

Bosna i Hercegovina

Босна и Херцеговина



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

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**Case No. S1 1 K 018951 15 Kžk (with reference to X-KRŽ-06/243)**

**Delivered and pronounced on: 9 June 2015**

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**Before the Panel of Judges composed of:**

**Mirza Jusufović, Presiding  
Tihomir Lukes, member  
Dragomir Vukoje, LL.M, member**

**PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA  
v.  
SRETEN LAZAREVIĆ, DRAGAN STANOJEVIĆ AND SLOBODAN OSTOJIĆ**

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**SECOND INSTANCE VERDICT**

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

**Mr. Adis Nuspahić**

**Attorneys:**

**Counsel for the sentenced person Sreten Lazarević, Mr. Radivoje Lazarević**

**Counsel for the sentenced person Dragan Stanojević, Mr. Miloš Perić**

**Counsel for the sentenced person Slobodan Ostojić, Mr. Miodrag Lj. Stojanović**

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**Number: S1 1 K 018951 15 Kžk (with reference to X-KRŽ-06/243)**

**Sarajevo, 9 June 2015**

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

The Court of Bosnia and Herzegovina, Section I for War Crimes, the Panel of the Appellate Division composed of Judge Mirza Jusufović, as the Panel President, and Judges Tihomir Lukes and Dragomir Vukoje, LL.M., as members of the Panel, with the participation of Legal Advisor Medina Džerahović, as the Minutes-taker, in the criminal matter against the accused Sreten Lazarević, Dragan Stanojević and Slobodan Ostojić, for the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina (CC BiH), as read with Article 29 of the CC BiH, pursuant to the Decision of the Constitutional Court of Bosnia and Herzegovina number AP-717/11 of 15 April 2015 revoking the Verdict of the Court of BiH No. X-KRŽ-06/243 of 22 September 2010 in the part pertaining to the application of the more lenient law, having held a hearing before the Appellate Division Panel in relation to the part in which the referenced Verdict has been revoked, in the presence of the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Mr. Adis Nuspahić, the accused Sreten Lazarević, Dragan Stanojević and Slobodan Ostojić and their respective Defense Attorneys, Radivoje Lazarević, Miloš Perić and Miodrag Lj. Stojanović, on 9 June 2015 issued and publicly announced the following:

**VERDICT**

The acts of the accused Sreten Lazarević, Dragan Stanojević and Slobodan Ostojić, established under the Verdict of the Court of BiH No. X-KRŽ-06/243 of 22 September 2010, of which the same Verdict found them guilty, 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), which was adopted pursuant to

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the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code SFRY<sup>[1]</sup>, as read with Article 22 of the same Code, for which the Panel sentences them, pursuant to the referenced statutory provision, as well as Articles 33, 38 and 41 of the CC SFRY, including Article 42(2) of the CC SFRY in relation to Slobodan Ostojić, as follows:

**Sreten Lazarević**, to imprisonment for a term of 7 (seven) years,

**Dragan Stanojević**, to imprisonment for a term of 5 (five) years, and

**Slobodan Ostojić**, to imprisonment for a term of 3 (three) years and 6 (six) months,

to which sentences the time they spent in custody, running from 22 September 2010 through 21 January 2011, as well as the time they spent serving their respective prison sentences received under the final Verdict of the Court of Bosnia and Herzegovina, No. X-KRŽ-06/243 of 22 September 2010, namely from 21 January 2011 when they were committed to serve the sentence onwards, shall be credited pursuant to Article 50(1) of the CC SFRY.

## **R e a s o n i n g**

### **I. PROCEDURAL HISTORY**

The Verdict of the Court of Bosnia and Herzegovina (Court of BiH), number X-KR-06/243 of 29 September 2008 found the accused Sreten Lazarević, Dragan Stanojević, Mile Marković and Slobodan Ostojić guilty of committing, by the acts described in the Operative Part of the referenced Verdict, the criminal offense of War Crimes against Civilians under Article 173(1)(c), as read with Article 29 of the CC BiH, and in relation to Sreten Lazarević, in connection with Article 31 and Article 180(2) of the CC BiH.

Pursuant to Article 285 of the Criminal Procedure Code of BiH (CPC BiH), and by applying Articles 39, 42, and 48 of the CC BiH, the Trial Panel of the Court of BiH sentenced the

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<sup>[1]</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 Socialist Federative Republic of Yugoslavia which was adopted as the Republic law at the times of imminent danger of war or at the war time (Official Gazette of the RBiH, No. 6/92) and the Law on the Confirmation of Decrees with the Force of Law (Official Gazette of BiH, No. 13/94).

accused Sreten Lazarević to imprisonment for a term of 10 (ten) years, and by applying Articles 39, 42, 48 and 50 of the CC BiH, the accused Dragan Stanojević to imprisonment for a term of 7 (seven) years, and the accused Mile Marković and Slobodan Ostojić to 5 (five) years in prison each.

