

Non-retroactivity, candour and ‘transitional relativism’: A response to the ECHR judgment in *Maktouf and Damjanović v. Bosnia and Herzegovina*

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1. Introduction

The judgment of the European Court of Human Rights in *Maktouf and Damjanović v. Bosnia and Herzegovina*¹ presents two of the most interesting dynamics in contemporary international legal discourse: the tension between what Posner and Vermeule identified as ‘transitional justice’ and ‘ordinary justice’;² and the tension between domestic transitional policies and extant (European) human rights law. It has also had the grotesque unintended consequence of people convicted of genocide at Srebrenica being released from prison.

The main issue raised by the *Maktouf and Damjanović* case was on Article 7 ECHR: essentially the principle of *nulla poena sine lege*. Responding to complaints by convicted war criminals, Bosnia and Herzegovina (BiH), explicitly argued that the principle of non-retroactivity should be set-aside in the interests of justice, in relation to certain historical situations.³ This is an especially clear argument that ‘transitional’ justice should allow us to jettison long-held assumptions that are core to ‘ordinary’ justice. Likewise, given the context in which this claim was made – in argument before the European Court – it shows not only that there is potential for transitional policies to clash with international human rights law, but also that states are willing clearly to request special treatment on transitional grounds. Indeed we shall see that, with arguably inconvenient candour, the representatives of BiH argued that this is what the European Court had, in fact, allowed previously in relation to Article 7.

This type of request for special treatment can be characterised as a claim for ‘transitional relativism’,⁴ by analogy to the more widely acknowledged claims for ‘cultural relativism’ visible within European human rights law.⁵

This comment will begin with a summary of the facts and the judgment in the case. We shall then turn to the case’s place within the wider context of jurisprudence on Article 7

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¹ *Maktouf and Damjanović v. Bosnia and Herzegovina* [2013] ECHR 703

² E Posner and A Vermeule, ‘Transitional Justice as Ordinary Justice’ (2004) 117 *Harvard Law Review* 761

³ *Maktouf and Damjanović* op. cit., supra n1, para. 62

⁴ See J A Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Abingdon: Routledge, 2012)

⁵ J A Sweeney, ‘Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era’ (2005) 54 *International and Comparative Law Quarterly* 459

ECHR, and then finally engage with the issues of candour, the 'duty to prosecute' human rights violations, and transitional justice.

2. The facts and the judgment in *Maktouf and Damjanović v. Bosnia and Herzegovina*

Background

Both of the applicants in the case had been convicted of war crimes. In 1993 Maktouf had assisted in the kidnapping of two civilians, with the aim of exchanging them for members of the Army of the Republic of Bosnia and Herzegovina (ARBH) who were being detained by the Croatian Defence Council.⁶ The ARBH was largely comprised of Bosnian Muslims (Bosniaks). The other applicant, Damjanović, had played a significant role in the ill-treatment of Bosniaks in Sarajevo, where in one incident lasting up to three hours the detainees were beaten with rifles, batons, bottles, kicks and punches.⁷

Both applicants were convicted and sentenced by the State Court in BiH under the 2003 Criminal Code of Bosnia, rather than under the 1976 Criminal Code of the former Socialist Federal Republic of Yugoslavia (which was in force at the time of the crimes). As part of the completion strategy of the International Criminal Tribunal for Former Yugoslavia war crimes chambers were established within the State Court, comprised of a mixture of international and local judges. Until 2006, international judges were appointed directly by the Office of the UN High Representative in BiH. The applicants challenged both the legal basis of the prosecution and sentence, as well as the appointment process of international judges.

This brief summary of the background prompts at least one immediate observation: the European Court took an interesting step by joining these cases, because although the applicants were making similar complaints before the European Court, they would have been on opposing sides during the conflict. This is significant because at various points in the past the European Court has been accused of taking a different stance on its application of Article 7 ECHR in transitional cases depending upon which side of the relevant conflict the applicant had fought.⁸ Its approach in this case forecloses any such discussion.

