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Number: S1 1 K 003417 16 Krž 15

Date: 3 March 2017

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Appellate Panel: Judge Mirko Božović, presiding  
Judge Tihomir Lukes, reporting judge  
Judge Redžib Begić, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

DUŠKO JEVIĆ AND MENDELJEV ĐURIĆ

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**SECOND-INSTANCE JUDGMENT**

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

Ibro Bulić

**Counsel for the convicted person Duško Jević:**

Dalibor Pejaković, PhD

**Counsel for the convicted person Mendeljev Đurić:**

Miodrag Stojanović

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**Number: S1 1 K 003417 16 Krž 15**

**Sarajevo, 3 March 2017**

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

The Court of Bosnia and Herzegovina, sitting as a Panel of the Appellate Division of Section I for War Crimes composed of Judge Mirko Božović, as the presiding judge, and judges Tihomir Lukes and Redžib Begić, as the Panel members, with the participation of legal adviser Neira Tatlić as the record-taker, in the criminal case against the convicted persons Duško Jević and Mendeljev Đurić for the criminal offense of Genocide in violation of Article 171(a) and (b) of the Criminal Code of Bosnia and Herzegovina in conjunction with Article 180(1) and Article 31 of the Criminal Code of Bosnia and Herzegovina, concerning the Decision of the Constitutional Court of Bosnia and Herzegovina AP-4239/13 dated 26 October 2016 revoking the Judgment of the Court of Bosnia and Herzegovina S1 1 K 003417 12 Krž 12 dated 20 May 2013 in the part pertaining to the application of a more lenient criminal code, having held an open session in the presence of Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina Ibro Bulić, the accused Duško Jević and his counsel Dalibor Pejaković and the accused Mendeljev Đurić and his counsel Miodrag Stojanović, on 3 March 2017 delivered the following

**J U D G M E N T**

Judgment of the Court of Bosnia and Herzegovina S1 1 K 003417 12 Krž 12 dated 20 May 2013 **is reversed** in respect of application of the criminal code and the decision on the sentence, so the acts of which **Duško Jević and Mendeljev Đurić** were found guilty by the first-instance judgment are now legally qualified as the criminal offense of Genocide in violation of Article 141 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (the code adopted on the basis of the Law on the Application of the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the Socialist Federal Republic of Yugoslavia) in conjunction with Article 24 thereof. This Panel, pursuant to the cited statutory provisions as well as the provisions of Articles 33, 38 and 41 the Criminal Code of the Socialist Federal Republic of Yugoslavia, **sentences** the accused for this criminal

offense to imprisonment for a term of twenty (20) years each. Pursuant to Article 50 the Criminal Code of the Socialist Federal Republic of Yugoslavia, the period of time that the accused spent in custody awaiting trial, commencing from 28 October 2009 until 23 August 2013 as the date when the accused started serving their respective prison sentences, shall be credited towards the sentence of imprisonment.

The rest of the judgment of the Court of Bosnia and Herzegovina S1 1 K 003417 12 Krž 12 dated 20 May 2013 shall otherwise remain unaffected.

## REASONING

### I. PROCEDURAL HISTORY

#### A. JUDGMENTS OF THE COURT OF BIH AND THE DECISION OF THE CONSTITUTIONAL COURT OF BIH

1. By Judgment of the Court of Bosnia and Herzegovina (Court of BiH) No. S1 1 K 003417 10 Krl (X-KR-09/823-1) of 25 May 2012, the Accused Duško Jević a.k.a. Staljin and Mendeljev Đurić a.k.a. Mane were found guilty of the criminal offense of Genocide, in violation of Article 171(a) and (b) of the Criminal Code of Bosnia and Herzegovina (CC BiH), in conjunction with Article 180(1) and Article 31 of the CC BiH; the Accused Duško Jević was sentenced to a long-term imprisonment for a term of 35 (thirty-five) years, while the Accused Mendeljev Đurić was sentenced to a long-term imprisonment for a term of 30 (thirty) years.

2. Pursuant to Article 284(1)(c) of the of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), the Accused Neđo Ikonić and Goran Marković were acquitted of the charges, as follows: the Accused Neđo Ikonić, that he committed the criminal offense of Genocide in violation of Article 171(a) and (b) of the CC BiH, in conjunction with Article 180(1) of the CC BiH; and the Accused Goran Marković, that he committed the criminal offense of Genocide in violation of Article 171(a) and (b) of the CC BiH, in conjunction with Article 31 of the CC BiH.

3. By the Judgment, the Accused were relieved of the duty to reimburse costs of the criminal proceedings, pursuant to Article 188(4) and Article 189(1) of the CPC BiH.

4. Pursuant to Article 198(2) and (3) of the CPC BiH, the injured parties and the relatives of the victims were instructed to pursue their claims under property law in civil action.