The same Verdict acquitted the accused Sreten Lazarević of the charges that he committed the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC BiH, in the way as described in Sections 1 and 1.5 of the acquitting part of the Verdict, the accused Mile Marković of the charges that he committed the criminal offense of War Crimes against Civilians under Article 173(1)(c) as read with Article 29 of the CC BiH, in the way as described in Sections 2 and 3.2 of the acquitting part of the Verdict, and the accused Slobodan Ostojić of the charges that he committed the criminal offense of War Crimes against Civilians under Article 173(1)(c) as read with Article 29 of the CC BiH, in the way as described in Sections 3 and 4.1 of the acquitting part of the Verdict.

Pursuant to Article 283(1)(b) of the CPC BiH, the charges were dismissed in relation to the acts under Count I.3 and 7.c), Count II.2 and 3 because the Prosecutor withdrew the referenced counts during the trial.

Pursuant to Article 188(4) of the CPC BiH, the Accused were relieved of the obligation to reimburse the costs of the criminal proceedings, while the injured parties were instructed, pursuant to Article 198(2) of the same Code, that they may pursue their claims under property law in a civil action.

The Decision of the Appellate Panel, number X-KRŽ-06/243 of 21 June 2009, granted the appeals filed by Mr. Radivoje Lazarević, Defense Attorney for the accused Sreten Lazarević, Mr. Miloš Perić, Defense Attorney for the accused Dragan Stanojević, Mr. Nenad Rubež, Defense Attorney for the accused Mile Marković and Mr. Miodrag Lj. Stojanović, Defense Attorney for the accused Slobodan Ostojić, revoked the referenced Verdict in its convicting part, and ordered a trial, in this part, to be held before the panel of the Appellate Division of Section I for War Crimes of the Court of BiH.

#### **1. Verdict of the Appellate Panel number X-KRŽ-06/243 of 22 September 2010**

After the renewed proceedings, the Panel of the Appellate Division (Appellate Panel/Panel) delivered a Second Instance Verdict number X-KRŽ-06/243 of 22 September

2010, finding the accused Sreten Lazarević, Dragan Stanojević and Slobodan Ostojić guilty of the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC BiH, as read with Article 29 of the CC BiH, and sentenced the accused Sreten Lazarević to imprisonment for a term of 9 (nine) years, the accused Dragan Stanojević to imprisonment for a term of 7 (seven) years, and the accused Slobodan Ostojić to imprisonment for a term of 5 (five) years. Under the same Verdict, the accused Sreten Lazarević was acquitted of the charges that, by the acts described in Section 1.5, he committed the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC BiH, as read with Article 180(2) of the CC BiH, while the accused Mile Marković was acquitted of all the charges brought against him.

The Operative Part of the Verdict established that, during the period between May 1992 and the end of summer 1992, in Zvornik, during the armed conflict and the war in BiH, as members of the reserve police force of the SJB Zvornik, the then Accused acted in violation of Article 3 of the Geneva Convention on the Protection of Civilians in Times of War of 12 August 1949, and accorded inhuman treatment to the civilians unlawfully imprisoned in the building of the Municipal Minor Offenses Court in Zvornik and the DP “Novi izvor” building in Zvornik.

The Appellate Panel established, in Section I of the Operative Part of the Verdict, that the Principal Accused **Sreten Lazarević** was a guard and *de facto* deputy warden of the prison located in the building of the Minor Offenses Court, subsequently in the DP “Novi izvor” building, in the way described in Sections 1–4 of the referenced part of the Operative Part of the Verdict. Thus, according to Section 1, the accused Lazarević enabled and did not prevent inhuman treatment accorded to prisoner Ramis Smajlović in the building of the Minor Offenses Court by consenting that this prisoner be taken from his detention room to the guards’ room, where a NN person beat him with a police stick, thereby causing severe suffering to him, despite the continued presence of the accused Sreten Lazarević in the room, whose obligation was to prevent the prisoner from being treated in such a way, which he failed to do; under Section 2. – in the DP “Novi izvor” building, the accused Lazarević arrived in the detention room, asked the prisoners if any of them was from Bratunac, and when Sejfo Omerović answered positively, the accused Lazarević took him out of the room and handed him over to a group of NN persons, whereby he enabled them to inhumanely treat the prisoner, since this group of NN persons took the prisoner to a nearby garage, beat him and caused severe suffering to him, and

thereupon threw him in the trunk of a vehicle by which they had previously arrived, and drove him in an unknown direction, after which he has been unaccounted for; under Section 3 – in the DP “Novi izvor” building, he accorded inhuman treatment to prisoner Nurija Nuhanović, as he had beat him and caused to him severe suffering as a result of which the prisoner lost his consciousness; under Section 4 – he was present in the DP “Novi izvor” building when a group of guards, including Slobodan Ostojić, inhumanely treated prisoners Ramis Smajlović and Admir Hadžić by having beaten them due to the alleged attempt of flight and caused severe suffering to them, whereby he consented to such a treatment of prisoners and failed to prevent it in any way whatsoever.

