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The Permanent Mission of Bosnia and Herzegovina to the United Nations Office and Other International Organizations at Geneva presents its compliments to the United Nations Office of the High Commissioner for Human Rights, and, referring to the letter dated April 1st 2014, has the honor to transmit the response of Bosnia and Herzegovina.

The Permanent Mission of Bosnia and Herzegovina to the United Nations in Geneva avails itself of this opportunity to renew to the United Nations Office of the High Commissioner for Human Rights the assurances of its highest consideration.



Geneva, June 20th, 2014

OFFICE OF THE HIGH COMMISSIONER
FOR HUMAN RIGHTS
Special Procedures Branch

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Bosna i Hercegovina



Босна и Херцеговина

Sud Bosne i Hercegovine
Kabinet predsjednika Suda

Суд Босне и Херцеговине
Кабинет председника Суда

Court of Bosnia and Herzegovina
Office of the Court President

No: Su-10-159/14
Sarajevo, 29 May 2014

Ministry of Human Rights and Refugees
Bosnia and Herzegovina
Human Rights Department

Trg BiH 3
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Ref. No: Your letter No. 07-02-6885-13/13

SUBJECT: Joint letter by the UN Special Rapporteur – Decision of the BiH Constitutional Court, jurisdiction and responsibilities

Dear Sir,

With reference to your letter No. 07-02-6885-13/13, which the Court of BiH received on 7 May 2014, in accordance with the jurisdiction of this court, we hereby provide you with our responses to the questions raised in the joint letter of the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence and the Chair of the Working Group on Enforced and Involuntary Disappearances, dated 3 April 2014.

The letter expresses concerns about several issues:

(1) The first among them is the issue of legal interpretation, which means jurisprudence created by the BiH Constitutional Court following the Decision of the European Court of Human Rights (ECtHR) in *Maktouf and Damjanović v. BiH* dated 18 July 2013, and then also the subsequent implementation of those decisions in the case law of the Court of BiH. As correctly stated in the referenced letter, the BiH Constitutional Court's decisions listed below, which were issued after the ECtHR decisions, rescinded final judgments of the Court of BiH in relation to the named applicants, and the Constitutional Court found violations of Article 7 of the ECHR in the following cases:

1. **Zoran Damjanović** –had been convicted before the Court of BiH of War Crimes against Civilians under Article 173 of the 2003 BiH CC and sentenced to **10.5** years of imprisonment (both first-instance and second-instance verdicts of the Court of BiH were then rescinded by the decision of the BiH Constitutional Court No. AP-325/08

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- dated 27 September 2013). The co-accused was Goran Damjanović (applicant before the ECtHR), which for the same offense had been sentenced to **11 years of imprisonment**, so that the revocation of the verdict affected him too.
2. **Slobodan Jakovljević** – had been convicted before the Court of BiH and sentenced to **28 years** for Genocide under Article 171 of the 2003 BiH CC, **Brano Džinić** – had been sentenced to **32 years** for Genocide under Article 171 of the 2003 BiH CC, **Aleksandar Radovanović** – had been sentenced to **32 years** for Genocide under Article 171 of the 2003 BiH CC, **Branislav Medan** – had been sentenced to **28 years** for Genocide under Article 171 of the 2003 BiH CC; (the second-instance verdict of the Court of BiH was rescinded in relation to these persons by the Decision of the BiH Constitutional Court No. AP-4065/09 dated 22 October 2013)
 3. **Milenko Trifunović** – convicted before the Court of BiH and sentenced to **33 years** for Genocide under Article 171 of the 2003 BiH CC, (second-instance verdict of the Court of BiH rescinded by the decision of the BiH Constitutional Court No. AP 4100/09 dated 22 October 2013)
 4. **Petar Mitrović**– had been convicted before the Court of BiH and sentenced to **28 years** for Genocide under Article 171 of the 2003 BiH CC, (the second-instance verdict of the Court of BiH rescinded by the decision of the BiH Constitutional Court No. AP 4126/09 dated 22 October 2013)
 5. **Nikola Andrun**– convicted before the Court of BiH and sentenced to **18 years** for War Crimes against Civilians under Article 173 of the 2003 BiH CC (second-instance verdict of the Court of BiH was rescinded by the decision of the BiH Constitutional Court No. AP 503/09 dated 22 October 2013)
 6. **Mirko (Mile) Pekez** – had been convicted before the Court of BiH and sentenced to **29 years** for War Crimes against Civilians under Article 173 of the 2003 BiH CC (the second-instance verdict of the Court of BiH was rescinded by the decision of the BiH Constitutional Court No. AP 116/09 dated 22 October 2013)
 7. **Milorad Savić** – had been convicted before the Court of BiH and sentenced to **21 years** for War Crimes against Civilians under Article 173 of the 2003 BiH CC, and **Mirko (Špiro) Pekez** – had been sentenced before the Court of BiH to **14 years** for War Crimes against Civilians under Article 173 of the 2003 BiH CC (the second-instance verdict of the Court of BiH in relation to these persons was rescinded by the decision of the BiH Constitutional Court No. 2948/09 dated 22 October 2013)
 8. **Zrinko Pinčić** – convicted before the Court of BiH and sentenced to **9 years** for War Crimes against Civilians under Article 173 of the 2003 BiH CC (second-instance verdict of the Court of BiH rescinded by the decision of the BiH Constitutional Court No. AP 1705/10 dated 5 November 2013)
 9. **Novak Đukić** – had been convicted before the Court of BiH and sentenced to **25 years** for War Crimes against Civilians under Article 173 of the 2003 BiH CC (the second-instance verdict of the Court of BiH was rescinded by the decision of the BiH Constitutional Court No. AP 5161/10 dated 23 January 2014)
 10. **Željko Ivanović** – had been convicted before the Court of BiH and sentenced to **24 years** for Genocide under Article 171 of the 2003 BiH CC (the second-instance verdict of the Court of BiH was rescinded by the decision of the BiH Constitutional Court No. AP-4606/13 dated 28 March 2014)