5. The Prosecutor's Office of BiH filed an Appeal against the first-instance judgment on the grounds of essential violation of the criminal procedure provisions referred to in Article 297(1)(k) of the CPC BiH, violation of the Criminal Code referred to in Article 298 of the CPC BiH and the incorrectly or incompletely established facts referred to in Article 299(1) of the CPC BiH, petitioning the Panel of the Appellate Division (hereinafter: the Appellate Panel) to grant the Appeal, partially revoke the impugned judgment in the part relating to Goran Marković and Neđo Ikonić, and to schedule a trial, pursuant to Article 315(2) of the CPC BiH, with a view to re-presenting the evidence adduced in the first instance that caused the state of facts to be erroneously and incompletely established, whereupon the Panel would find the Accused Neđo Ikonić and Goran Marković guilty of the criminal offense of Genocide in violation of Article 171(a) and (b) of the CC BiH, in conjunction with Article 180(1) and Article 31 of the CC BiH, impose on them a sentence of long-term imprisonment pursuant to the statute, and uphold the remaining part of the Judgment.

6. Attorney Vera Lazić, counsel for the Accused Duško Jević, filed an Appeal on the grounds of essential violation of the criminal procedure provisions, the incorrectly or incompletely established facts, violation of the Criminal Code, and the decision on the sentence, petitioning the Appellate Panel to grant the Appeal, reverse the first-instance judgment and acquit the Accused Duško Jević of the charges, pursuant to Article 284(c), in conjunction with Article 3(2) of the CPC BiH, and terminate his custody; alternatively, the Appellate Panel is petitioned to grant the Appeal and, pursuant to Article 315(1)(a) and (b) of the CPC BiH, render a decision revoking the first instance-judgment and scheduling a trial before the Appellate Panel, terminating the custody of Duško Jević.

7. Attorney Miodrag Stojanović, counsel for the Accused Mendeljev Đurić, filed an Appeal from the first instance judgment on the grounds of essential violation of the criminal procedure provisions referred to in Article 297(1)(i) and (k) of the CPC BiH, violation of the Criminal Code referred to in Article 298(1)(d) of the CPC BiH, the incorrectly or incompletely established facts referred to in Article 299 of the CPC BiH, and the decision on the sentence referred to in Article 300 of the CPC BiH, petitioning the Appellate Panel to grant the Appeal, revoke the first instance judgment and hold a trial; alternatively, the

Appellate Panel is petitioned to remand the judgment to the Trial Panel for reconsideration or, exceptionally, to reverse the judgment and impose a substantially more lenient sentence on the Accused Đurić.

8. Vera Lazić, defense counsel for the Accused Duško Jević, filed a Response to the Prosecutor's Appeal, petitioning the Appellate Panel to dismiss as ill-founded the Prosecutor's Appeal against the acquittal of the Accused Neđo Ikonić and Goran Marković, and uphold the first-instance judgment (the acquittal) in respect of the Accused Ikonić and Marković.

9. Attorney Nenad Rubež, counsel for the Accused Neđo Ikonić, filed a Response to the Prosecutor's Appeal, petitioning the Appellate Panel to dismiss as ill-founded the Prosecutor's Appeal relative to the Accused Neđo Ikonić and uphold the first-instance judgment acquitting the Accused Ikonić of the charges.

10. Attorney Veljko Čivša, counsel for the Accused Goran Marković, filed a Response to the Prosecutor's Appeal, petitioning the Appellate Panel to dismiss the Appeal as ill-founded and uphold the first-instance judgment.

11. Prosecutor filed a Response to the Appeal by Counsel for the Accused Duško Jević, petitioning the Appellate Panel to dismiss the Appeal as ill-founded.

12. Prosecutor filed a Response to the Appeal by the Counsel for the Accused Mendeljev Đurić, petitioning the Appellate Panel to dismiss the Appeal as ill-founded.

13. Pursuant to Article 304 of the CPC BiH, the Appellate Panel held a session on 20 May 2013. Paragraph (4) of the cited article provides that failure of the parties and defense attorney to appear before the Court despite being duly summoned shall not preclude the session from being held. Consequently, the session was held notwithstanding the absence of co-counsel for the accused Duško Jević and Mendeljev Đurić, who had been duly summoned.

14. At the session, Prosecutor and Defense Counsel for the Accused Duško Jević and Mendeljev Đurić briefly presented their respective Appeals and Responses. Counsel for the Accused Neđo Ikonić and Goran Marković also presented their Responses to the Prosecutor's Appeal. The parties and Defense Counsel reiterated the arguments they had presented in writing.

15. The Accused Duško Jević concurred with the arguments of his Counsel and expressed his regret for all victims in the war, in particular the victims in Srebrenica. He also stressed that he had not supervised or personally committed any crime and that his conscience was clear in that respect.

16. The Accused Mendeljev Đurić concurred with the arguments of his Counsel. He expressed his regret for the victims of the civil war. In addition, he stated that justice was not served with the first-instance judgment and that he had not done anything in breach of the Geneva Conventions.

