The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in plenary and composed of the following judges:

Mr. Mato Tadić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Valerija Galić,

Ms. Seada Palavrić,

Mr. Zlatko M. Knežević

Ms. Angelika Nuβberger, and

Ms. Helen Keller

Having deliberated on the appeal of Mr. **Vahid Hadrović,** in the case no. **AP-3330/18**, at its session held on 16 July 2021, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

> The appeal of Mr. **Vahid Hadrović** lodged against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. 04 0 K 004934 17 Kžk of 17 January 2018 is hereby dismissed as ill-founded.

REASONING

I. Introduction

1. On 13 June 2018, Mr. Vahid Hadrović ("the appellant") from Kakanj, represented by Ms. Vasvija Vidović, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court"), against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. 04 0 K 004934 17 Kžk of 17 January 2018.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 30 December 2019, the Supreme Court, Cantonal Court in Zenica ("Cantonal Court") and Cantonal Prosecutor's Office of the Zenica-Doboj Canton ("Cantonal Prosecutor's Office") were requested to submit their respective replies to the appeal. In addition, the Constitutional Court requested the Cantonal Court to submit a photocopy of the postal receipt on delivery of the challenged judgment of the Supreme Court of 17 January 2018 to the appellant and his lawyer.

3. The Supreme Court, Cantonal Court and Cantonal Prosecutor's Office submitted their replies to the appeal in the period from 3 through 7 January 2020. However, the Cantonal Court failed to submit within the given time limit the photocopy of the postal receipt to the Constitutional Court, as requested.

III. Facts of the Case

4. The facts of the case as drawn from the appellant's allegations and the documents presented to the Constitutional Court may be summarized as follows.

Introduction

5. By its Indictment of 13 March 2013, as amended on 14 March 2016, the Cantonal Prosecutor's Office charged appellant and F.D. with having committed the criminal offense of War Crimes against Civilians under Article 142 paragraph 1 in conjunction with Article 22 of the inherited Criminal Code of the Socialist Federal Republic of Yugoslavia ("CC SFRY").

6. By the judgment no. 04 0 K 004934 13 K of 13 June 2014 of the Cantonal Court, the appellant and accused F.D., *inter alia*, were found guilty of the criminal offense in question and were imposed a sentence of imprisonment of 10 years each.

7. By its decision no. 04 0 K 004934 14 Kž of 24 June 2015, the Supreme Court of the FBiH partially upheld the appeal of the appellant's defence counsel, quashed the Judgment of the Cantonal Court in Zenica of 13 June 2014 and remitted the case back to the first instance court for retrial.

8. In the renewed proceedings, after the decision of the Cantonal Court no. 04 0 K 004934 15 Kv 3 of 14 December 2015 separating the proceedings against the accused F. D., to be completed separately before that court, the appellant, by the judgment of the Cantonal Court no. 04 0 K 004934 15 K 2 of 16 March 2016, was found, *inter alia*, guilty of the criminal offense of War Crimes against Civilians under Article 142, paragraph 1 in conjunction with Article 22 of the inherited CC SFRY and, by applying the above provisions and the provision of Article 41 of the inherited CC SFRY, he was imposed the sentence of imprisonment of 10 years.

9. The defence counsel for the appellant filed an appeal against the judgment of the Cantonal Court of 16 March 2016, for a substantial violation of the provisions of the criminal procedure, a violation of the criminal law, an erroneous or incomplete establishment of the facts and decision on criminal sanction. The defence counsel proposed that the appeal be granted, that the impugned judgment be quashed, and that a hearing be ordered before that court.

10. The Supreme Court of FBiH issued decision no. 04 0 K 004934 16 Kž 2 of 8 February 2017, thereby partially granting the appeal of the appellant's counsel, quashing the judgment of the Cantonal Court in Zenica of 16 March 2016 and ordering a hearing before the Supreme Court in the present case.