It is visible from the foregoing decision of the BiH Constitutional Court that they practically mandate an automatic application of the Criminal Code of the former Yugoslavia (SFRY CC) in all cases involving the criminal offenses of war crimes that were covered by the SFRY CC, which includes War Crimes against Civilians and Genocide, irrespective of the

gravity of committed crimes. However, bearing in mind that the criminal offense of Crimes against Humanity was not codified in the SFRY CC, the new BiH Criminal Code passed in 2003 (the BiH CC) (see position of the ECtHR in *Šimšić v. BiH* before the ECtHR and the position of the BiH Constitutional Court¹) is to be applied in such cases. Although such a position evidently does not follow from either the letter or the spirit of the ECtHR's Decision, as properly noticed by the UN Special Representative and the Working Group Chair, still the Court of BiH has the obligation to comply with final and binding decisions issued by the BiH Constitutional Court, and act upon them. Non-compliance with the decisions issued by the BiH Constitutional Court constitutes a criminal offense under the laws in effect in BiH. In that regard, the Court of BiH was obligated to act in pursuance of the decisions of the BiH Constitutional Court, which will be referred to below.

However, and above all, we would like to take this opportunity to inform you that the opinions expressed in the letter by the UN Special Representative and the Working Group Chair, concerning the proper interpretation of the ECtHR judgment, fully reflect the understanding of the issue of retroactive application of law in war crimes cases before the Court of BiH, in accordance with which it had developed its previous case law. In war crimes cases adjudicated since 2009, the Court of BiH has started the practice of applying the SFRY CC in certain cases, specifically those pertaining to lesser crimes or low-ranking perpetrators, which is to say always when the punishment that needs to be imposed on a specific perpetrator falls within the limits of statutory minimum, being mindful of the fact that the previous law provided a lower sentencing threshold (5 years for war crimes) in relation to the new law (a minimum of 10 years of imprisonment for war crimes). However, when it comes to serious types of war crimes, the Court of BiH applied the new 2003 BiH CC, *inter alia*, bearing in mind that in such cases the punishment that needs to be imposed on the perpetrator falls within the statutory maximum, so given that the old SFRY CC provided death penalty as the maximum punishment for war crimes, and that the new law provides for a long-term imprisonment as the heaviest penalty (ranging between 21 and 45 years) instead, the Court has found that in such cases the new law was more lenient to the perpetrator. It can be deduced from the Decision in *Maktouf and Damjanović v. BiH* dated 18 July 2013 that the ECtHR upheld the most recent position and case law of the Court of BiH, deciding that the old SFRY CC should be applied *in the specific case at hand* in which there was no loss of human lives (meaning a less serious crime). The Decision implies that in case of different circumstances, where the crime has resulted in the loss of human lives, as is the criminal offense of Genocide with dozens or hundreds of killed persons, decisions on the more lenient law would not be the same, nor could the same legal arguments apply, but the court should compare the maximum penalties as prescribed by law. From the joint letter by the UN Special Rapporteur and the Working Group Chair follows an identical understanding of the ECtHR's judgment (commenting on the BiH Constitutional Court verdicts, page 5 of the letter states: „In this light, the Constitutional Court should have compared the maximum penalty for war crimes and genocide, under the 2003 code of 45 years imprisonment with the maximum penalty under the 1976 criminal code, which was the death penalty”.

Unfortunately, bearing in mind that the ECtHR did not in more detail elaborate on such a hypothetical case, and that it limited its analysis to the circumstances of the specific case, the

¹ See the latest case before the Constitutional Court of BiH on admissibility and merits, No. AP-2143/11 dated 24 April 2014, dismissing as ill-founded the applications filed by Ratko Bundalo and Nedo Zeljaja against verdicts of this Court No. X-KRŽ-07/419 and X-KR-07/419, which had found them guilty of Crimes against Humanity under Article 172 of the CC BiH (2003) and sentenced them to 22 and 15 years of imprisonment, respectively.

subsequent jurisprudence of the BiH Constitutional Court erred in interpreting the mentioned judgment, so that the BiH Constitutional Court found violations of Article 7 of the ECHR in all cases decided after 18 July 2013, which pertained to war crimes covered by both the SFRY CC and the BiH CC. In addition, the BiH Constitutional Court issued decisions to rescind final verdicts of the Court of BiH that applied the BiH CC (unlike the ECtHR which in *Maktouf and Damjanović* did not rescind the verdict of the Court of BiH). By its decisions, the BiH Constitutional Court effectively imposed an obligation on the Court of BiH to apply the SFRY CC in the reopened proceedings with regard to sentencing.

That has not only brought about a misinterpretation of the spirit of the ECtHR's Decision, but it has also prevented the practical application of one of the most important aspects of that Decision, laid down in Paragraph 65, which pertains to the judges' obligation to assess the issue of the more favorable law *in concreto*, not *in abstracto*.² Deciding matters *in concreto* has been rendered impossible, for it became clear based on all the foregoing decisions of the BiH Constitutional Court that that court does not allow the application of the new BiH CC to any act of war crimes that at the time when it was perpetrated was covered by the SFRY CC, regardless of its gravity and consequences – which is in contravention of the letter and spirit of the ECtHR's decision.