At the same time, the accused Lazarević has been acquitted of charges that, during the period between May 1992 and March 1993, on several occasions, he allowed unauthorized persons - groups of soldiers known as Gogić’s men, to enter the prison premises by personally unlocking the door, or allowing other guards to do so without punishing them, and thus, on unidentified days, enabled NN soldiers to physically abuse and beat the prisoners, whereby he would have committed the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC BiH, as read with Article 180(2) of the CC BiH.

Under Section II.1 of the Operative Part of the Verdict, the Appellate Panel concluded in relation to the accused **Dragan Stanojević** that, as a guard in the above mentioned prison, the accused Stanojević accorded inhuman treatment to unlawfully detained persons because, on several occasions, he had unlocked the prison premises and thereby enabled groups of soldiers to accord inhumane treatment to prisoners, particularly to prisoner Fahrudin Memić, by telling them that he was the person who had wounded a Serb, wherefore NN soldiers beat him several times, and caused great suffering to this prisoner; and in June 1992, in the DP “Novi izvor” building, he enabled a group of soldiers led by one “Saša” to beat up the same prisoner in the same way, which they did, having knocked him down on the ground and jumped on his back, thus causing great suffering to him.

The accused **Slobodan Ostojić** was under Section III.1. of the Operative Part of the Verdict found guilty because, as a guard in the above referenced prison, he took prisoners Ramis Smajlović and Admir Hadžić out of the prison cell and took them to another room, where he took part in their beating together with other guards, all because of their

alleged attempt to flee, whereby he caused great suffering to them.

## **2. Decision of the Constitutional Court of BiH**

Having acted upon the appeal filed by the accused Dragan Stanojević through his Counsel, Mr. Miloš Perić, of 14 February 2011 (AP-717/11), and the appeal filed by the accused Sreten Lazarević and Slobodan Ostojić, through their respective Attorneys, Mr. Radivoje Lazarević and Mr. Miodrag Lj. Stojanović (AP-735/11), of 15 February 2011, the Constitutional Court of Bosnia and Herzegovina (Constitutional Court of BiH) delivered, on 15 April 2015, a Decision number AP-717/11 granting, in part, the referenced appeals, finding violations of Article II/2 of the Constitution of Bosnia and Herzegovina and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and revoking the Verdict of the Court of BiH, No. X-KRŽ-06/243 of 22 September 2010, in the part pertaining to the **application of the more lenient law**. The same Decision dismissed as ill-founded the appeal filed by Dragan Stanojević, Sreten Lazarević and Slobodan Ostojić from the Verdict of the Court of BiH number X-KRŽ-06/243 of 22 September 2010 in relation to Article II/3.e) of the Constitution of BiH and Article 6(1) of the ECHR. Also, the Constitutional Court of BiH noted that revoking the Verdict of the Court of BiH in the referenced part shall, in no way, affect the applicants' deprivation of liberty, apprehension and imprisonment, which is under the exclusive jurisdiction of the Court of BiH. The case was remanded to the Court of BiH, which shall, as a matter of urgency, deliver a new decision in relation to the sentencing pursuant to Article II/2 of the Constitution of BiH and Article 7(1) of the ECHR.

The Decision of the Constitutional Court of BiH number AP-717/11 of 15 April 2015 was delivered to the Court of BiH on 11 May 2015.

In acting pursuant to the obligation transpiring from the referenced decision, and with the aim of its prompt implementation, the Appellate Panel held a hearing, on 4 June 2015, which was attended by the Prosecutor of the BiH Prosecutor's Office, the Accused and their respective Defense Attorneys.

The Prosecutor submitted that, pursuant to the Decision of the Constitutional Court of BiH, he did not object to the application of the CC SFRY, as the law that was in effect at the time when the crime at issue was committed in the concrete case. The Prosecutor moved the Appellate Panel to qualify under the CC SFRY the acts of which Sreten Lazarević,

Dragan Stanojević and Slobodan Ostojić were found guilty, and to impose on them prison sentences within the limits prescribed by the referenced Code.

Mr. Miloš Perić, Defense Attorney of the accused Dragan Stanojević, argued that the preconditions to hold a hearing have not been met and asked for its adjournment, insisting on the preliminary proceedings of the Court upon Counsel's motion to renew the proceedings for the benefit of the accused/sentenced persons in terms of conducting the procedure prescribed in Articles 330, 333 and 332 of the CPC BiH, being of the opinion that there were no grounds for the Court to act *ex officio*. Other Defense Attorneys stood by this position too.