17. The Accused Neđo Ikonić and Goran Marković fully concurred with the arguments of their respective Counsel.

18. Pursuant to Article 306 of the CPC BiH, the Appellate Panel, having reviewed the impugned judgment insofar as it is contested by the appeals, rendered Judgment S1 1 K 003417 12 Krž 12 dated 20 May 2013 dismissing the Prosecutor's Appeal as ill-founded, while granting the Appeals by Counsel for the accused Duško Jević and Mendeljev Đurić in part and reversing the first-instance judgment of the Court of BiH S1 1 K 003417 10 Kri dated 25 May 2012 in the part pertaining to the sentence, by imposing the following sentences: the Accused Duško Jević, long-term imprisonment for a term of thirty-two (32) years for the criminal offense of Genocide in violation of Article 171(a) and (b) of the CC BiH in conjunction with Article 180(1) and Article 31 of the CC BiH of which he has been found guilty; and the Accused Mendeljev Đurić, long-term imprisonment for a term of twenty-eight (28) years for the criminal offense of Genocide in violation of Article 171(a) and (b) of the CC BiH in conjunction with Article 180(1) and Article 31 of the CC BiH of which he has been found guilty. The rest of the judgment remained otherwise unaffected.

19. The accused Duško Jević and Mendeljev Đurić filed an appeal against the referenced final judgment of the Appellate Panel (AP-4239/13 of 14 October 2013) with the Constitutional Court of Bosnia and Herzegovina (Constitutional Court of BiH), alleging violations of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina (Constitution of BiH) and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), a violation of Article 7 of the ECHR and, finally, a violation of the right to an effective remedy under Article 13 of the ECHR.

20. The Constitutional Court of BiH adopted Decision AP-4239/13 of 26 October 2016 (Decision), granting in part the respective appeals filed by the convicted persons Duško Jević and Mendeljev Đurić, finding a violation of Article II(2) of the Constitution of BiH and Article 7 of ECHR and revoking the judgment of the Court of BiH S1 1 K 003417 12 Krž 12 dated 20 May 2013 in the part pertaining to the application of a more lenient criminal code. In doing so, the Constitutional Court stressed that the partial revocation of the referenced judgment of the Court of BiH is without prejudice to the appellants' deprivation of liberty and pretrial custody as a matter falling within the exclusive jurisdiction of the Court of BiH. The case was therefore remanded to the Court of BiH to employ an expedited procedure and issue a new decision in respect of sentencing in line with Article II(2) of the Constitution of BiH and Article 7(1) of the ECHR. Pursuant to Article 72(5) of the Rules of the Constitutional Court of BiH, the Court of BiH is obliged to inform the Constitutional Court of BiH about the measures taken to enforce the Decision, within the time-limit of three months after service of the Decision.

21. Furthermore, the Constitutional Court dismissed as ill-founded the appeal filed by Duško Jević and Mendeljev Đurić against the cited judgment invoking Article II(3)(e) of the Constitution of BiH and Article 6(1), (2) and (3)(d) of the ECHR.

22. The same Decision rejected as inadmissible the appeal filed by Duško Jević against Decision of the Court of BiH to Continue Pretrial Custody S1 1 K 003417 12 Krž 12 dated 21 February 2013, citing Article II(3)(d) of the Constitution of BiH and Article 5(4) of the ECHR, on the grounds of the expiration of the deadline for filing an appeal.

23. In accordance with the said Decision, the Appellate Panel held an open session in the case against the convicted persons Duško Jević and Mendeljev Đurić on 12 January 2017 for the purpose of implementing the Decision as promptly as possible. Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina Ibro Bulić, convicted person Duško Jević and his co-counsel Dragan Gotovac, and convicted person Mendeljev Đurić and his counsel Miodrag Stojanović appeared. The Panel notes that Attorney Vera Lazić, principal counsel for the convicted person Duško Jević, failed to appear, the reason being that she, according to a letter sent to the Court by Attorney Ozrenka Jakšić, was no longer practicing law, so Attorney Jakšić was in charge of winding up the affairs.

24. At the session, the convicted person Duško Jević pointed out that he did not want to be further represented in this criminal trial by Attorney Dragan Gotovac, which was also included in his letter to the Court dated 4 January 2017. The Appellate Panel notes at this



point that it did not receive the convicted person's letter before the session started, and the parties and defense counsel were advised of that.

25. Convicted person Duško Jević sought additional time from the Court to choose another attorney who would accept his case and prepare for the next session.

26. The Court granted the convicted person Duško Jević eight days to choose an attorney to represent him in this case and informed the parties that the session was adjourned pending selection of counsel for the convicted person Duško Jević.

27. On 20 January 2017, the Court received a letter in which the convicted person Duško Jević informed the Court that Attorney Dalibor Pejaković agreed to be the accused's counsel in the criminal trial as *ex officio* defense counsel.