The proceedings resulting in the challenged decision

11. By the Judgment of the Supreme Court no. 04 0 K 004934 17 Kžk of 17 January 2018, the appellant was found guilty for he, as a member of the Kakanj Public Security Station, together with F.D. had committed the murder of a Serb civilian S.P. during the armed conflict in Bosnia and Herzegovina (in place and in the manner described in more detail in operative part of the judgment),

in violation of the rules of international humanitarian law, thereby committing the criminal offense of War Crimes against Civilians under Article 142, paragraph 1 in conjunction with Article 22 of the inherited CC SFRY, and was sentenced to seven years in prison. Pursuant to Article 212, paragraph 3 of the Criminal Procedure Code of the Federation of Bosnia and Herzegovina, the injured party B.P. was instructed to pursue a property claim in civil proceedings, while the appellant was released from the obligation to reimburse the costs of the criminal proceedings.

12. In the reasoning of the judgment, the Supreme Court primarily stated that, in accordance with the decision of that Court of 8 February 2017, pursuant to Article 332, paragraph 2 of the CPC of FBiH, at the hearing held before that court, the evidence adduced during the first instance proceedings was taken over by reading the statements from the main trial held before the Cantonal Court (more closely described on pages 3 through 6 of the judgment). It further stated that at the hearing before the Supreme Court, Dr. Sabiha Brkić Silajdžić, an expert witness, and witnesses J.M. and Š.A. were re-examined. In addition, the following documents were admitted into evidence: record of examination of witness Š. A. made at the Zenica-Doboj Canton Ministry of Interior on 17 September 2012, record of examination of witness J. M. made at the competent police station on 18 August 2011 and record of the Cantonal Prosecutor's Office of 4 January 2013 with the testimony of witness J. M. Furthermore, it was also pointed out that at the hearing held before the Supreme Court, evidence was adduced by Mr. Alija Kotarević, an expert witness for ballistic and mechanoscopic analysis, who was heard at the hearing of 24 October 2017, and the written findings and opinion of the aforementioned expert of 12 October 2017 were submitted to the case-file as evidence. Besides, the Supreme Court pointed out that it also examined the evidence of the forensic analysis by the expert witness Dr. Zdenko Cihlarž, a forensic specialist, related to the damage to the body remains of the injured party S. P., so the expert witness was directly examined at the hearing, and his written findings and opinion of 7 November 2017 were included in the evidence. Moreover, upon a proposal of the defence counsel for the accused, witnesses R.D., M.B. and E.F. were examined at the hearing before the Supreme Court.

13. The Supreme Court pointed out that the testimony of the examined witnesses showed that S.P. had the status of a civilian at the time of the murder. Since international humanitarian law applies from the beginning of armed conflict until the cessation of hostilities, throughout the territory under the control of one of the parties, the Supreme Court pointed out that the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, as well as the provision of Article 3, paragraph 1, subparagraph a) of the Convention, prohibiting violence to life and person, in particular murder of all kinds, mutilation, cruel treatment

and torture, should be applied to civilians as well. However, the Supreme Court stated that it was established during the proceedings that the appellant, by the actions described in the operative part of the judgment, had violated the mentioned provision. The Supreme Court stated that according to the testimony of witnesses J.M. and Š.A., and partly the testimony of the aggrieved parties S.P. and B.P., as well as the testimony of witnesses J.J. and S.K. and according to the other evidence adduced, it was established that the appellant, separated from the group, had approached the injured party S.P. and addressed him with the cited words and then gave him a strong blow with his right fist in the area of his head. As a result, S. P. staggered and slid down the door stem into a squatting position. After that, the appellant, while standing above him, struck S.P. hard using the buttstock of the automatic rifle and, while S.P. was in such a position, the victim was approached by F. D., who fired five to six bullets from his automatic rifle in the direction of S. P.'s chest. In this connection, the Supreme Court pointed to the contents of the testimony of the witness J.M. regarding the appellant's participation in the incriminating event (pages 9 and 10 of the judgment), stating that the Court accepted the testimony of the mentioned witness as credible, since the witness was consistent and convincing in describing the event itself. The witness clearly described the place, manner and circumstances under which the appellant struck hard with his right fist the injured party S.P. in the head, which is why the Court gave credence to his testimony in that part, although other witnesses who had been on the scene did not confirm that in their statements. The other witnesses only stated that they had not seen anyone hitting the injured S.P., which did not mean that it had not really happened. It was also stated that the Supreme Court accepted the testimony of witness J.M. in the part wherein he stated that the appellant, using the buttstock of his automatic rifle, had given a strong blow to the right side of the injured party's head. In addition, J.M.'s testimony in that part was corroborated by other evidence, primarily the testimony of witness Š.A., as referred to in detail on pages 10 and 11 of the judgment. In this connection, the Supreme Court stressed that it accepted the testimony of witness Š.A. as credible since, in addition to his testimony regarding the essential facts and circumstances consistent with the testimony of witness J.M. to whom the Court also gave credence, the Court had in mind that the testimony of the witness S.A. was clear and consistent, and that the witness made the specific statements about the specific facts. In addition, the testimonies of witnesses S.A. and J.M. were corroborated by the testimonies of other witnesses as to some other circumstances related to the specific case (as described in detail on pages 11 and 12 of the judgment).

