The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina,* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Ms. Valerija Galić, President
Mr. Tudor Pantiru, Vice-President
Mr. Miodrag Simović, Vice-President
Ms. Seada Palavrić, Vice-President
Mr. Mato Tadić,
Ms. Constance Grewe,
Mr. Mirsad Ćeman,
Ms. Margarita Tsatsa-Nikolovska,
Mr. Zlatko M. Knežević

Having deliberated on the appeal of Mr. **Novak Đukić** in Case No. **AP 5161/10**, at its session held on 23 January 2014 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. **Novak Đukić** is hereby granted**.**

The violation of Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms has been established.

The Verdict of the Court of Bosnia and Herzegovina No. X-KRŽ-07/394 of 6 April 2010 shall be quashed.

The case shall be referred back to the Court of Bosnia and Herzegovina which is obligated to employ an expedited procedure and take a new decision in line with Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court of Bosnia and Herzegovina is ordered, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to inform the Constitutional Court of Bosnia and Herzegovina, within three months as from the date of delivery of this Decision, of the measures taken to execute this Decision.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

REASONING

I. Introduction

1. On 22 November 2010, Mr. Novak Đukić ("the appellant") from Banja Luka, represented by Mr. Dušan Tomić, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court"), against the Verdicts of the Court of Bosnia and Herzegovina ("the Court of BiH") Nos. X-KRŽ-07/394 of 6 April 2010 and X-KR-07/394 of 12 June 2009 respectively. The appellant supplemented his appeal on 5 January 2011, 25 April 2011, 9 October 2013 and 4 December 2013 respectively. Also, on 9 October 2013 he lodged a request for the issuance of an interim measure.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Court of BiH and the Prosecutor's Office of Bosnia and Herzegovina ("the Prosecutor's Office of BiH") were requested on 6 November 2013 to submit their respective replies to the appeal.

3. The Court of BiH and the Prosecutor's Office of BiH submitted their replies to the appeal on 21 November 2013.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 27 November 2013.

III. Facts of the Case

5. The facts of the case, as they appear from the appellant's allegations and the documents submitted to the Constitutional Court may be summarized as follows.

6. The Verdict of the First Instance Panel of the Court of BiH ("the First Instance Panel") no. X-KR-07/394 of 12 June 2009, which was upheld by the Verdict of the Appellate Panel of the Court of BiH ("the Appellate Panel") no. X-KRŽ-07/394 of 6 April 2010, found the appellant guilty of the criminal offence of the War Crime against Civilians under Article 173(1)(a) and (b) of the Criminal Code of Bosnia and Herzegovina ("the CC BiH"). The First Instance Panel conducted a criminal proceeding and established that during the state of war and the armed conflict in Bosnia and Herzegovina, contrary to the rules of international humanitarian law (the provisions of the Geneva Convention for the Protection of Civilian Persons in Time of War and Protocol additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts) and in violation of the rules of international law, the appellant had ordered the artillery attack on the populated area of Tuzla, the explosion of which had resulted in the death of 71 person, with over 130 persons

sustaining minor or serous bodily injuries. The appellant was sentenced to a long term imprisonment of 25 years for the given criminal offence.

7. In the reasoning of the Verdict the First Instance Panel stated, *inter alia*, that following a scrupulous and meticulous analysis of each piece of evidence individually and in connection with other evidence presented at the main trial, it established the facts of the case as stated in the enacting clause of the Verdict. Namely, the First Instance Panel established that the appellant, in the capacity of the Commander of the Ozren Tactical Group of the Army of Republika Srpska ("TG Ozren ARS"), had ordered on 25 May 1995 the Artillery Platoon, which was subordinated to him and located on the Ozren Mountain, Petrovo Municipality – the wider area of the Panjik village, to shell with 130 mm caliber M 46 guns the town of Tuzla, which was declared a United Nations Safe Area by the United Nations Resolution 824 of 6 May 1993. It was alleged that the Artillery Platoon members had executed that order by firing a number of artillery missiles on the town of Tuzla, of which one artillery missile, type OF-482, had hit a location in the immediate centre of the town called "Kapija" at 20:55 hours, which explosion had resulted in the death of 71 person, with over 130 persons sustaining minor or serous bodily injuries.

8. The First Instance Panel established that the appellant as the Commander of the Ozren Tactical Group had been present in his command post on 25 May 1995. Thanks to the reporting system which had been in place within the ARS, and which had been in operation also on 25 May 1995, the accused was aware of the situation on the ground, which had worsened several days prior to 25 May 1995. On 25 May 1995 he had had the command over the units subordinated to him, and had been, as usual, in the position wherefrom he had issued orders to his subordinates. As the First Instance Panel further alleged, there was not a single piece of evidence whatsoever suggesting that the appellant had been prevented that day from issuing orders or that he had delegated his authority to issue orders to anyone else, as this conclusion was corroborated by two orders that the accused had issued that day from his command post. The First Instance Panel reached an incontestable conclusion that this act was the result of a direct order issued by the Commander of the Ozren Tactical Group, that is the appellant himself. The Panel stated in the reasoning of the Verdict the evidence on which basis it established the relevant facts on the basis of which it may conclude beyond any reasonable doubt who was responsible for the perpetration of the criminal offence under Count 1 of the Indictment. The case-file contains two orders signed by the appellant in his command post on 25 May 1995: T-131 (Order for Commanders to Report, Ozren TG Command, Commander Novak Đukić, Strictly Confidential No. 01/231-1 dated 25 May 1995) and T-132 (Order to Units to Provide Information, Ozren TG Command, Commander Novak Đukić, Strictly Confidential No. 01/232-3 dated 24 May 1995).

9. By summarizing these findings, the First Instance Panel stated that the order for the employment of an M46 130 mm gun was in the exclusive jurisdiction of the Ozren Tactical Group Commander. Furthermore, Chiefs of Artillery could give proposals to the commander for the employment of this gun, but they could not issue an order for artillery fire, an order could be issued both in writing and orally, the M46 130 mm gun crew had had a direct wired telephone connection only with the Ozren TG Command, and the Ozren TG Command had been located in Panjik. The appellant was the ultimate person in the chain of command who could issue orders for the employment of the M46 130 mm gun. Arbitrary or unauthorized artillery fire had never been recorded, and on 25 May the appellant had been at his command post. In view of the aforementioned, the First Instance Panel concluded beyond a reasonable doubt that the appellant had committed the criminal act sanctioned by law as described under Count 1 of the Indictment.

10. The basic features of the criminal offence of the War Crime against Civilians, as the First Instance Panel concluded, are reflected in the existence of war and in the violation of the rules of international law and in the specific acts of the appellant within the scope of such behaviour. With regard to the applicability of substantive law, two legal principles are relevant for the Court of BiH. The first being the principle of legality, under which no one can be punished or sanctioned for an action which, prior to its perpetration, was not prescribed as a criminal offence punishable under the law or international legislation and for which no punishment was prescribed by law (Article 3 of the CC BiH). The second being the principle of time constraints regarding the applicability of the Criminal Code, under which the law which was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator and if the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied (Article 4 of the CC BiH). The principle of legality is also prescribed in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention").