The applicants' main argument was that they had been sentenced according to the 2003 Criminal Code, which they argued was more stringent than the 1976 Criminal Code. In other words, neither applicant claimed that they were innocent of the crimes at issue. It is also worth observing, therefore, that although we shall see that the applicants both went on to win in relation to Article 7 ECHR, they were only contesting their punishment and so the fact that they had been found to be war criminals was

⁶ *Maktouf and Damjanović* op. cit., supra n1, para. 11

⁷ *Maktouf and Damjanović* op. cit., supra n1, para. 19

⁸ See e.g. the dissenting Opinion of Judges Fura-Sandström, Davíd Thór Björgvinsson and Ziemele in *Kononov v. Latvia* (Chamber) [2008] ECHR 695 (which went on to influence the reversal of the Chamber's decision by the Grand Chamber in *Kononov v. Latvia* (GC) [2010] ECHR 667). See the discussion in Sweeney op. cit, supra n4, pp 63 *et seq.*

undisturbed. Thus the European Court did not make any financial award under Article 41, instead deciding that the fact of the judgment was a sufficient remedy in and of itself - although both applicants were able to claim costs of €10,000.⁹ Sadly this point seems to have been misunderstood by several news outlets, which have described the applicants as gaining €10,000 in 'compensation'.¹⁰

Even more troublingly, the Bosnian authorities have reacted to the judgment by releasing from prison not only the applicants but several other people, pending re-trial. It is reported that potentially hundreds of convicted war criminals could be released and re-tried.¹¹ At least six of the people released already had been convicted of genocide in relation to the Srebrenica massacre. This has attracted criticism from the Dutch Foreign Minister in particular (the Netherlands was in charge of Srebrenica when Bosnian Serb forces overran it and killed around 8000 Bosnian Muslim men and boys).¹² As we shall see, the European Court did not require such a drastic response, and in any event the judgment dealt only with war crimes and not crimes against humanity or genocide.

Arguments put to the European Court: Article 6 ECHR

Maktouf alleged a violation of Article 6 ECHR as well as the principal allegation under Article 7. We shall return to Article 7 shortly. The Article 6 argument was that international judges sitting in the State Court were not independent and impartial because they were appointed directly by the Office of the High Representative, and for only two years.

The European Court quickly agreed with the BiH Constitutional Court that this complaint was manifestly ill-founded: although the international judges were appointed by the High Representative, the Court found no reason to question that they were independent of that institution; and moreover although the term of office was 'relatively short' it was 'understandable' given the provisional nature of international participation in the State Court and the practical *modi operandi* of international secondments.

Further on in this comment we shall focus upon the Respondent State's request for special treatment in relation to Article 7 during the transition. However it can be noted even at this stage that the finding in relation to Article 6 was affected by an element of transitional relativism, with the Court's clear concession that the term of office of the

⁹ *Maktouf and Damjanović* op. cit., supra n1, para. 94

¹⁰ See e.g. <http://www.balkaninsight.com/en/article/maktouf-and-damjanovic-bring-down-bosnian-court-practice> (accessed 4.10.2013)

¹¹ See EU Business, 'Bosnia survivors outraged over war criminals' release', (4.12.2013) available at <http://www.eubusiness.com/news-eu/bosnia-wacrimes.rx0> (accessed 4.12.2013)

¹² See DutchNews.nl, 'Dutch foreign minister "astounded" by Bosnian war criminal release' (21.11.2013), available at http://www.dutchnews.nl/news/archives/2013/11/dutch_foreign_minister_astound.p hp (accessed 5.12.2013)

international judges was, although Convention-compliant, nevertheless ‘admittedly’ short.

Arguments put to the European Court: Article 7 ECHR

The main complaint by both applicants was that they had been sentenced in accordance with the 2003 Criminal Code rather than the 1976 version. Crucially, they argued that the 1976 version was more lenient, so therefore their punishment was in direct contravention of the rule in Art 7(1) ECHR prohibiting the imposition of a heavier penalty than that applicable at the time an offence is committed. This reflects the general principle of *lex mitior*, according to which where the law relating to the accused has been changed the less severe law should be applied.¹³ The applicants argued that the 2003 Code was more severe because it allowed for much longer sentences for the types of crime of which they had been convicted.

Part of the confusion in the case stems from the way in which war crimes were being handled in BiH. An overriding principle in Article 4 of the 2003 BiH Criminal Code stipulates that laws that were applicable of the time of an offence should be used, unless the law has been amended; if it *has* been amended, then the more lenient provision should be applied. This again reflects the general legal principle of *lex mitior* or *favor libertatis*. The problem is that the Entity Courts¹⁴ almost always used the 1976 Code, whereas until 2009 the State Court took the view that the 2003 Code was *always* more lenient.¹⁵ The core reason for the State Court’s conclusion on this point was that the 1976 Code included the death penalty for serious offences, whereas the 2003 Code does not. The applicants in the case, who recall were tried and sentenced by the State Court in 2006 and 2007 respectively, disagreed with the view that the 2003 code was more lenient in their circumstances: they would never have been eligible for the death penalty.