After the Court's dismissal of the Defense Attorneys' objection relating to the unsatisfied preconditions to hold the hearing, the Defense Attorneys of all the three Accused consistently proposed that the CC SFRY be applied to their clients as the more lenient law, being of the opinion that this issue has become indisputable after the Decision of the Constitutional Court of BiH. According to the Defense, the foregoing certainly required the imposing of far more lenient sentences on the Accused, given the fact that the Verdict No. X-KRŽ-06/243 of 22 September 2010 (para. 242), found extraordinary extenuating circumstances in relation to each Accused individually. In view of the foregoing, Counsel Miodrag Stojanović argued that, under the referenced Verdict, the accused Slobodan Ostojić received a prison sentence for a term of 5 (five) years, or the statutory minimum for the reduction of sentence pursuant to the then applied CC BiH, and that, accordingly, in the concrete case, taking into account all the particularly extenuating circumstances, in analogy with the delivering of the Verdict No. X-KRŽ-06/243 of 22 September 2010, the Accused should now receive a prison sentence for a term of 1 (one) year, as the statutory minimum for the reduction of punishment pursuant to the CC SFRY in relation to the criminal offense of War Crimes against Civilians under Article 142 of the same Code.

## **II. PROCEDURAL SITUATION AFTER THE DECISION OF THE CONSTITUTIONAL COURT OF BIH**

Prior to considering and explaining the new decision in relation to the application of the more lenient law and the 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, and in relation to the Defense's objection and request to delay the hearing, the Panel notes it is necessary to provide summary reasons for the procedural situation



which occurred after the Second Instance Verdict of the Court of BiH No. X-KRŽ-06/243 of 22 September 2010 was revoked, in the part as explained above.

In their motion for renewed proceedings for the benefit of the accused Sreten Lazarević and Dragan Stanojević, filed by their respective Attorneys, which the Court received on 4 June 2015, and to which Counsel for the accused Slobodan Ostojić also joined, which was based on the fact that the Constitutional Court of BiH's decision found violations of the applicants' human rights, the Attorneys argued that, after the Decision of the Constitutional Court of BiH, the preconditions set forth in Article 327(1)(f) of the CPC have been met to allow the reopening of the criminal proceedings completed by the final verdict. The Attorneys therefore moved the Court to allow, pursuant to Articles 330, 331 and 332 of the CPC BiH, and, accordingly, to order discontinuation of the execution of the imposed prison sentences.

The Appellate Panel correlated the objections and motions advanced by the Defense with the specific procedural situation it faced after the Decision delivered by the Constitutional Court. Specifically, this is indeed a situation which is not regulated by the procedural law. This is so because the CPC BiH contains no provisions to act upon when a second instance verdict has been revoked by the Constitutional Court of BiH, and, particularly, when a revocation in part is in question, where the remaining part of the verdict, pertaining to the commission of the crime and the guilt, remains unrevised, or final. Such a situation occurred in the concrete case because, in the same Decision, the Constitutional Court of BiH found explicitly, in relation to the other complaints advanced by the applicants-accused Dragan Stanojević, Sreten Lazarević and Slobodan Ostojić, that there was no violation of their right to a fair trial, the right to an adequate remedy and the right to non-discrimination. This was the reason for which the Applicants' complaints, contesting the Verdict of the Court of BiH for violations of article II/3.e) of the Constitution of BiH and Article 6(1) of the ECHR, were dismissed as ill-founded. In this regard, the reasoning of the Decision stated explicitly, in para. 71, the following:

“The Constitutional Court finds no violation of the right to a fair trial under Article II/3.e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention in a situation where the Constitutional Court establishes, on the ground of the reasoning of the contested Verdict, that the Applicants' responsibility under criminal law for the criminal offense of War Crimes against Civilians, of which they were found guilty and sentenced, was not established

based on an arbitrary evaluation of evidence, but rather, after direct and comprehensive examination and evaluation of evidence, individually and in combination, wherefrom the conclusion was drawn beyond a reasonable doubt that the Applicants indeed committed the criminal offense as charged, and based on which all significant issues were clarified in terms of the principle of presumption of innocence and the principle of *in dubio pro reo*.”

Considering the foregoing arguments, there is no doubt that, in the concrete case, the Constitutional Court of BiH did not bring into question the proper nature of the Verdict of the Court of BiH, No. X-KRŽ-06/243 of 22 September 2010, in the part pertaining to the existence of the criminal offense and the Accused’s guilt for the acts of which the Panel of the Appellate Division of the Court of BiH found them guilty<sup>1</sup>. Considering that the contested Verdict remains unrevised, or final, in the referenced part, any new deliberation on the existence of the criminal offense and the Applicants’ guilt before this Panel is not allowed, and deliberating and deciding are only limited to the issues of application of the more lenient Criminal Code and the sentencing, as ordered under the Decision of the Constitutional Court of BiH.

