIsaac v. Canada*, 14 October 1982, §§ 11-13; Communication No. 682/1996, *Westerman v. the Netherlands*, 13 December 1999, § 9.2; Communication No. 987/2001, *Gombert v. France*, 11 April 2003, § 6 (4); Communication No. 875/1999, *Filipovitch v. Lithuania*, 19 September 2003, § 7 (2); Communication No. 981/2001, *Teofila Casafranca de Gomez v. Peru*, 19 September 2003, § 7 (4); and Communication No. 1492/2006, *van der Platt v. New Zealand*, 22 July 2008, § 6 (4).

27. Not to mention more complex cases, where there exist intermediate laws between the law in force at the material time and the law in force at the time of the judgment. In those cases, the comparison takes into account all of the laws that are or were applicable to the facts, from the commission of the facts until the judgment.

28. For this reason, I cannot agree with the crucial paragraphs 69 and 70 of the judgment, which set out an abstract comparison of the minimum limits of the applicable penal laws.

29. This is the recent position of the appeals chamber of the State Court, which has continued to apply the 2003 Code to more serious instances of war crimes and the 1976 Code to less serious instances of war crimes.

30. For instance, a penal law with a lower maximum penalty does not necessarily result in a lighter penalty compared to a law with a higher maximum penalty. The sentencing judge is bound to take into account the facts of the case and the entire applicable legal framework, including the possibilities of mitigating factors in respect of sentencing and suspension. Thus, a penal law with a lower maximum penalty, but no suspension or very strict suspension options, may be *lex gravior* when compared to a penal law with a higher maximum penalty but also more generous suspension options, where the defendant qualifies *in concreto* for suspension under the latter but not the former law. The same may occur if one compares a law which provides for a lower maximum penalty but does not include certain sentencing mitigating factors, and a law which provides for a higher maximum penalty but also includes a broader set of sentencing mitigating factors in

The finding of *lex mitior* under Article 7 § 1 of the ECHR also implies a global comparison of the punitive regime under each of the penal laws applicable to the offender's case (the global method of comparison). The judge cannot undertake a rule-by-rule comparison (differentiated method of comparison), picking the most favourable rule of each of the compared penal laws. Two reasons are traditionally given for this global method of comparison: firstly, each punitive regime has its own rationale, and the judge cannot upset that rationale by mixing different rules from different successive penal laws; secondly, the judge cannot exceed the legislature's function and create a new *ad hoc* punitive regime composed of a miscellany of rules deriving from different successive penal laws. Hence, **Article 7 § 1 of the ECHR presupposes a concrete and global finding of *lex mitior*.**

9. Summing up, **there is to be no retroactive penal law, except in favour of the defendant**[31]. No one may be held guilty of a criminal offence that did not constitute a criminal offence under national or international law at the time when it was committed, nor may a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed (the negative version of the principle of legality). Conversely, a lighter penalty is to be imposed if, in the period since the criminal offence was committed, a new law has provided for a penalty lighter than that which was applicable at the time the offence was committed (the positive version of the principle of legality). **These principles are part of the rules of customary international law, binding on all States, and are peremptory norms with the effect that no other rule of international or national law may derogate from them**[32]**. In other words, the principle of legality in the field of criminal law, both in its positive and negative versions, is *jus cogens*.**

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sentencing, allowing the court to reach, in the circumstances of the case, a lower penalty under the latter law than that which it would have imposed under the former.

31. As Article 15 of the revised ArCHR puts it, "[i]n all circumstances, the law most favorable to the defendant shall be applied". Or in the words of von Liszt, *nullum crime, nulla poena sine lege* principles are "the bulwark of the citizen against the State's omnipotence, they protect the individual against the ruthless power of the majority, against the Leviathan. However paradoxical it may sound, the Criminal Code is the criminal's *magna charta*. It guarantees his right to be punished only in accordance with the requirements set out by the law and only within the limits laid down in the law" (von Liszt, "Die deterministischen Gegner der Zweckstrafe", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1893, p. 357).