14. As to the reliability of the testimony of witness J.M., the Supreme Court stressed that it followed from the part of his testimony wherein he stated that the appellant had never addressed and

asked him not to talk about the specific (incriminating) event, while F.D. begged him the opposite. In addition, the witness clearly stated that there were never any threats from the appellant and that they were encountering on the street and greeting each other. The aforementioned testimony of the witness indicates the absence of any intention to charge the appellant unfoundedly, as well as the absence of any reasons for which the witness would falsely charge the appellant. Therefore, the Supreme Court pointed out that it could not accept that the position of the appellant's defence counsel was well-founded as to the credibility of witnesses Š. A. and J. M., where indicating that the witnesses were highly motivated to shift the liability for complicity in the murder from themselves to the appellant's "shoulders". Therefore, the Supreme Court stated that the appellant, apart from his subjective position (that the trial was rigged by the mentioned witnesses), did not state specific circumstances that would indicate such a conclusion and, accordingly, the allegations (specified on page 13 of the judgment) did neither call into question the credibility of these witnesses, nor the credibility of their statements relating to the offense the appellant had been found guilty of by the judgment. In addition, the Supreme Court (as described in detail on pages 13–15 of the judgment) also discussed the issue of disagreement about the details of the event in question in the testimonies of the two witnesses (both at the investigation stage and at the main trial), as well as the credibility of their testimonies, stating that with the established substantial agreement of the testimonies of these witnesses on the decisive facts, that certain deviations as to the details of the events did not call into question their credibility. Having accepted the testimonies of the two witnesses as accurate and credible, the Supreme Court had in mind that they were supported, first of all, by the findings and opinion of expert witness Dr. Zdenko Cihlarž, a specialist in forensic medicine, as well as the findings and opinion of expert witnesses Dr. Sabiha Brkić Silajdžić and Mr. Alija Kotarević, an expert witness for ballistic and mechanoscopic analysis. Namely, the aforementioned expert witnesses gave their opinion about the injuries found on the skeletal remains of the injured S.P. and the injuries suffered by him during the event in question, the manner in which the injuries had been inflicted, and the causal link between those injuries and the fatal consequence (as described in detail on pages 15 through 18 of the judgment). Bringing the testimonies of the two witnesses concerned into connection with the findings and opinion of the expert witnesses concerned, as well as the evidence of a material nature (record of exhumation of mortal remains, forensic examination of the body of S. P. with photographs), the Supreme Court pointed out that it found that the appellant had committed the acts for which he was found guilty by the judgment. In reaching the above conclusion, the Supreme Court indicated that it took into account the testimony of witness A. T., as well as the appellant's testimony given by him as a witness (he denied his participation in the event in question and in inflicting bodily injuries on the injured party S. P.), but that the Court did not

accept those statements for they contradicted the evidence previously stated and analysed, nor were they corroborated by other evidence. It was also stated that the aforementioned statement of the appellant was not credible for it was not based on other evidence adduced, but aimed at avoiding criminal liability.

15. Finally, having regard to the factual description of the appellant's actions, the Supreme Court stated that the defendant was aware that the injured party could die, and that he wanted to do so since he was aware that it was a dangerous injury weapon and that it struck a vital part of the injured party's body. In view of the aforementioned, the Supreme Court concluded that the appellant had acted with intent. It was also emphasized that the appellant had committed the criminal offense as a co-perpetrator, since based on the evidence adduced in these proceedings, it was established with certainty that, on critical occasion (after the described actions) the appellant addressed F.D. and said: "Kill him Dedo". He fired five to six bullets from his automatic rifle towards the chest of S.P. In meting out the punishment to the appellant, the Supreme Court stated that it had in mind the purposes of sentencing, taking into account all the circumstances relevant to the sentencing (described in detail on page 19 of the judgment), and underlined that the prison sentence pronounced was proportionate to the gravity of the offense committed and the degree of guilt of the appellant, and that it was necessary and sufficient to achieve the objectives of both specific and general crime prevention.