11. Further, the First Instance Panel holds that the criminal offence that the appellant was charged with constitutes a criminal offence pursuant to international common law and therefore "*the general principles of international law*" apply to it, as defined in Article 4(a) of the CC BiH, "*the international law*" as specified in Article 7(1) of the European Convention and "*the general principles of law recognized by civilized nations*", referred to in Article 7(2) of the European Convention. Therefore, the First Instance Panel holds that based on these provisions, the CC BiH is applicable in the particular case. In addition to the aforementioned, during the time when the respective criminal offences had been committed, Bosnia and Herzegovina, as a successor state of the SFRY, was a signatory party to all the relevant international conventions on human rights and on international

humanitarian and criminal law. Likewise, the common law status of the criminal liability for war crimes against civilians and individual liability for war crimes committed during 1995 was confirmed by the Secretary General of the United Nations ("the UN"), the International Law Commission and the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("the ICTY"). In specific terms, the ICTY confirmed that the crimes of "direct attacks against civilians" and "indiscriminate attacks" were an integral part of the international common law at the time of the perpetration of the criminal offence. These tribunals established that the criminal liability for crimes against humanity and war crimes against civilians represented an imperative standard of international law, that those norms have the binding character (*ius cogens*). Therefore, in the opinion of the First Instance Panel, the criminal offence of the War Crime against Civilians, pursuant to the provisions of the Geneva Convention must be, in any case, subsumed under "*the general principles of international law*" in the light of Article 3 and 4(a) of the CC BiH. In view of the aforementioned, it is found that the war crimes against civilians constituted criminal offences at the relevant time, be it from the aspect of the international common law, or the treaty law or "*the principles of international law*", thereby observing the principle of legality, as well as the principle of *nullum crimen sine lege and nulla poena sine lege*. The First Instance Panel additionally noted that the criminal offences referred to in Article 173 of the CC BiH were also defined by the law, which was in force at the relevant time – namely the time of the perpetration of the criminal offence, and Article 142(1) of the Criminal Code of SFRY ("the CC SFRY"), which means that the respective criminal offence was punishable under the criminal code that was in force at the time, which makes the conclusions that the First Instance Panel reached regarding the principle of legality well-founded.

12. In this connection, the First Instance Panel found that the criminal offence the appellant was found guilty of constitutes a criminal offence under the international common law and therefore falls under "*the general principles of international law*", as prescribed by Article 4(a) of the Law Amending the CC BiH, and under "*the general principles of law recognized by civilized nations*", as prescribed by Article 7(2) of the European Convention, and, therefore, the CC BiH may be applied in the case at hand. Bearing in mind the mentioned principles, the First Instance Panel justified the application of the CC BiH by the fact that the punishment prescribed for the mentioned criminal offence was in any case more lenient than the capital punishment prescribed by the CC SFRY, that is the code that had been in force at the time of the perpetration of the criminal offence. Such a position, as further stated, is consistent with the Verdict rendered by the Appellate Panel in the Case against Abduladhim Maktouf, No. KPŽ 32/05 of 4 April 2006, and in the Case against Dragoje Paunović, No. KPŽ 05/16 of 27 October 2006.

13. When meting out punishment, the First Instance Panel, first and foremost, evaluated the severity of the criminal offence and the degree of liability of the appellant and found him guilty of the criminal offence of the War Crime against Civilians referred to in Article 173(1)(a) and (b) of the CC BiH considering the degree of liability, the conduct of the appellant and his personal circumstances, the personality of the accused, reformation and social rehabilitation, and having regard to the established facts of the case and legal findings. The First Instance Panel, at the same time, concluded that given the severity of the offence and the resulting consequences, only the punishment of long-term imprisonment could satisfy the interests of justice. Therefore, the First Instance Panel sentenced him for the mentioned criminal action to a long-term imprisonment of 25 years, finding that the type of criminal sanction was commensurate with the severity of the offence given the existing aggravating and mitigating circumstances, and the participation and the role of the appellant in the commission of this offence, and that the sentence will serve the overall purpose of criminal sanctions and the purpose of punishment in terms of the provisions of Article 39 of the CC BiH.

14. The Verdict of the Appellate Panel no. X-KRŽ-07/394 of 6 April 2010 dismissed the appeals lodged by the Prosecutor's Office of BiH and by the Defence Counsel for the appellant, and upheld in full the first instance verdict of 12 June 2009. The Appellate Panel holds that the challenged verdict correctly established the existence of the subjective elements of the attack directed against civilians and the indiscriminate attack under Article 173(1)(a) and (b) of the CC BiH, that is the form of liability of ordering under Article 180(1) of the CC BiH, which indicated that the objections stated in the appeal aimed in this direction were unfounded. In the wake of the aforementioned, the Appellate Panel, while examining the allegations stated in the appeal regarding the erroneously or incompletely established facts of the case, concluded that the First Instance Panel, based on the evidence presented, established unfailingly all decisive facts, which led to a correct conclusion that the appellant, by his actions, as described in Part I of the operative part of the challenged Verdict, satisfied all legal elements of the criminal offense of the War Crime against Civilians, which is the reason why it does not find the allegations stated by the defence in the appeal to be well-founded.

15. As to the application of the substantive law, the Appellate Panel established that in the respective case, both the law that was in force at the time of the perpetration of the criminal offense, as well as the law that is currently in force, prescribe as criminal offences the criminal actions of which the appellant was found guilty. Actually, these are the actions contained in the provision of Article 142(1) of the CC SFRY that was taken over. The CC BiH prescribes a sentence of at least ten years or long-term imprisonment for the criminal offense of the War Crime against Civilians under Article 173 of the CC BiH. On the other hand, the CC SFRY prescribes a sentence of a minimum of five years or

capital punishment for the criminal offense of the War Crime against Civilians under Article 142(1) of the CC SFRY. Having compared the mentioned sentences, the Court reached a conclusion that according to the applicable law, the prescribed sentence was in any case more lenient than the one prescribed earlier, notwithstanding the fact that the lower limit of the sentence in the previous law was five years. The reason being that the international common law established that a capital punishment is, in any case, more stringent punishment than one of long-term imprisonment. Likewise, according to the common law, the appellant has an absolute right not to be executed and the state must ensure that right, which was accomplished by the enactment of the new law. In addition to the aforementioned, the Appellate Panel considers that the punishment, which was imposed on the appellant in the case at hand, was not within the range that is closer to the lower limit of the sentence prescribed under the law for the respective criminal offense, in which case, exceptionally, the CC SFRY could be applied as a more lenient law. Therefore, the Appellate Panel established that the First Instance Panel, in applying the substantive law and the legal qualification of the offence, correctly applied the provisions of the applicable CC BiH, which entered into force on 1 March 2003. Thus, contrary to the allegations stated in the appeal, there was no violation of the principle of legality or time constraints regarding applicability of the law prescribed in Articles 3 and 4 of the CC BiH.

16. While examining the decision on the sentence within the scope of the allegations made in the appeal by the Prosecutor's Office of BiH and in terms of the provision of Article 308 of the Criminal Procedure Code of BiH, the Appellate Panel holds that the First Instance Panel properly meted out the punishment, taking into account all subjective and objective circumstances relating to the criminal offence and the perpetrator thereof, which make the imposed sentence adequate given the degree of culpability of the accused, the motives behind the offence, the degree of violation of the protected good, as well as personal circumstances of the accused. Therefore, the Appellate Panel holds that the long-term imprisonment sentence of 25 years that was imposed on the appellant was correctly meted out, and that the imposed sentence will serve the purpose of punishment envisaged under the provision of Article 39 of the CC BiH. The Appellate Panel recalls that the purpose of this article of the CC BiH is to express condemnation of the criminal offense, to deter the perpetrator from committing criminal offence in the future, to deter others from committing criminal offences (individual and general prevention), and in particular to influence the awareness of citizens as to the damaging effect of criminal offences and the fairness of punishment.

