DALLA COMUNITÀ INTERNAZIONALE

KUCI AZRA

The court of Bosnia and Herzegovina and its sisyphean task[1]

SUMMARY: 1. Introduction. – 2. Two Criminal Codes. – 3. The findings of the ECtHR in Maktouf and Damjanović case. – 4. Far-reaching consequences of the ECtHR decision in Maktouf and Damjanović case. – 5. Conclusion.

1. Introduction

On 18 July 2013, the Grand Chamber of the European Court of Human Rights (hereinafter: ECtHR) in its Judgment in *Maktouf and Damjanović vs. Bosnia and Herzegovina*[2] found a violation of Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR). This Judgment, although referring only to the cases of Maktouf and Damjanović, has produced serious legal consequences for all the cases of genocide and war crimes adjudicated at the War Crimes Chamber of the Court of Bosnia and Herzegovina (hereinafter: BiH).

Both Maktouf and Damjanović were tried at the War Crimes Chamber of the Court of BiH. The War Crimes Chamber was established in the early 2005 as a part of the existing (state) Court of BiH[3], and it has jurisdiction over the war crimes, crimes against humanity and genocide. When the War Crimes Chamber was established, both trial and appeals chambers were comprised of one national and two international judges and there were also international and national prosecutors working at the Prosecutor's Office of BiH.

Mr. Abduladhim Maktouf was tried at the Court of BiH and after Trial Chambers found him guilty of aiding and abetting the taking of hostages as a war crime, he was sentenced to five years' imprisonment[4]. In the appeals procedure, Appeals Chamber of the Court of BiH quashed this judgment and scheduled a new hearing. After this hearing, the Court of BiH convicted the applicant of the same criminal offence and imposed the same sentence[5].

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[1] LL.M. in International Humanitarian Law and Human Rights from Geneva Academy. Law Faculty, University of Sarajevo, Bosnia and Herzegovina Lawyer specialized in international humanitarian law and human rights.

[2] ECtHR, July 18, 2013, *Maktouf and Damjanović v. Bosnia and Herzegovina.*

[3] The Law on the Court of BiH was adopted on July 3, 2002 and the Court of BiH was formally established on May 8, 2002 when the first judges were appointed.

[4] Court of BiH, Trial Chamber, July 1, 2005, Maktouf, n. K-127/04.

[5] Court of BiH, Appeals Chamber, April 4, 2006, Maktouf, n. KPŽ-32/05.

Mr Goran Damjanović was tried at the Court of BiH and after Trial Chambers found him guilty of torture as a war crime, he was sentenced to eleven years' imprisonment[6]. In the appeals procedure, Appeals Chamber of the Court of BiH upheld that judgment[7].
In their applications to the ECtHR, both Maktouf and Damjanović claimed a violation of Article 7 of the ECHR in connection with the decisions of the Court of BiH in their respective cases. They complained that the Court of BiH had retroactively applied a more stringent criminal law than the one that was in force at the time when they committed their criminal offences, which resulted in longer prison sentences.

2. Two Criminal Codes

In order to understand the importance of the recent Judgment in *Maktouf and Damjanović vs. Bosnia and Herzegovina* and its impact on the work of the War Crimes Chamber of the Court of BiH, I will give a very basic introduction on the criminal provisions applicable to the crimes committed during the 1992-1995 conflict in the territory of BiH.
In April 1992, following the declaration of independence, in order to avoid a legal gap, the Presidency of the then Republic of Bosnia and Herzegovina, acting on the proposal by the Government, adopted a list of relevant Decrees having the force of law. One of them was the Decree with the force of law on the adoption of the Criminal Code of the Socialist Federal Republic of Yugoslavia, (hereinafter: the 1976 Criminal Code)[8]. While the 1976 Criminal Code did not recognise crimes against humanity, it did prescribe for war crimes and genocide. Those crimes were punishable by five to fifteen years of imprisonment, or in the most serious cases by the death penalty[9]. In accordance with the same Code, the death penalty could be replaced by a sentence of twenty years of imprisonment[10].
On 14 December 1995, when the General Framework Agreement for Peace

[6] Court of BiH, Trial Chamber, June 18, 2007, Damjanović, n. X-KR-05/107.
[7] Court of BiH, Appeals Chamber, November 19, 2007, Damjanović, n. X-KRŽ-05/107.
[8] Decree with the Force of Law on Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialist Federative Republic of Yugoslavia taken over as the republic law during the imminent war danger or during the time of war. This law was incorporated in the legal system of Bosnia and Herzegovina on April 11, 1992 and published in the Official Gazette of the Republic Bosnia and Herzegovina no. 2/92.
[9] Article 142 of the 1976 Criminal Code (the text of this code can be found on the web page *http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm#chap_3*).
[10] Article 38 of the 1976 Criminal Code.

