

Bosna i Hercegovina

Босна и Херцеговина



Sud Bosne i Hercegovine  
Суд Босне и Херцеговине  
Court of Bosnia and Herzegovina

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Case number: S1 1 K 002594 15 Krž4

Date of delivery: 16 April 2015

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Before the Panel of Judges: Dragomir Vukoje, LLM, Presiding  
Redžib Begić, Reporting Judge  
Mirza Jusufović, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

ESO MACIĆ

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REVISED SECOND INSTANCE VERDICT

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

Mr. Miroslav Janjić

**Counsel for the accused Eso Macić:**

Mr. Kadrija Kolić, Attorney

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**Number: S1 1 K 002594 15 Krž4**

**Sarajevo, 16 April 2015**

## **IN THE NAME OF BOSNIA AND HERZEGOVINA!**

The Court of Bosnia and Herzegovina, sitting in the Panel of the Appellate Division of Section I for War Crimes, comprised of Judges Dragomir Vukoje LL.M., as the Presiding, and Redžib Begić and Mirza Jusufović, as members of the Panel, with the participation of Legal Advisor Belma Čano-Sejfović, as the Minutes-taker, in the criminal matter against the sentenced person Eso Macić, for the criminal offenses of War Crimes against Civilians under Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina and War Crimes against Prisoners of War under Article 175(a) of the Criminal Code of Bosnia and Herzegovina, as read with Article 29 and Article 180(1) of the same Code, deciding upon the Decision of the Constitutional Court of Bosnia and Herzegovina, No. AP-4613/12 of 17 March 2015 revoking the Verdict of the Court of BiH No. S1 1 K 002594 13 Krž3 of 13 June 2013 in the part concerning the application of the more lenient criminal code, after a public session of the Appellate Panel held in the presence of the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Mr. Miroslav Janjić, the sentenced person Eso Macić and his Defense Attorney, Mr. Kadrija Kolić, on 16 April 2015 delivered the following:

## **V E R D I C T**

The Verdict of the Court of Bosnia and Herzegovina (Court of BiH), No. S1 1 K 002594 13 Krž3 of 21 October 2010, is hereby **revised** in relation to the applicable criminal code and sentencing, and the acts of which Eso Macić was found guilty under the Trial Verdict are legally qualified as the criminal offense of War Crimes against Civilians under Article 142(1) of the Criminal Code of the Socialistic Federative Republic of Yugoslavia (CC SFRY), adopted pursuant to the Law on the Application of the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the Socialistic Federative Republic of Yugoslavia, as read with Article 22 of the same Code, for which criminal offense the

Panel imposes on him, pursuant to the referenced provision, as well as Articles 33, 38(1) and 41(1) of the CC SFRY, a prison sentence for a term of 11 (eleven) years. Pursuant to Article 50 of the CC SFRY, adopted pursuant to the Law on the Application of the CC BiH and the CC of SFRY, the time the sentenced person spent in custody, running from 15 November 2012 until 29 July 2013, and serving the sentence under the final Verdict of the Court of BiH, No. S1 1 K 002594 10 Krl of 15 November 2012, shall be credited towards the sentence imposed.

The Verdict of the Court of BiH No. S1 1 K 002594 13 Krž3 of 13 June 2013 shall remain unaltered in its remaining part.

## **R E A S O N I N G**

### **I. PROCEDURAL HISTORY**

1. The Verdict of the Court of BiH, No. S1 1 K 002594 10 Krl of 15 November 2012, found the then accused Eso Macić guilty of committing, by the acts described in Sections 1 through 4 of the convicting part of the Verdict, the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina (CC BiH), as read with Article 29 and Article 180(1) of the CC BiH, for which criminal offense he received, pursuant to Article 285(1) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), and Articles 39, 40, 42(1) and (2) and 48 of the CC BiH, the prison sentence for a term of 15 (fifteen) years. Pursuant to Article 188(4) of the CPC BiH, the Accused was relieved of the duty to reimburse the costs of the criminal proceedings, which shall be paid from the budget appropriations of the Court. Pursuant to Article 198(2) of the CPC BiH, it was decided that all the injured parties be instructed that they may pursue their possible claims under property law in a civil action. Pursuant to Article 284(1)(c) of the CPC BiH, the same Verdict acquitted the then accused Eso Macić of the charges that, by the acts described in Counts 5 and 6 of the Indictment, he committed the criminal offenses of War Crimes against Civilians under Article 173(1)(c) of the CC BiH and War Crimes against Prisoners of War under Article 175(a) CC BiH, as read with Article 29 and Article 180(1) of the same Code. Pursuant to Article 189(1) of the CPC BiH, it was decided that, in this part too, the Accused will be relieved of the duty to reimburse the

costs of the criminal proceedings, which will be paid from the budget appropriations. Pursuant to Article 198(3) of the same Code, all injured parties were, in this part too, instructed that they may pursue their possible claims under property law in a civil action.

