

BOSNIA AND HERZEGOVINA



COURT OF BOSNIA AND HERZEGOVINA

Case No: S1 1 K 013419 13 Krl

Pronounced on: 13 December 2013

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Before the Panel composed of: Judge Enida Hadžiomerović, Presiding
Judge Zoran Božić
Judge Mira Smajlović

CASE OF PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

**THE ACCUSED GORAN DAMJANOVIĆ
AND ZORAN DAMJANOVIĆ**

FIRST INSTANCE VERDICT

Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina:

Vesna Ilić

Defense Counsel for the Accused Goran Damjanović:

Senad Kreho

Defense Counsel for the Accused Zoran Damjanović:

Fahrija Karkin

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Sarajevo, 13 December 2013

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting on the Panel composed of Judge Enida Hadžiomerović as the Presiding Judge and Judges Zoran Božić and Mira Smajlović as the Panel members, with the participation of Legal Advisor Sanida Vahida-Ramić as the record-keeper, in the criminal case against the Accused Goran Damjanović and Zoran Damjanović charged with the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina (the CC of BiH) upon the Indictment of the Prosecutor's Office of BiH No. KT-RZ 57/05 of 2 June 2006, which was confirmed on 9 June 2006, deciding in the reopened proceedings upon the 18 July 2013 Petition of the Defense Counsel for the Accused Goran Damjanović, attorney Senad Kreho, and applying Article 332(2) of the Criminal Procedure Code of Bosnia and Herzegovina (the CPC of BiH) in relation to the Accused Zoran Damjanović, based on the Judgment of the European Court of Human Rights (the European Court, ECtHR), Applications nos. 2312/08 and 34179/08, of 18 July 2013, having held a new public main trial, in the presence of Prosecutor of the Prosecutor's Office of BiH Vesna Ilić, the Accused Goran Damjanović and Zoran Damjanović and their Defense Counsel, attorneys Senad Kreho and Fahrija Karkin, pursuant to Article 333(3) of the CPC of BiH, on 13 December 2013 rendered and the Presiding Judge publicly pronounced the following

VERDICT

I Verdicts of this Court nos. X-KR-05/107 of 18 June 2007 and X-KRŽ-05/107 of 19 November 2007 are partially set aside, in the part that concerns the application of criminal code, in such a way that the Accused Goran and Zoran Damjanović's acts described in Section 1 of the Verdict No. X-KR-05/107 of 18 June 2007, of which the Accused have been found guilty, are legally qualified as the criminal offense of War Crimes against Civilians under Article 142(1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia (the CC of SFRY) (torture), in conjunction with Article 22

(Complicity), which was adopted based on the Law on Application of the Criminal Code of the Republic of BiH and the Criminal Code of SFRY, **and in relation to the decision on sentence**, in such a way that by applying the above provisions and Articles 33, 34, 38 and 41 of the CC of SFRY, for the offense noted above, the Accused Goran Damjanović is sentenced to imprisonment for the term of six (6) years and six (6) months, and the Accused Zoran Damjanović to imprisonment for the term of six (6) years.

II In the remaining part, Verdicts of this Court nos. X-KR-05/107 of 18 June 2007 and X-KRŽ-05/107 of 19 November 2007 shall stay in force.

III The Decision of this Court No. X-KRŽ-05/107 of 28 April 2008 on termination of the criminal proceedings shall stay in force.

IV Pursuant to Article 333(3) of the CPC of BiH, the time the Accused Goran Damjanović spent in custody from 26 April 2006 to 18 January 2007 and the time spent serving the sentence from 24 February 2008 to 12 October 2013, and for the Accused Zoran Damjanović the time he spent in custody from 26 April 2006 to 18 January 2007 and serving the sentence from 30 January 2008 to 12 October 2013, shall be credited towards the sentence.

I. REASONING

A. PROCEDURAL HISTORY

1. Under the Verdict of this Court No. X-KR-05/107 of 18 June 2007 (First Instance Verdict), the Accused Goran Damjanović and Zoran Damjanović were found guilty of the criminal offense of War Crimes against Civilians under Article 173(1)(c) (torture), in conjunction with Article 180(1) of the 2003 CC of BiH, while the Accused Goran Damjanović was additionally found guilty of the criminal offense of Illegal Manufacturing and Trade of Weapons or Explosive Materials under Article 399(1), in conjunction with Paragraph (2) of the same Article of the Criminal Code of Republika Srpska (the CC of RS).

2. For these offenses, the Accused Goran Damjanović was sentenced to a compound punishment of imprisonment for a term of twelve (12) years, and the Accused

Zoran Damjanović to ten (10) years and six (6) months of imprisonment.

3. Deciding on Appeals from the abovementioned Verdict, the Panel of the Appellate Division of this Court, by its Second Instance Verdict No. X-KRŽ-05/107 of 19 November 2007, upheld the First Instance Verdict in the part concerning the sentencing of the Accused to imprisonment, specifically the Accused Goran Damjanović for the term of eleven (11) years and the Accused Zoran Damjanović for the term of ten (10) years and six (6) months for the criminal offense of war crimes, while in relation to the criminal offense of Illegal Manufacturing and Trade of Weapons or Explosive Materials, of which Goran Damjanović had additionally been found guilty, it revoked the First Instance Verdict and ordered a retrial before the panel of the Appellate Division.

4. In the course of a retrial before the panel of the Appellate Division, the Prosecution dropped criminal charges for the abovementioned offense defined in the entity criminal legislation and, as a result, the panel of the Appellate Division rendered Decision No. X-KRŽ-05/107 of 28 April 2008 on termination of the criminal proceedings. This count of the Indictment was not the subject of consideration before the European Court and hence it does not require further elaboration. Therefore, this Panel decided that the Decision of this Court No. X-KRŽ-05/107 of 28 April 2008 on termination of the criminal proceedings should stay in force.

5. Further, through their Defense Counsel the Accused Goran and Zoran Damjanović initiated the proceedings before the Constitutional Court of BiH, and the Accused Goran Damjanović before the European Court too. The application of the Accused Goran Damjanović before the Constitutional Court of BiH was dismissed as out of time.

6. In the procedure of seeking the protection of legal guarantees under the European Convention on Human Rights (the European Convention, ECHR), the applicant Goran Damjanović, through his Defense Counsel, initiated the proceedings before the European Court, which resulted in the ECtHR's Judgment in the *Maktouf and Damjanović* case of 18 July 2013.

7. In its Judgment in the *Maktouf and Damjanović (Goran)* case, Application nos. 2312/08 and 34179/08 of 18 July 2013, the European Court established a violation of Article 7(1) of the European Convention, which resulted from the retroactive application of the 2003 CC of BiH instead of the 1976 CC of SFRY. The European Court noted,

however, 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.

B. COURSE OF THE REOPENED PROCEEDINGS BEFORE THE COURT OF BIH

8. Following the aforementioned Judgment of the European Court and after the Defense Counsel for the Accused Goran Damjanović, attorney Senad Kreho, filed with this Court a petition for reopening the proceedings for the benefit of his client, in its Decision No. S1 1 K 013419 13 Kvl of 4 October 2013 the Court allowed reopening the proceedings for the benefit of the convicted person Goran Damjanović and, having applied Article 332(2) of the CPC of BiH, the Court *ex officio* reopened the proceedings in relation to the convicted person Zoran Damjanović too. The Court proceeded to schedule a new main trial in the case that had previously been completed by Verdicts of this Court nos. X-KR-05/107 of 18 June 2007 (First Instance Verdict) and X-KRŽ-05/107 of 19 November 2007 (Second Instance Verdict).

9. After the Decision to reopen the proceedings became final on 11 October 2013, pursuant to Article 332(5) of the CPC of BiH, which, in the relevant part, stipulates that “[w]hen the decision calling for a reopening of the criminal proceeding becomes legally binding,” as was the case here “... the execution of the penalty shall be stayed,” the Court rendered Decision No. S1 1 K 013419 13 Kvl of 11 October 2013 to stay the execution of prison sentences, in relation to the Accused Goran Damjanović the sentence of imprisonment for the term of eleven (11) years, and in relation to the Accused Zoran Damjanović ten (10) years and six (6) months.

10. After rendering the Decision to reopen the proceedings, the Court received in writing the Decision of the Constitutional Court No. 325/08 of 27 September 2013 in which the Constitutional Court granted the appeal of the Accused Zoran Damjanović lodged by his Defense Counsel, attorney Fahrija Karkin, and found a violation of Article 7(1) of the European Convention and quashed both the first and second instance verdicts of this Court.

11. The main trial in the reopened proceedings commenced on 21 November 2013.

The Prosecution entirely stood by the Indictment No. KT-RZ 57/05 of 2 June 2006, which was confirmed on 9 June 2006. With the consent of parties and defense counsel, it was noted for the record that the Indictment was read out.

C. EVIDENCE PRESENTED

12. Defense Counsel for the Accused Goran Damjanović additionally pointed to the documentary evidence suggesting that his wife was unemployed, that his son is a high school student and that they are all members of a single household, in support of which he presented a household list, which was all part of the evidence on record in the original first instance proceedings.