in Bosnia and Herzegovina entered into force, the ECHR and its protocols became directly applicable and took precedence over the laws of Bosnia and Herzegovina. As a consequence, and in accordance with Protocol 6 of the ECHR, the death penalty could no longer be imposed.
On 1 March 2003 the new Criminal Code of BiH came into force[11] (hereinafter: the 2003 Criminal Code) and under this Code, genocide, war crimes and crimes against humanity became punishable by a term of imprisonment of ten to twenty years or, in the most serious cases, a long-term imprisonment of twenty to forty-five years.
Since its official launch in March 2005, the War Crimes Chambers of the Court of BiH applied the 2003 Criminal Code in all the cases involving genocide and crimes against humanity, as well as in most of the war crimes cases. In a few of the war crimes cases the judges applied the 1976 Criminal Code, because they found that it was more lenient *in concreto* for those defendants[12].

3. The findings of the ECtHR in Maktouf and Damjanović case

Both Maktouf and Damjanović, upon whose applications ECtHR rendered its decision, were found guilty for war crimes and in their cases, the Court of BiH applied the 2003 Criminal Code. The Grand Chamber of the ECtHR in its Judgment in *Maktouf-Damjanović vs. Bosnia-Herzegovina* found that the Court of BiH violated Article 7 of the European Convention on Human Rights (ECHR), «*it cannot be said that they were afforded effective safeguards against the imposition of a heavier penalty*»[13].
Article 7 of the ECHR reads:
«*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

[11] The High Representative in BiH imposed this Criminal Code and it was later adopted by the Bosnia and Herzegovina Parliamentary Assembly and published in the Official Gazette of Bosnia and Herzegovina 37/03. Later amendments were published in the Official Gazette of Bosnia and Herzegovina n. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, respectively.
[12] See for example - the Court of BiH, Appeals Chamber, March 25, 2009, Zijad, n. X-KRŽ-06/299, § 98-132.
[13] ECtHR, *Maktouf and Damjanović vs. Bosnia and Herzegovina*, § 70.

according to the general principles of law recognised by civilised nations».
The rule contained in the Article 7 of the ECHR is threefold – first, a crime can only be defined by law (national or international); second, a certain act or omission must be prohibited at the time it takes place and not retrospectively; and third, a heavier penalty cannot be imposed than the one provided for by the law at the time the conduct occurred. This rule enshrines one of the core principles of criminal law - the principle of legality.
The reasoning behind the principle of legality (*nullum crimen, nulla poena sine praevia lege poenali*) is the need to ensure that certain behaviour will not be declared as a criminal offence after it is conducted. It protects citizens' from the arbitrariness of lawmakers and it guarantees that the crimes and the penalties are clearly expressed by the law and foreseeable and accessible to everyone.
However, there is an exception to retroactivity known as the *lex mitior* principle. This principle works in favour of the defendant and it requires that if, subsequent to the commission of the criminal offence, the law is adopted that is more lenient for the defendant in question, that law will be applied.
As mentioned before, war crimes were prescribed by the 1976 Criminal Code. Therefore, the ECtHR could only be referring to the third element of Article 7: the penalty imposed cannot be heavier than the one provided for by law when the acts were committed. This follows from the reasoning of the ECtHR Judgment, although in paragraph 76 of its decision the ECtHR states only that there was a violation of Article 7 (in whole) and that «*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*»[14].
The ECtHR distanced itself from making a general conclusion on the more lenient law, which in any case is always determined *in concreto*[15]. The Court instead stated that in these two cases both proclaimed sentences were close to the minimum level of the prescribed sentence in the 2003 Criminal Code and that only the most serious instances of war crimes were punishable by the death penalty pursuant to the 1976 Code, therefore the applicants could have received lower sentences had the 1976 Code been applied in their cases because this Code contains a lower minimum sentence (in the case of Maktouf, the ECtHR concluded that he could have been sentenced to one year in prison and that for Damjanović it could have been possible to impose a sentence

[14] *Ibid.*, § 76.
[15] *Ibid.*, § 66-67.

of five years)[16].

4. Far-reaching consequences of the ECtHR decision in Maktouf and Damjanović case

Although the wording of this judgment is mild, the consequences that followed were grave for the BiH judiciary, but also for the BiH society in whole. After the ECtHR's Judgement, the Constitutional Court of BiH decided on application submitted by Mr Zoran Damjanović, the brother of Goran Damjanović (they were both tried and sentences together). The Constitutional Court of BiH found that the crimes for which Mr. Zoran Damjanović was convicted do not belong to the category of the most serious war crimes cases for which a death penalty was possible under 1976 Criminal Code and therefore applied law (the 2003 Criminal Code) was not more lenient, therefore there was a violation of Article 7(1) of the ECHR[17]. The Constitutional Court of BiH quashed the verdicts of the Court of BiH and ordered that the Court of BiH issues a new decision.