2. Deciding upon the appeal filed by Counsel of the then accused Eso Macić, the Appellate Division Panel granted the appeal, in part, in its Verdict No. S1 1 K 002594 13 Krž3 of 13 June 2013, revised the Verdict of the Court of BiH No. S1 1 K 002594 10 Krl of 15 November 2012 in its sentencing part, and sentenced the then accused Eso Macić, charged with the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC BiH, as read with Article 29 and Article 180(1) of the same Code, and found guilty under the referenced Verdict, pursuant to the mentioned provision and Articles 39, 40, 42(1) and (2) and 48(1) of the CC BiH, to a prison sentence for a term of 13 (thirteen) years, to which sentence the time he spent in custody, running from 15 November 2012, was credited pursuant to Article 56 of the CC BiH.

3. Having acted pursuant to the appeal filed by the sentenced person Eso Macić, the Constitutional Court of Bosnia and Herzegovina delivered, on 17 March 2015, a Decision No. AP-4613/12, revoking the Verdict of the Court of BiH No. S1 1 K 002594 13 Krž3 of 13 June 2013, in the part pertaining to the application of the more lenient law. The referenced Decision noted that the revocation of the Verdict of the Court of BiH No. S1 1 K 002594 13 Krž3 of 13 June 2013, in its referenced part, shall in no way affect the Appellant's deprivation of liberty, detention and custody, which is the exclusive jurisdiction of the Court of BiH. Under the same Decision, the Constitutional Court dismissed as ill-founded Eso Macić's appeal filed from the referenced Verdict of the Court of BiH in relation to Article II/3.e) of the Constitution of BiH and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms – the right to a fair trial (ECHR).

4. The case was remanded to the Court of BiH, which was under the obligation, as a matter of urgency, to deliver a new decision, pursuant to Article II/2. of the Constitution of BiH and Article 7(1) of the ECHR, and notify the Constitutional Court of BiH, within a deadline of 3 (three) months after the Decision serving, about the measures undertaken for the referenced Decision enforcement.

5. The Decision of the Constitutional Court of BiH No. AP-4613/12 of 17 March 2013 was forwarded to the Court of BiH on 1 April 2015.

6. Having acted in compliance with the obligation ensuing from the referenced Decision, and with a view of its prompt implementation, the Appellate Panel held, on 16 April 2015, a public session attended by the Prosecutor of the BiH Prosecutor's Office, Mr. Miroslav Janjić, the sentenced person Eso Macić and his Defense Attorney, Mr. Kadrija Kolić.

7. Counsel stood by all the reasons and propositions presented in the appeal, insisting that the provisions of the CC SFRY be applied. In addition, Counsel argued that the sentenced person could not receive a prison sentence exceeding the term of eight years, considering the ratio between the previously imposed sentence, the legal framework under Article 173 of the CC BiH and the legal framework set forth in Article 142(1) of the CC SFRY. Counsel also emphasized that the Defense further maintained all the objections advanced in relation to the alleged violations of Article 6 of the ECHR.

8. The sentenced person Eso Macić completely stood by his Counsel's presentation.

9. The Prosecution also held that the provisions of the CC SFRY should apply, and that in relation to the length of sentence, the gravity of the offense, the continuity of acts, relatively protracted period of time over which the Accused participated in the act of commission and the gravity of the resulting consequences should also be taken into account.

## **II. PROCEDURAL SITUATION AFTER THE DECISION OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA**

10. Prior to providing the explanation of reasons for the new decision in relation to the Criminal Code application and sentencing pursuant to Article II/2 of the Constitution of BiH and Article 7(1) of the ECHR, as ordered under the referenced Decision of the Constitutional Court of BiH, the Panel finds necessary to provide brief reasons pertaining to its procedural situation after the revocation of the Court of BiH's Appellate Verdict No. S1 1 K 002594 13 Krž3 of 13 June 2013, in the part as mentioned above.

11. The Decision of the Constitutional Court of BiH was explicit in relation to the remaining complaints advanced by the Applicant, sentenced person Eso Macić. In this regard, it was decided that the Applicant's complaints, contesting the Verdict of the

Court of BiH, *inter alia*, for violations of Article II/3.e) of the Constitution of BiH and Article 6(1) of the ECHR, are ill-founded. The reasoning of the Constitutional Court of BiH's decision explicitly stated that:

“76. According to the Constitutional Court, and primarily considering the reasoning of the contested Verdicts, it cannot be inferred that the state of facts was established arbitrarily and that the Court of BiH arbitrarily evaluated the adduced evidence. This is so considering that the decisive facts were determined based on ample evidence, comprehensively presented in the referenced Verdicts' reasoning, and that the evidence standing as the footing for those Verdicts was also explained in detail. Ultimately, the Constitutional Court observes that the reasoning of the contested Verdicts also contains exhaustive reasons and explanations for which the evidence was accepted, and that the Court's findings are based on a diligent and conscientious evaluation of evidence, individually and in combination with the other evidence adduced. Therefore, the Constitutional Court could not accept as well-founded the Applicant's complaints advanced along this line either.

77. For the foregoing reasons, the Constitutional Court finds that the Applicant's allegations, relating to the violation of the right to a fair trial under Article II/3. e) of the Constitution of BiH and Article 6(1) of the European Convention, are ill-founded.”

12. Considering the foregoing explanation provided by the Constitutional Court of BiH, it is clear that, in the concrete case, the Constitutional Court did not bring into question the proper nature of the Verdict of the Court of BiH in the part pertaining to the existent criminal offense and the guilt on the part of the sentenced person Eso Macić for the acts of which he was found guilty under the final Verdict of the Court of BiH.<sup>1</sup> As it further ensues from para. 86 of the Decision, the Constitutional Court explicitly stated that:

“... to protect the Applicant's constitutional rights, it suffices to revoke the contested Verdict of the Appellate Panel No. S1 1 K 002594 13 Krž3 of 13 June 2013 and refer the case back to the Court to deliver a new decision pursuant to Article 7(1) of the European Convention, in the part pertaining to the sentencing.”

13. In view of the foregoing, having received the referenced Decision of the Constitutional Court of BiH, the Panel of the Appellate Division of the Court of BiH faced a new situation, in fact unregulated by the procedural law. This is so because the CPC BiH contains no provisions providing for the possibility to revoke, at least partially, a second instance verdict and remand it for a new trial except in cases where an appeal is filed from the second instance verdict delivered upon revocation of the trial verdict and a hearing

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<sup>1</sup> This is the very reason for the Constitutional Court of BiH to revoke the Verdict of the Court of BiH No. S1 1 K 002594 13 Krž3 of 13 June 2013 only in the part pertaining to the application of the more lenient criminal code.

held before the Panel of the Appellate Division (Article 317.a of the CPC BiH).<sup>2</sup> In particular, the CPC BiH contains no provisions to act upon in cases where a second instance verdict is revoked by a decision of the Constitutional Court of BiH, notably in the part pertaining to the “application of the more lenient law”, when the issue of guilt is not disputed at all, as is the case here. Therefore, starting primarily from the fact that the Constitutional Court of BiH ordered the Court of BiH to render a new decision in an urgent procedure, the Panel attempted, in relation to the sentencing, to find the most efficient way to act in such a situation.

14. Starting from the fact that the decisions of the Constitutional Court of BiH are final and binding, the Appellate Panel found it necessary to re-examine the proper application of the Criminal Code and, accordingly, of the decision on sentence under the Appellate Verdict, relying on Article 314 of the CPC BiH. The referenced Article provides that “*by honoring an appeal, the Panel of the Appellate Division shall render a verdict revising the verdict of the first instance if the Panel deems that the decisive facts have been correctly ascertained in the verdict of the first instance, and that in the view of the facts established, a different verdict must be rendered when the law is properly applied.*”

15. In the concrete case, there is no appeal as a subject to decide on. Despite the foregoing, the Panel was mindful of the fact that the Decision of the Constitutional Court of BiH found that the Panel of the Appellate Division of the Court of BiH erred in applying the law, which is a decision that may be rendered by the Appellate Panel, in the ordinary proceedings, when such an appellate complaint exists. Also, deciding on the Applicant’s other complaints, the Constitutional Court of BiH found no *arbitrariness in the establishment and evaluation of the facts, or any other procedural violations* in the contested Verdict. Therefore, it ensues from the Decision of the Constitutional Court of BiH that it does not bring into question the proper nature of the finding of facts in the Verdict of the Court of BiH No. S1 1 K 002594 10 Krl of 15 November 2012, in the part in which it was confirmed by the Verdict No. S1 1 K 002594 13 Krž3 of 13 June 2013, whereby it became final. Therefore, in the Panel’s view, the factual situation resembles the procedural situation as regulated under Article 314 of the CPC BiH. Thus, in the absence of a strict legal provision governing the line of action in a situation existing in the concrete case, the Panel found it most purposeful and efficient to revise the Verdict of the Court of BiH No. X

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<sup>2</sup> Article 315 of the CPC BiH governing the requirements to revoke the verdict of the first instance, wherein



S1 1 K 002594 13 Krž3 of 13 June 2013, in the way as decided in the Operative Part of the Verdict, with a view to rendering a new decision remedying the violation found under the Decision of the Constitutional Court, which is binding on this Court, in the urgent proceedings as ordered under the Constitutional Court of BiH's Decision.

16. Starting from the BiH Constitutional Court's Decision and with a view to implementing it, the Appellate Panel of the Court of BiH decided as stated in the Operative Part of the Verdict for the reasons that follow:

### III. APPLICABLE LAW

17. In rendering its earlier Verdict, revoked by the foregoing Decision of the Constitutional Court of BiH in the part pertaining to the application of the more lenient law, the Appellate Panel reviewed, among other complaints, the issue of the Criminal Code application in the present case. The Panel made a comparative analysis of Article 173 of the CC BiH and Article 142 of the CC SFRY, adopted pursuant to the Law on the Application of the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the Socialistic Federative Republic of Yugoslavia<sup>3</sup> (the adopted CC SFRY), primarily from the aspect of the sentences prescribed under those Codes for the criminal offense of War Crimes against Civilians. The Panel also bore in mind that the accused Eso Macić was found guilty of committing the criminal offense as an accomplice, given that the prerequisites for the existence of complicity are more strictly defined under the CC BiH than under the CC SFRY. In view of the foregoing, the Panel found that more lenient to the then Accused was the application of the CC BiH, which came into force after the commission of the crime charged against the Accused, as opposed to the adopted CC SFRY, which was effective at the time when the criminal offense at issue was committed.

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only the Appellate Panel conducts the hearing.

<sup>3</sup>Decree with the force of law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialistic Federative Republic of Yugoslavia, adopted as the Republic Law at Times of Imminent Danger of War or during the State of War (Official Gazette of the RBiH, No. 6/92) and the Law on the Confirmation of Decrees with the Force of Law (Official Gazette of the RBiH, No.13/94), hereinafter: the adopted CC SFRY.

The earlier Verdict provided a comprehensive line of arguments for such a finding, wherefore it will not be repeated herein.

18. However, the Constitutional Court of BiH obviously did not accept such a line of arguments. The Constitutional Court of BiH referred to the reasoning of the contested Verdict of the Court of BiH regarding the application of the CC BiH as the more lenient law. As it ensues from the referenced Constitutional Court's Decision, first relating to the Court of BiH's arguments on the definition of the term of complicity under both Criminal Codes, the Constitutional Court referred to its finding in its Decision AP 556/12<sup>4</sup>, where it had already considered the same issue, as follows:

“The Constitutional Court has held that, in the stated circumstances, contrary to the Appellate Panel's view, the provisions on complicity do not affect the issue of imposing the more lenient sentence on the applicant, since the applicant is held liable as a co-perpetrator under the both laws...”

19. In its Decision revoking the Verdict of the Court of BiH “*in the part pertaining to the application of the more lenient law*”, the Constitutional Court of BiH has held that the adopted CC SFRY was more lenient to the then Accused and that, in relation to the sentencing, the CC BiH was retroactively applied to the prejudice of the Accused. In view of the foregoing, the Panel concluded that the adopted CC SFRY, as the law that was in force at the time when the crime was committed, should apply to the concrete case.

20. Given the finding that the sentenced person acted as a co-perpetrator in the commission of the acts of which the final Verdict found him guilty, and considering the above presented views of the Constitutional Court, the Appellate Panel qualified the acts of the sentenced person Eso Macić as War Crimes against Civilians under Article 142(1) of the CC SFRY, in connection with Article 22 of the same Code.

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<sup>4</sup> Referral to the Decision AP-556/12 “In the context of the foregoing, despite the fact that the CC BiH is more favorable to the accused with regard to the definition of the term of complicity than the CC SFRY, in terms of the facts pertaining to the concrete case, this circumstance had no consequences whatsoever for the Applicant's rights pursuant to Article 7 of the European Convention. The reasoning of the contested Verdicts show that the Applicant committed the acts of commission as a co-perpetrator, in terms of Article 29 of the CC BiH, namely that the Applicant's decisive contribution to the realization of the criminal offense was established, and that this circumstance implies that his acts are the acts of complicity also pursuant to the provisions of the CC SFRY, which requires a mere participation in the act of commission.”

#### IV. SENTENCING

21. Bearing in mind that, in the concrete case, the Panel found that the application of the adopted CC SFRY was justifiable, the referenced Code also had to be applied in the fashioning of the sentence for the criminal offense of which the convicted person Eso Macić was found guilty.

22. In deciding on sentence, the Panel had to be mindful of the magnitude of sentence set forth in Article 142 of the adopted CC SFRY for the criminal offense of which Eso Macić was found guilty, in accordance with the provisions prescribing the general principles in fixing punishment (Article 41 of the adopted CC SFRY), also bearing in mind the purpose of punishment provided for in Article 33 of the adopted CC SFRY. In this regard, the Panel took into account that the sentence prescribed for the criminal offense of War Crimes against Civilians under Article 142 of the adopted CC SFRY is imprisonment for a period of not less than 5 (five) years or the death penalty, and that after the abolishment of the death penalty in the meantime, the maximum prescribed sentence is imprisonment for a term of fifteen years. In addition, in fixing the punishment, the Panel paid special attention to all the circumstances which may affect imposing a less or more stringent sentence (extenuating and aggravating circumstances).

23. Therefore, in fashioning the sentence for the sentenced person, the Panel primarily relied on the statutory prescribed minimum and maximum sentences for the criminal offense at issue. Also, the Panel bore in mind all the circumstances which, in the concrete case, affected rendering a more or less stringent sentence (extenuating and aggravating circumstances).

24. Among the aggravating circumstances, the Panel took into account the particular brutality, cruelty and the lack of scruple demonstrated in the commission of the criminal offenses, as well as the persistence of the sentenced person Macić in the referenced crimes' undertaking, apparent from the undertaking of a large number of criminal acts in a relatively short period of time, number of victims against whom the prohibited acts were undertaken, and the fact that, at no moment whatsoever did he show any remorse or compassion to the victims of the crime.

25. Among the extenuating circumstances, the Panel took into account the previous life of the sentenced person and the fact that he had no convictions, either until the

moment of the commission of the concrete crime or after its commission.

26. In view of all the foregoing, and considering the statutory prescribed limits of the punishment for the criminal offense at issue, the purpose of punishment, and all the circumstances which can affect rendering a more or less stringent sentence, and particularly the degree of the criminal responsibility of the sentenced person, motives for which the crime was committed, degree of danger or of the violation of the protected value, the circumstances under which the offense was committed, and the personal circumstances of the sentenced person, the Panel concluded that the prison sentence for a term of eleven years for the committed crime is adequate/proportional with all the circumstances and the personality of the sentenced person as a perpetrator, and that thereby the purpose of punishment, both the special and general deterrence, will thus be achieved in its entirety.

27. The Appellate Panel concluded that Counsel's view, that the sentence exceeding the term of eight years would be a new violation of the rights of the sentenced person, is ill-founded. Specifically, the punishment cannot be expressed by a mere mathematical operation and by establishing an alleged proportionality between the previously imposed sentence and a possible sentence within the statutory magnitude between 5 and 15 years. Such a model, as proposed by the Defense, would not amount to individualizing of the sentence which would satisfy all the principles of the criminal proceedings, and which would be compliant with Article 33 of the CC SFRY, that is, it would not serve the purpose of punishment.

28. In view of all the foregoing, the second instance verdict had to be revised also with regard to the sentencing, and the decision be rendered as stated in the Operative Part of the Verdict. Pursuant to Article 50 of the adopted CC SFRY, the time the sentenced person spent both in custody and serving the sentence imposed under the final Verdict shall be credited towards the imposed sentence.

29. Ultimately, the Panel did not address the complaints advanced by the sentenced person's Counsel regarding the alleged violations of Article 6 of the European Convention since the Constitutional Court of BiH had already reviewed them and found no violation whatsoever of the referenced Article of the Convention. Also, this Court does not have any possibility at all to review its own decisions in the way as suggested by the Defense.

30. In view of the foregoing reasons, the Appellate Panel decided as stated in the Operative Part of this Verdict.

**MINUTES-TAKER:**

**Legal Advisor**

**Belma Čano – Sejfović**

**PANEL PRESIDENT**

**JUDGE**

**Dragomir Vukoje, LL.M**

**NOTE ON LEGAL REMEDY:** No appeal lies from this Verdict.