IV. Appeal

a) Allegations from the appeal

16. The appellant holds that the challenged decision is in violation of his rights under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"). The appellant alleges that the court violated the right to presumption of innocence and principle *in dubio pro reo*, which resulted in the arbitrary conclusion by the court that he had inflicted the injury to the right side of the head of the injured party. In this connection, the appellant complains of an arbitrary assessment of other numerous evidence, including the credibility of the findings of the expert witnesses. According to the appellant's assessment, the Supreme Court simply disregarded a number of statements in favour of the appellant, accepting only parts of the statements that it considered to corroborate the allegations in the indictment. The appellant refers to the witnesses interrogated in the present criminal case, stating that the Supreme Court, in reaching a judgment of conviction, essentially relied on the testimonies of two unreliable witnesses – direct participants in

the event (J.M. and Š. A.), as "highly interested and motivated to shift the liability to someone else, specifically, to the appellant". It also relied on the testimonies of the aggrieved parties S.P. and B.P. who testified according to the testimony of witness J.M. In addition, the appellant points out that those testimonies were full of controversy, inconsistencies in each of them separately, and significant inconsistencies of the statements as to the decisive facts, as well as that these statements were essentially subsequently added to and changed. It is therefore stressed, "it is clear that the conclusion of the court on the consistency of the statements in the essential fact of inflicting the injury is arbitrary". In the light of the aforementioned, and in the context of allegations on the arbitrary assessment of evidence and a violation of the principle *in dubio pro reo*, the appellant states that the judgment is based on evidence which does not indicate with certainty that the appellant had committed a criminal offense, and the court disregarded the obvious contradictions in the testimonies of the witnesses. Therefore, the requirements under Article 305(7) of the FBIH CPC were not met in the present case. In addition, the appellant highlights that the Court failed diligently to assess the findings of the expert witness Dr. Sabiha Silajdžić Brkić, ballistics expert witness Alija Kotarević and expert forensic witness Dr. Zdenko Cihlarž. Otherwise, it would not have drawn the arbitrary conclusion on the facts that create the criminal offense of War Crimes against Civilians, although it is clear from the case and evidence that there are no elements of the criminal offense in question.

b) Response to the appeal

17. In response to the appeal, the Supreme Court states that the allegations in the appeal are unfounded. It is stressed that all the evidence on which the Supreme Court based the impugned judgment were assessed in accordance with the provisions of Article 296, paragraph 1, in conjunction with Article 16 of the FBiH CPC. In addition, the Court assessed all the evidence diligently, *i.e.* it assessed pieces of evidence one-by-one and in relation to each other and, based on such an assessment, the Court concluded whether a fact had been proved. The Court further states that the right of the court to assess the existence or lack of facts is neither connected nor restricted by the specific formal rules of evidence. Based on the diligent assessment of all the evidence separately and taken together, the Court drew the conclusions as to the existence of facts and established that the appellant had committed the criminal offense of which he was found guilty. According to the Supreme Court, it follows that the allegations in the appeal are unfounded where stating that the evidence was wrongly and incompletely assessed, or that the assessment of the evidence adduced was arbitrary. The Court highlights that the reasoning of the appeal does not contain specific and well-argued reasons, which would make the allegations plausible that the

evidence were assessed inadequately and incorrectly. It merely presents the assessment of individual evidence without bringing them into connection with all the evidence adduced, and the subjective views of the appellant. In addition, it is pointed out that in the impugned decision the Court ruled on all the objections raised by the appellant's defence as to the credibility of individual witnesses and their testimonies, in respect of which the Court gave adequate reasons, and it maintains them in their entirety. Furthermore, the allegations in the appeal calling into question the importance of the findings and opinion of the medical expert witness, which were assessed by the Court in the impugned decision, were not substantiated and could not be accepted as well-founded. Besides, the reasoning of the impugned decision gave the clear reasons on admissibility and credibility of the findings and opinions of expert witnesses that were brought into connection with other evidence. It is stated that the conclusion of the Supreme Court on proving that the appellant had committed the criminal offense he was found guilty of is based on all the evidence adduced. Therefore, the Supreme Court states that it maintains all the reasons given in the impugned decision. For that reason, there was no room for applying the rule *in dubio pro reo*, the application of which is insisted on in the appeal in question. As the impugned decision is not in violation of the appellant's right referred to in the appeal, it is suggested that the appeal be dismissed as ill-founded.