In addition, we wish to note that the Decision dated 5 December 2013 of the Council of Europe's Committee of Ministers, which monitors the enforcement of the ECHR decisions, has also highlighted the significance of rendering *in concreto* decisions. The Decision, *inter alia*, stated the following:

The Deputies 4. stressed therefore that the execution of this judgment, as a part of general measures, requires domestic courts, when seized with complaints of violations of Article 7, to assess, in the particular circumstances of each case, which law is most favourable to the defendant including as regards the gravity of the crimes committed.

Unfortunately, the decision of the Committee of Ministers of the Council of Europe has not affected the case law of the Constitutional Court of BiH, which has continued even after this Decision, and which the Court of BiH is bound to apply in its case law.

(2) When it comes to the concrete enforcement of the decisions of the Constitutional Court, we have to inform you that, following the aforementioned Constitutional Court's Decisions, revoking the convictions rendered by the Court of BiH, all **persons who had been serving their respective prison sentences were released** on the basis of those judgments. In his letter, the Special Representative has expressed concerns about the convicted persons' release. We note, however, that, even though the decisions of the Constitutional Court have not called into question these persons' guilt, the legal basis pursuant to which they were committed to serve their respective prison sentences ceased to exist as a result of the revocation of the convicting verdicts rendered against them. In parallel, there was no possibility for the Court of BiH to order the referenced persons into custody in a way which would be compliant with the principles of the European Convention, as well as with the provisions of the Criminal Procedure Code of BiH.

² “ §65 of the Judgement. The European Court found that it was not “its task to review in abstracto whether the retroactive application of the 2003 Code in war crimes cases is, per se, incompatible with Article 7 of the Convention. This matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts have applied the law whose provisions are most favourable to the defendant.”

The referenced cases were reverted to the stage of the proceedings which preceded the issuance of the appeal verdicts (which were revoked by the Constitutional Court of BiH), and the Court of BiH continued the proceedings from this stage onwards. We also note that the domestic law, or the Criminal Procedure Code of BiH, does not provide for procedural rules for such a legal situation, where final and binding decisions of the criminal court are revoked by the Constitutional Court, which has created certain dilemmas for the Court of BiH. In all the above referenced cases, the Appellate Panels have instructed the parties and their defense counsel (referring to the decisions of the Constitutional Court of BiH) that in the reopened proceedings the revoked decisions would only be reviewed in the part concerning the application of substantive law with regard to sentencing. In other words, there was no need to present again the evidentiary materials, or to reopen the proceedings in whole.

The SFRY CC was applied pursuant to the explicit instruction of the Constitutional Court of BiH, and after the reopened proceedings were conducted the outcome of the referenced cases as of 26 May 2014 is as follows:

1. **Zoran Damjanović** – in the reopened proceedings before the Court of BiH, on **6 March 2014**, was found guilty of War Crimes against Civilians under Article 142 of the SFRY CC and sentenced to **6 years in prison** (pursuant to the principle of *beneficium coesionis*, the Court has also reopened the proceedings against the co-accused **Goran Damjanović**, who had been, along with Zoran Damjanović, under the same Verdict, found guilty of War Crimes against Civilians under Article 173 of the 2003 BiH CC, and sentenced to 11 years in prison, and in the reopened proceedings, sentenced to **6.5 years in prison** on the basis of Article 142 of the SFRY CC). Both these convicted persons have been serving their new respective prison sentences since **19 May 2014**.
2. **Slobodan Jakovljević et al.** – in the reopened proceedings, on **23 January 2014**, the Court of BiH rendered a verdict finding this accused guilty of Genocide under Article 141 of the SFRY CC, and sentenced him to a **20-year prison sentence**. Under the same Verdict, the co-accused **Brano Džinić, Aleksandar Radovanović, Branislav Medan and Milenko Trifunović** were also found guilty of Genocide under Article 141 of the SFRY CC, and received prison sentences for a term of **20 years each**. These convicted persons are **still at liberty** pursuant to the Decisions suspending the enforcement of prison sentence, and the procedure to commit them to serve their new respective sentences is underway.
3. **Milenko Trifunović** – in the reopened proceedings, in the above referenced Verdict of **23 January 2014**, the Court of BiH has found him guilty of Genocide under Article 141 of the SFRY CC, and sentenced him to **20 years in prison**. Milenko Trifunović is **still at liberty** on the basis of the Decision suspending the enforcement of prison sentence, and the procedure to commit him to serve the new prison sentence is underway.
4. **Petar Mitrović** – in the reopened proceedings, on **22 January 2014**, the Court of BiH rendered a verdict finding him guilty of Genocide under Article 141 of the SFRY CC, and sentenced him to **20 years in prison**. Petar Mitrović is **still at liberty** on the basis of the Decision suspending the enforcement of prison sentence, and the procedure to commit him to serve the new prison sentence is underway.
5. **Nikola Andrun** – in the reopened proceedings, on **24 January 2014**, the Court of BiH rendered a verdict finding him guilty of War Crimes against Civilians under Article 142 of the SFRY CC, and sentenced him to **14 years in prison**. Nikola Andrun is **still at liberty** on the basis of the Decision suspending the enforcement of prison sentence, and the procedure to commit him to serve the new prison sentence is underway.

