



Court of Bosnia and Herzegovina should not have retroactively applied the 2003 Criminal Code to two war criminals

In today's Grand Chamber judgment in the case of [Maktouf and Damjanović v. Bosnia and Herzegovina](#) (application nos. 2312/08 and 34179/08), which is final¹, the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 7 (no punishment without law) of the European Convention on Human Rights.

The case concerned complaints by two men convicted by the Court of Bosnia and Herzegovina of war crimes about the proceedings before that court. They complained in particular that a more stringent criminal law, namely the 2003 Criminal Code of Bosnia and Herzegovina, had been applied to them retroactively than that which had been applicable at the time they committed the offences – in 1992 and 1993 respectively – namely the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia.

Given the type of offences of which the applicants had been convicted (war crimes as opposed to crimes against humanity) and the degree of seriousness (neither of the applicants had been held criminally liable for any loss of life), the Court found that the applicants could have received lower sentences had the 1976 Code been applied. Since there was a real possibility that the retroactive application of the 2003 Code operated to the applicants' disadvantage in the special circumstances of this case, it held that they had not been afforded effective safeguards against the imposition of a heavier penalty.

Principal facts

The applicants are Abduladhim Maktouf and Goran Damjanović, an Iraqi national and a national of Bosnia and Herzegovina, respectively. Mr Maktouf was born in 1959; he lives in Malaysia. Mr Damjanović was born in 1966; he is serving his prison sentence in Bosnia and Herzegovina.

Both applicants were convicted by the Court of Bosnia and Herzegovina ("the State Court") of war crimes committed against civilians during the 1992-1995 war. War crimes chambers were set up within the State Court in early 2005 as part of the International Criminal Tribunal for the former Yugoslavia's completion strategy. The State Court can decide to take over war crime cases because of their sensitivity or complexity, and it can transfer less sensitive and complex cases to the competent Entity court. In an agreement of December 2004 between the High Representative (an international administrator for Bosnia and Herzegovina, a position established with the authorisation of the United Nations Security Council) and the Bosnia and Herzegovina authorities, international judges can be appointed to the State Court. Between 2004 and 2006, the High Representative appointed more than 20 international judges to the State Court for a renewable period of two years.

Mr Maktouf had helped to abduct two civilians in 1993 in Travnik in order to exchange them for members of the ARBH forces (mostly made up of Bosniacs) who had been captured by the HVO forces (mostly made up of Croats). In July 2005, a trial chamber of

¹ Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

the State Court convicted him of aiding and abetting the taking of hostages as a war crime and sentenced him to five years' imprisonment under the 2003 Criminal Code of Bosnia and Herzegovina ("the 2003 Criminal Code"). In April 2006, an appeals chamber of the court confirmed the conviction and the sentence after a fresh hearing with the participation of two international judges.

Mr Damjanović had taken a prominent part in the beating of captured Bosniacs in Sarajevo in 1992 to punish them for resisting a Serb attack. In June 2007, a trial chamber of the State Court convicted him of torture as a war crime and sentenced him to 11 years' imprisonment under the 2003 Criminal Code. An appeals chamber of the same court upheld that judgment in November 2007.

Both men's constitutional complaints were ultimately rejected. Mr Damjanović's complaint was dismissed as out of time in April 2009. Mr Maktouf's case resulted in a leading decision in June 2007 by the Constitutional Court, which found in particular that none of Mr Maktouf's rights under the European Convention of Human Rights had been breached.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial), Mr Maktouf alleged that the proceedings against him had been unfair, notably because the international judges who decided on his case on appeal had not been independent. Relying on Article 7 (no punishment without law), both applicants complained that the State Court had retroactively applied to them a more stringent criminal law, the 2003 Criminal Code, than that which had been applicable at the time of their commission of the criminal offences, namely the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia ("the 1976 Criminal Code"). Relying on Article 14 (prohibition of discrimination) and Article 1 of Protocol No. 12 (general prohibition of discrimination), they also complained that they had been treated differently from those who were tried before the Entity courts, which normally applied the 1976 Criminal Code in war crime cases and imposed on average lighter sentences than the State Court.

The applications were lodged with the European Court of Human Rights on 17 December 2007 and 20 June 2008, respectively. On 10 July 2012 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber. A Grand Chamber hearing was held on 12 December 2012.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
 Josep **Casadevall** (Andorra),
 Guido **Raimondi** (Italy),
 Ineta **Ziemele** (Latvia),
 Mark **Villiger** (Liechtenstein),
 Isabelle **Berro-Lefèvre** (Monaco),
 David Thór **Björgvinsson** (Iceland),
 Päivi **Hirvelä** (Finland),
 George **Nicolaou** (Cyprus),
 Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"),
 Nona **Tsotsoria** (Georgia),
 Zdravka **Kalaydjieva** (Bulgaria),
 Nebojša **Vučinić** (Montenegro),
 Kristina **Pardalos** (San Marino),
 Angelika **Nußberger** (Germany),
 Paulo **Pinto de Albuquerque** (Portugal),

Johannes **Silvis** (the Netherlands),

and also Michael **O'Boyle**, *Deputy Registrar*.