32. The International Committee of the Red Cross shares the view that the non-retroactivity of crimes and penalties is a principle of customary international law, in times of both peace and war (Rule 101 of the Study on Customary International Humanitarian Law, conducted by the International Committee of the Red Cross).

The "general principles of law recognised by civilised nations" in criminal law

10. General principles of law can be a source of international criminal law if and when they are sufficiently accessible and foreseeable at the material time. The principle of non-retroactivity does not prejudice the punishment of a person for an act or omission that, at the time when it was committed, was criminal according to the general principles of law as recognised by the community of civilised nations. Article 7 § 2 of the ECHR and Article 15 § 2 of the ICCPR provide for such a case[33]. Although historically created to justify the Nuremberg and Tokyo judgments, this protective provision also applies to other adjudication proceedings[34]. It has its own field of application, since it refers to crimes which have not yet been crystallised into customary international law at the material time, nor been enshrined into treaty law applicable to the facts, but already represent an intolerable affront to the principles of justice, as reflected in the practice of a relevant number of nations[35]. In order to avoid legal uncertainty and comply with the other facet of the principle of legality, that is to say the principle of specificity (*nullum crimen sine lege certa et stricta*), close scrutiny of the relevant State practice is required: only when the general principles of law reflect the treaty and domestic practices of a relevant number of States can

33. The very first draft of this provision was presented at the second session of the Commission on Human Rights, in December 1947, on the initiative of Belgium and the Philippines for the draft UDHR. This so-called "Nuremberg/Tokyo clause" was ultimately rejected on the grounds that it did not add anything to the main rule, since general principles of law were part of international law. At the sixth session of the Commission on Human Rights, in May 1950, during the discussions on the draft ICCPR, Eleanor Roosevelt opposed it with similar arguments, because the phrase "under national or international law" already covered prosecution under international criminal law, and the expression "the general principles of law recognised by civilised nations" was used in Article 38 (c) of the Statute of the ICJ to designate one of the sources of international law. In February 1950 the same proposal was raised by the Luxembourg expert in the discussions on the draft ECHR. In spite of the opposition, the provision was adopted in both the ICCPR and the ECHR, with the specific purpose of safeguarding the post-Second World War trials (*Travaux Préparatoires de la CEDH*, vol. III, pp. 163, 193 and 263, and, subsequently, *X. v. Belgium*, no. 268/57, Commission decision of 20 July 1957, Yearbook 1, p. 239, and *Kononov v. Latvia* [GC], no. 36376/04, § 186, ECHR 2010).

34. In fact, there are four countries which have included the "Nuremberg/Tokyo clause" in their Constitutions: Canada (Article 11 (g)), Cape Verde (Article 30), Poland (Article 42 § 1) and Sri Lanka (Article 13 § 6).

35. On 30 September 1946 the principle of justice was asserted *ubi et orbi* by the International Military Tribunal in *Göring and Others*: "In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished." (*Nuremberg Trial Proceedings*, vol. 22, p. 461)

they be recognised as expressing the will of the community of civilised nations to criminalise a particular form of conduct[36]. It follows that the criminalisation of conduct based on the general principles of law is not an exception to the principle of the prohibition on retroactive penal law, in so far as the conduct already corresponded, from a substantive perspective, to criminal conduct when it occurred. Thus, the "Nuremberg/Tokyo clause" does not apply when at the material time the conduct was punishable as a crime by national law, but with a lesser penalty than that enshrined in a subsequent law or treaty[37].