28. The Appellate Panel issued Decision S1 1 K 003417 16 Krž 15 dated 25 January 2017, appointing Attorney Dalibor Pejaković as principal *ex officio* counsel for the convicted person Duško Jević.

29. As the statutory requirements to hold an open session of the Panel were met, the session was held on 3 March 2017 in the presence of the parties and defense counsel. Prosecutor Ibro Bulić, convicted person Duško Jević and his counsel Dalibor Pejaković, convicted person Mendeljev Đurić and his counsel Miodrag Stojanović appeared.

30. At the session, counsel Pejaković submitted that the incorrect code was applied in the case in question and that the Constitutional Court of BiH was clear in that respect. Counsel argued that the law that is more lenient to the perpetrator needed to be applied. He further argued that the death penalty may not be imposed and that its alternative is a 20 years' prison sentence. Although this was not the subject matter of the decision of the Constitutional Court of BiH, counsel maintained that when meting out the sentence one should take into consideration that transcripts of witness testimony were used in this trial and that because of that Defense was denied a possibility to cross examine the witnesses. In counsel's view, in light of the contents of the summons and the (non)presence of a defense counsel the accused's statement should not have been used as evidence either. Finally, counsel added that the accused does not have a criminal record, that he is a family man and father of one child. For all the reasons mentioned above, counsel urged the Court to decide on suspension of his client's serving of the sentence, as the decision that constitutes the basis for his client's serving the prison sentence has been revoked.

31. Convicted person Duško Jević concurred with his counsel.

32. Counsel Stojanović first of all stated that he joined the submissions of counsel for the first accused. Thereafter, he said that he was aware that he could not deal with facts regarding guilt and Article 6 of ECHR, and then invoked the issue of meting out punishment under the CC SFRY. Counsel asked a question: if there is no death penalty, then what is being replaced by a 20 years' prison sentence? Specifically, counsel asserted that the death penalty can no longer be imposed; accordingly, the limit is not 20 years but a range between 5 and 15 years. Counsel also pointed out that when meting out the punishment one needed to know what the convicted person had done. Counsel further alleged that the extenuating circumstances needed to be assessed within the said penal framework. According to the Defense, the punishment required an individualized approach rather than imposing 20 years' prison sentences on both accused. Therefore, in defense counsel's view, 15 years' imprisonment is the maximum penalty to be applied in this case. Furthermore, counsel mentioned filing a petition to the Court to have the serving of the sentence suspended, but the Court dismissed the petition. In that respect, counsel pointed out that the guilt was the basis for the prison sentence, and that the convicted person was serving a prison sentence that has been revoked, and was not serving a sentence on the basis of guilt.

33. Convicted person Mendeljev Đurić concurred with his counsel. He added that he did not murder anyone, that he did not lie, that he did not commit the sin with which he is charged and that his conscience is clear. He pointed out that he has been killed as a human being, and that he and the families of victims have been deprived of the right to the truth. He further pointed out that his conviction was not justice.

34. Prosecutor responded to the allegations by the Defense, submitting that the first-instance judgment was left intact for the most part during the second-instance proceedings and that there was no reason to deviate from those findings. In particular, Prosecutor pointed out that the convicted persons did not express their remorse for the crimes committed. He petitioned the Court to follow the instructions of the Constitutional Court of BiH and impose adequate sentence, using the findings from the first-instance judgment as guidance. Furthermore, Prosecutor was of the opinion that there were no grounds for a suspension of the sentence.

35. Following the Prosecutor's response, the Court gave the floor to Defense to say the final word. Counsel Pejaković stated that his arguments were aimed solely at the meting

out of the punishment, adding that the reason why Duško Jević did not express his remorse was because he did not commit the crime.

36. Convicted person Duško Jević said that he had prepared a presentation for this session; however, being aware of a perception of the trial, he decided not to present his arguments. Jević noted that he could not express remorse if he did not commit the crime, but he did say that he felt sorry for the victims. He did not deny that he was a senior officer, but he stressed that he was not a criminal or a monster.

37. Finally, counsel Stojanović stated that a guilty person expresses remorse. However, there was no guilt here, only regret, for there is always regret for victims.

#### **B. PROCEEDINGS BEFORE THE APPELLATE PANEL**

38. Prior to addressing the procedure of explanation of the new decision relative to the application of a more lenient criminal code and the pronouncement of a punishment, the Appellate Panel will briefly adduce the reasons on the procedural situation it was in after the second-instance judgment of the Court of BiH S1 1 K 003417 12 Krž 12 dated 20 May 2013 was revoked in the part mentioned above.