17. The Appellate Panel states that, regarding the aggravating circumstances on the part of the appellant, the First Instance Panel found that the appellant as a serviceman knew that an ultimate responsibility of a person entrusted with command duties is the protection of civilians, regardless of the

warring side they are on; that the appellant's direct order triggered one of the most atrocious shelling during this war overall, resulting in the death of 71 person, with over 130 persons sustaining minor or serous bodily injuries. It is stated that the First Instance Panel gave due consideration to the family circumstances of the accused, and taking into account that, although he is the father of two adult children, one child was receiving medical treatment in Belgrade. Next, the First Instance Panel assessed, as a mitigating circumstance, the fact that the accused cooperated with the prosecution bodies. All of the mentioned evidence regarding mitigating and aggravating circumstances were accepted by the Appellate Panel as well as its own conclusions, and held that in the particular case, given the gravity of the criminal offence and the resulting consequences, only a sentence of a long-term imprisonment could serve the purpose of punishment, envisaged under the provision Article 39 of the CC BiH. In addition, the Appellate Panel concluded that the proposal of the Prosecutor's Office of BiH to impose on the appellant the sentence of long-term imprisonment lengthier than the one previously established was not warranted, because the appellant had committed the respective criminal offence with a possible intent, and that he could not have known that the missile would hit the "Kapija" Square in Tuzla. Therefore, bearing in mind that the Appellate Panel found that the first instance Verdict correctly and completely established the facts of the case relative to the actions of the appellant, as well as his culpability, the Appellate Panel concluded that the imposed sentence of long term imprisonment of 25 years was correctly meted out.

IV. Appeal

a) Allegations stated in the appeal

18. The appellant holds that the challenged decisions violated Article 7 of the European Convention and Article 2(1) of Protocol No. 7 to the European Convention, the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, Article 14(1) and (2) and Article 15 of the International Covenant on Civil and Political Rights and Article 11 of the Universal Declaration of Human Rights. He holds that the mentioned verdicts were based on the erroneously and incompletely established facts of the case, which is the result of the erroneous evaluation of evidence, wherefrom, as he claims, "*the arbitrary application of law followed*".

19. As to the violation of the right referred to in Article 7 of the European Convention, the appellant indicated that he was sentenced by a legally binding and an enforceable verdict for the criminal offence of the War Crime against Civilians under Article 173 of the CC BiH, which criminal offence was also prescribed under Article 142 of the CC SFRY. The appellant holds that the courts, through erroneous interpretation of a mandatory application of a more lenient law, applied the criminal

code which was more stringent for him. He holds that he should have been sentenced under the provisions of the CC SFRY, as that law had been in force at the time of the perpetration of the respective criminal offence of the War Crime against Civilians and, because, purportedly, that law prescribed a more lenient punishment for the respective criminal offence, and was more favourable and lenient to the appellant.

20. The appellant holds that in the particular case the provision of Article 14 of the Criminal Procedure Code of BiH ("the CPC BiH") (equality of the parties to the proceedings – the principle of truth) and the provision of Article 15 of the CPC BiH (free evaluation of evidence) have been violated. Namely, Article 14 of the CPC BiH guarantees equality of the parties to the proceedings, as one of the fundamental requirements for a fair trial. This provision actually defines and establishes the principle of truth as a supreme principle of the criminal procedure. This principle binds the Court, the Prosecutor's Office and other bodies participating in the proceedings to establish truthfully and completely the facts that are exculpatory as well as inculpatory for the suspect or the accused. The Court of BiH, according to the appellant's opinion, passed its decision, *i.e.* the convicting verdict based exclusively on one piece of the presented evidence – the finding and opinion of the expert for the Prosecutor's Office of BiH, Prof Dr Berko Zečević, considering that anything associated with this piece of evidence was disputable and contrary to the rules of criminal procedure. The appellant explains extensively that he could not agree, primarily, with the procedure of the presentation of evidence and the establishment of facts, explaining elaborately that the Court could not accept the expert analysis carried out by Prof Dr Berko Zečević. He holds that, based on the documentation in the case-file, it is more than evident that it was claimed that the shell had been fired from the positions on Ozren, the village of Vrbak, from the place called Cerovo Brdo, and that the aforementioned substantive evidence and documents prepared on the basis thereof did not mention at all the position of the gun/cannon in the Panjik village. The appellant alleges that the Panjik village is more than 27,000 m away from the explosion site and that the Joint Commission found that the distance was circa 21,000 m and they informed the investigative judge of their finding right away. He holds that a reconstruction of event was not ordered by the Prosecutor's Office of BiH making thus this action of theirs unlawful as well, since it served as the basis for the expert's finding wherefrom he deduced his opinion, and was carried out in contravention of the provisions of Article 93(1) of the CPC BiH. In view of the above, the only possible and reasonable conclusion that comes to mind is that the finding and opinion of the expert Zečević, according to the appellant's opinion, were completely inconsistent with the facts and findings presented in the investigation documentation made by the Joint Commission. Given a reasonable doubt that there are two craters at the scene and the expert Zečević's denial of the findings of the Joint Commission, the

appellant considers that the expert Berko Zečević provided the false findings, thereby misleading the Panel of the Court of BiH. Considering the verdict as a whole, the appellant particularly emphasizes that the verdict exceeded the scope of the indictment, assuming its own accusatory role thereby resulting in the scope of the indictment being exceeded, which amounts to a substantial violation of the provisions of the criminal procedure under Article 297(1)(j) of the CPC BiH. If the order had been incorporated in the indictment, the appellant would have defended himself from such an assertion, in this manner, however, he was deprived of the right to defence. In addition, there is a contradiction between the verdict's enacting clause and reasons, given the fact that Kapija is mentioned in the enacting clause, whereas it cannot be found in the Order. Due to this contradiction, a substantial violation of the mentioned procedural provision under item (k)(Ic) occurred, as there was no order to target any civilian object whatsoever, particularly not in an indiscriminate manner as presented in the verdict.

21. Taking into account all the aforesaid, it may be concluded that in the course of the proceedings conducted before the Court of BiH against the appellant, a number of provisions regulating the fundamental human rights have been violated, as already outlined. As to the application of Article 7 of the European Convention, as well as Article 4(1) of the CC BiH, the appellant holds that it was clearly prescribed that criminal charges and a verdict may be based on the norm that was applicable at the time of the incriminating act, and that no heavier penalty may be imposed than the one applicable at the time of the perpetration of the offence, thereby listing several decisions of the European Court in Strasbourg and of the Constitutional Court case-law. As to the right to a fair trial, the appellant points out as the most important thing that the substantive criminal law was erroneously applied in this case, the facts of the case were incompletely and erroneously established, the enacting clause of the verdict was contradictory unto itself and to the reasons thereof, the scope of the indictment was exceeded, the principle of the presumption of innocence was violated, as well as the principle *in dubio pro reo*, the rule that the burden of proof is on the prosecution was violated, and the right to receive a reasoned judgment was violated. The appellant concludes that it is obvious that there has been no conscientious and meticulous assessment of each piece of evidence individually and in connection with other evidence, and the Court of BiH focused its attention on the evidence of the Prosecutor's Office of BiH, failing thus to assess with equal attention, or to assess at all, the evidence of the Defence, accepting the evidence of the Defence in fragments only to the extent to which and when it was necessary to support a piece of evidence of the Prosecution. The appellant alleges that the Court of BiH, instead of resolving the issue as to whether the perpetrator of the incriminating offence has been proved by conducting a profound analysis as imperatively prescribed by the provision of Article 290(7) of the CPC BiH, it was

satisfied by giving credence to the findings and the testimony of the expert for the Prosecutor's Office of BiH.