The political and judicial context of the case

11. The State Court Act, which initiated the State Court of BiH, was promulgated on 12 November 2000 by the High Representative for Bosnia and Herzegovina. The Court of BiH was effectively established on 3 July 2002 by the Parliament of BiH with the Law on the Court of BiH. A new Criminal Code of BiH came into force on 1 March 2003. A Book of Rules on the review of war-crimes cases was issued on 28 December 2004. A special chamber for war crimes in the Court of BiH began its work on 9 March 2005. In June 2008 the BiH Justice Sector Reform Strategy 2008-2012 was adopted by the BiH Council of Ministers. This strategy was created through a joint effort between the Ministries of Justice of the State of BiH, the Entities and cantons, as well as the Brčko District Judicial Commission and the High Judicial and Prosecutorial Council. On 29 December 2008 the Council of Ministers of BiH adopted the National War Crimes Strategy, which was complementary to the transitional justice strategy.

Following the 2003 judicial reforms, four jurisdictions emerged: BiH, the Brčko District, the Federation of BiH and the Republika Srpska. The judicial organisation did not provide for a mechanism by which court practices and differing legal interpretations could be resolved and harmonised. Consequently, the State Court of BiH and the Supreme Courts of both Entities issued verdicts with very different findings on key legal

36. The offence of contempt of court has been presented as an example of a crime under the general principles of law (see *Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, case no. IT-94-1-A-R77, ICTY judgment of 31 January 2000, § 15).

37. Thus, the Grand Chamber should have distanced itself clearly from the unfortunate decision in *Naletilić v. Croatia* ((dec.), no. 51891/99, ECHR 2000-V), in which the Court interpreted Article 7 § 2 of the Convention as applicable to the applicant's contention that he might receive a heavier punishment from the ICTY than he might have received from the domestic courts. The Grand Chamber should have distanced itself for two reasons: firstly, this interpretation of Article 7 § 2 is problematic; secondly, *Naletilić* concerned a case where an international prosecutor had accused the applicant before an international tribunal of a crime enshrined in international law, whereas in the present case the applicants were accused before a domestic court of a crime foreseen in national law.

questions, resulting in divergences in court practice and legal interpretation. In fact, in 2008, the Ministry of Justice of BiH concluded that "[t]his unpredictability affects the way that BiH is regarded in the international legal arena, and BiH runs the risk of breaching conventions"[38]. The same political concern was expressed by the Parliamentary Assembly of the Council of Europe, for example in its Resolution 1626 (2008) on Honouring of Obligations and Commitments by Bosnia and Herzegovina: "inconsistencies still exist in the application of criminal law by various courts at state and entity level with respect to war crimes, which leads to inequality of treatment of citizens, in the light of the European Convention on Human Rights"[39]; and by the Organization for Security and Co-operation in Europe (OSCE) in its overview of five years of war-crimes processing in Bosnia, which referred to "a situation of manifest inequality before the law in war crimes cases tried before different courts in BiH. In practice, this means that persons convicted of war crimes before different courts might receive widely divergent sentences"[40].

12. The incoherent case-law was compounded by the displacement of cases from their natural jurisdictions, as the Council of Ministers of BiH itself admitted in referring to the "[i]nconsistent practice of the review, takeover and transfer of war crimes cases between the Court and the Prosecutor's Office and other courts and prosecutor's offices, and the lack of agreed upon criteria for the assessment of sensitivity and complexity of cases"[41]. In fact, after the adoption of the Orientation Criteria of the Prosecutor's Office in 2004, so-called "very sensitive" crimes were to be kept by the Special Department for War Crimes of the Prosecutor's Office of BiH, and "sensitive" crimes were to be sent to the cantonal and district prosecutor's offices in the locations in which the events occurred as stated in the case files. These guidelines were very unclear and, worse still, were not applied consistently. In simple terms, this "case-by-case prosecution" method did not work well, since it "only deepened the ongoing mess about what, who and how things should be done"[42]. The lack of a prosecutorial

38. Bosnia and Herzegovina Justice Sector Reform Strategy 2008-2012, Sarajevo, June 2008, p. 70.

39. The same political opinion was shared by the Venice Commission in its Opinion No. 648/2011, paragraphs 38 and 65.

40. OSCE, "Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010, May 2011", p. 19. See also the International Center for Transitional Justice, "Bosnia and Herzegovina: Submission to the Universal Periodic Review of the UN Human Rights Council Seventh Session", September 2009; Human Rights Watch, "Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts", July 2008; and Human Rights Watch, "Justice for Atrocity Crimes: Lessons of International Support for Trials before the State Court of Bosnia and Herzegovina", March 2012.