6. *Mirko (Mile) Pekez* – in the reopened proceedings, on 16 December 2013, the Court of BiH rendered a verdict finding him guilty of War Crimes against Civilians under Article 142 of the SFRY CC, and sentenced him to 20 years in prison. The convicted person has been serving his sentence since 31 March 2014.
7. *Milorad Savić* – in the reopened proceedings, on 18 December 2013, the Court of BiH rendered a verdict finding him guilty of War Crimes against Civilians under Article 142 of the SFRY CC, and sentenced him to 15 years in prison. The convicted person has been serving his sentence since 17 March 2014. The co-accused *Mirko (Špiro) Pekez* was, in the reopened proceedings, found guilty of War Crimes against Civilians under Article 142 of the SFRY CC, and sentenced to 10 years in prison. The convicted person has been serving his sentence since 17 March 2014.
8. *Zrinko Pinčić* – in the reopened proceedings, on 17 December 2013, the Court of BiH rendered a verdict finding him guilty of War Crimes against Civilians under Article 142 of the SFRY CC, and sentenced him to 6 years in prison. The convicted person has been serving his sentence since 31 March 2014.
9. *Novak Đukić* – the reopened proceedings are pending. The convicted person is at liberty on the basis of the Decision suspending the enforcement of prison sentence.
10. *Željko Ivanović* – the reopened proceedings are pending. The convicted person is at liberty on the basis of the Decision suspending the enforcement of prison sentence.

(3) The third issue raised in the letter of the UN Special Representative and the Working Group Chair is the issue of consequences of all the referenced events for the process of transitional justice in BiH. These events have undoubtedly diminished the victims' trust into the judiciary as one of the fundamental mechanisms of transitional justice in BiH.

Also mentioned along this line was the Draft National Strategy on Transitional Justice, still not adopted in BiH, and the National War Crimes Prosecution Strategy, which has been in force since 2008. Considering that the Court of BiH is one of the main subjects defined under the 2008 National War Crimes Prosecution Strategy, we note that one of the main objectives and the expected results defined under the Strategy is the harmonization of the case law in the application of criminal codes in war crimes cases between the Entity-level judiciaries (which apply in practice the 1976 SFRY CC), and the state-level judiciary (which in practice for the most part applies the 2003 BiH CC). The Strategy has, along this line, recommended the following:

“In addition, harmonization of the court practice will also be facilitated by decisions of the Court of BiH on the transfer of cases, in which the court or prosecutor's office to which the case has been transferred may be obliged to apply the substantive code of Bosnia and Herzegovina therein.

By applying the existing provision contained in Article 13 of the Law on the Court of BiH, the Court of BiH shall issue binding directions containing the Court's interpretation in relation to the applicable substantive law in war crimes cases.”

It can be inferred from the foregoing that the development of the case law of the Constitutional Court of BiH, following the decision of the ECHR in *Maktouf and Damjanović*, is in violation of the referenced Strategy.

Finally, we want to underline a very important issue, that is, the obligation of the State of BiH concerning the *efficient* sentencing or imposing *adequate* sanctions for the gravest violations of international humanitarian law. The State of BiH has undertaken this obligation

not only by ratifying the relevant international conventions strictly providing for this obligation, but also by the guarantees it has offered in taking over the cases transferred to BiH by The Hague Tribunal from its jurisdiction. One of those cases is *Milorad Trbić*, transferred to the BiH authorities under the ICTY's Order of 23 April 2007, whereupon the case was successfully completed before the Court of BiH. Milorad Trbić was sentenced for the criminal offense of Genocide to a long term imprisonment of 30 years, by applying the 2003 BiH CC. Trbić has appealed the verdict to the Constitutional Court of BiH for a violation of Article 7 of the Convention. The appeal has still not been decided. However, we hereby underline the relevant part of the ICTY Decision on the Transfer of Cases of 23 April 2007:

„C. Applicable Substantive Law

26. Although the Referral Bench is not competent to purport to dictate the law to be applied by the national court trying a case referred under Rule 11bis rule, it must nonetheless be satisfied that if the case were referred to the authorities of Bosnia and Herzegovina, there would exist an adequate legal framework which not only criminalizes the alleged conduct of the Accused, but which also provides for appropriate punishment in the event the Accused is convicted.”

We remain at your disposal for any additional information you may need.

Respectfully,

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Tužilaštvo - Tužiteljstvo Bosne i Hercegovine
Тужилаштво Босне и Херцеговине
Prosecutor's Office of Bosnia and Herzegovina

Number: A-558/12
Sarajevo, 14 May 2014

Ministry of Human Rights and Refugees

Human Rights Department
Attn: Damir Ljubić M. Sc.

Subject: An Answer to a letter by the UN Special Rapporteur - Constitutional Court's Decision

In *Maktouf* case, the Court of Bosnia and Herzegovina found that the legislative framework for sentencing under the 2003 Criminal Code of Bosnia and Herzegovina was more favourable to the defendant than the SFRY Criminal Code, which prescribed a death penalty for the same crime. This verdict by the Court of Bosnia and Herzegovina was appealed against at the Constitutional Court by the defendant alleging a violation of Article 7 of the European Convention through the application of the 2003 Criminal Code of BiH. The Constitutional Court rejected the appeal and upheld the verdict of the Court of BiH.