After that, the Constitutional Court of BiH rapidly processed the applications submitted by other ten applicants who were sentenced by the Court of BiH for war crimes and genocide[18]. These applications were pending before the Constitutional Court of BiH for years only to have their cases resolved in a single day, on 22 October 2013. In its decisions regarding these applications, the Constitutional Court of BiH, interpreting the ECtHR Judgment in *Maktouf and Damjanović vs. Bosnia-Herzegovina*, overturned several judgments of the Court of BiH, including those against six defendants found guilty of genocide. The Constitutional Court of BiH again found violations of Article 7 of the ECHR, but it used somewhat stronger wording than that used by the ECtHR. It found that, according to the law that was in force at the time criminal offences in question were committed, a prison sentence amounting to fifteen years (or twenty years or the death penalty for the most serious cases), could have been imposed. However, the Court found that that at the time when the trials in question took place, «*there was no theoretical or practical possibility to pronounce a death penalty on the applicant*»[19]. Therefore it found that the highest penalty that can be pronounced is twenty years impris-

[16] *Ibid.*, § 68-70.

[17] The Constitutional Court of BiH, September 27, 2013, Damjanović, n. AP 325/08.

[18] Official announcement at the web page of the Constitutional Court of BiH, *http://www.ccbh.ba/eng/press/index.php?pid=6927&sta=3&pkat=506&kat=505*.

[19] The Constitutional Court of BiH, October, 22 2013, Trifunović, n. AP 4100/09, § 47.

onment. The Court went on comparing the sentence of twenty years of imprisonment with the sentence of a long-term imprisonment of forty-five years and concluded that «*in this case it is without doubt that Criminal Code of SFRY is more lenient for the appellant*»[20].

On 5 November 2013, the Constitutional Court of BiH was deciding upon the appellation of Mr. Zrinko Pinčić, who was convicted by the Court of BiH in 2009 for war crimes against civilians and was sentenced to a prison sentence of nine years. In its decision, the Constitutional Court of BiH found that, since Mr Pinčić was given a sentence below the minimum sentence of ten years prescribed by the 2003 Criminal Code, the 1976 Criminal Code would be more lenient since it has a minimum sentence of five years imprisonment, thus finding a violation of Article 7 of the ECHR.[21] The Constitutional Court of BiH therefore quashed the verdict of the Court of BiH and ordered that the Court of BiH issues a new decision.

If the Constitutional Court of BiH followed the reasoning of the ECtHR, it is not clear why it did not took into account the fact that the consequences of both Maktouf's and Damjanović's actions were far less grave than the consequences of the genocide in Srebrenica and the most of the other war crimes cases processed at the Court of BiH. The ECtHR stated that, because acts committed by Maktouf and Damjanović did not result in loss of lives, in those two cases, death penalty could not have been pronounced in accordance with the 1976 Criminal Code[22]. On the other hand, for the most serious cases, such as genocide, at the time when they were committed, the death penalty *was* stipulated by the 1976 Criminal Code. When deciding which law is more lenient, the court should take into consideration the entire law, with all of its sanctions, that could have been handed down at the time acts in question were committed and apply it to the facts of the case. That is the only way to really compare the law that would have been used at the time when acts were comitted, with the law that is in force at the time the trial took place[23]. In addition, when applying *lex mitior* principle, the court can only take into an account an actual law. In that regard, it is true that death penalty could not have

[20] The Constitutional Court of BiH, October, 22 2013, Trifunović, cit., § 48, emphasis added.

[21] The Constitutional Court of BiH, November, 5 2013, Pinčić, n. AP 1705/10.

[22] ECtHR, *Maktouf and Damjanović vs. Bosnia and Herzegovina*, § 68: «(...) *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*».

[23] See *Commentary of the Criminal Codes in Bosnia and Herzegovina, Council of Europe/European Commission*, Book I, Sarajevo, 2005, p. 67.

been imposed in the period after Dayton Peace Accords, but the law in force still stipulated it. The 1976 Criminal Code without the death penalty was never enacted through a standard parliamentary procedure in any part of BiH and therefore it cannot be considered as "a law" that can be taken into consideration when deciding on the most lenient law. The death penalty was abolished in the Federation of BiH in 1998, in the Republika Srpska in 2000 and in Brcko District in 2001, when the new criminal codes were adopted, replacing the 1976 Criminal Code[24]. In all three criminal codes, death penalty was replaced with the long-term imprisonment. As mentioned before, 2003 Criminal Code of BiH also contains a long-term imprisonment. Therefore, a system of penalties that contained the death penalty for the most severe crimes was replaced with a system containing a long-term imprisonment in accordance with the human rights standards.