18. The Cantonal Court states that the second instance court, by passing the impugned decision, acted in line with the regulations of the domestic legislation, and that the provisions of the European Convention referred to in the appeal were not violated, so it is proposed that the appeal be dismissed as ill-founded.

19. The Cantonal Prosecutor's Office states that the appellant reiterates the identical facts as those presented during the hearing before the Cantonal Court and the Supreme Court respectively. The mentioned Courts gave the legal, convincing and logical reasoning on those facts for their decisions.

V. Relevant Laws

20. The **Criminal Code of Socialist Federal Republic of Yugoslavia** (*Official Gazette of SFRY*, 44/76, 36/77 – Corrigendum, 34/84, 74/87, 57/89, 3/90, 38/90, 45/90 – Corrigendum).

For the purposes of the present decision, the Constitutional Court uses the unofficial revised text of the regulations made in the Constitutional Court of BiH, as published in the official gazettes, since it is not published in all official languages and alphabets, and which, as relevant, reads:

COMPLICITY

Article 22

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

WAR CRIMES AGAINST A CIVILIAN POPULATION

Article 142, paragraph 1

(1) Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders an attack against the civilian population, settlement, individual civilians or persons unable to fight, which results in the death, […]; an indiscriminate attack without selecting a target, by which the civilian population is injured; that the civilian population be subject to killings, […], or who commits some of the foregoing acts, shall be punished by imprisonment for not less than five years […].

21. The **Criminal Procedure Code of Federation of Bosnia and Herzegovina** (*Official Gazette of FBiH*, 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13 and 59/14).

For the purposes of this decision, the Constitutional Court uses unofficial revised text of the regulations made in the Constitutional Court of BiH, which, as relevant, reads:

Article 3

Presumption of Innocence and In Dubio Pro Reo

(1) A person shall be considered innocent of a crime until guilt has been established by a final verdict.

(2) A doubt with respect to the existence of facts composing characteristics of a criminal offense or on which the application of certain provisions of criminal legislation depends shall be decided by the court with a verdict and in a manner that is the most favourable for the accused.

Article 16

Free Evaluation of Evidence

The right of the court, prosecutor and other bodies participating in the criminal proceedings to evaluate the existence or non-existence of facts shall not be related or limited to special formal evidentiary rules.

Article 296
Evidence on which the verdict is grounded

(1) The court shall reach a verdict solely based on the facts and evidence presented at the main trial.

(2) The court is obligated to evaluate conscientiously every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, to conclude whether the fact(s) have been proved.

Article 305, paragraph 7

Contents of the Verdict

(...)

(7) The court shall specifically and completely state which facts and on what grounds the court finds to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence, the reasons why the court did not sustain the various motions of the parties, the reasons why the court decided not to directly examine the witness or expert whose testimony was read, and the reasons guiding the court in ruling on legal matters and especially ascertaining whether the criminal offense was committed and whether the accused was criminally responsible and in applying specific provisions of the Criminal Code to the accused and to his act.

VI. **Admissibility**

22. Pursuant to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina.

23. Pursuant to Article 18(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the

judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

24. In the present case the subject matter challenged by the appeal is the judgment of the Supreme Court, no. 04 0 K 004934 17 Kžk of 17 January 2018, against which there are no other effective remedies available under the law. While considering the timeliness of the appeal, the Constitutional Court observes that the appellant stated that the mentioned judgment of the Supreme Court dated 17 January 2018 was delivered to him on 27 April 2018, *i.e.* to his defence counsel on 3 May 2018. At the request of the Constitutional Court, the Cantonal Court failed to deliver the postal receipt on the delivery of the challenged judgment to the appellant or to his defence counsel. Therefore, due to the lack of evidence on the delivery of the challenged judgment of the Supreme Court dated 17 January 2018 to the appellant and his defence counsel, and bearing in mind that the judgment in question is a final decision in this criminal law matter, the Constitutional Court concludes that in assessing the timeliness of the appeal it will accept the appellant's allegation that the mentioned judgment of the Supreme Court was delivered to him on 27 April 2018, *i.e.* on 3 May 2018, as the appellant cannot be blamed for the failure of the court to deliver the postal receipt on the delivery of the challenged judgment. Given that the appeal was lodged on 13 June 2018, the Constitutional Court concludes that the respective appeal was indisputably lodged within the time limit of 60 days, as prescribed by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court, as there is no formal reason rendering the appeal inadmissible, nor is it manifestly (*prima facie*) ill-founded.

25. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18 (1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the present appeal meets the admissibility requirements.

VII. **Merits**

26. The appellant holds that the challenged decision is in violation of his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention.

27. Article II(3) of the Constitution of Bosnia and Herzegovina, in so far as relevant, reads as follows:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.

28. Article 6(1), (2) and (3)(d) of the European Convention, as relevant, read:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

[...]

d) to examine or have examined witnesses against him, [...].

29. The Constitutional Court notes that the proceedings in question related to the determination that the criminal charges against the appellant were well-founded, therefore, the appellant in the respective proceedings was entitled to the guarantees of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention.

30. The Constitutional Court observes, first, that the appellant essentially reiterated the allegations he had made in the proceedings before the Supreme Court.

31. The appellant's allegations about a violation of the right to a fair trial essentially concern the manner in which the evidentiary procedure was conducted in the relevant legal matter, *i.e.* the assertion that the Supreme Court arbitrarily and erroneously assessed the evidence adduced. As a result, according to the appellant, the facts of the case were erroneously or incompletely determined and, consequently, the positive legislation was erroneously applied. In this connection, the Constitutional Court primarily points to the fact that, according to the case-law of the European Court of Human Rights ("the European Court") and of the Constitutional Court, it is not the task of these courts to review the ordinary courts' findings relating to the facts of the case and the application of the law (see European Court, *Pronina v. Russia*, Decision on Admissibility of 30 June

2005, Application no. 65167/01). Namely, the Constitutional Court is not called upon to substitute ordinary courts in the assessment of facts and evidence, but, in general, it is the task of ordinary courts to assess the presented facts and evidence (see European Court, *Thomas v. the United Kingdom*, judgment of 10 May 2005, Application no. 19354/02). Likewise, the Constitutional Court will not interfere with the manner in which the ordinary courts admitted evidence as evidentiary material. The Constitutional Court will not interfere with the situation where ordinary courts gave credence to the evidence of one party in a procedure based on a free assessment of evidence. That is exclusively the role of ordinary courts, even when the statements of witnesses at a public hearing and under oath are contradictory to one another (see the European Court, *Doorson v. The Netherlands*, Judgment of 26 March 1996, published in Reports no. 1996-II, paragraph 78).

32. The European Court and Constitutional Court pointed out in a number of decisions that even though a domestic court has a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions, an authority is obliged to justify its activities by giving reasons for its decisions (see ECtHR, *Suominen v. Finland,* judgment of 1 July 2003, application no. 37801/97, paragraph 36 and *mutatis mutandis*, Constitutional Court, Decision no. *AP 5/05* of 14 March 2006, available at: www.ustavnisud.ba).

33. Thus, the task of the Constitutional Court is to establish whether the proceedings, including the method of the presentation of evidence, viewed as a whole, were fair. As a rule, all the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument (see, *Asch v. Austria*, Judgment of 26 April 1991, Series A no. 203, page 10, paragraph 27, and *Kovač v. Croatia*, Application no. 503/05, Judgment of 12 April 2007 paragraph 25). As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he was making his statements or at a later stage of the proceedings (see, *Klimentyev v. Russia*, Application no. 46503/99, Judgment of 16 November 2006, paragraph 124, and *Z. v Latvia*, Application no. 14755/03, Judgment of 24 January 2008, paragraph 94).