With regard to the objection contesting the stage of the proceedings and the request to decide the Attorneys’ motion to reopen the proceedings for the benefit of the accused/sentenced persons, as a sort of preliminary issue in the criminal matter, the Appellate Panel noted that it is not authorized to review its own decisions in the part where its decisions were not brought into question under the decisions of the Constitutional Court, and that pursuant to Article 330 of the CPC BiH, the responsibility of Panel referred to in Article 24(5) of the same Code, is generally to decide on the requests to reopen the proceedings.

In any case, neither the guilt of the Accused/Applicants nor the established state of facts was brought into question by the Constitutional Court of BiH’s Decision, nor did the Constitutional Court issue any order in this regard. Therefore, despite certain similarities, the proceedings after the Decision of the Constitutional Court of BiH cannot be treated as the proceedings conducted as the extraordinary remedy set forth in Article 327 of the CPC

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<sup>1</sup> This is the reason for the Constitutional Court of BiH to revoke the Verdict of the Court of BiH No. X-KRŽ-06/243 of 22 September 2010 only in the part pertaining to the application of the more lenient law.

BiH, pursuant to which the procedure should be conducted exclusively in accordance with Articles 330, 331 and 332 of the CPC BiH, as the Defense teams required.

Specifically, Article 327 of the CPC BiH provides for a possibility to reopen the proceedings for the benefit of the sentenced person, as an extraordinary remedy, when “...*the criminal proceeding was completed by a legally binding verdict...*”, under specified circumstances and conditions, where sub-paragraph f) of the referenced Article provides that the proceeding can also be reopened “*if the Constitutional Court of Bosnia and Herzegovina, the Human Rights Chamber or the European Court of Human Rights establish that the human rights and basic freedoms were violated during the proceedings and that the verdict was based on these violations*”.

Therefore, the general requirement to be satisfied, in order to reopen the proceeding, on which the Defense insisted, is the existence of a legally binding verdict delivered in the criminal proceedings. In the concrete case, the previous final verdict has been revoked in the part pertaining to the application of the more lenient law, and, accordingly, to the sentencing, wherefore no final decision on this issue exists any more. In addition, to allow the reopening of the proceedings for the benefit of the sentenced person, it is necessary that the decision of one of the above referenced Courts **has found violations of the rights and freedoms**, so that the verdict can be based on such violations. This requirement has been satisfied in the present case, and a violation of Article 7 of the ECHR found. The Constitutional Court, however, even took a step further pursuant to the Rules of the Court, and itself revoked the Verdict of this Court, in part.

Considering the Counsel’s reference to the different case law of certain Courts’ panels, the Panel notes that, in the case of *Maktouf and Damjanović v. BiH*<sup>2</sup>, the European Court of Human Rights found a violation of Article 7 of the ECHR in the final and binding verdicts of the Court of BiH, delivered in the criminal proceedings conducted before this Court against the referenced Applicants. The European Court, however, did not deal with the Verdict itself, but rather noted the referenced violation and ordered that the violation be remedied. Pursuant to the referenced decision, and in deciding on the requests to reopen the proceedings filed by the Defense teams for the sentenced persons Damjanović and Maktouf, the Court of BiH allowed the reopening of the proceedings for the benefit of the sentenced persons by applying Article 327(1)(f) of the CPC BiH.

It clearly ensues from the foregoing that the present case does not concern the situation strictly prescribed in Article 327 of the CPC BiH, that is, an extraordinary legal remedy-reopening of the criminal proceedings for the benefit of the sentenced person. This is so because not only that the Constitutional Court found the referenced violation, but it also took a step further, and pursuant to its Rules and the its constitutional ground, revoked the Verdict in the part pertaining to the application of the more lenient law. Had the Constitutional Court intended that the procedure, set forth in the provisions to which the Defense Attorneys referred, be pursued after its decision, it would have noted only the violation found, without revoking the Verdict in the referenced part. Having acted in the way it acted in the concrete case, the Constitutional Court's decision determined in advance the stage of the proceedings to be conducted before the Appellate Panel.

Therefore, starting primarily from the fact that the Constitutional Court of BiH ordered the Court of BiH to deliver a new decision, as a matter of urgency, the Panel rendered a new decision pertaining to the revoked part of the Verdict, apart from Articles 330-332 of the CPC BiH. Also, the Appellate Panel deems it necessary to note that, by such acting, the final aim and purpose, intended to be achieved by filing the requests to reopen the proceedings for the benefit of the sentenced persons, have been achieved, namely remedying the violation found under the decision of the Constitutional Court and rendering a new verdict remedying the referenced violation. Specifically, in case of the reopened proceedings, the Court would be also under obligation to remedy the violation exclusively concerning the application of the more lenient law and the sentencing, rather than to decide anew on the guilt of the accused persons, which was the Defense's apparent intention by insisting on the procedure set forth in Articles 330, 331 and 332 of the CPC BiH.