In *Damjanović* case the Court of BiH handed down a guilty verdict, following the procedure of the previous cases, *Maktouf*, and applied the 2003 Criminal Code of BiH. This verdict was appealed at the Constitutional Court of BiH by the defendants alleging a violation of Article 7 of the European Convention through the application of the 2003 Criminal Code of BiH. The Constitutional Court rejected the appeal, referring to his earlier decision in the *Maktouf*.

In both cases applications were filed with the ECtHR, alleging violations of Article 7 of the European Convention. After 5 years the ECtHR ruled on these two applications and found a violation of Article 7 of the European Convention. ECtHR's reasoning for its decision noted that the both cases involved less serious criminal offenses that had not resulted in fatal consequences the defendants had been convicted of, so a more favourable code for them was the SFRY Criminal Code because it prescribed a lower minimum prison sentence for the type of criminal offence. In its decisions the ECtHR did not examine cases involving the most serious crimes against humanity and, given the specific applications, it did not examine the issue of death penalty and did not rule on what code should be applied to the most serious crimes against humanity. The ECtHR emphasized that the decision should not be taken in the way that the application of the 2003 Criminal Code was in violation of the European Convention in all war crimes cases. Moreover, the ECtHR stressed that its decision should not be taken in the way that the defendants should have received lower punishments but that the application of the 2003 Criminal Code in these two particular cases could not provide sufficient guarantees to protect them from the possibility of getting harsher sentences. It

stated that a decision on the code which should be applied should be made in each case individually, depending on the seriousness of the crime.

It should be noted that, in its first, 10 April 2012 decision on the application filed against the verdict issued by the Court of BiH in *Šimšić against Bosnia and Herzegovina*, who was convicted for crimes against humanity by applying the 2003 Criminal Code, the ECtHR found that the application of the 2003 Criminal Code was not contrary to the European Convention, although the Code provides for a prison sentence ranging from 10 to 45 years. The ECtHR has rejected at least four applications on the same grounds ever since.

The decisions of the ECtHR in *Maktouf* and *Damjanovic* are of declaratory nature and as such they did not quash the verdicts of the Court of BiH but provided grounds for a retrial.

The applicants filed petitions for retrial with the Court of BiH in both cases and the Court of BiH repeated the proceedings to determine the guilt and sentencing proceedings based on the evidence presented.

After 5 years of holding the appeal "in the drawer", at the meeting held on 22 October 2013, the Constitutional Court ruled on appeals of five appellants convicted of war crimes and six appellants convicted of genocide. Unlike *Maktouf* and *Damjanovic*, these cases involved some of the most serious crimes prosecuted at the state level. The Constitutional Court found a violation of Article 7 of the European Convention and quashed the final verdicts of the Court of BiH in all the cases.

The appeals were upheld and final verdicts were quashed in the following cases:

- Slobodan Jakovljević received 28 years of long-term imprisonment for genocide
- Aleksandar Radovanović received 32 years of long-term imprisonment for genocide
- Branislav Medan received 28 years of long-term imprisonment for genocide
- Brano Džinić received 32 years of long-term imprisonment for genocide
- Milenko Trifunović received 33 years of long-term imprisonment for genocide
- Petar Mitrović received 28 years of long-term imprisonment for genocide
- Nikola Andrun received 18 years of long-term imprisonment for war crimes
- Milorad Savić received 21 years of long-term imprisonment for war crimes
- Mirko (Špiro) Pekez received 14 years of long-term imprisonment for war crimes
- Mirko (Mile) Pekez received 29 years of long-term imprisonment for war crimes

In its decisions, completely opposing the views expressed in the decisions of the ECtHR in *Maktouf* and *Damjanovic*, the Constitutional Court held that regardless of the severity and consequences of the crime against humanity, including genocide, the application of the Criminal Code of BiH, which is in contrast with the European Convention, is not an option. This accepted principle prevents making a decision on the most favourable code depending on circumstances of each case individually, including the gravity of the crime, which circumstance ECtHR decisions find one of the criteria in decision-making.

The SFRY Criminal Code was in force at the time of the offenses and the Code provides for a death penalty, the offender being aware of committing a capital offense at the time of the offense, which is a punishment harsher than any prison sentence, including punishments under BiH CC, which provides for a statutory maximum sentence of imprisonment of 45 years.

Given that both the SFRY Criminal Code and BiH CC provide for identical elements of the crime of genocide in the same manner and in the same manner define aiding and abetting as a form of complicity and accountability, it was necessary to compare the prescribed sentence for the crime in order to assess which Code was to be considered a milder for the offender.

The gravity of the crimes which the appellants were parties to is such that, in view of the criminal policy of the previous law (SFRY CC), it would justify the imposition of death penalty, which was set forth as an alternative. Prescribing such a penalty, the legislature had a clear intention of giving the possibility of imposing the penalty for the most serious offenses, which offenses the appellants were charged and found guilty of undoubtedly were.

Although the death penalty has been abolished in the meantime (the entry into force of the Constitution of Bosnia and Herzegovina), one cannot entirely ignore its existence or an intention of the legislature in respect of offenses to which it applies. In this particular case, it is a very serious crime with immensely serious consequences and it is reasonable to ask the question which crime, if not this crime, would justify the imposition of maximum sentence.

Unlike the SFRY Criminal Code, which provides for a death penalty as maximum sentence, the BiH CC provides for a long-term imprisonment of 45 years as maximum punishment for the crime of genocide. Long-term imprisonment, which allows adjustment and gradation of sentence to the particular degree of culpability of the offender in a way that he can receive a prison term of between 21 and 45 years, is certainly milder than the prescribed death penalty under the previous code.