41. Council of Ministers of BiH, "National War Crimes Strategy", 28 December 2008, p. 4.

strategy for the prioritisation and selection of cases, and the absence of substantive reasoning for the prosecutor's choice of the trial court and of effective judicial review of that choice, led to significant uncertainty regarding the prosecutor's priorities and choices, some politicians even questioning the department's objectivity in its case-selection process, in view of the fact that 90% of cases before the war-crimes chamber involved Serb defendants[43].

It was not until 2008 that the authorities developed a written national strategy aimed at developing a more systematic approach to cases and allocating resources in war-crimes cases[44]. In order for cases to be selected and their complexity to be assessed in a uniform and objective manner, thus informing the decision-making process with regard to the takeover or transfer of a case, the State Court and the Prosecutor's Office of BiH, with the participation of other judicial and prosecutorial authorities, drafted the Case Complexity Criteria. Subsequently, Article 449 of the BiH Code of Criminal Procedure – Deciding on Cases Pending before Other Courts and Prosecutor's Offices – was amended by Law no. 93/09, which introduced the following criteria for the transfer and allocation of cases: "the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case."[45]

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42. Zekerija Mujkanović, "The Orientation Criteria Document in Bosnia and Herzegovina", in Forum for International Criminal and Humanitarian Law Publication Series no. 4 (2010, second edition), at p. 88.

43. Human Rights Watch, "Narrowing the Impunity Gap: Trials before Bosnia's War Crimes Chamber", February 2007, p. 9.

44. Human Rights Watch, "Justice for Atrocity Crimes", cited above, p. 42.

45. As the OSCE concludes, "the case complexity criteria are a laundry list of factors to be taken into consideration in determining if the proceedings will be conducted before the BiH Court". In short, the criteria are extremely broad and do not provide clear guidance as to what thresholds must be met to justify a marking as "most complex" or "less complex" (see OSCE, "Delivering Justice in Bosnia and Herzegovina", cited above). The broad nature of these criteria and especially of the criterion "other circumstances of importance in assessing the complexity of the case" is particularly problematic. One cannot but remember the principle of the natural or lawful judge and the solemn prohibition of extraordinary criminal courts contained in Article 8 of the ACHR and in the constitutional provisions of a considerable number of countries, such as Article 135 § 2 of the Albanian Constitution, Article 85 § 2 of the Andorran Constitution, Article 176 § 5 of the revised Angolan Constitution, Article 18 of the Argentinian Constitution, Article 92 of the Armenian Constitution, Article 125 (VI) of the Azerbaijani Constitution, Articles 14 and 116 (II) of the Bolivian Constitution, Article 5 (XXXVII) of the Brazilian Constitution, Article 19 § 3 of the Chilean Constitution, Article 61 of the Danish Constitutional Act, Article 123 § 2 of the East Timor Constitution, Article 15 of the El Salvador Constitution, Article 78 § 4 of the Ethiopian Constitution, Article 101 of the German Basic Law (*Grundgesetz*), Articles 25 and 102 of the Italian Constitution, Article 76 of the Japanese Constitution, Article 33 § 1 of the Liechtenstein Constitution, Article 111 of the Lithuanian Constitution, Article 86 of the Luxembourg Constitution, Article XXV (1) of the Macedonian Constitution, Article 118 of the Montenegrin Constitution, Article 13 of the Mexican Constitution, Article 167 § 2 of the Mozambican Constitution, Article 4 § 8 of the Nigerian