Accordingly, the cases of genocide in Srebrenica, having in mind their grave consequences, fall into the category of the most serious cases for which death penalty could have been pronounced in accordance with the 1976 Criminal Code. Therefore, the 1976 Criminal Code, in its entirety, as it existed at the time crimes were committed and as it continued to exist after 1995, although death penalty could not be imposed in accordance with human rights instruments, cannot be more lenient for those defendants.

The ECtHR's Judgment in *Maktouf and Damjanović vs. Bosnia-Herzegovina* and its extensive interpretation by the Constitutional Court of BiH created a peculiar situation in the country regarding the applicability of material law and sentencing policy. On one side, the crimes against humanity that were not prescribed by the 1976 Criminal Code, are processed in accordance with the 2003 Criminal Code. This is done in accordance with the Article 4a of the 2003 Criminal Code, which allows for the trial and punishment of any person for any act or omission that was criminalized under the general principles of international law at the time when it was committed[25]. The applicability of the 2003 Criminal Code in these cases was confirmed by the ECtHR in its Decision on Admissibility in *Šimšić vs. Bosnia-Herzegovina*[26]. Šimšić, after he was found guilty by the Court of BiH for the crimes against humanity and sentenced in accordance with the 2003 Criminal Code[27], filed an application with the

[24] Bosnia and Herzegovina is comprised of two entities – the Federation of BiH and the Republika Srpska and Brcko District as a special unit of local self-government.

[25] Article 4(a), The Criminal Code of BiH.

[26] ECtHR, April 10, 2012, *Šimšić vs. Bosnia and Herzegovina.*

[27] The Court of BiH, Appeals Chamber, August 7, 2007, Šimšić, n. X-KRŽ-05/04.

ECtHR, claiming that in his case there was a violation of Article 7 of the ECHR because crimes against humanity were not a criminal offence under national law during the 1992-95 war. The ECtHR found Šimšić's application inadmissible because «*(his) acts, at the time when they were committed, constituted an offence defined with sufficient accessibility and foreseeability by international law*»[28].

Therefore, if found guilty of crimes against humanity, under the 2003 Criminal Code, a person can receive up of forty-five years of imprisonment. Conversely, for war crimes and genocide that were prohibited by the 1976 Criminal Code, the maximum sentence that can be imposed if a person is found guilty is twenty years of imprisonment. The resulting discrepancy undermines the whole sentencing policy before the Court of BiH. In terms of prescribing prison sentences, BiH opted for a system of relatively determined sentences where only minimum and maximum lengths of prison sentences are stipulated in the law for a certain crime and judges can chose a sentence inside this range. It is believed that this system of sentences preserves the certainty and predictability of sentencing while at the same time offers the best basis for the individualization of sentences. Judges can apply the sentence adjusting it to the specific circumstances of each particular case, taking into account «*the degree of criminal liability, the motives for perpetrating the offence, the degree of danger or injury to the protected object, the circumstances in which the offence was perpetrated, the past conduct of the perpetrator, his personal situation and his conduct after the perpetration of the criminal offence, as well as other circumstances related to the personality of the perpetrator*»[29].

With this in mind, it is worth mentioning that for genocide, crimes against humanity and war crimes, the 2003 Criminal Code prescribes the same range of prison sentences – ten to twenty years or long-term imprisonment up to forty-five years. Although there is no hierarchy of crimes, some of the most severe sentences at the Court of BiH were imposed on those found guilty of genocide. This shows that judges at the Court of BiH do consider genocide to be the most severe crime that calls for the most severe punishment. Lower on the scale (with some exceptions[30]) are the sentences imposed on those found guilty of the crimes against humanity. Moving the scale down for genocide

[28] ECtHR, *Šimšić vs. Bosnia and Herzegovina,* § 25.

[29] Article 48, The Criminal Code of BiH.

[30] Veselin Vlahović was found guilty for crimes against humanity and the Court of BiH sentenced him to a 45-year long-term imprisonment (appeal process in this case is ongoing), in web page of the Court of BiH, *http://www.sudbih.gov.ba/index.php?id=2749&jezik=e.*

cases, with a maximum sentence of twenty years that can be imposed in accordance with 1976 Criminal Code, will most certainly influence the sentencing policy for crimes against humanity. In practice, this will result in prison sentences of duration less than twenty years for crimes against humanity, as well.