22. The appellant proposes that the appeal be granted and a violation of the right under Article 7 of the European Convention be established, as well as a violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina in conjunction with Article 6 of the European Convention, that the submission be dealt with in an expedited fashion as provided for by Article 24(4) of the Rules of the Constitutional Court, that a public hearing be held as provided for by Article 46(1) and (2) of the Rules of the Constitutional Court, that both challenged verdicts of the Court of BiH be quashed and that the case be referred back to the Court of BiH for a retrial, and that the Constitutional Court, given all the violations effected by the Court of BiH, awards a corresponding monetary amount in respect of the compensation for pecuniary and non-pecuniary damage.

b) Replies to the appeal

23. In its reply to the appeal the Court of BiH states that the allegations outlined in the appeal regarding the violation of Article 6 of the European Convention are unfounded, as the challenged verdicts, in the opinion of the Court of BiH, contain thorough and valid arguments for each individual conclusion, and, in that sense, the appellant's allegations that this was an arbitrary assessment by the court, which allegedly resulted in the violation of the principle of the establishment of truth and free evaluation of evidence, are incorrect. Namely, the first instance verdict contains a detailed reasoning on each and every relevant fact in legal terms which was the subject-matter of the indictment, as well as the reasoning as to the evidence on which basis a certain fact was established, thereby stating why the Court of BiH accepted some pieces of evidence and rejected others. In the assessment of the Court of BiH, the first instance verdict offered reasons as to why the finding of the expert Prof Dr Berko Zečević, challenged by the appellant, was accepted and not the finding and opinion of the expert Kostić, offered by the Defence, as well as the explanation of the reason why the court did not accept that a new super-expertise, and regarding each of the conclusions on facts, in addition to the expert's findings the court stated and reasoned the corroborating evidence, which clearly follows from the reasoning of the first instance verdict. Regarding all the conclusions on facts listed in the appeal, the first instance verdict contains the reasoning of the Court, and all of the conclusions of the First Instance Panel were accepted in their entirety by the Appellate Panel, thereby providing the arguments for each and every objection raised in the appeal with respect to the conclusions of the First Instance Panel.

24. As to the allegations relating to the application of the criminal code, the Court of BiH put forward a detailed argumentation in the first instance verdict relative to the application of the substantive law, in particular the CC BiH of 2003, which argumentation was upheld by the second

instance verdict, which verdicts followed the then jurisprudence and position of the Constitutional Court of Bosnia and Herzegovina expressed in the Decision in the case of *Maktouf* No. *AP 1785/06* of 30 March 2007 regarding the application of the Criminal Code of BiH to the criminal offence of the War Crime against Civilians. The second instance verdict, which found the appellant guilty, was adopted by the Appellate Panel, which, amongst the national judiciary, represents the highest ordinary court established by the Law on the Court of Bosnia and Herzegovina, thus the mentioned objection raised by the appellant on the violation of the right for a verdict to be reviewed by a higher court is manifestly ill-founded. In view of all the aforementioned, the Court of BiH holds the respective appeal is ill-founded and it proposes that the appeal be dismissed as such.

25. The reply of the Prosecutor's Office reads that the violation of the right to a fair trial did not occur, as the Court of BiH did not present or evaluate evidence arbitrarily, thereby respecting the right to defence. The Prosecutor's Office of BiH primarily holds that the appellant's claims on possible violations reflect, for the major part, his earlier allegations stated in the appeal raised before the Court of BiH during the course of the criminal proceedings overall. The fact that the appellant alleged such grounds for the appeal, which had already been the subject-matter of a thorough analysis by the criminal tribunal, does not necessarily comply with the standards which govern the procedure of review of constitutionality and the protection of human rights.

26. The Prosecutor's Office of BiH holds that the Court correctly evaluated the applicable law by applying Article 4(a) of the CC BiH and assessed its application according to the general principles of international law. Pursuant to international law the right of *nullum crimen sine lege and nulla poena sine lege* relates to the knowledge, clarity and predictability of the substantive criminal law. As the Prosecutor's Office of BiH states, under the legislation of Bosnia and Herzegovina, Article 4(1) of the CC BiH allows for an exception to the general rule so that Articles 3 and 4 do not prejudge the trial and punishment of a person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law, thus, adopting an identical text of Article 7(2) of the European Convention and Article 15(2) of the International Covenant on Civil and Political Rights. Consequently, in the opinion of the Prosecutor's Office of BiH, a person might be criminally prosecuted for the criminal offence under Chapter XVII of the CC BiH even if it is not prescribed in the domestic law, which was in force at the time of the perpetration thereof, if the offence was criminal under international or common law at the time of the perpetration thereof.

27. Furthermore, the Prosecutor's Office of BiH stated that the application of long term imprisonment in Bosnia and Herzegovina affords enough space to the domestic courts for the application of the principle of the margin of appreciation for the purpose of meting out an appropriate

criminal sanction for the sake of the individualisation of a crime. The Prosecutor's Office of BiH concluded that, in appropriate circumstances, under Article 48(1) (General Principles of Meting out Punishments) of the CC BiH, the court evaluated, within the scope of restrictions prescribed by law for a particular offence, in view of the purpose of punishment and taking into account all the circumstances relative to the meting out of punishment, and taking into account all aggravating and extenuating circumstances, all relevant issues to be considered in order to come to an appropriate criminal sanction for the given perpetrator.

V. Relevant Law

28. **Criminal Code of Bosnia and Herzegovina (***Official Gazette of BiH,* Nos. 37/03, 54/04, 61/04, 30/05, 53/06, 55/06 and 32/07), in the text applied at the time of the trial, in its relevant part reads as follows:

Principle of Legality

Article 3

(1) Criminal offences and criminal sanctions shall be prescribed only by law.
(2) No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.

Time Constraints Regarding Applicability

Article 4

(1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.
(2) If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

Trial and punishment for criminal offences pursuant to the general principles of international law

Article 4a)

Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.

Imprisonment

Article 42, paragraphs 1, 2 and 3

(1) Imprisonment may not be shorter than thirty days or longer than twenty years.

(2) For the gravest forms of serious criminal offences perpetrated with intent, imprisonment for a term of twenty to forty-five years may be exceptionally prescribed (long-term imprisonment).

(3) Long-term imprisonment may never be prescribed as the sole principal punishment for a particular criminal offence.

Reduction of Punishment

Article 49

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

a) When law provides the possibility of reducing the punishment;

b) When the court determines the existence of highly extenuating circumstances, which indicate that the purpose of punishment can be attained by a lesser punishment.

Limitations in Reduction of Punishments

Article 50, paragraph 1, item a

(1) When the conditions for the reduction of punishment referred to in Article 49 (Reduction of Punishment) of this Code exist, the punishment shall be reduced within the following limits:

a) If a punishment of imprisonment of ten or more years is prescribed as the lowest punishment for the criminal offence, it may be reduced to five years of imprisonment;

War Crimes against Civilians

Article 173

(1) Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts:

a) Attack on civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damage to people's health;

b) Attack without selecting a target, by which civilian population is harmed;

[...]

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

29. **Criminal Code of SFRY** (*Official Gazette of SFRY*, Nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90), in its relevant part, reads as follows:

Capital Punishment

Article 37, paragraphs 1 and 2

(1) The death penalty may not be imposed as the only principal punishment for a certain criminal act.

(2) The death penalty may be imposed only for the most serious criminal acts when so provided by the statute.

Imprisonment

Article 38, paragraphs 1, 2 and 3

(1) The punishment of imprisonment may not be shorter than 15 days nor longer than 15 years.