Regardless of whether the 2003 Code was the *lex mitior* in the applicants’ cases, to which we shall return shortly, international bodies including the OSCE, UN Human Rights Committee and the Council of Europe’s ‘Venice Commission’ had already expressed concern about the lack of consistency inherent in this state of affairs.¹⁶

The BiH government built upon the reasoning of the Constitutional Court in Maktouf’s domestic case, arguing that as long as an act was criminal under the general principles of law recognised by civilised nations and under national law, then Article 7(2) permitted the application of a harsher sentence than that applicable at the time of

¹³ See *Scoppola v. Italy (No. 2)* [2009] ECHR 1297, but note the Partly Dissenting Opinion of Judge Nicolaou, joined by Judges Bratza, Lorenzen, Jočiené, Villiger and Sajó.

¹⁴ BiH comprises two ‘entities’, the Federation of Bosnia and Herzegovina, and the Republika Srpska. There is also the self-governing administrative unit of the Brčko district.

¹⁵ After March 2009 the State Court altered its approach, deeming that the 1976 Code was more lenient in relation to more minor offences, whereas the 2003 Code was more lenient in relation to serious offences. See *Maktouf and Damjanović* op. cit., supra n1, para. 29

¹⁶ *Maktouf and Damjanović* op. cit., supra n1, para. 31-33

offence. The Constitutional Court had been inspired by the unfortunate, but rather insignificant, admissibility decision of the European Court in *Naletilić v. Croatia*.¹⁷ The decision concerned the ICTY prosecution of the notorious Croatian military commander Mladen Naletilić. In the decision, a European Court Chamber appeared to suggest that Article 7(2) ECHR could bar the application of the second sentence of Article 7(1). The reasoning was scant, and can be quoted in full thus:

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 § 1 of the Convention invoked by the applicant could not apply.* [emphasis added]

This is problematic because the text of the Convention itself would seem to suggest that the purpose of Article 7(2) is to confirm that, as long as the offence was recognised in international law, then trial and punishment can begin, albeit subject to and in conformity with Article 7(1). There is consistent legal authority suggesting that the two paragraphs of Article 7 are interlinked in this way, and must be interpreted in a concordant manner.¹⁸ Until *Naletilić* there was nothing to suggest that Article 7(2) in some way allowed for the disapplication of Article 7(1). It would seem Article 7(2) in fact reiterates the principle of *nulla poene sine lege*, but clarifies that international law is, for these purposes, relevant 'law'.

The European Court must bear responsibility for the misleading nature of the *Naletilić* admissibility decision. However it can also be argued that the BiH Constitutional Court should not have been influenced quite so heavily by this judicial infelicity. Although *Naletilić* is a well-known figure, the *Naletilić* admissibility decision is a very shaky legal basis for the proposition made in *Maktouf and Damjanović*. First of all, the Court in *Naletilić* did not actually state that Article 7 was applicable in the case. Second, the approach taken by the Chamber was not reasoned by reference to any prior cases.

Alongside attempting to interpret the text of Article 7, the Government argued that, in the interests of justice, the principle of retroactivity could be 'set aside'.¹⁹ In other words, even if Article 7(2) did *not* act as an exemption to Article 7(1), then Article 7(1) could be ignored if justice demanded it. This is a novel argument, based on transitional relativism. The Government's position was that, 'The rigidity of the principle of non-retroactivity [...] had to be softened in certain historical situations so that this principle would not be to the detriment of the principle of equity.'²⁰ The same argument was put forward by the Office of the High Representative, which was a third party to the case.²¹ The argument was unsuccessful, but it is this element of the case that gives rise to the need for a thorough examination of the case's place within the pantheon of Article 7 jurisprudence.

¹⁷ *Naletilić v. Croatia* (dec.), App no 51891/99 (ECtHR 4 May 2000)

¹⁸ See e.g. *Tess v. Latvia* (dec.), App no. 34854/02 (ECtHR 12 December 2002); *Papon v. France* (dec.), App no. 54210/00 (ECtHR 15 November 2001).

¹⁹ *Maktouf and Damjanović* op. cit., supra n1, para. 62

²⁰ *Maktouf and Damjanović* op. cit., supra n1, para. 62

²¹ *Maktouf and Damjanović* op. cit., supra n1, para. 32

The Reasoning of the European Court

The European Court noted that Maktouf had been given the lowest sentence possible under the 2003 Code, and that Damjanović's sentence was only just above the lowest level. It was therefore significant for the European Court that the 1976 Code was 'without doubt' the more lenient in relation to minimum sentences.²² They *could* have received the same sentences under the 1976 Code, but there was a real possibility that by applying the 2003 Code retrospectively the applicants had been put at a disadvantage. This was enough to find a violation of Article 7.

The European Court also quickly, and rightly, clarified that Article 7(2) is merely a 'contextual clarification'²³ of the rule in Article 7(1): there was no sense in which Article 7(2) was designed to be a general exception to Article 7(1). The Court did not explicitly overrule the *Naletilić* admissibility decision, but it is now beyond doubt that either it, or the BiH Constitutional Court's interpretation of it, was flawed.

The Court equally firmly rejected the idea that deriving from international humanitarian law there could be a duty to punish war crimes adequately even in contravention of the principle of non-retroactivity.²⁴ However, rather than exploring the merits of the argument that transitional societies need some transitional relativism, the Court made a straightforward legal argument based upon the observation that the Geneva Conventions themselves also contain the principle of non-retroactivity. The concurring Opinion of Judge Ziemele explored recent developments in international law at greater length, noting the 'growing consensus' regarding the international 'duty to prosecute' the most serious international crimes. However, in her analysis this point was not relevant to the outcome of the case: the case could be decided simply by observing that at the relevant time the State Court did not have a practice of examining on a case by case basis which criminal code was the more lenient. It is possible that the European Court underestimated the strength of the international duty to prosecute, and so we shall return to this point shortly.

There were two further concurring opinions. According to Judge Kalaydjieva the decisive issue was that of foreseeability. The existence of the two applicable criminal codes was sufficient to impede foreseeability to the extent of violating Article 7 ECHR. According to scholarly Concurring Opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić, the violation of the Convention stemmed from the domestic authorities not having carried out a 'global' assessment of which criminal code, in its entirety, was the more lenient (and, in their assessment *in concreto*, the 1976 code was the *lex mitior*). This is interesting because Judge Pinto de Albuquerque expressly rejected that domestic judges should be compelled to choose between the applicable codes on the facts of each case: rather they should make a 'concrete and global' finding, for two important reasons:

[F]irst, each punitive regime has its own rationale, and the judge cannot upset that rationale by mixing different rules from different successive penal laws; second, the judge cannot exceed the legislature's function and create a new ad-hoc punitive regime

²² *Maktouf and Damjanović* op. cit., supra n1, para. 69

²³ *Maktouf and Damjanović* op. cit., supra n1, para. 72

²⁴ *Maktouf and Damjanović* op. cit., supra n1, para. 74

composed of a miscellany of rules deriving from different successive penal laws. (per Judge Albuquerque, joined by Judge Vučinić)

This was not the only departure from the approach taken in the main body of the judgment. According to this concurring opinion, the applicants' convictions should have been declared null and void by the relevant national court, followed by a re-trial. This was not the approach taken in the judgment itself which, as mentioned above, dealt merely with costs and expenses under Article 41 ECHR. In recent years the Court has built upon the foundations of Article 46 to require specific actions from Respondent States. These have included individual measures such as to release a wrongly-detained applicant,²⁵ and general measures up to and including so-called 'pilot judgments'.²⁶ No such further recommendation was made under Article 46 in the *Maktouf and Damjanović* judgment. The fact that Judge Pinto de Albuquerque favoured release and re-trial, and that the majority did not support this, makes the actions of the Bosnian authorities in releasing the ten prisoners all the more questionable.

3. The Significance of the Case

The central feature of this case is the explicit rejection of the equally explicit arguments of BiH that transitional justice requires the suspension of otherwise perfectly valid human rights legal concepts. Let us first re-tread briefly the definition of transitional justice. We shall then turn to two issues: the notion of candour; and the evolution of the 'duty to prosecute'.

Transitional Justice

The present author has previously argued that it is best to separate two distinct meanings of 'transitional justice', and consequently two distinct approaches to studying it.²⁷ The UN has used the phrase as a collective label given to, 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.²⁸ They include policies such as lustration and reparations – as well as war crimes trials. There is a wealth of literature on best-practice in relation to these policies, which overlaps with the related areas of security sector reform and post-conflict reconstruction more generally.²⁹

²⁵ *Assanidze v. Georgia* (2004) 39 EHRR 32, para. 43, but note the partly concurring opinion of Judge Costa.

²⁶ See e.g. *Broniowski v. Poland* (2005) 40 EHRR 21

²⁷ See Sweeney op. cit, supra n4, p22

²⁸ United Nations Security Council, Report of the Secretary General: The Rule of law and transitional justice in conflict and post-conflict societies, UN Doc S/2004/616, 4

²⁹ C. Bell, On the Law of Peace (Oxford: OUP, 2008); R. Brooks, Can Might Make Rights? Building the Rule of Law After Military Interventions (Cambridge: CUP, 2006); A Cassese, The Special Court and International Law: The Decision Concerning the Lome Agreement Amnesty (2004) 2 *Journal of International Criminal Justice* 1130; R Cryer 'Post-Conflict Accountability: a Matter of Judgement, Practice or Principle', in ND White and D Klaasen (eds) The UN, Human Rights, and Post-Conflict Situations (Manchester: Manchester University Press, 2005) 267 -289; J Hagan, Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal (Chicago: Chicago University Press,

A second view is more normative in nature. It enquires more into the nature of the 'justice' revealed by these transitional policies: the argument is that it is possible to observe a form of justice that is both qualified by and constitutive of the transition itself. Under this second view transitional justice is thus the, '*conception of justice* associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.'³⁰ Ruti Teitel has been instrumental in identifying this form of justice, in relation to which it is crucial to note Teitel's further observation that such forms of justice may often be 'partial and nonideal'.³¹ From this perspective, studying transitional justice is about unpicking its internal contradictions and awkward compromises.

At the beginning of this Comment a brief mention was made of Posner and Vermeule's oft-cited work on 'Transitional justice as ordinary justice'. Their key contention was that transitional justice policies are defensible because they can be placed along a spectrum that would see them merely as notable elements of 'ordinary justice'.³² On their reading of the situation, the *prima facie* rule of law dilemmas presented by transitional justice (and which, for Teitel, embody their non-idealism) can be overcome by using comparators from non-transitional legal systems. The present author's view is that Posner and Vermeule underestimated the multiplicity of rule of law dilemmas in a transitional society: whilst it might be possible to find 'ordinary' comparators for 'transitional' policies, it would be impossible to find them *all at the same time and in the same state* (Posner and Vermeule's comparators have a wide historical and geographical range). Nevertheless, their identification of legal techniques commonly adopted in transitional societies is helpful, even if ultimately we disagree on their significance.

The Representatives for the Government of BiH were clearly aware of the key cases on Article 7 mentioned above, such as *Streletz, Kessler and Krenz v. Germany*³³ and the *K-H W* case.³⁴ *Streletz, Kessler & Krenz* and *K-H W* dealt with murders at the Berlin wall, and it set the pattern for many subsequent cases that were based on convictions rooted in crimes defined by international law.³⁵ However there was a second, more distinctive, element to the case. The applicants were convicted on a strict re-interpretation of the

2003); C Romano, A Nollkaemper, and J Kleffner (eds), Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia (Oxford: OUP, 2004); C Stahn, 'Justice under Transitional Administration: Contours and Critique of a Paradigm', in H. Fischer and N. Quenivet (eds), Post-conflict Reconstruction: Nation- and/or State-Building, (Berlin: Berliner Wissenschafts-Verlag, 2005) 141 – 167. NB I am grateful to my co-editor Dr Matthew Saul for elements of this short bibliography which was compiled for our forthcoming book: M Saul & J A Sweeney (eds.) International Law and Post-Conflict Reconstruction Policy (Abingdon: Routledge, 2014)

³⁰ R Teitel, 'Transitional Justice Genealogy', (2003) 16 *Harvard Human Rights Law Review* 69

³¹ R Teitel, Transitional Justice (OUP, New York 2000), 215

³² E Posner and A Vermeule, op. cit. supra, n2, 761

³³ *Streletz, Kessler and Krenz v. Germany* (2001) 33 EHRR 31

³⁴ *K-H W v. Germany* (2003) 36 EHRR 59

³⁵ These cases are discussed at length in Chapter 2 of Sweeney op. cit., supra n4.

domestic law applicable at the time of the particular killings. The applicants in the first case were senior leaders of the GDR, who were responsible for the overall security policy at the Berlin Wall. The applicant in *K-H W* had been a young soldier when, in 1972, he shot in the head an escapee attempting to swim to West Germany via the river Spree, who subsequently drowned. The central contention of all the applicants, in both cases, was that their convictions after German reunification were in contravention of Article 7 ECHR: they had been acting in accordance with the GDR law at it was understood at the time; and the offences were not made out under international law either. The applicants could never have foreseen the *ex post facto* strict re-interpretation of the applicable law to cover the relevant killings.

Let us consider the point about foreseeability. The German domestic courts had applied the letter of the law as it existed at the time of the offences. However, state practice at the time (mandated by, amongst others, *Streletz, Kessler and Krenz* themselves) ran contrary to the law, and soldiers like K-HW who killed escapees were duly rewarded for their lethal diligence.³⁶ They clearly did not 'foresee' that the Berlin wall would fall, and that the stoic resistance of the East German populace would be rewarded a few weeks later by the great David Hasselhof belting out songs atop the remains of the wall in celebration of the New Year.³⁷

This left the German judiciary with a choice about how to address the element of retroactivity in the 'unforeseeable' prosecutions. As Posner and Vermeule observed, courts in such a situation must, 'either openly acknowledge retroactivity or else resort to a variety of legal techniques designed to sidestep or eliminate the retroactivity problem.'³⁸ Amongst these legal techniques Posner and Vermeule identified 'taking nominal law seriously' and 'an appeal to a higher law' (such as international law). The German courts took both approaches: the nominally applicable GDR law criminalised the actions in question, even if at the time it was not being interpreted to do so; and the actions were clearly contrary to international law.