D. PROCEDURAL DECISIONS

13. On 21 November 2013, during the main trial hearing and having heard the parties and the defense counsel, this Panel decided against hearing evidence in relation to the guilt because that matter was not in question, that is, the Panel decided to hear evidence that may impact the decision on criminal sanction only. Accordingly, the evidence that was considered in the original proceedings and that remained in effect was evaluated in the reopened proceedings only in light of the decision on sentence.

14. Namely, the purpose of the new main trial is to remove the violation of Article 7(1) of the European Convention. As clearly stated in paragraph 67 of the ECtHR's Judgment in the *Maktouf and Damjanović* case:

“... the definition of war crimes is the same in Article 142 § 1 of the 1976 Criminal Code, which was applicable at the time the offenses were committed, and Article 173 § 1 of the 2003 Criminal Code, which was applied retroactively in this case. (...) The lawfulness of the applicants' convictions is therefore not an issue in the instant case.”

15. It is further stated in paragraph 76 of the ECtHR's Judgment: “... 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 [the CC of SFRY] should have been applied in the applicants' cases.”

16. As can be seen from the above, the exclusive obligation of the Court of BiH in the reopened proceedings was to remove the violation established in the ECtHR's Judgment concerning the retroactive application of the law (Article 7(1) of the European Convention). Therefore, in spite of the opposition of the Defense, the Panel refused the motion to hear all the evidence again, allowing only the presentation of evidence of relevance to the criminal sanction, given that the first and second instance verdicts remained in effect in those parts and that, accordingly, the same is true of the evidence presented in those proceedings.

E. CLOSING ARGUMENTS

17. In its closing arguments, the Prosecution entirely stood by its closing arguments presented in the original first instance proceedings before this Court on 12 June 2007.

18. Defense Counsel for the Accused Goran Damjanović, attorney Senad Kreho entirely maintained his closing arguments presented in the original first instance proceedings, with a note that the CC of SFRY should be applied in the present proceedings as the more lenient law. Since the issue of application of the more lenient law, in his view, has been resolved beyond all doubt, he argued that this Panel had to be particularly mindful of the mitigating circumstances, much in the same manner as the original Trial Panel did, given that, primarily, the criminal offense charged did not result in the loss of life. As the Defense argues, this, along with the fact that the Accused is unemployed, that he lives in the same household with his wife who is also unemployed, and factoring in the additional passage of time since the commission of the offense, warrants a sentence below the legally prescribed minimum level. The Accused Goran Damjanović agreed with the arguments presented by his Defense Counsel.

19. Defense Counsel for the Accused Zoran Damjanović, attorney Fahrija Karkin, maintained his closing arguments presented on 18 June 2007, with identical motion that his client be acquitted of all charges since, in the Defense's view, his guilt has not been established beyond a reasonable doubt. In the event the Panel still decided to render a convicting verdict, Defense Counsel moved the Panel to follow the instructions of the

Constitutional Court of BiH, Decision No. AP 325/08 of 27 September 2013 that quashed the first and second instance verdicts of the Court of BiH on account of the established violation of the principle of legality and advised that the Accused has to be tried for the offense, of which he has been found guilty, under the provisions of the CC of SFRY. As for the mitigating and aggravating circumstances, Defense Counsel stated that they did not address this issue either in the Appeal from the Verdict or in their appeal to the Constitutional Court of BiH given that his client maintained his innocence, so he left it to the Panel to decide. While doing so, Defense Counsel stated that the original Trial Panel had been mindful of the minimum sentence as the legally prescribed special minimum level for this criminal offense, and that it ultimately rendered a sentence close to the minimum level. Taking this reasoning further, Defense Counsel moved this Panel to act in the same manner in the reopened proceedings, this time applying the CC of SFRY. The Accused Zoran Damjanović agreed with the arguments presented by his Defense Counsel.

**F. CONCLUSIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE
CONSTITUTIONAL COURT OF BIH REGARDING VIOLATION OF ARTICLE 7(1) OF
THE EUROPEAN CONVENTION**

20. As mentioned earlier, in paragraph 67 of its Judgment in the *Maktouf and Damjanović* case, the European Court noted 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 offenses were committed, and Article 173§1 of the 2003 Criminal Code, which was applied retroactively in this case..."

21. On the other hand, in paragraphs 46-49 of its decision in the *Zoran Damjanović* case, the Constitutional Court of BiH "... first and foremost, notes that the case of the appellant Zoran Damjanović, as regards both the factual substrate and the legal issue, is not different from the case of *Maktouf and Damjanović*, which was considered by the European Court in the aforementioned decision. In that respect the Constitutional Court notes that the appellant Zoran Damjanović too was found guilty of the same crime by the same Verdict of the Court of BiH as the applicant Goran Damjanović." The Constitutional Court concluded that the case of *Maktouf and (Goran) Damjanović* initiated before the

European Court and the case of *Zoran Damjanović* conducted before the Constitutional Court of BiH concern identical arguments in relation to the application of substantive law, and “[a]ccordingly, the Constitutional Court holds that there is no reason not to accept, in this part, the reasons and reasoning provided by the European Court...” in the case of *Maktouf and (Goran) Damjanović*.

22. Based on the above and in much the same manner as the European Court did in the case of *Maktouf and (Goran) Damjanović*, “... the Constitutional Court holds that there is a realistic possibility in the present case that the retroactive application of the BiH Criminal Code was to the detriment of the appellant [Zoran Damjanović] in respect of sentencing which is contrary to Article 7(1) of the European Convention, irrespective of the fact that, given the prescribed range of the prison term, this does not mean that the appellant would have received a lower imprisonment sentence had the SFRY Code been applied in his case. Namely, it is of crucial importance that the appellant could have received a lower sentence had this code been applied”, which constitutes a violation of Article 7(1) of the European Convention (no punishment without law).

G. CONCLUSIONS OF THE PANEL IN THE REOPENED PROCEEDINGS - LEGAL ANALYSIS AND QUALIFICATION OF THE OFFENSE

23. In light of the findings of the European Court in the case of *Maktouf and (Goran) Damjanović* and the Constitutional Court of BiH in the case of *Zoran Damjanović*, the lawfulness of convictions concerning both of the Accused in this case was not an issue in those proceedings, but only the application of the criminal code and the resultant decision on criminal sanction, which is why this Panel, in the reopened proceedings, moved exclusively within the framework of removing the violation of Article 7(1) of the European Convention that had been established in the above proceedings.

24. Article 7(1) of the European Convention reads as follows:

“No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense 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 offense was committed.”

25. In the same vein, Articles 3 and 4 of the CC of SFRY, as well as Articles 3 and 4 of

the CC of BiH, stipulate that the law that was in effect at the time when the criminal offense was perpetrated is the law which is to be applied in relation to the perpetrator of the crime (*tempus regit actum*). This principle may be departed from only in the interest of the Accused and only in the event that the new law or the law which has been amended after the criminal offense has been perpetrated is more lenient to the perpetrator. Whether a new law is more lenient or not to the perpetrator is resolved *in concreto*, or by comparing the old and the new law(s) in each specific case.

26. Based on the foregoing, the Panel finds that the law to be applied in relation to the Accused Goran and Zoran Damjanović is the adopted CC of SFRY as the law that was in effect at the time when the criminal offense was perpetrated, and at the same time the law that is more lenient to the Accused, which was established both in the relevant Judgment of the European Court and the Decision of the BiH Constitutional Court.

27. In this regard, in the reopened proceedings the Panel evaluated the acts of the Accused, which had been legally qualified in the original proceedings in accordance with Article 180 of the CC of BiH (Individual Criminal Responsibility), in light of Article 22 of the CC of SFRY (Complicity). The Panel found that the acts, of which the Accused have been found guilty and with respect to which both First and Second Instance Verdicts remain in effect, correspond to the legal description provided for in Article 22 of the CC of SFRY given that the acts of the Accused, as presented in the factual description, entirely fit the legal description of complicity provided therein.

28. Therefore, having conducted the reopened proceedings this Panel qualified the acts of the Accused, of which they have been found guilty by the Verdict of this Court No. X-KR-05/107 of 18 June 2007, as the criminal offense of War Crimes against Civilians under Article 142(1) of the CC of SFRY, in conjunction with Article 22 of the same Code (Complicity), which was adopted based on the Law on Application of the Criminal Code of the Republic of BiH and the Criminal Code of SFRY. In doing so, and implementing the ECtHR's Judgment, this Panel entirely implemented the Decision of the BiH Constitutional Court and removed the violation of Article 7(1) of the European Convention.

29. In all this, the Panel was mindful of the fact that the BiH Constitutional Court is a supreme national instance whose decisions are final and binding, *inter alia* with regard to the application of the European Convention, and in line with Article VI of the BiH Constitution and Article 74 of the Rules of the BiH Constitutional Court.