(2) The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty.

(*3) For criminal acts committed with intent for which the punishment of fifteen years imprisonment may be imposed under statute, a punishment of imprisonment for a term of 20 years may be imposed for severe forms of such an offence.*

Reduction of Punishment

Article 42

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

1) *when provided by statute that the offender's punishment may be reduced;*
2) *when it finds that such extenuating circumstances exist which indicate that the purpose of punishment can be attained by a lesser punishment.*

Mode of Reducing Punishments

Article 43, paragraph 1, item a)

(1) When there are conditions for the reduction of punishment referred to in Article 42 of this law, the court shall reduce the punishment within the following limits:

a) if a period of three years' imprisonment is prescribed as the lowest limit for the punishment for a criminal act, it may be reduced for a period not exceeding one year of imprisonment.

War Crime against Civilians
Article 142, paragraph 1

Whoever in violation of rules of international law effective in the time of war, armed conflict or occupation, orders an attack on civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damage to people's health; attack without selecting a target, by which civilian population is harmed; [...] or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

VI. Admissibility

30. 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.

31. Pursuant to Article 16(1) of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal have been exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him.

32. In the present case, the subject-matter challenged by the appeal is the Verdict of the Court of BiH No. X-KRŽ-07/394 of 6 April 2010 against which there are no other effective remedies available under the law. Next, the appellant received the challenged verdict on 22 September 2010 and the appeal was filed on 22 November 2010, *i.e.* within the 60-day time-limit provided for by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court, because it is neither manifestly (*prima facie*) ill-founded, nor is there any other formal reason that rendering the appeal inadmissible.

33. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16 (1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the respective appeal meets the admissibility requirements.

VII. Merits

34. The appellant considers that the challenged verdicts violated Article 7 of the European Convention and Article 2(1) of Protocol No. 7 to the European Convention, the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina, Article 6(1) of the European Convention, Article 14, paragraphs 1 and 2 and Article 15 of the International Covenant on Civil and Political Rights and Article 11 of the Universal Declaration of Human Rights.

35. As regards the allegations stated in the appeal, the Constitutional Court will first examine the allegations of the appellant relating to the violation of Article 7 of the European Convention.

No punishment without law

Article 7 of the European Convention reads as follows:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

36. According to the allegations stated in the appeal, the challenged decisions of the Court of BiH are not consistent with Article 7 of the European Convention, given that the appellant was sentenced under the provisions of the CC BiH, whereas he holds that he should have been sentenced under the provisions of the CC SFRY, as that law had been in force at the time the respective criminal offence had been committed, namely the war crime against civilians, and because that law prescribes a more lenient punishment for the respective criminal offence, thereby making it more favourable and lenient for the appellant.

37. In that respect, the Constitutional Court primarily indicates that the case involves a criminal offence which is prescribed in the provisions of the CC BiH, its Article 173, Chapter XVII - Crimes against Humanity and the Values Protected by International Law, i.e. which was prescribed in the provisions of the CC SFRY in Article 142, Chapter XVI – Crimes against Humanity and International Law. This is a criminal offence from the group of the so-called war crimes. Therefore, the Constitutional Court will examine the challenged decisions in respect of the compatibility thereof with Article 7 of the European Convention.

38. The Constitutional Court recalls that the European Court of Human Rights ("the European Court") had already considered in its hitherto case-law applications raising similar legal issues in respect of the possible violation of Article 7 of the European Convention, in two cases (in which the Court of BiH had adopted decisions) namely the case of the applicant Boban Šimšić (see, the European Court of Human Rights, *Boban Šimšić v. Bosnia and Herzegovina*, Decision on Admissibility of 10 April 2012, Application no. 51552/10; "the Šimšić Case"), and in the case of the applicants Abduladhim Maktouf and Goran Damjanović (see, the European Court of Human Rights, *Maktouf and Damjanović v. Bosnia and Herzegovina*, Judgment of 18 July 2013, Applications nos. 2312/08 and 34179/08; "the Maktouf and Damjanović Case").

39. In this respect, the Constitutional Court observes that the European Court dismissed in the Šimšić Case as manifestly ill-founded the application in which the applicant pointed to the violation of Article 7 of the European Convention, on account of the fact that the criminal offence of crimes against humanity, which he was found guilty of and punished for, had not constituted a crime under domestic law in the time of war from 1992 to 1995. The European Court stated in the mentioned decision, among other things, that the offences, which the applicant was sentenced for, had not constituted a crime against humanity under domestic law until the entry into force of the 2003 Criminal Code of BiH, but that it is evident that the impugned acts constituted, at the time when they were committed, a crime against humanity under international law (paragraph 23 of the Judgment), which implies that the European Court considered this case under Article 7(2) of the European Convention. Finally, the European Court concluded in the present case that the applicant's acts, at the time when they were committed, constituted an offence defined with sufficient accessibility and foreseeability by international law. Thus it dismissed the allegations related to Article 7 of the European Convention as manifestly ill-founded (paragraph 25 of the Judgment).

40. Further, the Constitutional Court observes that, on the other hand, the European Court found a violation of Article 7 of the European Convention in the Maktouf and Damjanović Case. In the mentioned judgment, first and foremost, the European Court noted that some crimes, notably crimes

against humanity, were introduced into national law in 2003, so the courts therefore have no other option but to apply the 2003 Criminal Code of BiH in such cases. However, it was indicated that the respective applications raise entirely different questions to those in the Šimšić Case, given that the war crimes committed by the applicants Maktouf and Damjanović constituted criminal offences under national law at the time when they were committed (paragraph 55).

41. In that regard, the Constitutional Court points out that in its latest case-law (see Decision on Admissibility and Merits No. *AP 325/08* of 27 September 2013, available at www.ustavnisud.ba, "the Damjanović Case"), which follows the case-law of the European Court developed in the Maktouf and Damjanović Case, who were also found guilty of having committed a criminal offence of the war crime against civilians under Article 173 of the CC BiH, it established that a violation of Article 7(1) of the European Convention occurred, because there was a realistic possibility that the retroactive application of the CC BiH, in a situation where the respective criminal offence had existed as such in the provision of Article 142 of the CC SFRY, was to the detriment of the applicants/appellants in respect of the sentencing, which is in contravention of Article 7(1) of the European Convention.

42. The Constitutional Court highlights that the decisions cited above noted that it was not the task of the European Court [neither is it the task of the Constitutional Court] to review *in abstracto* whether the retroactive application of the 2003 CC BiH in war crimes cases is, *per se*, incompatible with Article 7 of the European Convention, but that this matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts have applied the law whose provisions are most favourable to the defendant (paragraph 65).

43. The cited decisions further highlighted that the definition of war crimes that the applicants were found guilty of is the same in both the CC SFRY and the CC BiH, which was applied in the present case retroactively. However, it was indicated that these two laws offer a different range of sentences for war crimes. Further, it was noted that the European Court did not accept the arguments stating that the CC BiH was more lenient for the applicants than the CC SFRY, as it did not prescribe death penalty. In that regard, it was pointed out that in the present case no death penalty could be imposed for the actions that the applicants were charged with, since that penalty was prescribed only for the most severe forms of war crimes and that the war crimes, which the applicants in the respective cases had committed, in no way fall in that category, particularly so that none of the committed offences had resulted in the loss of life. Consequently, since there was no possibility of imposing the most severe punishment in the present case, the European Court took into consideration the amount of the minimum sentence that might be possibly imposed on the applicants. Following the analysis of the range of the sentences imposed on the applicants and the sentences that they could have possibly received, depending on the law that was to be

applied in their respective cases, the European Court concluded that, given the possibility of imposing a shorter imprisonment sentence, the CC SFRY proved to be more favourable. The European Court further stated in the respective decision that the sentences imposed upon the applicants had been within the range of punishment as prescribed by both the CC SFRY and the CC BiH and that, therefore, it could not be argued with certainty that either of the applicants would have been punished more leniently if the CC SFRY had been applied. However, notwithstanding that, the European Court indicated that: *What is crucial, however, is that the applicants could have received lower sentences had that Code (note: the CC SFRY) been applied in their cases* (paragraph 70).