### **III. APPLICABLE LAW**

In rendering its Verdict number X-KRŽ-06/243 of 22 September 2010, which was revoked in the part pertaining to the application of the more lenient law by the above referenced Decision of the Constitutional Court of BiH, the Appellate Panel addressed the issue of the application of substantive law in the case. Having made a comparative analysis of Article 173 of the CC BiH and Article 142 of the adopted CC SFRY, primarily from the aspect of

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<sup>2</sup> The Applications nos. 2312/08 and 34179/08, Decision dated 18 July 20013.

sentences prescribed for the criminal offense of War Crimes against Civilians, the Appellate Panel concluded that the application of the CC BiH, which is the law that entered into force after the commission of the crime charged against the Accused, is more favorable to the Accused, as opposed to the adopted CC SFRY, which was in effect at the time when the crime was committed. The previous Verdict provided a comprehensive line of arguments for such a conclusion, which will not be repeated now. The footing of the referenced arguments was in the earlier decision of the Constitutional Court of BiH in *Maktouf*, number AP-1785/06 of 30 March 2006, under which the application of the CC BiH, regardless of the principle of non-retroactivity, was evaluated as proper at the time, on which the Panel relied in delivering the Verdict number X-KRŽ- 06/243 of 22 September 2010.

After the Decision of the European Court of Human Rights in *Maktouf and Damjanović*, however, the Constitutional Court of BiH changed its position regarding the issue of the application of the more lenient law and the application of the CC BiH. In this regard, the Decision on Admissibility and Merits, number AP-717/11 of 15 April 2015, which is being implemented herein, provided the following line of arguments in paras. 57 and 60:

“Having correlated the previous views with the concrete case, and relying on the principle of the European Court, pursuant to which its task is not to consider *in abstracto* whether the retroactive application of the 2003 CC BiH to the war crimes cases is in itself compatible with Article 7 of the European Convention, the Constitutional Court has held that the answer to this question depends on the circumstances pertaining to each case individually. These circumstances depend on the length of the imposed and prescribed sentence, namely the magnitude of sentences prescribed by the law which was in effect at the time when the criminal offense was committed and the law based on which the sentence is imposed (the CC SFRY or the CC BiH). The Constitutional Court has noted that the criminal offense of War Crimes against Civilians was defined identically under both codes (CC SFRY and CC BiH), but that the magnitude of prescribed sentences differed. In this regard, the Constitutional Court of BiH has held that, considering the length of the prescribed sentence, it is of particular significance to determine which law (CC SFRY or CC BiH) is “the more lenient”, or more favorable with regard to the prescribed minimum sentence.” (para 57.)

“Bearing in mind that, pursuant to the CC SFRY, the minimum prescribed prison sentence is five years, and ten years pursuant to the CC BiH, and the fact that, by applying the provisions of the CC BiH, the Applicants received the sentences below that prescribed by

the law, there is no doubt that, in the circumstances of the concrete case, the CC SFRY is the more lenient law regardless of the fact that, given the prescribed magnitude of the prison sentences, it does not mean that the Applicants would have received a lower prison sentence had the CC SFRY been applied to their case. Specifically, the fact that the Applicants could have received a lower sentence had this law been indeed applied is of key significance (see, *Maktouf and Damjanović*, para. 70).” (para 60.)

Considering this position in the Constitutional Court of BiH’s Decision, which revoked the previous Verdict of this Court in the referenced part, pursuant to which the adopted CC SFRY is the more lenient law to the Applicants than the CC BiH, the Appellate Panel concluded that the adopted CC SFRY should apply to the concrete case as the law that was in effect at the time when the criminal offense was committed. Therefore, the acts of which Sreten Lazarević, Dragan Stanojević and Slobodan Ostojić were found guilty under the Trial Verdict – inhuman treatment, are now under the present Verdict legally qualified as the criminal offense of War Crimes against the Civilian Population under Article 142(1) of the CC SFRY.

Considering the established form of participation of the Accused in the commission of the charged acts, comprehensively described in the Operative Part of the original Verdict, which the Constitutional Court did not contest (acts of co-perpetrators), the appropriate provision of the CC SFRY had to be applied too, namely Article 22 of the same Code.

Article 22 of the CC SFRY (complicity) provides as follows:

“If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act.”