39. According to the reasons provided for the Decision of the Constitutional Court of BiH, the impugned judgment violated an appellant's constitutional right under Article II(2) of the Constitution of BiH and Article 7(1) of the ECHR, because in the case in question the Court of BiH, when ruling on the criminal charge against the appellants, applied provisions of the CC BiH retroactively despite the fact that the range of sentences unequivocally showed that the CC SFRY (in effect at the time of commission of the crime of which the appellants have been found guilty) was more lenient. In contrast, the Constitutional Court of BiH finds that there is no violation of the right to a fair trial under Article II(3)(e) of the Constitution of BiH or Article 6 paras 1, 2 and 3(d) of the ECHR in a situation, as is the one in the present case, in which there was no violation of the principle of impartiality of the Court, when the reasons for the impugned decision clearly suggest that the guilt of the appellants for the criminal offense of which they have been convicted was not a result of an arbitrary assessment of evidence and when the allegations of a violation of the principle of equality are baseless. In this respect, the Constitutional Court of BiH concluded that the conviction is based on the evidence presented at the trial, with the same opportunity being given to the appellants to challenge the Prosecution's evidence

and with unambiguous and thorough reasons in the judgment reasoning clearly showing that all the evidence presented by both parties to the proceedings were weighed carefully, and that the decision is a result of the proceedings as a whole. In the process, no major issue remained unexplained in terms of the principles of presumption of innocence and *in dubio pro reo*, as indicated in the referenced decision.

40. In view of the fact that the Court does not have the authority to review its own final decisions, in the part not called into question by the decisions of the Constitutional Court of BiH, the guilt of Duško Jević and Mendeljev Đurić as well as the established facts were not called into question by the Decision, and the Court will not therefore review and alter the previous second-instance decision in that part.

41. Furthermore, it should be noted that, upon receiving the decision of the Constitutional Court of BiH, the Appellate Panel found itself in a particular situation not regulated by a procedural law, for the reason that the CPC BiH does not recognize the possibility of revoking (even in part) of a second-instance judgment and remanding a case back for a new trial. In particular, the CPC BiH does not contain provisions to be applied in the event a second-instance judgment is revoked by a decision of the Constitutional Court of BiH in the part pertaining to a decision on "*application of a more lenient law*" with the issue of guilt not being in dispute, as is the case here. Accordingly, this Panel, proceeding primarily from the fact that the Constitutional Court of BiH ordered the Court of BiH to render a new decision in an expedited procedure in respect of the punishment, made efforts to find the most efficacious way to handle this situation.

42. In the Appellate Panel's view, in the case in question, from the procedural point of view, there are no appeals with respect to which a decision needed to be made, while the appeals against the first-instance judgment can be referred to solely for the purpose of a reminder about the earlier course of the proceedings. Accordingly, this Panel took into consideration the fact that the Constitutional Court of BiH found in its decision that the Appellate Panel erred in terms of the code applied, but found no procedural violations in the impugned judgment. Consequently, the decision of the Constitutional Court of BiH suggests that the Constitutional Court is satisfied that the facts were established properly in the first-instance judgment of the Court of BiH so in that part the judgment was upheld, i.e. became final by Judgment of the Court of BiH S1 1 K 003417 12 Krž 12 dated 20 May 2013, in view of the fact that the relevant part of the judgment was not revoked by the Decision.

43. Based on the foregoing, the Appellate Panel, in the absence of a strict statutory provision governing the actions in a situation such as the one in the case in question, found that it would be most appropriate and efficacious, with a view to issuing a new decision remedying the violation found in the decision of the Constitutional Court (binding on this Court) in an expedited procedure as ordered, to reverse Judgment of the Court of BiH S1 1 K 003417 12 Krž 12 dated 20 May 2013 as determined in the enacting clause of this judgment.

44. Taking into consideration the decision of the Constitutional Court of BiH, with a view to its implementation, the Appellate Panel has ruled as stated in the enacting clause above for the following reasons:

## **II. APPLICATION OF THE CRIMINAL CODE**

45. By implementing the Decision of the Constitutional Court of BiH that, according to Article VI(5) of the Constitution of BiH, is final and binding, the Appellate Panel is under obligation to remedy the violation, considering that the decision determined that the impugned judgment applied the incorrect criminal code to the detriment of the convicted persons Duško Jević and Mendeljev Đurić, i.e. the law that was the most lenient for them was not applied.

46. Specifically, under the first-instance judgment the accused Duško Jević and Mendeljev Đurić were found guilty of committing the criminal offense of Genocide in violation of Article 171(a) and (b) of the CC BiH in conjunction with Article 180(1) and Article 31 of the CC BiH: the accused Duško Jević was sentenced to a long-term imprisonment for a term of thirty-five (35) years, while the accused Mendeljev Đurić was sentenced to a long-term imprisonment for a term of thirty (30) years. This means that the law that was in effect at the time of the trial – the CC BiH of 2003 – was applied.

47. It should be borne in mind that both the law that was in effect at the time of commission of the crime in 1993 (CC SFRY) and the law currently in effect (CC BiH), prescribe the criminal acts of which Jević and Đurić were found guilty as the criminal offense of Genocide. It is therefore clear that statutory requirements for conducting criminal proceedings against perpetrators for the criminal offense of Genocide and punishment of that offense exist, keeping in mind that the acts perpetrated by the convicted persons constituted a criminal offense both according to the law previously in

effect (the law in effect at the time of commission of the crime) and the law currently in effect (the law in effect during the trial).

48. To that end, the criminal offense of Genocide is prescribed in Article 171 of the CC BiH and Article 141 of the CC SFRY.

49. Article 171 of the CC BiH reads as follows:

*Whoever, with the aim of destroying, in whole or in part, a national, ethnic, racial or religious group, orders perpetration or perpetrates any of the following acts:*

*a) Killing members of the group;*

*b) Causing serious bodily or mental harm to members of the group;*

*( ... )*

*shall be punished by imprisonment for a term of not less than ten years or a long-term imprisonment.*

50. Article 141 of the CC SFRY reads as follows:

*Whoever, with the intention of destroying a national, ethnic, racial or religious group in whole or in part, orders the commission of killings or the inflicting of serious bodily injuries or serious disturbance of physical or mental health of the group members, or a forcible dislocation of the population, or that the group be inflicted conditions of life calculated to bring about its destruction in whole or in part, or that measures be imposed intended to prevent births within the group, or that children of the group be forcibly transferred to another group, or whoever with the same intent commits any of the foregoing acts, shall be punished with a sentence of imprisonment for not less than five years or by the death penalty.*

51. The quoted statutory provisions suggest that the definitions of the crime of genocide are completely the same, and the assessment of which code is more lenient to the perpetrator required an analysis of the prescribed punishment. Namely, as indicated in the Decision of the Constitutional Court of BiH, there is a difference between the two codes in terms of the range of sentences for the crime in question.

52. In that respect, paragraph 65 of the Decision reads: *„in the view of the Constitutional Court, it can be concluded that in case when a criminal offense is prescribed by both laws (the law that was in effect at the time of commission and the subsequently passed law), in line with the second sentence in Paragraph 1 of Article 7 of the European Convention, it is required to examine which of the two or more laws passed in succession stipulates a more lenient sentence and then apply that law, i.e. the law stipulating a more lenient punishment (the principle of favor rei).“*

53. In that connection, the Appellate Panel finds that under the second-instance judgment the persons in question were sentenced to a long-term imprisonment (respectively, the accused Duško Jević to 32 years' imprisonment and the accused Mendeljev Đurić to 28 years' imprisonment) by applying the CC BiH. Consequently, the prison sentences envisaged for the most serious crimes were imposed on them, and it is therefore necessary to compare the statutory maximum in both criminal codes and determine which one is more favorable to the convicted persons.

54. The Appellate Panel, bearing in mind paragraph 66 of the decision of the Constitutional Court of BiH, finds that the criminal offense of Genocide referred to in Article 141 of the CC SFRY is punishable by imprisonment for a term between 5 and 15 years, 20 years' imprisonment or the death penalty, on the grounds that Article 37(1) of the CC SFRY provides that *“the death penalty may not be imposed as the only principal punishment for a certain criminal act”*, while Article 38(2) thereof provides that *“the court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty.”*

55. To support the finding that the death penalty has been eliminated from the system of criminal sanctions, it is alleged that Protocol No. 6 to the ECHR entered into force when the Constitution of BiH entered into force on 14 December 1995: this Protocol abolished the death penalty (Article 1), also providing that a State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war (Article 2). Moreover, Protocol No. 13 to the European Convention concerning the abolition of the death penalty in all circumstances was adopted by the Council of Europe on 3 May 2002, which Bosnia and Herzegovina ratified on 28 May 2003.

56. It follows from the aforesaid that at the time of adjudication it was not possible to impose the death penalty for the criminal offense of which Jević and they were convicted.

In that respect, it is necessary to determine which maximum punishment from the two referenced criminal codes is more lenient to the convicted persons.

57. The Appellate Panel, taking into consideration the allegations in the decision of the Constitutional Court of BiH, finds that a 20 years' imprisonment (as the maximum punishment under the CC SFRY) is more lenient in comparison to the maximum punishment under the CC BiH (long-term imprisonment for a term of 45 years). Consequently, the CC SFRY is the more lenient code in terms of the maximum punishment prescribed.

58. Furthermore, both codes prescribe Aiding and Abetting (convicted persons Duško Jević and Mendeljev Đurić were aiders in committing the crime of genocide): Article 24 of the CC SFRY and Article 31 of the CC BiH, respectively. Article 24 of the CC SFRY provides: „(1) *Anybody who intentionally aids another in the commission of a criminal act shall be punished as if he himself had committed it, but his punishment may also be reduced*“, whereas Article 31 of the CC BiH provides: “(1) *Whoever intentionally assists another in perpetrating a criminal offense shall be punished as if he has perpetrated the offense himself, although the punishment may be reduced. (2) The following, in particular, shall be considered as assisting in the perpetration of a criminal offense: giving advice or instructions as to how to perpetrate a criminal offense, supplying the perpetrator with tools for perpetrating the criminal offense, removing obstacles to the perpetration of the criminal offense and promising, prior to the perpetration of the criminal offense, to conceal the existence of the criminal offense, to hide the perpetrator, the tools used for perpetrating the criminal offense, the traces of the criminal offense or the objects acquired by the perpetration of the criminal offense.*”

59. Furthermore, it is important to note that, according to the impugned judgment, Duško Jević and Mendeljev Đurić were convicted under individual responsibility referred to in Article 180(1) of the CC BiH, which did not exist as such in the CC SFRY. For that reason the Appellate Panel omitted “*in conjunction with Article 180(1) of the CC BiH*” from the legal qualification of the offense in order to benefit the convicted persons in that respect as well, considering that the convicted persons undertook acts of perpetration as direct perpetrators, i.e. they ordered members of the 1<sup>st</sup> Company of the Jahorina Training Center to take part in a forcible transfer of women, children and the elderly... to a territory outside the Republika Srpska, the killing and infliction of serious bodily and mental harm to the group of... and supervised them during that operation, thereby aiding in the partial



destruction of that group on national, religious and ethnic grounds, which is envisaged in the statutory definition of the criminal offense of Genocide referred to in Article 141 of the CC SFRY.

60. In view of the fact that the Constitutional Court of BiH found that in the case in question there was no violation of the right to a fair trial under Article II(3)(e) of the Constitution of BiH or Article 6(1), (2) and 3(d) of the ECHR, i.e. violations that affected the established facts, the factual finding in the impugned judgment that members of the Jahorina Training Center operated in the area of responsibility of the Bratunac Brigade appears to be indisputable, and despite the fact that at that time the convicted persons did not have official decisions on appointment (they received them subsequently) they, according to the First-Instance Panel, at the material time and before that *de facto* performed the tasks of instructors at the Jahorina Training Center in their respective fields for which they had received training. Furthermore, during the trial it was determined beyond any reasonable doubt that the instructors acted as platoon leaders during their field mission.

61. In addition, the convicted person Duško Jević performed the duty of Assistant Commander of the Special Police Brigade of the MUP RS / Ministry of Internal Affairs of the Republika Srpska/ and Commander of the Jahorina Training Center of the Special Police Brigade. As for the convicted person Mendeljev Đurić, the evidence has shown that he performed the duty of Commander of the 1<sup>st</sup> Company of the Jahorina Training Center.

62. Based on the foregoing, the Appellate Panel properly assessed and qualified the referenced acts of the convicted persons as the criminal offense of Genocide in violation of Article 141 of the CC SFRY in conjunction with Article 24 thereof, and applied the more lenient criminal code to them in keeping with the order of the Constitutional Court of BiH.

### **III. DECISION ON THE SENTENCE**

63. When taking a decision on the punishment, the Appellate Panel will for the most part rely on the proper findings made in the impugned judgment, primarily the general considerations and requirements laid down by the statute as criteria to be weighed in meting out a punishment, followed by individually established facts and circumstances of relevance to the punishment in the case in question, considering that they have not been called into question by the decision of the Constitutional Court of BiH.

64. Bearing in mind that the Panel applied the CC SFRY to the case at issue, the same code needed to be applied in the decision on the sanction as well, adhering to the range of punishments defined in Article 141 of the CC SFRY for the criminal offense of which Duško Jević and Mendeljev Đurić have been found guilty, in accordance with the provisions laying down general principles in fixing punishment.

65. In view of the fact that an assessment of which law is more lenient is a factual issue, i.e. it includes an assessment of all the circumstances surrounding a particular case, when meting out the punishment the First-Instance Panel, having weighed all the extenuating and aggravating circumstances, sentenced the accused Duško Jević to a long-term imprisonment for a term of thirty-five (35) years and the accused Mendeljev Đurić to a long-term imprisonment for a term of thirty (30) years, meaning that the sentences were moving in the direction of the statutory maximum for the given criminal offense under the applied CC BiH. The Second-Instance Panel did not deviate much from the imposed sentences, reversing the first-instance judgment by sentencing Duško Jević to a long-term imprisonment for a term of thirty-two (32) years and Mendeljev Đurić to twenty-eight (28) years, also applying the CC BiH.

66. Following the adoption of the decision of the Constitutional Court of BiH, in this trial the Appellate Panel, pursuant to Article 41(1) of the CC SFRY, first of all fixed the punishment within the limits prescribed for the specific criminal offense, the maximum punishment in particular. As a result, as noted above, the Panel found that according to the CC SFRY the maximum punishment that could be imposed in the case in question is a 20 years' prison sentence, as the only substitute for the death penalty.

67. The purpose of punishment and the principles in fixing punishment are stipulated in, respectively, Articles 33 and 41 of the CC SFRY, and this Panel applied them when deciding on the criminal sanction for the convicted persons in the case concerned. Namely, the Appellate Panel weighed all the circumstances, extenuating and aggravating alike, giving special consideration to the degree of criminal responsibility of the convicted persons, the motives for the perpetration of the act, the degree of danger or injury to the protected object, the circumstances in which the act was committed, the past conduct of the offenders, their personal situations and their conduct after the commission of the act, as well as other circumstances relating to the personality of the offenders.

68. With regard to extenuating circumstances on the part of the convicted persons Jević and Đurić, the Appellate Panel noted that the accused have families and no prior

convictions. The law requires that those circumstances be taken into consideration notwithstanding the fact that the case at issue involves the most serious crime, and that the object of protection are values that are also protected by international law.

69. In terms of the aggravating circumstances, this Panel stresses that the convicted persons Jević and Đurić, as MUP officers and professionals, were aware of the laws of war as well as the Geneva Conventions. Furthermore, they had reason to know that protection of civilians was one of fundamental responsibilities of persons entrusted with command duties regardless of which warring party they belonged to.

70. As the convicted persons demonstrated proper decorum during the trial, their conduct during the trial was proper and in accordance with procedural rules and, as such, it does not constitute either an aggravating or extenuating circumstance.

71. In view of the Constitutional Court's findings that a 20 years' prison sentence is a substitute for the death penalty prescribed for the criminal offenses moving in the direction of the maximum punishment, this Panel, taking into account all the circumstances surrounding this case, imposed that very sentence on Duško Jević and Mendeljev Đurić. The Appellate Panel holds that a 20 years' prison sentence is the only possible punishment in light of the gravity of the offense as well as the circumstances surrounding the commission of the offense, the consequences, the manner of perpetration and the specific acts of the perpetrators.

72. Consequently, in the Appellate Panel's view, a 20 years' prison sentence imposed on Duško Jević and Mendeljev Đurić is the only sanction that can achieve the purpose of punishment laid down in Article 33 of the CC SFRY, and only this sanction meets the general and specific purpose of punishment.

73. On the other hand, the Panel notes that it was limited by a binding order from the Decision of the Constitutional Court, and voices a serious doubt that the imposed sanction would indeed meet the purpose of punishment for the most serious crime known to mankind, adding that the sanction does not meet the requirements of international documents and practice in punishing the crime of genocide. In that respect, according to this Panel, the allegations by Counsel for the convicted person Mendeljev Đurić that there is no punishment individualization if a 20 years' prison sentence is imposed for the crime of genocide are ill-founded.

74. The issue of which law is more lenient, supporting the views taken in the decision of the Court of BiH that has been revoked by the decision of the Constitutional Court of BiH, was recently reviewed by the ECtHR, case... (judgment delivered...) paragraphs..., where the applications of both applicants were declared inadmissible. Specifically, it was determined that at the time of perpetration of the criminal offense a Criminal Code that prescribed the death penalty as the maximum punishment for the criminal offense was in effect, which by all means made the subsequent code more lenient as it deleted the death penalty and prescribed a 40 years' prison sentence as the maximum punishment. Consequently, the ECtHR took the view that a 40 years' prison sentence was more lenient than the death penalty that was prescribed at the relevant time.

75. Finally, it should be pointed out that the protected object of these crimes are universal human values, a condition and a basis for a joint and humane existence, and their violation constitute serious breaches of international humanitarian law norms. The gravity of the crimes is underlined by the fact that they are not subject to the statute of limitations. No punishment can adequately reflect the gravity of the committed crimes.

76. Punishing genocide is a matter of international interest, and genocide is a crime under international law condemned by the civilized world, and the principal perpetrators as well as their accomplices must be punished regardless of their identity or the grounds on which the crime was committed (religious, racial, political or other).

77. For the reasons mentioned above, the Appellate Panel reversed the second-instance judgment in terms of the decision on the sentence as well, as set out in the enacting clause of this judgment.

78. Pursuant to Article 50 of the CC SFRY, the period of time the convicted persons Duško Jević and Mendeljev Đurić spent in custody from 28 October 2009 until they started serving their prison sentences on 23 August 2013 (running uninterruptedly) shall be credited towards the sentence of imprisonment.

79. In view of the fact that the decision of the Constitutional Court of BiH did not affect other portions of the second-instance judgment S1 1 K 003417 12 Krž 12 dated 20 May 2013, the judgment remained unaffected and in effect.

80. For all the reasons stated above, pursuant to Article 314 of the CPC BiH, the impugned judgment was reversed in terms of the legal qualification of the offense and the

decision on the sentence, and a ruling was made as in stated the enacting clause of this judgment.

**RECORD-TAKER**

**Legal adviser**

Neira Tatlić

**PRESIDING JUDGE**

**Mirko Božović**

**LEGAL REMEDY:** No appeal is allowed against this judgment.