The issue for the European Court, if it was to square the domestic prosecutions with Article 7 ECHR, was thus whether to acknowledge that there was a surmountable element of retroactivity in the convictions (that is, to concede an element of transitional relativism), or to deny wholesale that there was even a whiff of retroactivity. The European Court was rather ambiguous on this, which may have given the government of BiH the confidence in *Maktouf and Damjanović* to request the disapplication of the principle of non-retroactivity altogether. It is at this point the issue of candour arises.

Candour

³⁶ In the form of medals, cash rewards, and extra holidays (see the facts in *Streletz, Kessler and Krenz* op. cit supra n33, para. 23).

³⁷ For the megastar's continued involvement in the fate of the wall, see <http://www.theguardian.com/commentisfree/2013/mar/19/david-hasselhoff-berlin-wall-fall> (accessed 8.10.2013)

³⁸ Posner and Vermeule's point, however, is that both approaches are predicated on a false premise: that elements of retroactivity are wholly absent in established legal systems.

In *Streletz, Kessler and Krenz* the European Court reasoned that a transitional state, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law.

From this starting point, the European Court in *Streletz, Kessler and Krenz* likened the 'new' interpretation of the relevant GDR law to the gradual evolution of criminal law that it had approved in previous cases.³⁹ In other words, although there was a transitional dimension to the case, the European Court subsumed the German approach within its existing jurisprudence on the gradual clarification of offences in 'ordinary', non-transitional, cases.

This was a clever legal technique for 'sidestepping' the retroactivity element, such as Posner and Vermeule had observed in domestic cases. It disguised the element of transitional relativism that the Court's reasoning implicitly condoned. Despite this sidestep, the Government in *Maktouf and Damjanović* cited the *Streletz, Kessler and Krenz* case specifically as authority for the proposition that in the interests of justice, the principle of retroactivity could be set aside.⁴⁰ Was this a mistake? Probably not: it is more likely that the Government in *Maktouf and Damjanović* were simply candid, such as the outspoken child in the Hans Christian Andersen tale of the 'Emperor's new clothes'.⁴¹

Let me explain. It is legally the case that previous judgments of the European Court had indeed condoned the gradual development of the criminal law.⁴² However, the clear *volte-face* concerning the interpretation of the GDR criminal law was anything but gradual. It represented a clear - and quite intentional - break with the past timed to coincide with reunification. This is why the European Court in *Streletz, Kessler and Krenz* further stressed the, 'pre-eminence of the right to life' in international human rights instruments, as a factor counting in favour of the German courts' 'strict' interpretation of Article 7 being subsumed within the earlier cases on the gradual development of the criminal law.⁴³ Thus, formally speaking, the European Court maintained the appearance of dispensing 'ordinary justice' but it was perfectly obvious to any observer that this was not the whole story. It is just that no one chose to emphasise that point. Just like the boy in the 'Emperor's new clothes', the BiH government chose to say what everyone else was thinking, but had been too bashful to declare.

The Government in *Maktouf and Damjanović* therefore can be forgiven for misreading the European Court's signals in this regard: after all, they merely relied on *Streletz, Kessler and Krenz* as they saw it: evidence that the European Court's standards could be

³⁹ *Streletz, Kessler and Krenz* op. cit supra n33, para. 82

⁴⁰ *Maktouf and Damjanović* op. cit., supra n1, para 62

⁴¹ In the story, no one except the child dares to say that the new clothes that the king has been conned into buying are, in fact non-existent, thus rendering the king completely naked. See the materials presented by the Hans Christian Andersen Centre at http://www.andersen.sdu.dk/vaerk/hersholt/TheEmperorsNewClothes_e.html (accessed 19.11.2013)

⁴² See *SW v. UK* (1996) 21 EHRR 363, para. 36

⁴³ *Streletz, Kessler and Krenz* op. cit supra n33, para. 85

modulated in order to respond to the imperatives of transitional states. They were not rewarded for their candour.