#### **IV. SENTENCING**

Considering that, in the concrete case, the Panel deemed justified the application of the adopted CC SFRY, the same code had to be applied in fixing the punishment within the magnitude of punishments prescribed under Article 142 of the CC SFRY for the criminal offense of which Sreten Lazarević, Dragan Stanojević and Slobodan Ostojić were found guilty, pursuant to the provisions defining the general standards in meting out the punishment under Article 41 of the CC SFRY. In this regard, the Panel bore in mind that the prescribed sentence for the criminal offense of War Crimes against the Civilian Population under Article 142(1) of the CC SFRY is imprisonment of not less than 5

(five) years or the death penalty. The Constitutional Court found in para. 59 the following:

“In addition, the Constitutional Court found, in relation to the reasoning of the contested Verdict of the Court of BiH regarding the application of the CC BiH as “the more lenient” law from the aspect of prescribed sentences, that the Applicants did not receive the sentence of a long-term imprisonment, but rather the sentence below the statutory prescribed minimum. This further means that there was a possibility to impose a lower sentence on the Applicants, within the prescribed magnitude, and that there was no need to determine which law prescribed the more lenient maximum sentence, but rather to determine the more lenient sentence with regard to the minimum sentence (see, *Maktouf and Damjanović*, paras. 67-69).”

In fixing the punishment, the Panel paid special attention to all the circumstances which may affect rendering a more or less stringent sentence (extenuating and aggravating circumstances). The Panel took into account that the Accused committed the charged acts in the capacity of members of the reserve police-guards in the prison, being aware of their position and powers in relation to the prisoners whom they were obligated to protect, that the accused Lazarević also acted as a *de facto* warden deputy, or the holder of the highest-level responsibility, although with no effective powers in relation to the other guards and no possibility to replace them, or to initiate the disciplinary proceedings or punish them, but nevertheless with the possibility and obligation to report their unlawful actions. Certainly, the Panel also took into account the number of acts, or the persistency shown by the accused Lazarević and Stanojević in the crime commission.

Among the extenuating circumstances in relation to all the Accused, the Panel took into account their previous unblemished life, highly proper conduct and attendance before the Court with no measures ordered to secure their presence in the courtroom, the fact that they have never been criminally prosecuted, that they are family men who have children. In addition, the Panel took into account that their activities pertain to the time and conditions where para-military formations, with their cruel behavior and violent acts, made more difficult to the guards to normally perform their duties, as well as their conduct after the commission of the criminal offense, in the way that, in the aftermath, they made efforts to re-establish the previous good terms/relations with many prisoners and neighbors of the other ethnicities and with the former prisoners.

Also, the fact that a certain number of witnesses testified that the Accused assisted certain prisoners and were not violent to them, are the circumstances which the Panel

evaluated particularly and deemed as the extenuating ones. Thus, the Panel has accepted that the accused Lazarević helped the prisoners by providing medical help to them on several occasions. Witness Ramis Smajlović particularly testified that the accused Lazarević once brought to him 20 pcs of baby-beef patty on his own initiative, since he knew that the witness does not consume pork meat. Witnesses Ismet Ibrahimović and Asim Banjanović also testified that Sreten was a kind man, and that he washed Asim's face after he had been beaten and brought to the "Novi Izvor" building, having told him "*no one will do any harm to you any more*", for which the witness is grateful to him.

As to the accused Dragan Stanojević, accepted and particularly evaluated were the statements of witnesses: Fadil Smajlović, who testified that the Accused had helped him; Ahmet Bošnjaković, who expressed his gratitude to the Accused for his fair conduct in the prison; Alija Buljubašić, who described the incident when Dragan saved them from paramilitary formations while they performed labor; Nenad Jeremić, who was at the relevant time recruited as a driver and drove prisoners to perform labor, on which occasion Dragan was most frequently present, and who helped the prisoners and protected them; and Dobrivoje Ristić, who was under compulsory work obligation at the farming cooperative of his company and drove the prisoners to work there. On such occasions, he would be given a list of needed commodities, particularly cigarettes, which the witness used to buy at a small stand along the drive, while Dragan, as the guard in their escort, never kept them from doing that. Therefore, the accused Stanojević helped out most prisoners during their time in prison, having shown human qualities and understanding, wherefore most of the injured parties filed no claim under property law in relation to him.

In relation to the accused Ostojić, the Panel took into account the absence of both persistency and ruthlessness in the commission of the offense since it has found that he committed a single criminal action, and the fact that the witnesses-prisoners generally do not remember him as a person prone to violent behavior.

All the foregoing circumstances, taken into account by the Panel in delivering the Verdict X-KRŽ- 06/243 of 22 September 2010, in their entirety, in the Panel's view have the character of particularly extenuating circumstances, as also previously concluded.

In relation to the significance of particularly extenuating circumstances and possible reduction of sentence, the Panel points to the contents of Article 42 of the CC SFRY, to



which the Defense Attorneys particularly referred. The referenced Article reads as follows:

“The court may set the punishment below the limit prescribed by statute, or impose a milder type of punishment:

(1)...