30. However, the role of the European Court is supranational. The European Court, as the ultimate body in charge of interpreting the European Convention, issues final and binding judgments on a supranational level, based on which, pursuant to Article 46 of the European Convention, member states of the Council of Europe must comply with final judgments of the European Court, which has been done in this case by reopening the proceedings before this court, whereby the violation of Article 7(1) of the European Convention, which was found by the mentioned Judgment of the European Court and the Decision of the BiH Constitutional Court, was effectively removed in relation to both of the Accused.

II. DECISION ON SENTENCE

31. In view of the acts of commission of the criminal offense, form of participation of the Accused and the degree of their liability, that is, that the Accused were found guilty that in violation of the rules of international law, during the armed conflict in BiH, they tortured¹ the captured civilians who at the time enjoyed the status of protected category within the meaning of Common Article 3 of the 1949 Geneva Conventions, this Panel holds that the sentence in the present case should lean towards the minimum level prescribed for this criminal offense.

32. However, the Panel finds that it is not possible to impose a sentence “slightly above the minimum” by merely applying math rules for subtraction to this slightly above the minimum standard. It is true that there was no loss of life, but in light of the committed acts the Panel was also mindful of the proportionality of sentence to the offense, along with the already established mitigating and aggravating circumstances, and it found that the sentence imposed on the Accused would fully meet the purpose of general and special deterrence.

¹ Torture, to which those aggrieved by the acts of the Accused were subjected, entails violation of the rules of international law and it is proscribed by numerous international standards. The Court notes that “[t]he prohibition of torture and inhuman or degrading treatment or punishment is a general international standard, which, albeit differently formulated, is found in various international instruments such as Article 3 of the European Convention on Human Rights” (Explanatory Report to the Convention for the Prevention of Torture and Inhuman or degrading Treatment or Punishment), which prescribes that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

33. Therefore, in deciding on the type and length of punishment, the Panel was mindful of the prescribed range for this criminal offense, taking into account the purpose of punishment, as well as "... all the circumstances bearing on the magnitude of punishment... in particular, the degree of criminal responsibility... the degree of danger or injury to the protected object, the circumstances in which the act was committed..." In addition, the Panel took into account the past conduct of the offenders, their personal situation and their conduct during the criminal proceedings (Articles 33, 34, 38 and 41 of the CC of SFRY).

34. Of the aggravating circumstances on the part of the Accused, the Panel considered the degree of their criminal responsibility, the fact that the conduct of the Accused violated psychological and physical integrity of the aggrieved persons, that their personal dignity and self-respect were particularly degraded. The overall circumstances prevalent at the relevant time suggest that the torture, to which the aggrieved persons were subjected and which lasted continuously for several hours, was outside of normal human experience – on the one side, the aggrieved persons were unprotected, unarmed, wounded and exhausted and placed *hors de combat*, and on the other side were armed soldiers who beat them using rifles, batons, bottles, kicks and punches and who used that situation to openly demonstrate their dominance and power over the aggrieved persons.

35. Of the mitigating circumstances on the part of the Accused, the Panel was mindful of their family situation, the fact that they have no prior convictions and their fair conduct during the proceedings. The established mitigating circumstances, however, are not sufficient either in terms of their quality or quantity to warrant a reduction of punishment.

36. In view of all the above circumstances, this Panel sentenced the Accused Zoran Damjanović to imprisonment for the term of six (6) years and the Accused Goran Damjanović to imprisonment for the term of six (6) years and six (6) months, having established that his conduct was more brutal and cruel, which the Panel considered to be an additional aggravating circumstance on the part of the Accused Goran Damjanović and which is why the Panel sentenced him to a longer imprisonment.

37. Finally, bearing in mind that the purpose of conducting the reopened proceedings for the benefit of the Accused was to remove the established violation of Article 7(1) of the European Convention, the Panel decided as stated in the operative part

of this Verdict, while in other parts the Verdicts of this Court nos. X-KR-05/107 of 18 June 2007 and X-KRŽ-05/107 of 19 November 2007, as well as the decision of this Court No. X-KRŽ-05/107 of 28 April 2008 on the stay of criminal proceedings, remain in effect.

38. Pursuant to Article 333(3) of the CPC of BiH, the time the Accused Goran and Zoran Damjanović spent in custody and serving the previous sentence shall be credited towards the sentence, in case of the Accused Goran Damjanović six (6) years, four (4) months and ten (10) days, and in the case of the Accused Zoran Damjanović five (5) years, ten (10) months and eight (8) days.

RECORD-KEEPER

Legal Advisor

Sanida Vahida-Ramić

PRESIDING JUDGE

Enida Hadžiomerović

NOTE ON LEGAL REMEDY: An Appeal from this Verdict may be filed with the panel of the Appellate Division of this Court within fifteen (15) days of the receipt of the written copy thereof.