44. Bearing in mind all of the aforementioned and applying the positions of the European Court to the appellant's case, the Constitutional Court observes, first and foremost, that that case, regarding both the factual substrate and the legal issues, differs from the aforementioned cases of the European Court and of the Constitutional Court in relation to the legal qualification of the criminal offence and the range of the imposed punishment and, therefore, given the range of the sentence imposed on the appellant, it is necessary to establish which law is more lenient for the appellant, in terms of the maximum sentence that may be imposed on the appellant.

45. Namely, the Constitutional Court recalls that the challenged verdicts found the appellant guilty and sentenced him for committing the criminal offence of the War Crime against Civilians under Article 173 of the CC BiH. The Constitutional Court observes that a definition of the War Crime against Civilians is the same in Article 142 of the CC SFRY, which was applicable at the time of the perpetration of the respective criminal offence (in 1995 that is to say) as in Article 173 of the CC BiH, which was applied retroactively in the particular case. It, therefore, follows from the aforementioned that the appellant was found guilty of the criminal offence which, as such, *constituted a criminal offence at the time when it was committed* (within the meaning of the first sentence of Article 7(1) of the European Convention) and that fact, in terms of guarantees referred to in the second sentence of Article 7(1) of the European Convention, implies the obligation of the Constitutional Court to examine that *a heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed.* Within the context of the aforesaid, the Constitutional Court indicates that the appellant, through the application of the provisions of the CC BiH, in the end was sentenced to the long term imprisonment of 25 years.

46. In this respect, the Constitutional Court recalls that both the CC BiH and the CC SFRY offer a different range of punishments for the criminal offence of War Crimes against Civilians of which the appellant was found guilty. Namely, under the CC SFRY the prescribed punishment was the imprisonment sentence for a term of five to fifteen years or, for the most severe cases, the death penalty,

instead of which the imprisonment sentence of twenty years might have been imposed. Under the CC BiH the prescribed punishment is the imprisonment of ten years or a long term imprisonment. Furthermore, the Constitutional Court indicates that, in the particular case, for the acts the appellant was charged with, given the manner of perpetration of that criminal offence and its consequences, as it relates to the most severe form of a war crime, there was a possibility to impose the most severe punishment, which was prescribed for the most severe acts of war crimes. The possibility, therefore, existed for the most severe punishment to be imposed on the appellant in the present case. The Constitutional Court points out that in the particular case, as opposed to case of the European Court, *Maktouf* and *Damjanović,* and the Constitutional Court's case *Damjanović*, the prison sentence imposed on the appellant was closer to the maximum of the prescribed punishment. Considering this, the Constitutional Court points out that, unlike the cases where it was being established which law was more lenient regarding the minimum punishment, in the present case it is necessary to establish which law is more lenient for the appellant regarding the maximum punishment prescribed.

47. In this respect, the Constitutional Court indicates that the European Court in the case of *Scoppola v. Italy* (see the European Court, *Scoppola v. Italy,* No. 10249/03, of 17 September 2009) took a position that it was necessary to depart from the case-law established by the Commission in the case of *X v. Germany* and established that Article 7(1) of the European Convention did not guarantee only for the principle of prohibition of retroactive application of the more severe criminal code but also, implicitly, it guaranteed the principle of retroactive application of the more lenient criminal code. This principle is enunciated in the rule reading that in the event of a difference between the criminal code in force at the time of the perpetration of a criminal offence and criminal codes enacted and applied subsequently and prior to the final judgment, courts must apply the law which provisions are most favourable to the accused.

48. Applying the aforementioned principle to the present case, in which the appellant was sentenced for the criminal offence of War Crimes against Civilians, the Constitutional Court holds that a general (abstract) position cannot be taken as to which of the two criminal codes (the CC SFRY and the CC BiH) foresees a "more lenient" or "heavier" penalty for the mentioned criminal offence and, in this regard, consequently, an abstract conclusion cannot be made as to which of the two mentioned laws is to be applied (in cases where specific criminal offences of war crimes a person is charged with according to the indictment are prescribed in both criminal codes) on the ground that that law prescribes a "more lenient penalty". It will be possible to reach such conclusions only on a case-by-case basis and it is highly likely that the mentioned codes (the CC SFRY and the CC BiH) will be applied differently given that, as already stated, one and the same law, depending on concrete circumstances of

each particular case, may prove to be more lenient in one situation or, in another, it may be more stringent in terms of the penalty that is to be imposed. In the view of the Constitutional Court it may be concluded that in cases where the respective criminal offence was incriminated in both codes (in the code applicable at the time of the perpetration of an offence and in the subsequently enacted code), it is mandatory to examine, in accordance with the second sentence of Article 7(1) of the European Convention, which of the two or more codes adopted successively foresees a more lenient penalty and then to apply that code, *i.e.* the code prescribing a more lenient penalty (the *favor rei* principle).

49. The Constitutional Court observes that in the present case the Court of BiH sentenced the appellant to a long-term imprisonment of 25 years. In this regard and in the context of the maximum penalty prescribed for the specific criminal offence, the Constitutional Court indicates that the provisions of Article 37(1) of the CC SFRY stipulate that *the death penalty may not be imposed as the only principal punishment for a certain criminal act* and that the provisions of Article 38(2) also stipulate that *the court may impose a punishment of imprisonment for a term of twenty years for criminal acts eligible for the death penalty.* In addition, the Constitutional Court points out that according to the aforementioned provisions it follows that, therefore, the death penalty was not the only maximum penalty prescribed for the criminal act committed by the appellant, rather that, as an alternative to the death penalty, a sentence of imprisonment for a term of twenty years could be imposed in certain cases. Therefore, the Constitutional Court indicates that a sentence of imprisonment for a term of five to fifteen years or a punishment of imprisonment for a term of twenty years or the death penalty could be imposed for the criminal offence of War Crimes against Civilians under the CC SFRY.

50. In that context, the Constitutional Court indicates that, beyond any dispute, the death penalty, prescribed by the CC SFRY as the maximum penalty for the criminal offence in question, is more severe than the penalty of long-term imprisonment, prescribed as the maximum penalty by the CC BiH. However, the Constitutional Court recalls that Article II(2) of the Constitution of Bosnia and Herzegovina prescribes that the rights and freedoms as provided for in the European Convention and Protocols thereto are directly applicable in Bosnia and Herzegovina, and that these acts have priority over all other law. In that respect, the Constitutional Court indicates that upon entry into force of the Constitution of Bosnia and Herzegovina (on 14 December 1995) also Protocol No. 6 to the European Convention entered into force, prescribing that death penalty is to be abolished (Article 1), and that a state may in its legislation stipulate the death penalty for the offences committed in time of war or of imminent threat of war (Article 2). Moreover, the Constitutional Court indicates that subsequently, on 3 May 2002, at the level of the Council of Europe, Protocol No. 13 to the European Convention was

adopted prescribing abolishment of death penalty in all circumstances, which Bosnia and Herzegovina ratified on 28 May 2003. Having in mind the foregoing, the Constitutional Court indicates that it clearly follows from the abovementioned that at the time of the issuance of the challenged decisions, which were adopted during 2008 and 2009, there was neither a theoretical nor practical possibility for the death penalty to be imposed upon the appellant for the criminal offence in question.

51. The Constitutional Court recalls that the issue of the status of death penalty had been previously considered in the Decision of the Human Rights Chamber for BiH *Sretko Damjanović v. BiH no. CH/96/30 of 5 September 1997*. In this decision it was stated, *inter alia*: "In considering whether the threatened execution of the applicant would be provided for in national law and in accordance with its provisions for the purpose of Article 2 of Protocol No. 6 to the Convention, the Chamber must take into account relevant provisions of the Constitution set out in Annex 4 to the General Framework Agreement. In this respect the Chamber notes that under Article 2 of Annex II to the Constitution, dealing with transitional arrangements, it is provided that laws in effect at the date of entry into force of the Constitution "shall remain in effect to the extent not inconsistent with the Constitution." The application of the death penalty could therefore only be considered to be provided by national law in the form of Article 141 or 142 of the Criminal Code in so far as the provisions of those Articles were not themselves "inconsistent with the Constitution." (paragraph 34). Furthermore, "Where one of the human rights agreements imposes a clear, precise and absolute prohibition on a particular course of action, the only way in which the obligation to secure the right in question to all persons without discrimination can be carried out is by giving effect to the prohibition. Laws which run counter to such a prohibition cannot, therefore, be considered consistent with the Constitution and cannot therefore be regarded as a proper basis in domestic law for any action which is required under the European Convention to be lawful in domestic law. The Chamber, therefore, considers that Articles 141 and 142 of the Criminal Code, in so far as they authorize the application of the death penalty in peacetime, are not consistent with the Constitution and that the threatened execution of the applicant would not therefore be provided for by national law for the purpose of Article 2 of Protocol No. 6 to the European Convention. It would, therefore, breach Article 2 of Protocol No. 6 for this reason also." (paragraph 37).

52. Therefore, given the fact that it was not possible to impose the death penalty on the appellant, the question arises as to what maximum penalty might be imposed on the appellant under the CC SFRY. In this respect, the Constitutional Court notes that the provisions of Article 38(2) of the CC SFRY prescribe that "the court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty". The Constitutional Court holds that it clearly follows from

the quoted provision that the maximum penalty for the criminal offence in question, in a situation where it is no longer possible to impose the death penalty, is the 20-year prison sentence. When comparing the 20-year prison sentence (as a maximum penalty for the criminal offence in question referred to in the CC SFRY) to the long-term sentence of 45 years in prison (as a maximum sentence for the criminal offence in question according to the CC BiH), the Constitutional Court holds that it is beyond any doubt that the CC SFRY is more lenient law to the appellant in the instant case. Therefore, given the fact that it was possible to impose the maximum penalty of 20 years in prison on the appellant according to the CC SFRY, whereas the long-term sentence of 25 years in prison was imposed on him in accordance with the CC BiH, the Constitutional Court holds that the CC BiH was retroactively applied to the detriment of the appellant insofar as the penalty imposed was concerned, which was contrary to Article 7 of the European Convention.

53. Taking into account the aforementioned, the Constitutional Court holds that the challenged Verdict of the Court of BiH violated the appellant's constitutional right under Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7 of the European Convention. With the aim of protecting the appellant's constitutional right, the Constitutional Court finds it sufficient to quash the Verdict of the Court of BiH, No. X-KRŽ-07/394 of 6 April 2010, and to remit the case to that court, which is to take a new decision in accordance with Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention.

Other allegations

54. Given the conclusion relating to the violation of Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7 of the European Convention, the Constitutional Court holds that there is no need to consider separately the alleged violations of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, Article 14(1) and (2) and Article 15 of the International Covenant on Civil and Political Rights and Article 11 of the Universal Declaration of Human Rights.

55. The Constitutional Court points out that it did not decide at all on the suspension of the enforcement of the imprisonment sentence and the release of the appellant, neither did it decide on the procedure for adoption of a new decision by the Court of BiH, as these issues fall within the scope of competence of the Court of BiH.

VIII. Conclusion

56. The Constitutional Court concludes that the appellants' constitutional right under Article II(2) of the Constitutional Court of Bosnia and Herzegovina and Article 7 of the European Convention was

violated, as the retroactive application of the CC BiH in the instant case was to the detriment of the appellant with regards to the sentencing.

57. Pursuant to Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

58. In view of the decision of the Constitutional Court in this case, it is not necessary to consider separately the appellant's proposal for an interim measure.

59. Pursuant to Article 41 of the Rules of the Constitutional Court, a separate dissenting opinion of the Vice-President Seada Palavrić shall be annexed to this Decision.

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

Valerija Galić

President of the Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of the Judge Seada Palavrić on the Decision of the Constitutional Court No. AP 5161/10 *of 23 January 2014*

In the Decision of the Constitutional Court No. AP 5161/10 the Constitutional Court of Bosnia and Herzegovina:

Granted the appeal, found a violation of Article II(2) of the Constitutional Court of Bosnia and Herzegovina and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), quashed the second instance verdict of the Court of BiH and referred back the case to that court with an order to take a new decision in an expedited procedure in line with Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention.

With due respect for the majority decision, I cannot agree with the reasoning and the conclusion relating to the granting of the appeal No. AP 5161/10.

The reasoning of the Constitutional Court may be summarized as follows:

In the relevant part, the Constitutional Court referred to its respective Decision No. *AP 325/08* of 27 September 2013, which it adopted by following the case-law of the European Court developed in the *Maktouf and Damjanović* Case, wherein that court established that a violation of Article 7(1) of

the European Convention occurred, because there was a realistic possibility that the retroactive application of the CC BiH, where the applicants were found guilty of having committed a criminal offence of the war crime against civilians under Article 173 of the CC BiH in a situation where the respective criminal offence, as such, had existed in the provision of Article 142 of the CC SFRY, was to the detriment of the applicants/appellants in respect of the sentencing, which is in contravention of Article 7(1) of the European Convention.

Next, the Constitutional Court pointed out that *in the present case* the challenged verdicts found the appellant guilty of and sentenced him for committing the criminal offence of the War Crime against Civilians under Article 173 of the CC BiH. The Constitutional Court observed that a definition of the War Crime against Civilians is the same in Article 142 of the CC SFRY, which had been applicable at the time of the perpetration of the respective criminal offence (in 1995 that is to say) as in Article 173 of the CC BiH, which was applied retroactively in the particular case. It, therefore, followed from the aforementioned that the appellant was found guilty of the criminal offence which, as such, *constituted a criminal offence at the time when it was committed* (within the meaning of the first sentence of Article 7(1) of the European Convention) and that fact, in terms of guarantees referred to in the second sentence of Article 7(1) of the European Convention, implies the obligation of the Constitutional Court to examine that *a heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed.* Within the context of the aforesaid, the Constitutional Court indicated that the appellant, through the application of the provisions of the CC BiH, in the end was sentenced to the long term imprisonment of 25 years.

While presenting the reasons on the basis of which it found a violation of Article 7 of the European Convention, the Constitutional Court, among other things, indicated that it clearly followed from the reasons adduced in the decision that at the time of the issuance of the challenged decisions, which were adopted during 2008 and 2009, there was neither a theoretical nor practical possibility for the death penalty to be imposed upon the appellant for the criminal offence in question.

Given the fact that, therefore, it was not possible to impose the death penalty on the appellant, the question arises as to what maximum penalty might have been imposed on the appellant under the CC SFRY. In this respect, the Constitutional Court noted that the provisions of Article 38(2) of the CC SFRY prescribed that “the court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty”. According to the opinion of the Constitutional Court, it clearly followed from the quoted legal provision that the maximum penalty for the criminal offence in question, in a situation where it was no longer possible to impose the death penalty, was the 20-year prison sentence. When comparing the 20-year prison sentence (as a maximum penalty for the criminal

offence in question referred to in the CC SFRY) to the long-term sentence of 45 years in prison (as a maximum sentence for the criminal offence in question according to the CC BiH), the Constitutional Court held that it was beyond any doubt that the CC SFRY was more lenient law to the appellant in the instant case. Therefore, given the fact that it was possible to impose the maximum penalty of 20 years in prison on the appellant according to the CC SFRY, whereas the long-term sentence of 25 years in prison was imposed on him in accordance with the CC BiH, the Constitutional Court held that the CC BiH was retroactively applied to the detriment of the appellant insofar as the penalty imposed was concerned, which was contrary to Article 7 of the European Convention.

In my opinion,

The Constitutional Court followed in its decision the principles, which the European Court of Human Rights ("the European Court") abided by in the Decision of *Maktouf and Damjanović v. BiH*.

My reasons for disagreeing with the reasoning and conclusions of the Constitutional Court in relation to the Decision No. *AP 5161/10* ***are as follows***:

- First and foremost, I hold that the Constitutional Court, unlike the European Court, did not give importance to the fact ***that the appellant, unlike the applicants Maktouf and Damjanović, was found guilty of taking lives, namely 71 life and around 200 wounded***, and, according to the criteria of the European Court, on that fact depended the assessment of the severity of the crime and, accordingly, the prescribed punishment at the time of the perpetration of the criminal offence. For, both, the case of *Maktouf and Damjanović* and the case at hand concern the same criminal offence. The difference is that the applicants in the case of *Maktouf and Damjanović* were not sentenced before the domestic courts for the most severe forms of the criminal offence of the War Crime against Civilians, for which the death penalty was prescribed, but for the milder form of that criminal offence and the imposed sentences, which were almost minimum, attested to it, whereas the long-term prison sentence of 25 years was imposed on the appellant, which is one of the most severe punishments prescribed in 2003, after it was no longer possible to impose a death penalty in Bosnia and Herzegovina, namely as a substitute for the death penalty.
- Next, the Constitutional Court arrived at a milder punishment by comparing the punishment of long-term imprisonment of 45 years, which is prescribed under the 2003 CC BiH, with the

punishment of 20 years imprisonment under the 1976 CC SFRY, which might have been imposed as a substitute sentence for the death penalty, instead of comparing it with the death penalty.

- I reckon, however, that Article 7 of the European Convention should neither be understood nor construed in such a way, nor that the European Court had interpreted or applied Article 7 in this manner. The mentioned article, undoubtedly, insists that the punishment to be imposed should not be more severe than the punishment that ***was applicable*** at the time the criminal offence was committed. Here there are no exceptions either when it comes to the perpetrators of the criminal offences of war crimes. However, *I reckon that the Constitutional Court, by demanding a milder punishment for the appellant, could not have compared the long-term imprisonment sentence with the 20-years imprisonment sentence, but with the death penalty, which was applicable at the time of the perpetration of the war crime that the appellant was found to be liable for, irrespective of the fact that at the time of the trial the death penalty could no longer be imposed. Article 7 of the European Convention clearly insists that a perpetrator of a criminal offence cannot receive a more severe punishment in comparison to the punishment that was applicable at the time a criminal offence was committed, and not in comparison to the punishment that can no longer be imposed at the time of the trial*.
- What is more, it seems that the Constitutional Court overlooked that it was considering the present appeal wherein *the challenged decisions of the Court of BiH imposed on the appellant the sentence of long-term imprisonment of 25 years and not of 45 years, thus the imposed and not the prescribed maximum penalty should have been compared instead with the death penalty*. Also, I reckon that even the lifelong prison sentence (in case that it was prescribed by the 2003 CC BiH) is milder than the death penalty, which was prescribed and applicable at the time the criminal offence was committed, and, in particular, the long-term prison sentence of 25 years, which was imposed on the appellant in the present case, is milder.
- Since it was deciding the specific appeal, I reckon that the Constitutional Court must have taken into account the reasoning adduced for the challenged first instance verdict which, among other things, indicated that the application of the 2003 CC BiH is additionally justified by the fact that the punishment prescribed by the CC BiH is, in any case, milder than the death penalty, which was in force at the time the criminal offence was committed, which satisfied the criterion of time constraints regarding applicability of the criminal code, that is the application of the law that is more lenient for the perpetrator, as well as the reasoning adduced for the second instance verdict presented in paragraphs 142 and 143 of that verdict, where the Court of

BiH indicated that, while examining the decision on the punishment within the scope of the allegations made in the appeal by the Prosecutor's Office and within the meaning of the provision of Article 308 of the CC BiH, it found that the first instance panel correctly meted out the punishment bearing in mind all subjective and objective circumstances relating to the criminal offence and the perpetrator thereof, which make the imposed sentence adequate in terms of the degree of the appellant's criminal liability, the motives for perpetrating the offence, *the degree of injury to the protected object*, as well as the appellant's personal situation, and concluded that the imposed long-term prison sentence of 25 years was correctly meted out and that the imposed punishment will serve the purpose of punishment provided for in the provision of Article 39 of the CC BiH, which requires the following: to express the condemnation of a perpetrated criminal offence; to deter the perpetrator from perpetrating criminal offences in the future; to deter others from perpetrating criminal offences (individual and general prevention), and, in particular, to increase the consciousness of citizens of the danger of criminal offences and of the fairness of punishing perpetrators; and that it is necessary to bear in mind that the protected objects of these criminal offences are the universal human values, objects that are a condition and a basis for co-existence and humane existence, which violation constitutes a serious violation of the international law norms, which seriousness and severity are attested to by the fact that these offences are not subject to the statute of limitations.

- In addition to the aforementioned, by proceeding in this manner, namely by comparing the long-term prison sentence with the prison sentence of 20 years and not with the death penalty, the Constitutional Court brought about the situation whereby the perpetrators of war crimes who were not found liable for the losses of human lives and for other "milder" war crimes and the perpetrators of war crimes who were found guilty of losses of tens of human lives and of other most severe war crimes were subsumed under the same range of punishment, even received punishments for war crimes milder than the punishment for "an ordinary" murder.
- In the end, it appears illusory when the Constitutional Court states that it did not assess *in abstracto* the issue of a more lenient law, because it is a fact that it was *de facto* done in all the cases wherein the same criminal offence was prescribed by the 1976 CC SFRY and the 2003 CC BiH. It follows that in such cases the CC SFRY will be applied as the more lenient law for a perpetrator. Therefore, in my opinion, the crime constituting a violation of the international humanitarian law, which was always prescribed as not to be subject to the statute of limitations and to be subject to the most severe punishment – for which, under the 1976 CC SFRY, a death penalty was prescribed, and, under the 2003 CC BiH, a long-term prison sentence – loses the

purpose of punishment itself, that is to say that the purpose of punishment will be served solely against the war crimes perpetrators who were tried before the International Criminal Tribunal for the former Yugoslavia, or, on the other hand, the persons being tried before that court are in a significantly less favourable position than the persons tried for the same crimes before the Court of BiH.

It follows that I am absolutely in no position to agree with the conclusion adopted by the majority of the Constitutional Court in relation to this issue. With due respect, I use this opportunity to express my disagreement.