(2) when it finds that such **extenuating circumstances exist which indicate that the aims of punishment can be attained by a lesser punishment.**”

In the concrete case, the Appellate Panel concluded that all the referenced circumstances relating to the Accused, in their entirety, have the character of particularly extenuating circumstances. Considering, however, the nature of the charges of which Sreten Lazarević and Dragan Stanojević were found guilty, the continuity of the actions' taking, certain persistency expressed through the acts described in Sections I.1-4 of the Operative Part of the Verdict, in relation to Sreten Lazarević continually undertaken over the three-month period, and the acts under Section II.1 in relation to Dragan Stanojević, undertaken repeatedly, the Panel's view is that by a sentence reduced below the statutory minimum the purpose of punishment, primarily general deterrence, could not be achieved to the necessary extent.

Specifically, the quoted Article 42 of the CC SFRY provides for a possibility to reduce the sentence below the statutory minimum, only provided that both cumulatively set requirements have been satisfied: if it has been established that there are particularly extenuating circumstances and if the purpose of punishment can be achieved by the reduced punishment. According to the Panel, the former rather than the latter requirement has been satisfied in the concrete case, wherefore the Panel deems it is not justified to apply Article 42(2) of the CC SFRY and impose on the accused Lazarević and Stanojević a sentence below the one prescribed by the law.

Unlike the previous Verdict, where the sentencing framework of the then applied CC BiH<sup>3</sup> was considered, and where the particularly extenuating circumstances resulted in the imposing of the sentence below the statutory minimum since the Panel deemed, in such a situation, that the purpose of punishment prescribed by the law would be achieved by the then sentence of 9 (nine) years imposed on the accused Sreten Lazarević and 7 (seven)

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<sup>3</sup> Article 173 of the CC BiH provides for a prison sentence not less than ten years or a long-term imprisonment.

on the accused Dragan Stanojević (which could be imposed only by reducing the sentence below the statutory minimum), the Panel presently does not conclude so, since the special statutory minimum for the criminal offense at issue, pursuant to the CC SFRY, is a prison sentence of not less than 5 years.

Such a conclusion is also in compliance with the position taken by the Constitutional Court in its Decision, which in para. 71 states the following:

“The Constitutional Court, however, found a violation of the Applicants’ right under Article II/2 of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention, because in the concrete case the CC BiH was retroactively applied to the Applicants’ detriment with regard to the sentencing, namely because **there is a realistic possibility that the retroactive application of the CC BiH was to their prejudice regarding the sentencing, even though it does not mean that the Applicants would have received a lower sentence**, which is contrary to the referenced Article.” (the Panel’s emphasis added)

Contrary to the foregoing concerning the sentences imposed on the accused Lazarević and Stanojević, the Panel concluded that the quoted provision on reduction of punishment can apply to the accused Slobodan Ostojić, namely that by reducing the sentence below the statutory minimum of 5 years, the purpose of punishment, primarily the general deterrence, can be achieved to the necessary extent.

In view of the foregoing, and bearing in mind the statutory limits of sentences prescribed for the criminal offense at issue, the aim of punishment, and all the circumstances which affect the imposing a more or less stringent sentence, and particularly the degree of criminal responsibility of the Accused, the motives for which the offense was committed, the degree of danger for or violation to the protected value, the circumstances under which the offense was committed, and personal/family circumstances of the Accused persons, the Panel concluded that the prison sentences of 7 years imposed on the accused Sreten Lazarević, 5 years imposed on the accused Dragan Stanojević, and 3 years and 6 months imposed on the accused Slobodan Ostojić, are adequate/proportionate with all the circumstances pertaining to the case, and the personality of each Accused individually, and that thereby the purpose of punishment, both special and general deterrence, will be achieved completely.

In this regard, the Panel has particularly noted that, pursuant to the CC SFRY, the

individualization of sentence and its fixing anew cannot be dealt with from a mere mathematical perspective in relation to the former sentence, as indirectly implied by Counsel Stojanović, but rather that an array of relevant circumstances needs to be evaluated, taking into account all the aspects of fixing sentences, particularly that of the purpose of punishment.

Pursuant to Article 50(1) of the CC SFRY, the time the Accused spent in custody, running from 22 September 2010 through 21 January 2011, as well as in serving their respective prison sentences under the final Verdict of the Court of BiH number X-KRŽ-06/243 of 22 September 2010, running from 21 January 2011 when they were committed to serve the sentences onwards, shall be credited towards the imposed prison sentence.

**MINUTES-TAKER:**

**Medina Džerahović**

**PANEL PRESIDENT  
JUDGE**

**Mirza Jusufović**

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