Given the above, particularly the fact that the nature and severity of the particular crime is such that it would justify a death penalty as maximum penalty under the previous code, the Criminal Code of Bosnia and Herzegovina is in this case a more lenient law, because long-term imprisonment, regardless of its duration is undoubtedly more lenient than a death penalty.

The opinion of the Constitutional Court implying that the aforementioned sanction can easily be removed from e.g. Article 141 of the SFRY Criminal Code is unacceptable. In this way, a law that actually does not exist would be actually implemented, that is, one sanction would be removed and replaced by another without express statutory provisions.

Although the Constitutional Court has already ruled on the appeals of defendants convicted of genocide, finding that the SFRY Criminal Code is more lenient for the defendants and invoking judgments of the European Court of Human Rights in *Damjanovic* and *Maktouf*, the Prosecutor's Office believes that the views of the European Court from the judgments could not be applied by analogy to these appeals.

At the 1186th meeting held on 12 May 2013, the Committee of Ministers of the Council of Europe issued a decision in which it emphasized "that the European Court did not consider *in*

abstracto whether the retroactive application of the 2003 Code in cases of war crimes was *per se* contrary to Article 7 of the Convention" and that "it is necessary that the national courts assess the particular circumstances of each case, including the ones in terms of the gravity of the offense, and determine which law is more lenient to the offender ". The question that must be asked is: If the applicants had been convicted at the time of the offense would they have been sentenced to death? This is the only way to decide which law is more lenient, bearing in mind that the sanction that is not currently applied cannot be simply removed as if it had never existed.

After the decisions of the Constitutional Court were sent to the Court of BiH, the Court of BiH decided without delay to release all the defendants from prison, not specifying any measures to ensure their appearance before court, excluding any order for detention, so that all the defendants could be released.

The Prosecutor's Office of Bosnia and Herzegovina was surprised by this decision of the Court of Bosnia and Herzegovina and, at the peak of discontentment and protests by victims - returnees to the village from which they were expelled and public concerns, it submitted to the Court of BiH motions for detention of all defendants who were released by the Court's decision.

The Prosecutor's Office considers that the release of the defendants caused a clear and real danger to further smooth and lawful conduct of criminal proceedings. However, given the provisions of Article 131, paragraph 2 of the BiH CPC, which states: "detention shall be determined or extended in a decision of the Court on prosecutor's motion...", the Prosecutor's Office of Bosnia and Herzegovina has moved for detention of all defendants on grounds under Article 132, paragraph 1, subparagraphs a) and d) of the BiH CPC, which fulfils the basic prerequisite for detention.

In terms of the basic criterion for detention - grounded suspicion, the Prosecutor's Office believes that there is still a reasonable doubt that the defendants committed the crimes in a way and at times as stated in the indictment filed by the Prosecutor's Office of Bosnia and Herzegovina and the first-instance verdict of the Court of BiH.

With regard to the special grounds for detention under Article 132, paragraph 1, subparagraph a), the Prosecutor's Office deems that there are conditions met for ordering detention on this ground. According to the jurisprudence of the European Court of Human Rights, in assessing whether it is appropriate to order or extend detention of defendant to hinder his escape the following factors: the character and personality of the accused, the property of the accused, family ties of the accused, contacts of the accused abroad, the level of punishment expected, specific state of the detention and a lack of strong links within the country must be taken into account.

In terms of the level of punishment expected, the Prosecutor deems that the defendants were found guilty in the first instance verdict of the Court of BiH for the most serious offense - Genocide under Article 171 of the Criminal Code of BiH and received sentences of long-term imprisonment and in retrial they can receive maximum sentences, which objectively can be a motivation for the defendants to avoid prosecution by hiding in the future. It should also be borne in mind that the defendants went on a hunger strike during the first instance trial by refusing to appear at trial, and only thanks to the fact that during the entire criminal proceedings they were in detention their escape was prevented and their appearance at Court was ensured.

These particular cases involve criminal offenses that are punishable not only under national but also international law, which in conjunction with the fact that these crimes do not fall under the statute of limitations leads to the conclusion that the particular crimes have characteristics of the extraordinariness. In addition, the commission of the criminal acts has led to consequences that are

extremely difficult and immense, since it was killing of a large number of people. At that time, mass killings were carried out in the areas where victims of the crime are living today and the return of refugees to these areas is in progress. The particular cases involve mainly people who are either directly or indirectly victims of the crimes, people who have survived terrible traumas, so meeting the defendants in the places where they are living would certainly undermine peace of the returners and lead to their re-traumatization.

All of the specific circumstances of the crime of genocide, as one of the most serious violations of the values protected by both domestic and international law, make the Prosecutor's Office believe that mass criminal acts were committed in these particular cases. Taking into account the great suffering and pain that was caused to the victims and their families, the Prosecutor's Office believes that it is right to establish the existence of extraordinary circumstances and a result, which is reflected in the disruption of public order if the defendants remain at large.

That legitimate fear that victims confronted with the defendants in their places be re-traumatized is justified is confirmed by the fact that owing to the latest events, i.e. termination of prison sentence of the defendants, one of the protected witnesses suffered initial shock, anger, fear for himself and his family and the only recourse in this situation for him and his family is to move out of their property, to leave their place of residence and look for a safer place for himself and his family. This information was obtained directly in a conversation an investigator of the Prosecutor's Office had with the protected witness.

This is not the only surviving witness of mass executions, which the applicants are charged with, but there are other people who are possible witnesses in new trials before the Court of BiH and they will be intimidated enough to testify, while the cumulative reasons can lead to serious threat of protests by returnees and disturbance of public order. This is augmented by the current political context of the state of Bosnia and Herzegovina, in which the fact that representatives of the political elite honours war criminals as heroes depending on what nationality the criminals belong to is increasingly coming to the fore and so does the increasing pressures of certain political elites to abolish the Court and the Prosecutor's Office of BiH.

The Prosecutor's Office has operational data that, in honour of the release of one of the defendants, Brane Džinić, a celebration was organized in Sekovići, followed by a cannonade from different firearms and songs and chants, which caused fear, anxiety and anger among returnees.

The Prosecutor's Office believes that the release of the defendants have led to negative reactions from the public, especially among vulnerable groups such as victims and returnees. In support of this allegation there is the fact that the witnesses who had testified in the cases before the Court of BiH had received threats and that „they have not felt safe ever since the prisoners were released“. (Proof: Statement by representatives of the Association "Mothers of Srebrenica and Zepa Enclaves" of 20 November 2013 in "Avaz" daily). Further, they stated that they had been victims in 1995 and now again they felt as victims of the legal system“.

Finally, when all the concretized facts above are taken into account, it is possible to conclude that the defendants' appearance at or near the place of residence of the injured parties is going to cause a disturbance of public order, whereby prerequisites for detention referred to in Article 132, paragraph 1, subparagraph d) of the BiH CPC are fulfilled.

The Prosecutor's Office held that the wording of the entire legal provision indicated that the legislator put term „extraordinary circumstances“ not to mean a state of emergency, i.e. does not include such circumstances the consequences of which relate to the whole nation and endangering the organized community life in a manner that the extreme crisis or danger require special rather than usual measures or restrictions in order to maintain public safety, health and order. The phrase extraordinary circumstances, in itself, is aimed to determine the spirit and scope of the standard in a specific manner - the detention may be ordered only exceptionally (or extremely restrictively) in a situation where the act is very difficult by its nature, which gravity is reflected in two essential elements: objective - the legally prescribed penalty is imprisonment of ten years or more and

subjective - the method of execution gives the act a special (specific) weight and the circumstances shows that, because of all this, the release of defendants would result in a threat to public order.

The Prosecutor's Office invoked Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides for the right to liberty and security of person. Paragraph 1 / a) of this Article provides that no one shall be deprived of his liberty except for lawful detention of a person after conviction by a competent court. The same substantive content is afforded in the constitutional right to liberty and security under Article II/3.d) of the Constitution of BiH (see, *mutatis mutandis*, the decision of the Constitutional Court no. U 12/01, Paragraph 34 or U 27/01, paragraph 30). Term "judgment" in this article does not mean that the judgment must be final. In its decision *Wemhoff v Federal Republic of Germany* (27 June 1968, Series A, no 7) the European Court of Human Rights noted: [...]that a person convicted at first instance, whether or not he has been detained up to this moment, is in the position provided for by Article 5 (1) (a) (art. 5-1-a) which authorises deprivation of liberty "after conviction". This last phrase cannot be interpreted as being restricted to the case of a final conviction [...].

Protection of human freedom is a fundamental public interest which is incorporated in human rights and freedoms. However, human rights and freedoms recognize public interest of the state. That is because limitations of human rights and freedoms which are recognized in a normative system of human rights and freedoms are a reflection of different public interests of the state. Some of these interests are the guaranteed protection of justice and the protection of rights and freedoms of other persons. It is in this sense that the second and third paragraphs of the Preamble of the Constitution of BiH indicate that the government must be committed to peace and justice as a priority public interest. This can be achieved if the state allows democratic governmental bodies to operate and to follow fair procedures. In this context, the right to liberty and security of the person recognizes the right of the state to deprive an individual of freedom if it is necessary in a democratic state for the public interest. The public interest is undoubtedly the execution of criminal sanctions, too because it is the purpose of Article 5, paragraph 1 a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms or facilitating the conduct of criminal proceedings, which is public interest in terms of Article 5, paragraph 1c) of the European Convention for the protection of Human Rights and Fundamental freedoms. And last but not least, the state has the right to justify a restriction of human rights and freedoms with an obligation to protect human rights and freedoms of others. That is because there is nothing undemocratic in limiting the rights and freedoms to protect the democratic system and rule of law.

In this case, it has clearly proved that, after the decision of the Constitutional Court, which was based on jurisprudence of the European Court of Human Rights in *Maktouf and Damjanovic v. Bosnia and Herzegovina*, there is a legal gap that would have resolved the emerging problem if it had been filled in. It is very important to note that the reason for the reversal of this judgment was not a violation of the right to a fair trial (compare, for example, the Constitutional Court's Decision No. AP 4129 / 09), including the question of finding of guilt for the commission of the most serious crimes, but only the question of the application of more lenient law and the possibility of redefining the sentence for an elimination of violations of Article 7 of the European Convention, which is determined by the Constitutional Court. However, formal and technical consequences of the decision of the Constitutional Court in the present case affect inevitable elements of the criminal proceedings that, however, have not been disputed by the Constitutional Court. Consequently, the interest of the state is to protect part of the criminal proceedings that is not disputable from the point of view of human rights and freedoms. Consequently, and according to the interpretation of the Prosecutor's Office, the decision of the Constitutional Court of BiH was not aimed to challenge the execution of the sentence as such in principle.

Unfortunately, starting from the previous explanation, the Criminal Procedure Code does not regulate the situation in which BiH found itself after the quashing of decision on appeal against original verdict by the Constitutional Court. Obviously, it is a legal limbo. Article 138, paragraph 3

of the CPC clearly determines the maximum length of detention after the first instance verdict. On the other hand, the CPC does not provide for the quashing of verdicts and retrial. Consequently, the CPC does not provide for a possibility to remand criminal proceedings to a certain stage and, therefore, consequences for the accused / defendant in terms of detention or confinement in such situations are not provided for. That is because Article 333 in conjunction with Article 327, paragraph 1.f) provides for the possibility of a new trial because of, *inter alia*, a decision of the Constitutional Court which has identified violations of human rights and freedoms. However, according to the above-cited provisions, quashing of the judgment is not provided for in such cases. Of course, according to the autonomy of the Constitutional Court in determining ways of eliminating violations of human rights and freedoms (Article 74, paragraph 4 of the Constitution of Bosnia and Herzegovina, Official Gazette No. 60/05, 64/08, 51/09), the Constitutional Court can work out a mode, which is not necessarily in agreement with CPC. However, in such a situation, as in this case, if the Court of BiH cannot apply the interpretation to fill the legal gap it can be found in a legal limbo.

In this particular case, the Prosecutor's Office of BiH deems that there is a possibility to fill the legal gap, which is certainly what the Constitutional Court had in mind. That is because the intention of the Constitutional Court was not to get the Court of BiH in a legal limbo and disable it. In this context, the Prosecutor's Office of BiH believes that the last sentence of Article 138, paragraph 3, can be applied analogously. The Prosecutor's Office of BiH believes that the *ratio legis* of the above-cited provisions is fully applicable in the particular situation, because the decision of the Constitutional Court can be treated as a "higher decision quashing a lower decision". The fact that it is about "repetition" of detention should not affect the interpretation! That is because, under normal circumstances and in normal procedure, this provision is intended to protect defendants from unreasonable length of proceedings, but on the other hand it entitles the state to protect the criminal proceedings. In the circumstances of the particular cases, guilt and obligation of serving the sentence have not been brought in question in principle and that is why the deadlines under Article 138, paragraph 3 should be given to the State to dispose of them.

However, even disregarding the application of the analogy to the present case, as the Prosecutor's Office of BiH has already explained in the previous paragraph, the state has public interest that persons convicted (now) with non-final verdicts remain serving their sentences until the verdict becomes final by direct application of Article 5, paragraph 1.a.) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. That is because this article is part of the legal system which is directly applicable and, moreover, has a priority in relation to other laws (cf. the cited decisions of the Constitutional Court, No. AP 2948/ 09, § 35). Accordingly, the Prosecutor's Office of BiH believes that this provision is a direct legal ground for the motion for detention, even unrelated to any other further statements about the reasons for detention set out in this motion. That is because the existence of this provision and its nature in the legal system of BiH gives a clear legal ground in terms of "lawful detention". Even if the Court of BiH held that the CPC in this legal and factual situation did not provide a legal ground for detention, such a legal position would be in conflict with the state's rights arising under Article 5, paragraph 1 a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In a situation of "collisions" of provisions, i.e. of CPC and Article 5, paragraph 1 a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Convention for the Protection of Human Rights and Fundamental Freedoms clearly derogates the CPC as it is "above " the law in a hierarchical and legal sense. The Prosecutor's Office of BiH considers that otherwise the convicted persons would "benefit" from the legal gap which would jeopardize the public interest of the state and rights of others, especially of the victims of commission of criminal offenses found and their family members (Article 2 and 3 of the European Court of Human Rights). The Prosecutor's Office of BiH indicates that detention after the first instance verdict is not included in the "length of detention" under Article 5, paragraph 3 of the European Convention for the Protection of Human

Rights and Fundamental Freedoms, as this period is considered fictitiously as serving the term (i.e. it is obligatory included in prison term, which has been imposed on this occasion), but it is legally covered by Article 5, paragraph 1 (a) (Judgment of the European Court of Human rights, *B. v. Austria*, 28 March 1990, Series A, No. 175, pp. 34-40).

This interpretation is in accordance with Article I / 2 of the Constitution of BiH, which clearly provides for a constitutional obligation of the state to operate as a state of law. This principle of the rule of law provides for the right of public authorities to fill legal gaps in a way that will be in accordance to the principles of justice as a universal value that permeates all human rights and freedoms. In this regard, it is important to emphasize that the state cannot be blamed for the CPC's not providing for this situation. That is because insufficient legal regulation, over which the public authorities are "stunned" after the Constitutional Court's decision, is not a result of inaction of public authorities or wilful failure to pass legislation that would clearly regulate this situation. Therefore, the defendants convicted with non-final verdicts cannot abuse the new situation.

The Constitutional Court of BiH would have to alter its position in relation to the most serious offenses and crimes in all applications, 40 of them having been filed, to properly apply the principles of the ECtHR judgment in "*Maktouf*" and "*Damjanovic*". The new interpretation of the Constitutional Court must be based on guarantees that the European Convention provides for victims' rights, the right to life, the right to personal liberty, family life, privacy, etc., bearing in mind that all of these rights were violated with these crimes. The right arising from Article 7 of the European Convention does not have supremacy over other individual rights or any other right enshrined in the Convention.

Practically, the Constitutional Court could continue finding a violation of Article 7 of the European Convention without quashing the verdict, which would provide a ground not to terminate serving of prison term by offenders but to, thus, give to the Court of BiH clear instructions for retrial only insofar as it relates to the determination of sentence.

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