The Duty to Prosecute

Since the judgment in the *Streletz, Kessler and Krenz* case back in 2001 there have been significant developments regarding the so-called 'duty to prosecute'. Indeed, even in *Streletz, Kessler and Krenz*, and in order to strengthen its conclusions in relation to Article 7, the European Court drew attention to wider sources of public international law including the UDHR and ICCPR to conclude that the right to life is, 'an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights'.⁴⁴

The 'duty to prosecute', as a tangible legal duty, was expressed clearly as early as Orentlicher's 1991 piece in *The Yale Law Journal*.⁴⁵ Orentlicher herself has revisited the argument *inter alia* in her role as the UN's Independent Expert to Update the Principles to Combat Impunity⁴⁶ and in her reflective piece in the inaugural edition of the *International Journal of Transitional Justice*.⁴⁷ The argument is that by combining the specific treaty duties to prosecute certain international crimes; the positive obligations deriving from human rights treaties; and customary international law, it is possible to deduce an international legal duty to prosecute perpetrators of human rights violations.⁴⁸

The notion of a duty to prosecute has gained international political acceptance in the form not only of the Orentlicher-influenced 2005 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' but also the UN's 2005 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law'. Paragraph 4 of the latter states that,

In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.

It is these developments to which the government of BiH may have been referring in *Maktouf and Damjanović*, when they argued that there was a duty under international humanitarian law to punish war crimes adequately.⁴⁹ Clearly the above-quoted portion

⁴⁴ *Streletz, Kessler and Krenz* op. cit. supra n33, para. 94; The Court also undertook a similar exercise in relation to freedom of movement as a human right.

⁴⁵ See D Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100(8) *Yale Law Journal* 2537

⁴⁶ UN Commission on Human Rights, *Report of the independent expert to update the Set of Principles to combat impunity*, 18 February 2005, E/CN.4/2005/102, available at: <http://www.refworld.org/docid/42d66e7a0.html> (accessed 19.11.2013)

⁴⁷ D Orentlicher, "'Settling Accounts" revisited: Reconciling Global Norms with Local Agency' (2007) 1 *International Journal of Transitional Justice* 10

⁴⁸ See Orentlicher op. cit., supra, n47

⁴⁹ *Maktouf and Damjanović* op. cit., supra n1, para 62

of the Basic Principles does not include the phrase, 'punish *adequately*' but it would be absurd to read the Principles in any other way. It is worth recalling that the UN's Office of the High Representative in BiH had also argued, as a third party, 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 the case. The European Court merely responded that there was,

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.

This is disappointing because it is not inconceivable that an earlier legal regime might be the *lex mitior* precisely because it punished international crimes inadequately (and not just less severely). It would have taken little drafting ingenuity to add a caveat such that the European Court's conclusions were tempered by recent developments in relation to the 'duty to prosecute' and that, were the application of the *lex mitior* as regards punishment to lead to inadequate punishment of an international crime, the Court would come to a different conclusion.

The failure to make this clarification has left the European Court at odds not only with a burgeoning consensus on the duty to prosecute, but also some of its Chamber decisions including, for example, *Association 21 Decembre et al v. Romania*.⁵⁰ In the latter case the European Court took a forceful approach to a stalled investigation into deaths arising from the successful revolution against Nicolae Ceauşescu in 1989. The European Court stressed that the procedural obligation arising from Article 2 ECHR could stretch back to investigating massive violations of human rights that took place even before a state signed the Convention (as long as enough of the procedural flaws took place after its signature and ratification).⁵¹ The positive obligation was inspired by the right of the victims to know what had happened, and implied the right to an effective judicial investigation and a possible right to compensation.⁵² Although not an obligation of result, any ensuing investigation must be impartial, include a careful examination of the circumstances surrounding the killings, and be capable of leading to the identification *and punishment* of those responsible.⁵³ Again, it is impossible to interpret this advice as requiring anything other than *effective* punishment.

Even more recently, in the extraordinary rendition case of *El-Masri v. FYR Macedonia* the Court drew attention again to the 'right to truth'.⁵⁴ The prosecution and punishment of the perpetrators of massive violations of human rights is a powerful means of setting out the events of the past, coming to terms with it, and discouraging similar future conduct.⁵⁵ However these developments, on an overarching right to truth linked to the positive obligations emanating from the procedural limb of Article 2 ECHR, and from the treatment of victims (or surviving or descendent family members) under Article 3 ECHR

⁵⁰ *Association 21 December 1989 & Others v Romania*, App nos 33810/07 and 18817/08 (ECtHR, 24 May 2011)

⁵¹ *Association 21 December 1989* op. cit., supra n50, para. 86

⁵² *Association 21 December 1989* op. cit., supra n50, para. 104

⁵³ *Association 21 December 1989* op. cit., supra n50, para. 25

⁵⁴ *El-Masri v. the former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25