Decision of the Court

Article 7

At the outset, the Court made a distinction between two categories of serious violations of international humanitarian law falling under the State Court's jurisdiction. As to crimes against humanity which were introduced into national law in 2003, the Court noted that the State Court and the Entity courts had no other option but to apply the 2003 Criminal Code. It confirmed its finding in the case of *Šimšić v. Bosnia and Herzegovina* (no. 51552/10), decision of 10 April 2012, that the fact that crimes against humanity had not been criminal offences under national law during the 1992-95 war was 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. Accordingly, the case of *Maktouf and Damjanović* raised entirely different questions to those in the *Šimšić* case.

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

The Court noted that the definition of war crimes was the same in the 1976 Criminal Code, which had been applicable at the time the offences were committed, and in the 2003 Criminal Code, which had been applied retroactively in the applicants' case. The applicants had not disputed that their acts constituted criminal offences defined with sufficient accessibility and foreseeability at the time when they were committed. What was at issue was therefore not the lawfulness of their convictions but the different sentencing frameworks regarding war crimes for which the two Criminal Codes provided.

While pursuant to the 1976 Code war crimes were punishable by imprisonment for a term of five to 15 years, or, for the most serious cases, the death penalty or 20 years' imprisonment, pursuant to the 2003 Code war crimes attracted imprisonment for a term of ten to 20 years or, for the most serious cases, long-term imprisonment for a term of 20-45 years. Under the 1976 Code, 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. Under the 2003 Code, they were also to be punished as if they themselves had committed the crimes, and their punishment could be reduced to five years' imprisonment.

The State Court had 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. Mr Damjanović had been 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.

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 noted that only the most serious instances of war crimes were punishable by the death penalty pursuant to the 1976 Code. As neither of the applicants had been held criminally liable

for any loss of life, the crimes of which they were convicted clearly did not belong to that category.

It was of particular relevance that the 1976 Code was more lenient in respect of the minimum sentence, as Mr Maktouf had received the lowest sentence provided for and Mr Damjanović had received a sentence which was only slightly above the lowest sentence provided for. The Court granted that the applicants' sentences were within the latitude of both the 1976 Criminal Code and the 2003 Criminal Code. It thus could not be said with any certainty that either applicant would have received lower sentences had the former Code been applied. What was crucial, however, was that the applicants could have received lower sentences had the 1976 Code been applied. Accordingly, since there was a real possibility that the retroactive application of the 2003 Code operated to the applicants' disadvantage as concerned the sentencing, it could not be said that they had been afforded effective safeguards against the imposition of a heavier penalty, in breach of Article 7.

Furthermore, the Court was 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. It considered this argument to be inconsistent with the intention of the drafters of the Convention that Article 7 § 1 contained the general rule of non-retroactivity and that Article 7 § 2 was only a contextual clarification, which had been 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. It was clear in the Court's opinion that the drafters of the Convention had not intended to allow for any general exception to the rule of non-retroactivity.

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

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

Other articles

The Court declared inadmissible Mr Maktouf's complaint under Article 6 and both applicants' complaints under Article 14 and Article 1 of Protocol No. 12.

It found in particular that there were no reasons to doubt that the international judges of the State Court were independent of the political organs of Bosnia and Herzegovina, of the parties to the case and of the institution of the High Representative. The international judges' appointment had precisely been motivated by a desire to reinforce the independence of the State Court's war crime chambers and to restore public confidence in the judicial system. Moreover, 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 was understandable given the provisional nature of the international presence at the State Court and the mechanics of international secondments.

As regards the discrimination complaint, the Court first noted that given the large number of war crime cases in post-war Bosnia and Herzegovina, it was inevitable that the burden had to be shared between the State Court and the Entity courts. If 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. The Court was aware that the Entity courts imposed in general lighter sentences than the State Court at the time. However, that treatment was not to be explained in terms of personal characteristics (such as nationality, religion or ethnic origin) and therefore it did 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.

Article 41 (just satisfaction)

Since it was not certain that the applicants would indeed have received lower sentences had the 1976 Code been applied, the Court held that the finding of a violation of the Convention constituted in itself sufficient just satisfaction for any non-pecuniary damage suffered. The Court further held that Bosnia and Herzegovina was to pay each applicant 10,000 euros (EUR) in respect of costs and expenses.

Separate opinions

Judges Ziemele, Kalaydjieva, Vučinić and Pinto de Albuquerque expressed concurring opinions, which are annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.