Assessment of the facts in the present case under the European standard

13. It is against this political and judicial background, and in the light of the above-mentioned principles, that the facts in the present case must be assessed. And the conclusion is ineluctable: both applicants were subjected to an arbitrary criminal judgment which inflicted on them severe retroactive penalties. The evident proof of this arbitrariness is that the applicant Mr Damjanović was sentenced under the 2003 Code to eleven years' imprisonment by the State Court for beatings, more than double the lowest sentence admissible under the 1976 Code. This conclusion is even more forceful in the case of the applicant Mr Maktouf, who was sentenced under the 2003 Code to five years' imprisonment, that is to say five times the lowest sentence imposable under the 1976 Code.

14. Mr Maktouf received the lowest penalty provided by the 2003 Code for aiders or abettors of war crimes, and Mr Damjanović a penalty slightly above the minimum provided by the same Code for principals of war crimes, because the courts attached weight to the mitigating sentencing factors. Had the courts applied the same mitigating sentencing criteria under the 1976 Code, as they could have done, they would necessarily have imposed much lower penalties on the applicants. This comparison *in concreto* between the penalties that the applicants received, and those that they could have expected under the 1976 Code, shows clearly that the 1976 Code was the *lex mitior* and the 2003 Code was the *lex gravior*[46]. By acting in this manner, the national courts breached not only Article 4 § 2 of the 2003 Criminal Code of BiH, but also Article 7 § 1 of the ECHR[47].

Constitution, Article 17 § 3 of the Paraguayan Constitution, Article 139 § 3 of the Peruvian Constitution, Article 172 § 2 of the Polish Constitution, Article 209 § 3 of the Portuguese Constitution, Article 126 § 5 of the Romanian Constitution, Article 118 § 3 of the Russian Constitution, Article 143 of the Rwandan Constitution, Article 39 § 7 of the São Tomé and Príncipe Constitution, Article 48 § 1 of the Slovakian Constitution, Article 117 of the Spanish Constitution, Article 11 of the Swedish Instrument of Government, Article 30 § 1 of the Swiss Constitution, Article 125 of the Ukrainian Constitution and Article 19 of the Uruguayan Constitution. Wide-ranging clauses concerning the transfer and removal of criminal cases have in the past been instrumental to the operation of such courts and are unacceptable under the principle of the natural or lawful judge.

46. This case is very similar to that in Communication No. 981/2001, cited above, § 7 (4). As in the present case, Mr Gómez Casafranca was sentenced to the minimum term of twenty-five years under the new law, more than double the minimum term under the previous law, and the national courts provided no explanation as to what the sentence would have been under the old law had it been still applicable.

47. The cases of Mr Damjanović and Mr Maktouf clearly illustrate the conclusion that the Government themselves reached in respect of the general situation, previously described, of the prosecutorial and judicial organisation in BiH (Council of Ministers of BiH, National War Crimes Strategy, 28 December 2008, p. 15).

Conclusion

15. Since the national courts applied arbitrarily and retroactively the *lex gravior*, I find that there has been a violation of Article 7 § 1 of the ECHR. The legal effect of the finding of a violation of Article 7 is that the applicants' convictions must be declared null and void by the competent national court. Article 7 is a non-derogable right, as Article 15 of the ECHR clearly states. If the applicants' convictions remained valid in spite of a finding that they had violated Article 7, this would represent a *de facto* derogation from Article 7. Such derogation would not only invalidate the finding of a violation in the Court's present judgment, but also Article 15. Should the respondent State still wish to adjudicate the alleged criminal acts committed by the applicants during the Bosnian war, a retrial is necessary. When Anselm von Feuerbach coined in § 24 of his *Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts* of 1801 the Latin expression *nulla poena sine lege*, he also added that this principle allowed for no exceptions: it must benefit all offenders, be their crimes petty or brutal.