Furthermore, the quashed decisions and following retrials have a serious impact on the obligations of Bosnia and Herzegovina to ensure a fair and effective criminal procedure and adequate and proportional punishment for those who committed the most serious crimes under international law.

In addition, the decisions of the Constitutional Court of BiH pose further challenges for the Court of BiH in terms of procedure. First, there was an issue regarding the legality of the prison sentences of ten individuals in whose cases the Constitutional Court of BiH adjudicated. As the Constitutional Court of BiH found a violation of Article 7 of the ECHR in those cases and ordered the Court of BiH to issue new decisions in an expedited procedure, the Court of BiH rendered the decision to suspend their prison sentences. This was done because there was no longer a legal ground for these defendants to continue to serve their prison sentences[31]. The Prosecutor's Office of BiH reacted with several motions towards the Court of BiH arguing that these ten defendants should be put in detention again. However, the Court of BiH decided to refuse these motions.[32]. As the Court of BiH explained in their decision, since there are no explicit provisions that would serve as ground for the deprivation of liberty, they had to decide in favour of the accused (*in dubio pro reo*)[33].

These decisions increased public uproar, especially among victims associations in BiH. Having in mind that under the Article 3 of the ECHR, criminal laws must be effective and punish those who perpetrate torture, and inhumane or degrading treatment, victims in each of the cases where decision of the Court of BiH were quashed, could claim their rights, as they are laid down in the ECHR and the Constitution of BiH, are violated.

5. Conclusion

The Court of BiH has already scheduled new trials in the above-mentioned cases. Some of the trials were already held before the Appellate Chamber of

[31] Press release published on November, 19 2013, in *http://www.sudbih.gov.ba/?id=2977&jezik=e*.

[32] Press release published on December, 5 2013, in *http://www.sudbih.gov.ba/?id=3003&jezik=e*.

[33] The principle *in dubio pro reo* is also contained in Article 3 of the Criminal Procedure Code of Bosnia and Herzegovina.

the Court of BiH following the rules of the appellate procedure. Since neither ECtHR nor the Constitutional Court of BiH found the violation of Article 6 of the ECHR, the guilt of these accused was never in question. Therefore, the Appellate Chamber went on and applied different material law to the facts established during the previous proceedings. Accordingly, the judges only had to alter the sentences by applying the Criminal Code that is considered to be more lenient for the defendant *in concreto*.

For example, Mr. Zrinko Pinčić, who was in earlier proceedings found guilty of the criminal offense of war crimes against civilians pursuant to Article 173 of the 2003 Criminal Code in conjunction with item e) which includes, inter alia, coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), all in conjunction with Article 180 (individual criminal responsibility) and sentenced to imprisonment for the term of nine years, in the reopened proceedings at the Court of BiH was found guilty of the criminal offense of war crimes against civilians in violation of Article 142 of the 1976 Criminal Code and his sentence was reduced to six years imprisonment[34].

However, the domino effect triggered by the ECtHR Judgment will not stop here. There are additionally around twenty adjudicated cases with more than twenty defendants found guilty for war crimes or genocide at the Court of BiH. The lawyers of most of these defendants have already filed appeals to the Constitutional Court of BiH regarding violations of Article 7 of the ECHR. In some of these cases the Constitutional Court of BiH already reached the same conclusion as that in the ten decisions handed down on 22 October 2013.

Having in mind all these repercussions, it is unclear why the Constitutional Court of BiH rushed its decisions and did not take more time to thoroughly analyse the reasoning of the ECtHR judgment. They should have analysed the differences between Maktouf and Damjanović cases and the cases they had to decide upon and not just make the same conclusion as the ECtHR did. They should have given more weight to the fact that, for the acts in most cases they were deciding upon, at the time when they were committed, the death penalty was stipulated and therefore, the 1976 Criminal Code, in its entirety[35] is not more lenient for those defendants.

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[34] All information on this case are available on the web page of the Court of BiH, *http://www.sudbih.gov.ba/index.php?opcija=predmeti&id=151&jezik=e*.

[35] See supra note 22.

However, there is no point dwelling on something that could have happened - the decisions have been rendered and the Court of BiH is already reopening its cases and applying the 1976 Criminal Code. Having in mind that some of these trials lasted for years before the final verdict was reached and that there are several thousand suspects for war crimes, crimes against humanity and genocide that are waiting to be prosecuted at the Court of BiH, these retrials appear to both victims and to public as a huge rock that judges are pushing up the steep hill, only to see it roll back to the bottom when they reach the top of the hill.