34. In addition, in the context of assessment of evidence in the criminal law matter in question, the appellant pointed to a violation of the principle *in dubio pro reo*. The mentioned principle, within the meaning of the Convention, is a specific expression of the presumption of innocence (see, the European Court, *Vassilios Stavropoulos v. Greece*, Application no. 35522/04, paragraph 39 and *Cleve v. Germany*, Judgment of 15 January 2015, Application no. 48144/09, paragraph 52), and coincides with one of the basic requirements of criminal justice that the prosecution has to prove its

case beyond reasonable doubt and in accordance with one of the fundamental principles of criminal law, namely, with the principle *in dubio pro reo* (see *Melich and Beck v. Czech Republic*, Application no. 35450/04, Judgment of 24 July 2008, paragraph 49), that following the diligent assessment of evidence (separately and together with other pieces of evidence), in the event of existence of doubts as to the existence of the legally relevant (decisive) facts which make the elements of a criminal offense, particularly if it concerns guilt, it adjudicates in favour of the accused. In the opinion of the Constitutional Court, the principle *in dubio pro reo* may be called into question if there is no comprehensive analysis of all the evidence presented in the reasoning for the court's decision, thereby removing such possible doubt. In accordance with the mentioned principle, the court will render a judgment of acquittal not only in case when the innocence of the accused has been proved but also in case when the guilt of the accused has not been proved.

35. In the present case, the appellant claims a violation of the principle *in dubio pro reo, as the Supreme Court reasoned and assessed only evidence that are in favour of the judgment of conviction, thereby ignoring and not assessing the evidence the appellant adduced. The appellant's contention is essentially substantiated by his allegations relating to the credibility of witnesses J. M. and Š. A., whose statements the Supreme Court, in the appellant's opinion, erroneously assessed and should not have been given credence. In this connection, in addition to the aforementioned principles,* the Constitutional Court *recalls that it is beyond* its jurisdiction to appraise the quality of the conclusions of ordinary courts regarding the assessment of evidence unless such assessment appears manifestly arbitrary. Likewise, the Constitutional Court will not interfere with the manner in which ordinary courts admitted evidence as evidentiary material. The Constitutional Court will not interfere with a situation as to which evidence of the parties to the proceedings were given credence by the ordinary courts based on free assessment of evidence. It is solely the role of ordinary courts, even where the statements given by witnesses in court and on oath are in conflict (see, the European Court, *Doorson v. The Netherlands, Judgment* of 26 March 1996, published in Reports no. 1996-II, paragraph 63).

36. By bringing the mentioned views into connection with the facts of the present case, the Constitutional Court observes that the reasoning for the challenged decision does not lack the careful and meticulous assessment of evidence, both those proposed by the prosecution, as well as those proposed by the appellant's defence. *The Supreme Court* provided detailed reasons and reasoning as to why it accepted certain pieces of evidence in entirety or only in part, basing the conclusion on the assessment related to other evidence adduced. In doing so there was no omission concerning a detailed and exhaustive analysis of certain vagueness and imprecisions in the

testimonies of the witnesses J.M. and S.A. and objections in relation to the credibility of their testimonies and the credibility of those witnesses, including the findings and opinions of experts in the criminal matter in question. Special attention was paid to the aforementioned in the challenged decision, too. *The Supreme Court carried out a detailed analysis of the testimonies of the aforementioned witnesses*, and provided the reasons and reasoning as to why the testimonies of those witnesses were given credence. The Constitutional Court does not find that the reasoning is arbitrary or that it calls into question the conclusion of the Supreme Court that the appellant, as a co-perpetrator, was a participant in the incriminated event of which he was found guilty. The Constitutional Court observes that particularly in that regard the relevant parts of the challenged decision offer the detailed reasoning in respect of the value of the testimonies of those witnesses. It was ultimately concluded that *the Supreme Court did examine their consistency when assessing their testimonies* (as well as the testimonies of other witnesses who testified in these proceedings). Also, a comparison was made between the facts about which a particular witness testified and those facts which were established by other witnesses, and the facts established by means of material evidence, all in order to establish whether they were corroborated or challenged by other evidence in the case, which is the reason why any arbitrariness in the challenged decision is ruled out. In view of the above, according to the Constitutional Court, it follows that the establishment of the appellant's guilt in the present case was not, as he alleged, based exclusively on the testimonies of the specified witnesses (J.M. and S.A.) but on a comprehensive analysis of the mentioned evidence as well as of other evidence adduced at the main trial, and the appellant and his defence counsel had a possibility to contest them. In view of the assessment of the evidence adduced, the Supreme Court established decisive facts, which is why the appellant's assertions are ill-founded, which ultimately raised the issue of the facts of the case established in the proceedings in question. Therefore, the Constitutional Court could not conclude that *the Supreme Court exceeded its discretion to assess the evidence produced in the course of proceedings, which would result in* a violation of Article 6(1) of the European Convention, that is, that *the Supreme Court* had the slightest doubt regarding any piece of evidence and that it failed to interpret it in a manner which was more favourable to the appellant, as a result of which there was no violation in the present case of the principle *in dubio pro reo* under Article 6, paragraph 2 of the European Convention.