⁵⁵ Orentlicher op. cit., supra n45, p2542

may have come to a shuddering halt after the Grand Chamber judgement in *Janowiec and Others v. Russia*, where the European Court declined to find a violation of either Article 2 or 3 ECHR in applications brought by family members of the thousands of Polish prisoners of war executed in the notorious Katyn massacre in 1940.⁵⁶

4. Conclusion: Recognising Transitional Relativism

This case comment began by introducing the *Maktouf and Damjanović v. Bosnia and Herzegovina*. Subsequently we have seen that the case raises interesting questions about the recognition of transitional relativism, and the ‘duty to prosecute’. In relation to the former we saw that on the Article 6 point the European Court appeared to allow some flexibility in relation to ‘admittedly short’ term of office international judges in the BiH State Court, but in relation to Article 7 denied that such flexibility could go so far as to render Article 7(1) inapplicable where the interests of (transitional) justice apparently required it.

These observations highlight the lack of consistency in the European Court’s approach to transitional justice and transitional relativism. Sometimes the European Court has: 1) appeared explicitly to acknowledge that the interests of transitional justice justify departures from the standards that apply in non-transitional states; 2) implicitly made the acknowledgement, such as in *Streletz, Kessler and Krenz v. Germany* and; 3) in other cases the Court has denied it altogether. This comment has examined the second category already, but let us briefly contrast the first and the third.

There are several examples of the first category, where the European Court has apparently conceded an element of transitional relativism.⁵⁷ Perhaps the clearest is the 2006 Grand Chamber judgment in *Ždanoka v. Latvia*.⁵⁸ The case concerned limitations imposed upon a communist politician’s electoral rights under Article 3 of Protocol 1 ECHR. In finding that the limitations did not violate the Convention, the European Court observed that,

While such a measure may scarcely be considered acceptable in the context of one political system, for example in a country which has an established framework of democratic institutions going back many decades or centuries, it may nonetheless be considered acceptable in Latvia in view of the historico-political context which led to its adoption [...].⁵⁹

The case has been discussed at length elsewhere,⁶⁰ but for the purposes of this comment it suffices to observe that this is *prima facie* evidence that the European Court can, when it so chooses, modulate its standards in such a way as to accommodate a degree of transitional relativism.

However, the European Court is not always so generous. Thus, we now turn to the third category outlined above, where a request for transitional relativism is rejected outright. Such an approach is visible, for example, in the cases of *Beshiri v. Albania* and *Nuri v.*

⁵⁶ *Janowiec and Others v. Russia* (2014) 58 EHRR 30

⁵⁷ See generally Sweeney op. cit., supra n44

⁵⁸ *Ždanoka v. Latvia* [2006] ECHR 231

⁵⁹ *Ždanoka v. Latvia* op. cit, supra n 58, para. 133

⁶⁰ See generally Sweeney op. cit., supra n44

Albania, both of which concerned the failure of the Albanian state to enforce the decisions of local Property Restitution and Compensation Commissions, which had awarded compensation to the applicants. In *Beshiri* the Government drew attention to, 'objective circumstances such as the lack of funds and its impact on the general interest of the community.'⁶¹ In *Nuri*, the Government pleaded both in relation to Article 6 and Article 1, Protocol 1, that,

the process of restitution and compensation could not occur overnight and spontaneously, and that the delays associated therewith were related to the transition process the country was going through.⁶²

The European Court rejected both pleas for clemency and thus, in these cases, denied that Convention standards could be loosened to accommodate the difficult circumstances of democratic transition.

The contrast between the first and third categories of cases here outlined is the same as the contrast between the ECtHR's approach to Article 6 and Article 7 in *Maktouf and Damjanović*. This observation reinforces the impression that *Maktouf and Damjanović* is yet another case where the European Court has grappled with the issue of transitional justice, but has not clearly or consistently articulated in which circumstances it will, or will not, concede an element of transitional relativism.

It is likely that this ambiguity will continue unless and until the European Court acknowledges, and begins explicitly to interact with, the concept of transitional justice. At present the European Court has *never* referred to the concept of transitional justice in its reasoning (a HUDOC search for the term will only find reference to NGOs with those words in their name, or factual references to national strategies). This is all the more surprising given that the European Court has made reference to other concepts not found in the text of the Convention, and which are closely connected to transitional justice – such as the notion of 'militant' or 'self-defending' democracy. There is a vast European jurisprudence engaging with domestic transitional justice policies now, but unless the European Court wrestles with the concept itself its reasoning is doomed to inconsistency.

⁶¹ *Beshiri v Albania* (2008) 46 EHRR 17, para. 96

⁶² *Nuri v Albania* [2009] ECHR 194, para. 32; on Article 6 see para. 24.