37. Furthermore, the Constitutional Court observes that the appellant, by stating that *the Supreme Court* "simply disregarded numerous testimonies favourable to the appellant, accepting only parts of the testimonies which it deemed to confirm the allegations stated in the indictment", raised the issue of equal treatment of the parties in the criminal proceedings in question. According

to the Constitutional Court, these allegations in the present case essentially concern the assessment of the evidence itself, and this right in criminal proceedings often coincides with the principle of "equality of arms", as an inherent element of a fair trial under Article 6(1) of the European Convention. The right to "equality of arms" requires that each party be offered a reasonable (procedural) possibility to present their case under the conditions that do not put a party at a disadvantage in comparison to the other party. Bringing the mentioned positions into connection with the circumstances of the present case, the Constitutional Court bears in mind that the appellant, namely his defence counsel was allowed to propose their witnesses in the criminal proceedings in question, as well as to examine the witnesses of the Cantonal Prosecutor's Office and to contest their allegations from the testimonies deposited during the investigation and at the main trial. For that reason, the Constitutional Court holds that the appellant was not put at a disadvantage in comparison to the Cantonal Prosecutor's Office and that, therefore, his right to equality of the parties to the proceedings and the right to defence were not violated within the meaning of Article 6(3)(d) of the European Convention.

38. Finally, the Constitutional Court notes that the appellant challenges the existence of general elements of the criminal offense of War Crimes against Civilians, which he was convicted of by the impugned decision after a retrial before the Supreme Court and, according to the appellant, it is primarily reflected in the failure to prove the elements of the criminal offense, *i.e.* in the arbitrary conclusion about the facts that create the elements of the aforementioned criminal offense which he was charged with and convicted of. In this connection, the Constitutional Court notes that it ensues from the reasoning of the impugned judgment of the Supreme Court that that Court elaborated in detail all the elements of the criminal offense in question. In addition, according to the Constitutional Court, there is no arbitrariness in the conclusion of the Supreme Court regarding the determination of the state mind of the appellant, as a co-perpetrator at the material time, *i.e.* that he committed the criminal offense with (direct) intent. In view of the above, the Constitutional Court holds that the Supreme Court drew its conclusion as to the existence of the criminal offense in question, in the context of the appellant's actions, in a manner consistent with the standards of the right to a fair trial and, accordingly, the appellant's allegations as to the legal qualification of the criminal offense in question appear to be unfounded.

39. In view of the aforementioned, the Constitutional Court notes that in determining the appellant's criminal responsibility in the criminal proceedings in question, taken as a whole, the appellant was not denied any procedural guarantee, which would lead to a violation of the right to a fair trial within the meaning of Article 6(1), (2) and (3)(d) of the European Convention.

VIII. **Conclusion**

40. The Constitutional Court concludes that there is no violation of the appellant's right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1), (2) and (3)(d) of the European Convention. There is no violation as looking at the proceedings as a whole, the Supreme Court gave detailed, clear and valid reasons for the challenged decision as to the evidence adduced and the application of the positive legislation. In addition, the appellant's defence had an equal possibility as the Cantonal Prosecutor's Office to present and propose evidence, as well as to challenge them. The Supreme Court gave logical and convincing reasons indicating that it was proven that the appellant as a co-perpetrator had committed the criminal offense of War Crimes against Civilians under Article 142 (1) of the SFRY CC. Also, there is nothing in the reasoning for the challenged judgment indicating that *the Supreme Court had any doubt as to* the facts that create the elements of the criminal offense which he was charged with, so as to resolve that doubt by a judgment in a manner that would be more favourable to the appellant.

41. Pursuant to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

42. Pursuant to Article 43 of the Rules of the Constitutional Court, Judge Zlatko M. Knežević gave a statement of dissent from the majority decision.

43. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina