The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18(3)(h), Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 22/14 and 57/14), 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. Đorđe Ždrale** and appeal of **Ms. Spomenka Ždrale and Mr. Dragiša Jokić** in case no. **AP 220/11**, at its session held on 25 September 2014, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of **Mr. Đorđe Ždrale** against the verdicts of the Court of Bosnia and Herzegovina no. X-KŽ-08/540-1 of 14 October 2010 and X-K-08/540-1 of 16 April 2010 is hereby dismissed as ill-founded.

The appeal of **Ms. Spomenka Ždrale and Mr. Dragiša Jokić** against the treatment they were subjected to

in the Foča Penal-Correctional Institution, as regards the right under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, is hereby dismissed as ill-founded.

The appeal of **Mr. Đorđe Ždrale, Ms. Spomenka Ždrale and Mr. Dragiša Jokić** against the treatment they were subjected to in the Foča Penal-Correctional Institution, as regards the right under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Articles 8 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, is hereby dismissed as ill-founded.

The appeal lodged by **Mr. Dragiša Jokić and Mr. Đorđe Ždrale** against the treatment they were subjected to in the Foča Penal-Correctional Institution, as regards the right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, is hereby rejected as inadmissible for being incompatible *ratione materiae* with the Constitution of Bosnia and Herzegovina.

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 11 January 2011, Mr. Đorđe Ždrale ("appellant Ždrale" or "the appellant"), who is currently serving his prison sentence in the Foča Penal-Correctional Institution, and is represented by Mr. Dragiša Jokić, a lawyer practicing in Istočno Sarajevo, filed 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"), no. X-KŽ-08/540-1 of 14 October 2010 and no. X-K-08/540-1 of 16 April 2010.

2. On 24 April 2012, the appellant submitted a supplement to the appeal to the Constitutional Court because of the treatment in the Foča Penal-Correctional Institution and the mentioned supplement also contained the request for an interim measure whereby the Ministry of Justice of the Republika Srpska ("the RS Ministry of Justice"), *i.e.* the Foča Penal-Correctional Institution, would issue an order on termination of five precisely described actions taken by the officials of the Foča Penal-Correctional Institution against the appellant. At the request of the Constitutional Court of 26 February 2014, the appellant supplemented his appeal on 4 March 2014. The appeal was assigned the case number AP 220/11.

3. On 24 April 2012, Mr. Dragiša Jokić from Istočno Sarajevo ("appellant Jokić") and Ms. Spomenka Ždrale ("appellant Spomenka Ždrale"), who is represented by Mr. Dragiša Jokić, a lawyer practicing in Istočno Sarajevo, filed the appeal with the Constitutional Court on the ground of an alleged violation of their human rights during and in relation to their visits to appellant Ždrale in the Foča Penal-Correctional Institution. Appellant Jokić and appellant Spomenka Ždrale also submitted the request for issuance of an interim measure and that request is identical to the request in the Case no. AP 220/11. Appellant Jokić and appellant Ždrale supplemented their appeal on 6 June 2012. At the request the Constitutional Court of 26 February 2014, the appellants supplemented their appeal on 4 March 2014. The appeal was assigned the case number AP 1505/12.

II. Procedure before the Constitutional Court

4. Given that in the instant case there are two appeals arising from the same legal and factual basis, the Constitutional Court has decided to join the cases AP 220/11 and AP 1505/12 in respect of which a single proceeding will be conducted and a single decision no. AP 220/11 will be adopted.

5. Pursuant to Article 22, paragraphs 1 and 2 of the Rules of the Constitutional Court (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09 – hereinafter: the previously applicable Rules), which were applicable at the time when the mentioned actions were taken, on 4

November 2011, 27 April and 29 May 2012 and 26 February 2014 the Constitutional Court requested the Court of BiH, the Prosecutor's Office of Bosnia and Herzegovina ("the Prosecutor's Office of BiH"), the Foča Penal-Correctional Institution, the RS Ministry of Justice and the Ministry of Justice of Bosnia and Herzegovina ("the BiH Ministry of Justice") to submit their responses to the appeal. Furthermore, on 26 February 2014, the Foča Penal-Correctional Institution was requested to submit additional information relating to the case and the Foča Penal-Correctional Institution did so on 7 March 2014.

6. The Court of BiH and Prosecutor's Office submitted their responses to the appeal on 22 November 2011 and on 26 January 2012, respectively. The Foča Penal-Correctional Institution, the RS Ministry of Justice and BiH Ministry of Justice submitted their replies to the appeal on 14 and 15 May and on 8 June 2012, respectively. Furthermore, on 7 March 2014 the Foča Penal-Correctional Institution submitted the response to "the supplement to the appeal", including the requested information.

7. Pursuant to Article 26 paragraph 2 of the previous Rules of the Constitutional Court, the responses to the appeals were communicated to the appellants on 4 and 18 July 2012.

III. Facts of the Case

8. The facts of the case drawn from the appellants' statements and the documents submitted to the Constitutional Court, including the documents from the case-file AP 3105/09 (in respect of which the Constitutional Court adopted a Decision on Admissibility and Merits of 14 September 2010 and decided on the appeal filed by appellant **Ždrale** against the decision of the Court of BiH on determination and extension of detention and, *inter alia*, dismissed the appeal filed against the decision of the Court of BiH on subject-matter jurisdiction relative to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), and Article 2 of Protocol No. 7 to the European Convention may be summarized as follows.

Introductory remarks - subject-matter jurisdiction of the Court of BiH during the conduct of investigation

9. In its Decision number X-KRN-08/540 of 19 June 2008 marked as "confidential" the Court of BiH granted the motion of the Prosecutor's Office of BiH of 30 May 2009 and found that the Court of Bosnia and Herzegovina had jurisdiction to proceed in the criminal proceedings before the Prosecutor's Office of BiH upon the Order on the Conduct of Investigation no. KT-99/06 of 6 March 2006 against the appellant and seven other suspects whose names were listed, due to the criminal offence of first degree murder under Article 149 (2) of the Criminal Code of the Republika Srpska (the "RS CC") and criminal offences against the public safety of persons and property under Article 402(1) of the RS CC in conjunction with Article 42 of the CCRS, criminal offence of murder under Article 166(2)(d) of the Criminal Code of the Federation of Bosnia and Herzegovina ("the CCFBiH"), criminal offence of murder under Article 166(1) of the CCFBiH and criminal offence of provoking general danger under Article 323(1) of the CCFBiH in conjunction with Article 54 the CFBiH. In the reasons for the decision it was noted that the Prosecutor's Office of BiH submitted the request to the Court of BIH for determination of jurisdiction for conducting investigation in criminal cases of the County Prosecutor's Office in Bijeljina no. KTN-111/00 and Cantonal Prosecutor's Office in Sarajevo no. KTN/13771/05 against the appellant and seven other suspects for the purpose of continuation of investigation in the mentioned criminal offences, so that an order may be issued for the conduct of investigation and that requests could be submitted for issuance of orders to the Court of BiH and that an indictment could be filed with the Court of BiH. Furthermore, the Court of BiH noted that in the motion had been stated that the appellant is suspected of committing criminal offences covered by the investigation conducted in both criminal cases. It is also stated that the Prosecutor's Office of BiH pointed out in its request that, *inter alia*, the suspects were charged also with the criminal offences regulated by the Criminal Code of BiH ("the CCBiH"), such as the following: Illicit Trafficking in Narcotic Drugs under article 195 of the CCBiH, criminal offence of Money Laundering under Article 209 of the CCBiH and the criminal offence of Tax Evasion under Article 210 of the CCBiH, the prosecution of which falls within the jurisdiction of the Court of BIH. The Court of BiH pointed out that it established its jurisdiction on the basis of Article 23(2) of the Criminal Procedure Code ("the CPC BH") and Article 13(2)(b) of the Law on the Court of BiH. In the instruction on legal remedy it was noted that an appeal could be filed against the relevant decision with the Appellate Panel of the Court of BiH within three days of its receipt.

10. On 17 January 2009, the appellant was deprived of liberty in FR Germany and, upon the completion of extradition procedure, he was extradited to BiH and was handed the Decision no. X-KRN-08/540 of 19 June 2008. The appellant filed an appeal against this decision on 26 February

2009, which the Appellate Panel of the Court of BiH rejected as inadmissible in its Decision X-KO-08/540-1 of 5 August 2009. In the reasons for the decision the Appellate Panel stated that it had examined "normative lack or existence of grounds for the issuance of the challenged ruling which would, possibly, lead to the establishment of the right to lodge an appeal against it." It is further stated that it follows from the analyses of the legal text, that the Court, **only** upon noticing that it does not have jurisdiction, shall issue a decision declaring itself incompetent (the so-called negative decision) and once such decision has taken legal effect, it shall forward the case to the competent court while, in the case when, *ex officio*, or upon the motion by a party or defence counsel**,** it establishes that it has jurisdiction, which was the case here, it shall continue the proceedings without issuing a formal decision (the so-called positive decision) on that. Therefore, according to the standpoint of the Appellate Panel, the respective decision, given its legal nature, is of "purely declaratory character as it only refers to the previously established jurisdiction and, as such, it cannot constitute any right as regards the parties or defence attorney". It is noted that the defence may raise the issue of the court's subject-matter jurisdiction again after the indictment is filed.

Subject-matter jurisdiction of the Court of BiH upon the completion of investigation

11. On 4 August 2009 the Prosecutor's Office of BiH submitted, for the purpose of confirmation, the Indictment no. KT-309/08 to the Court of BiH against the appellant for existence of well-founded suspicion that he had committed a criminal offence of first degree murder referred to in Article 149(1)(1), (2) and (4) and (2) of the RSCC.

12. The preliminary hearing judge of the Court of BiH, in the Decision no. X-KO-08/540 of 4 August 2009, declared that the Court of BiH has no subject-matter jurisdiction to conduct criminal proceedings upon the Indictment no. KT-309/08 of 4 August 2009 (Section I). It was decided in the same decision that after the mentioned decision becomes legally binding" the case shall be forwarded to the County Court in Bijeljina as a court which has the subject-matter and territorial jurisdiction" (Section II). It is noted in the reasons for the decision that the criminal offence the appellant is charged with, and which was committed in the manner described in the factual part of the Indictment, does not meet any of the requirement under Article 7(2)(a) and (b) of the Law on Court - revised text, former Article 13 of the mentioned Law), given its nature and grounds and that the requirements under Article 23(2) of the BiH CPC were not met as the Indictment failed to include any of other criminal offences or persons against which the investigation was initiated upon the Order of 6 March 2006.

13. The Pre-trial Panel of the Court of BiH, in its Decision no. X-KO-08/540-1 of 10 August 2009, granted the appeal of the Prosecutor's Office of BiH and quashed the Decision no. X-KO-08/540 of 4 August 2009, and then remitted the case for new decision. It is noted in the reasons for the decision that the preliminary hearing judge failed to request the Prosecutor's Office of BiH to amend the Indictment with respect to establishing the subject-matter jurisdiction of the Court of BiH, which is referred to under Article 7(2) (b) of the Law on the Court of BiH as it is conditional jurisdiction and it must be established in each individual case. Furthermore, it was noted that the issue of jurisdiction must be taken into account during the entire proceedings given that, from one phase to another, its modification may occur, and that the basis of jurisdiction to conduct proceedings in the particular situation has to be established in the Indictment itself.

14. After the Indictment was sent back to the Prosecutor's Office of BiH on 14 August 2009 for the purpose of amending it, the Prosecutor's Office of BiH submitted the amended Indictment to the Court of BiH of "the same legal qualification and factual substrate", including the explanation of the reasons for jurisdiction of the Court of BiH, in respect of which the preliminary hearing judge issued again the Decision no. X-K-08/540-1 of 18 August 2009 that the Court of BiH did not have the subject-matter jurisdiction to conduct criminal proceedings against the appellant. It was noted that Prosecutor's Office of BiH, *inter alia*, noted that Court did not have jurisdiction to act in this case "because that criminal offence may cause other detrimental consequences to BiH and that it based its position on „the manner and all circumstances of the perpetration of the criminal offence which caused severe disturbance, fear and uncertainty amongst citizens not only of the Republika Srpska but also on the entire territory of Bosnia and Herzegovina and the declining of citizens' confidence regarding the institutions of authorities in this country competent to secure protection and security of its citizens".

15. Furthermore, it is noted in the decision that the assessment of the Prosecutor's Office regarding the lack of efficiency of the judicial bodies and police in the Republika Srpska, *i.e.* in Bijeljina, is not acceptable as the Prosecutor's Office is not authorized to give such assessments of the work of the Entity bodies. It is also stated that the Prosecutor's Office has overseen the fact that during 2003, three years after the perpetration of the respective criminal offence the judicial reform in BiH has started and it is still underway and the basic goal thereof is exactly the more efficient investigation of criminal offences and more efficient selection of holders of judicial functions, in which case the basic criterion is their quality and capability. Thus, as noted by the Court of BiH, the confidence of citizens in institutions should be built not only on the level of the State and Court of BiH, but also on the Entity level and those courts, including the County Court in Bijeljina, as courts having subject-matter and territorial jurisdiction, have been successfully conducted and concluded the proceeding so far as regards

considerably more difficult and more complex criminal cases from its jurisdiction. Furthermore, it is that in the factual description of action of commission of the criminal offence the appellant is charged with the circumstances relating to the status and personality of the murdered persons during the commission of the offence were not stated and that those circumstances were insignificant when it comes to establishing the jurisdiction of the Court of BiH.

16. The Court of BiH noted that it was correct that the particular case concerned a serious and complex criminal offence which, at the time of its perpetration, had caused certain disturbance in public both at the local and Entity and State level. However, as it is further stated, after that some other serious criminal offences occurred, which were successfully dealt with by the competent and in the meantime reformed entity courts, including the County Court in Bijeljina. Accepting the position of the Prosecutor's Office and jurisdiction on the basis of such reasoning, as further mentioned in the decision, would in fact call into question the capability of other courts in BiH to conduct trials in complex cases falling within their jurisdiction. Therefore, in the opinion of the preliminary hearing judge, the position of the Prosecutor's Office is erroneous that the referring this case back to the court having the subject-matter jurisdiction would endanger a gained trust by the citizens, international institutions and judicial bodies of other states in the institutions of BiH and derogation of the reputation of this Court and the Prosecutor's Office. The Court does not acquire its reputation and does not earn respect by trying criminal offences for which it lacks the subject-matter jurisdiction irrespective of those being the gravest and most complex criminal offences. To the contrary, as it is further stated, it acquires its reputation and respect only by persistent and consistent application of positive regulations of BiH relating to, *inter alia*, the jurisdiction of the Court of BiH. By an extensive interpretation of Article 7(2)(a) of the BiH CPC, - "causing other detrimental consequences to Bosnia and Herzegovina" - would cause legal uncertainty and lack of public confidence in the competent Entity courts and their successful dealing with the gravest criminal offences under their jurisdiction. Furthermore, it was noted that the mentioned criminal offence is prescribed in the CC FBiH and the Criminal Code of the Brčko District and that it is about a typical Entity criminal offence falling within the group of criminal offences against life and limb.

17. The Panel of the Court of BiH, deciding the appeal of the Prosecutor's Office of BiH against the decision of 18 August 2009, granted the appeal by its Decision no. X-KRo-08/540-1 of 25 August 2009 and modified the challenged decision and declared that the Court of BiH had the subject-matter jurisdiction to try the criminal case against the appellant. In the reasons for the decision it is noted that the manner in which the criminal offence the appellant is charged with was committed caused fear and a feeling of insecurity among the citizens, as well as distrust in the governmental institutions in charge

of providing them with protection and that, with the aim of achieving general safety, there is a need for including the state level bodies in clarifying a large number of unsolved murders exceeding local levels, as the issue is about organized crime.

18. It is mentioned that the Prosecutor's Office of BiH noted that "the challenged decision erroneously evaluated the allegations from the 'Analyses and the Position of the Collegium of Prosecutors of Istočno Sarajevo' of 1 March 2006; the allegations and written evidence stated in the above document lead to the conclusions and performance evaluations, as well as to the consequences, which were caused and which could be caused if the case at hand was not tried before the Court of BiH". Furthermore, it is mentioned that in the challenged decision the qualification of criminal offence is considered in the wrong manner, as it is viewed separately from other circumstances, and it is also stated that the issue is about the Entity related criminal offence falling within the group of criminal offences against life and limb committed in the RS Entity, for which reason no basis is found for establishing the jurisdiction of the Court of BiH. The Court of BiH pointed out that it had no intention nor was it its task to deal with evaluation of the performance of the entity bodies but other circumstances, within the meaning of Article 7(2) of the Court of BiH, justified the jurisdiction of the Court of BiH to try the case at hand. For that purpose, as noted, the Court of BiH took into account the "Analyses by the Collegium of Prosecutors of Istočno Sarajevo of 1 March 2006 transmitted to the Prosecutor's Office of BiH – Organized Crime Department for the evaluation of several unsolved cases from the category of organized crime offences such as the case of murder the appellant is charged with." It is noted that the Analyses "clearly shows, *inter alia*, that unsolved cases are brought into connection with organized crime groups, and that the prosecution bodies show the lack of power in an attempt to solve or prosecute those cases and that the citizens feel fear". Because of the widespread network and conclusion that in "parts" it is not possible to have efficient fight against it, the Analyses indicate that "without full coordination in actions and exchange of information on regional and international level (and citizens' trust) there would be no successful solution of this form of organized crime". The pressure, threats and partial forgetfulness of witnesses accompany the cases in which the appellant appears and the aforesaid is confirmed in the official Note of the Prosecutor of the County Prosecutor's Office of Istočno Sarajevo of 20 September 2006, to which the appeal refers and it is enclosed to the Indictment.

19. Finally, it is noted that on the occasion of establishing the jurisdiction of the court the appellant's personality profile was disregarded, *i.e.* that he had been deprived of liberty under the International Warrant, that he had already been convicted for the criminal offence of murder, that he had been suspected of and connected with a large number of murders of persons who had been the

owners of companies or persons from economy-related and political scene, including other criminal offences committed in the area of RS and Federation of BiH. Given that the fear of citizens is associated with the appellant's personality profile and his connections with organized crime and that because of such crimes BiH is amongst countries posing serious security risks and the detrimental consequences are reflected in the lack of financial investments. All of these are the reasons for establishing the subject-matter jurisdiction of the Court of BiH to try the case at hand. In support of the above stated there is the standpoint presented by the professionals – the Prosecutors of the RS Entity that for those reason these murder cases, which are connected with organized crime, should be tried at the State level. Finally, the passing of time between the perpetration of criminal offence and reasons of cost-effectiveness justify the subject matter jurisdiction of the Court of BiH in this case.

20. On 31 August 2009, the preliminary hearing judge upheld the Indictment of the Prosecutor's Office of BiH no. KT-309/08 of 14 August 2009 because of a well-founded suspicion that he had committed the criminal offence of first degree murder under Article 149 of the RSCC.

21. Upon the inspection of the documents from the case-file no. AP 315/09, the Constitutional Court concludes that the file comprises also the document titled "Analyses and the Position of the Collegium of Prosecutors of Istočno Sarajevo of 1 March 2006 " no. A-91/06 (KTN-3/02, KTN-11/02 and KTN-43/06). In addition, the Constitutional Court concludes that it follows from that document that it was submitted to the Prosecutor's Office of BiH/Chief of the Organized Crime Department and the reason for its submission is the submission for review of the document – "Analyses and the Position of the Collegium with regards to unsolved cases of murders of Željko Marković, Risto Jugović, Ratomir Spaić and the adjudicated case of murder of Srđan Knežević." It was noted in the mentioned Analysis that "upon analyzing the situation, the facts and circumstances of the case of undiscovered perpetrators of murders […], the Collegium of the County Prosecutor's Office of Istočno Sarajevo concludes that, given the manner in which those criminal offences were perpetrated and the motives, the perpetrators are the members of a wide criminal organization who have their logistics, material support, and support of different forms among the individuals in the government system and among some business subjects. All relevant indicators that have been obtained show that it is about a wide-spread group of organized criminals involving a large number of persons". Furthermore, it is noted in the Analysis that "the mentioned cases are most probably the segment of a wider content and those cases, given their nature, could not be tried without them being brought into connection with organized crime groups. Therefore, we are of the opinion that with the aim of efficient detection and criminal prosecution of perpetrators of criminal offences that represent the form of organized crime which, most probably, is exposed in these cases, you should review those cases and find out whether it is about a

form of organized crime or not, in particular given that despite the fact that the families suffering damage were frequently informing and addressing media, none of the top Entity government officials, within the boundaries of their authority, showed a stronger interest in these "cases". It is further stated that because of its spreading and network it is not possible to have efficient fight against it in parts or segments of local authority. To do that the following is required: a unified and accessible database, fast exchange of information on interstate level as well, wide powers, a single strategy for solving the "cases" fully, not partially; technical equipment and adequate training, particularly marking, wider or narrower, of the logistics and sources providing funds". It is also stated that "with the aim of achieving general safety of citizens of Bosnia and Herzegovina, it is high time for the state level bodies to show some interest in clarification of murder cases in this area, as it cannot be said that the issue is about individual cases, which we have a lot but those cases are clarified, but it is about organized form of crime whose aim is not only the murder, but those aims are more profound and are related to the financial gain and overpower needed for further unlawful transactions. In particular, it should be noted that the confidence of citizens in the State governmental bodies would be restored if the institutions at the state level took over the task of clarification of those "cases" for which it is evident that they exceed the boundaries of local government level."

Facts with regards to the procedure of issuance of challenged verdicts - AP 220/11

22. By its Verdict no. X-K-08/540-1 of 16 April 2010 the Court of BiH found that the appellant was guilty of the criminal offence of first degree murder under Article 36(2)(1) of the RSCC, since, by the actions thoroughly described in the operative part of the verdict, he had committed the aforesaid offence for which he was sentenced to 20 years in prison and the time he spent in prison was credited to the sentence. Pursuant to Article 198, paragraph 2 of the BiH CPC, the victim was instructed to file a property claim and the appellant, based on Article 188(1) in conjunction with Article 186 (2) of the BiH CPC, was ordered to pay the costs of the criminal proceedings to the amount for which it was stated that it would be determined upon the issuance of separate decision.

23. In the reasons for the verdict of the Court of BiH, it is noted that based on the evidence presented during the main trial the Court of BiH found that the appellant, while serving his sentence in the prison in Istočno Sarajeve (the Kula Correctional Facility) for the committed criminal offence of murder, had obtained permission to use a furlough in the period from 5 to 12 June 2000, which had not been recorded in the required prison documentation. Then, upon the completion of preparations, he, with persons known to him – organisers and co-perpetrators, on 7 June 2000 killed Ljubiša Savić aka Mauzer ("the victim"). Namely, the Court of BiH found that the appellant, including another person known to him, while driving in the Toyota Camry ("the vehicle "Toyota") had followed the murdered

person who, at an intersection of several streets, stopped his vehicle to allow another person into the vehicle, whereupon the appellant, opened fire from an automatic rifle in the direction of the victim, firing 13 bullets in total, of which 6 projectiles hit the victim causing his instant violent death. The Court of BiH further found that at the same time the safety of the person who had been trying to get inside the vehicle driven by the victim and the passengers at the Railway Station not far from the scene had been jeopardized. After that, the appellant and the co-perpetrator, as found by the Court of BiH, fled the scene in the direction of the place of Hase where they left the vehicle Toyota leaving 2 automatic rifles, cartridges with unused ammunition and the rubber gloves they had used, whereupon they took off the clothes they were wearing and threw them out of the vehicle while on the run towards Ugljevik.

24. The Court of BiH pointed out that during the main trial, at the proposal of the Prosecutor's Office of BiH, it examined 36 witnesses and eight experts who explained their findings and opinions. Moreover, the Court of BiH stated that it inspected the substantive evidence (with attachments), which the Prosecutor's Office used to prove that the appellant had committed the criminal offence as charged (marked as T1 – T81). It was stated that at the main trial, upon the proposal of the defence, the Court also examined seven witnesses, among whom there was one expert witness and that the inspection of substantive evidence handed by the appellant to the court of BiH during the main trial was carried out (marked as O1-O141).

25. As regards its subject-matter jurisdiction, the Court of BiH stated that the mentioned jurisdiction was established by the Decision of the Court of BiH no. X-KO-08/540-1 of 25 August 2009 and that during the main trial the facts relevant to the decision making on the established subject-matter jurisdiction were not changed. Furthermore, the Court of BiH pointed to the fact that the prosecutor's evidence, produced during the main trial (examined authorized official persons of the Bijeljina Security Services Centre) showed that during the investigation in this case the entity investigative authorities demonstrated inefficiency and lack of coordination which, in the context of a large number of unsolved murders in the RS, resulted in the Analysis by the Collegium of Prosecutors of Istočno Sarajevo Prosecutor's Office dated 17 March 2006 (Exhibit O-22), which observed "impotence on the part of the law-enforcement agencies and fear among citizens". It was noted that the conclusions in this document by a judicial institution, including the unsolved murder of the victim, could, in the Court's opinion, be recognized as "other detrimental consequences outside the entity territory", justifying the assertion of the jurisdiction by the Court of BiH, in terms of Article 7(2)(b) of the Law on the Court of BiH.

26. Furthermore, the Court of BiH stated that after a comprehensive and meticulous evaluation of all presented evidence, it accepted these facts as proven decisive facts or the facts based on which one can establish a logical connection among the pieces of evidence and unambiguously conclude that the appellant had committed the criminal offence, as charged, at the time and in the manner described in the indictment. The Court of BiH pointed out that the facts on the presence of the "Toyota" vehicle at the scene of the incriminated event at Hase, in which the automatic rifles had been found as well as the items with the traces of the appellant's DNA, were confirmed by the testimonies of two prosecution witnesses whose testimonies concur with the ballistic examination of the automatic rifles found in the vehicle and the cartridges found at the spot during the investigation. Moreover, the Court of BiH stated that other items and traces found in the vehicle "Toyota", as precisely described in the verdict, were delivered to the Crime Technicians Centre in Banjaluka ("CTC"). Also, the Court of BiH noted that upon a wider inspection of the spot where the vehicle had been left the clothing items were found and those items were listed in the Official Note no. 11-02/2 of 8 June 2000. It was noted that the Court clarified the unclear points in marking of these traces pointed to by the defence during the proceedings by way of interrogating the witnesses of prosecution - two crime technicians who inspected the spot, collected and secured the evidence and made the scene sketch and photo-documentation. The Court of BiH pointed to the fact that pursuant to Article 151 of the then applicable Criminal Procedure Code, the authorities of the interior were obliged to take "necessary measures to detect the perpetrator of the criminal offence…, to recover and secure the trace evidence of the criminal offense and items that may serve as evidence".

27. Furthermore, the Court of BiH stated that based on the biological traces isolated on the items found in the "Toyota" vehicle, the Prosecutor's Office of BiH proved the appellant's presence in the vehicle and based on the established presence of particles of gunpowder gases on the glove with the biological traces the fact that it was the appellant who had opened fire from the automatic rifle towards the victim. As regards this piece of evidence, the Court of BiH stated that it meticulously considered the defence objections regarding the prosecutor's using "fabricated evidence" (wording used by the defence in its closing argument), that is, that the gloves that were the subject of expert analysis do not come from the vehicle "Toyota". However, as regards that piece of evidence, the Court of BiH extensively described the actions of the competent authorities when they were conducting expert evaluation and pointed out that on the basis of the finding and opinion of the RS MoI Forensic Centre (Exhibit T-39) no usable traces of papillary lines were found on the pair of rubber gloves used in the expert analysis.

The finding explained the way in which the gloves were handled during the expert examination (the right glove cut and treated with ninhydride), whereas the other glove was cut down to the thumb and left aside to be used for a DNA analysis. It is further stated that the finding of the Faculty of Biology of the University of Belgrade ("the Faculty of Biology"), (Exhibit T-50) dated 2 July 2007 clearly states that on 31 May 2007, among other things, the "left rubber glove cut along the thumb to the opening upwards" and the "right glove with traces of black powder and red colour stains, cut along the line of the little finger" were submitted for the expert analysis. It is further explained in the verdict that the DNA material isolated from the submitted gloves represents more or less a mixed DNA material which is more clearly isolated in some samples, whereas in one sample the present material originates almost solely from the appellant and that the DNA material isolated from the black sweatshirt belongs to the appellant with a 1 in $2.57x10^{18}$ random match probability. It is stated that the expert witness Dušan Keckarević (from the Faculty of Biology), explained at the trial the way in which the expert evaluation was conducted, gave clear and convincing explanations to the questions put by the prosecutor and the defence. The Court of BiH also points out that in this part, the Court reflects upon the objection raised by the appellant that the Faculty of Biology could not use the indisputable biological traces of the appellant from another criminal case and previously determined DNA profiles. Based on the adduced evidence, the Court determined that the indisputable biological material was taken from the appellant on 17 November 2006 based on the order of the investigative judge of the Belgrade District Court No. KRI-2275/06 dated 17 November 2006. In the BiH Court's opinion, the expert witness could use such obtained indisputable biological material in the subsequent expert analysis upon the request of the Prosecutor's Office of BiH because it is the evidence which was not obtained in a violation of the appellant's right and which could not be regarded as unlawful evidence.

28. In addition, the Court of BiH states that expert witness Rijad Konjhodžić (from BiH) conducted an identical expert evaluation of the appellant's biological evidence preceded by taking his mouth swab and head hairs "with his voluntary consent". Expert witness Konjhodžić unambiguously contended in his opinion that it was practically proven that the biological material from sample I of the left glove originated from the appellant and that there existed a medium strong indication that the biological material from the right glove originated from the appellant. The Court of BiH points out that expert witness Konjhodžić thoroughly explained at trial the way in which the expert evaluation was conducted, expounded on the finding and convincingly and unambiguously, as stated by the Court of BiH, answered the questions by the defence, entirely maintaining his presented opinion. Bearing in mind the fact that expert witness Konjhodžić conducted the expert evaluation independently of the

Belgrade Faculty of Biology and yet practically corroborated the finding and opinion of the Belgrade Faculty of Biology, the Court concludes that the presence of appellant Ždrale's biological traces on the gloves, sweatshirt and baseball cap found in the "Toyota" vehicle during the investigation after the murder of the victim was proven beyond a reasonable doubt. Moreover, the Court of BiH states that it particularly thoroughly considered the testimony of defence expert witness Damir Marjanović and concluded that his expert testimony did not call into question the findings of expert witnesses Konjhodžić and Keckarević respectively. In particular, witness Marjanović confirmed very clearly that the conclusions reached by expert witnesses Konjhodžić and Keckarević unquestionably ensued from the facts given in their findings and that he had no remarks to that effect. The challenges raised by witness Marjanović concerned the methodological approaches in the organization and presentation of the finding and opinion, which, in the Court's opinion, could not affect the scientific foundation of the finding and opinion presented.

29. The Court of BiH further states that it also carefully analyzed the testimony of the prosecution witness J.D., who was "strikingly convincing, reasonable, almost spontaneous and very clear in his testimony". Furthermore, the Court of BiH states that it had in mind the lack of logic in the testimony of the mentioned witness which related to the role of the appellant in the murder (the appellant drove, Mačar fired). In this connection, the Court of BiH states that although it is a relevant fact, the lack of logic can be attributed to the fact that the witness got indirect information about the incident, but also to his intention to knowingly shift the responsibility to the deceased person (Vlatko Mačar).

30. Furthermore, the Court of BiH established that the appellant had used prison privileges and had been absent from Kula Correctional Facility during the period from 4/5 to 12/13 June 2000. It is noted that the departure and return of the appellant was registered in the Daily Occurrences Book and confirmed by the testimonies of three interrogated witness, for which the Court of BiH stated that they were clear and compelling and the Court therefore accepted them as objective. Also, the Court of BiH took under advisement the objections by the defence that the documents pertaining to the official records of the Kula Correctional Facility (Daily Occurrences Books and Work Log – prosecution Exhibits T-33 and Reports T-34), which the prosecutor obtained on the basis of his order (Exhibit T-36 and 37) through authorized official persons of "SIPA", could not be regarded as lawfully obtained evidence, since it was obtained without a Court's order. The Court considers erroneous the conclusion of the defence that the documents constituting official records of state authorities must be obtained on

Court's orders because the law provides that all state authorities have an obligation to officially cooperate with the prosecutor (Article 21(2) of the BiH CPC).

31. Furthermore, the Court of BiH states that in the context of the evidence presented, it carefully considered the objections by the defence regarding "irregularities in the preliminary proceedings", that is, regarding the way of collecting, marking and securing the evidence. The Court concluded that these irregularities did not affect the traces secured at the scene and did not put into question the probative value of the evidence presented at trial. The Court of BiH pointed out that it did not accept the objections by the defence on the unlawfully obtained finding and opinion of the Faculty of Biology (the institution of another state) in violation of Article 407 and 408 of the BiH CPC and provisions of Article 3 and 4 of the Agreement on Mutual Legal Assistance between Bosnia and Herzegovina and Serbia and Montenegro. It is noted that the formal procedures for obtaining finding and opinion of the expert cannot affect its probative value because the expert of the Faculty of Biology (Dušan Keckerović) presented and expounded on his finding and opinion at the main trial. According to the opinion of the Court of BiH, it is the presentation of the finding and opinion at trial that gives it the evidential value, because its scientific value is essentially proven in the direct and cross-examination. Moreover, it is noted that the Court of BiH carefully considered the defence evidence pertaining to the discrediting of that expert witness. Having analyzed the defence evidence both individually and collectively, the Court could not conclude that the expert witness was unreliable or that his expert evaluation lacked professional foundation. It is noted that the lack of clarity in correspondence which the defence justifiably referred to can be regarded as a result of deficient procedures relating to document and record management, which does not necessarily diminish the professional and scientific value of the expert evaluation.

32. Finally, the Court of BiH points out that bearing in mind the general rules for meting out the sentence referred to in Article 41 of the RS CC (General Part), the Court imposed on the appellant the punishment of twenty years imprisonment. The Court of BiH notes that the punishment of imprisonment for a term not less than ten years or death punishment is prescribed for the committed criminal offence. It is noted that pursuant to Article 38(2) of the SFRY Criminal Code (General Part), which was in force in Republika Srpska at the time of the murder, the Court may also pronounce twenty years imprisonment for the criminal offences punishable by the death. Thus, as pointed out by the Court of BiH, the punishment of twenty years imprisonment was stipulated at the time of the commission of the criminal offence as an alternative punishment. In view of the aforesaid, as noted by

the Court of BiH, that interpretation allows only one conclusion that this criminal offence carries alternatively the sentence of imprisonment of not less than ten years (with the general maximum of up to 15 years), twenty years of imprisonment and death penalty. Since the direct application of Article 1 of Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") eliminates the possibility of imposing the death penalty, the sentence of 10 to 15 years imprisonment and twenty years imprisonment remain as alternative punishments. According to the viewpoint of the Court of BiH, the punishment of twenty years imprisonment exists as an independent criminal sanction and is not related to the possibility of imposing the death penalty for the present offence (the law uses the phrase "prescribed death penalty"). Further, the Court of BiH states that it in particular considered and took under advisement, as aggravating circumstances, the facts that the appellant had been convicted of the same type of criminal offence (murder), that he had committed the same type of the criminal offence while serving the sentence and that the lives of other people had been endangered during the perpetration of the criminal offence. As stated in the verdict the Court did not find any mitigating circumstances on the part of the appellant.

33. While deciding the appellant's appeal against the verdict no. X-K-08/540/1 of 16 April 2010, the Appellate Panel composed of Judge Meddžida Kreso, as the Presiding Judge, and Judge Redžib Begić and Judge Dragomir Vukoje, as members of the Panel, rendered the verdict no. X-KŽ-08/540-1 of 14 October 2010, whereby it partially granted the appellant's appeal and modified the first instance verdict with regards to the legal qualification of the criminal offence and the appellant was found guilty because, with his acts factually described in the operative part of the referenced Verdict, he had committed the criminal offense of Murder, in violation of Article 36(2)(2) of the Criminal Code of Republika Srpska – Special Part (*Official Gazette of the Socialist Republic of Bosnia and Herzegovina* No. 16/77, 32/84, 40/87, 41/87, 33/89, 2/90 and 24/91, and the *Official Gazette of Republika Srpska* No. 15/92, 14/93, 17/93, 26/93, 14/94 and 3/96), while the remaining part of the appellant's appeal was dismissed and the first instance verdict was upheld.

34. In the reasoning of the verdict, contrary to the complaints in the appeal as regards the subject-matter jurisdiction of the Court of BiH, the Appellate Panel found the reasons provided in the BiH Court's Decision No. X-KO-08/540-1 of 25 August 2009 to be accurate, as did the First Instance Panel. Further the Appellate Panel pointed out that it also regarded as accurate the First Instance Panel's position from the contested Verdict that the jurisdiction of a court once determined should not be altered if the court had not established new facts and circumstances of importance for the issue. It

was noted that the appellant's objection was unfounded that the two instances principle was violated because it was the Special Panel that decided on the Prosecution's appeal against the Preliminary Hearing Judge's Decision that the Court of BiH lacked jurisdiction. Furthermore, the Appellate Panel pointed out that the Special Panel, as well as the First Instance Panel that rendered the contested Verdict, correctly inferred from the referenced exhibit that there existed "other detrimental consequences beyond the territory of an Entity", pursuant to Article 7(2) of the Law on the Court of BiH, so the claim that this conclusion was a result of either erroneously or incompletely established state of the facts was unfounded. Further, the Appellate Panel emphasized that the Order of the Prosecutor's Office of BiH on Conducting an Investigation in this case had been issued on 6 March 2006. Therefore, the appellant's allegations on "prohibition of retroactive application of law" are unfounded as the Law on the Court of BiH entered into effect on 1 February 2003, whereas the criminal offence which the appellant was charged with in the challenged verdict had been committed on 7 June 2000. Therefore, as concluded by the Appellate Panel, the timing of the commission of the criminal offense is not of importance for this Decision; what is decisive is when the jurisdiction of the court was established.

35. Furthermore, as regards the appellant's allegations that the Court of BiH unlawfully excluded the public from the main trial during the examination of witness J.D, the Appellate Panel pointed out that Article 235 of the BiH CPC provides a panel of judges to exclude the public for the entire main trial or a part of it from the opening to the end of the main trial. The exclusion of the public can be done on a motion of the parties or *ex officio*, but always after hearing the parties, which was done in the instant case. Prior to rendering this decision the Panel heard the parties and the defence counsel for the appellant. Since it found the Prosecutor's motion to be well-founded, that is, concluded that the examination of the referenced witness with the presence of the public might result in a disturbance of the peace or of public order, given the specific nature of the contents of his testimony, the Panel rendered the decision to exclude the public. Further, the Appellate Panel pointed out that it found that the First-Instance Panel, in the reasons for the verdict, provided the explanation of the contradictory evidence, specifically, the respective statements of P.N. and Dž.N, which actually led to the erroneously and incompletely established state of the facts.

36. Also, the Appellate Panel points out that the fact, that the description in the operative part of the contested verdict contains several qualifying circumstances, of which one is decisive for a certain grave type of criminal offense while the others may constitute aggravating circumstances when meting out the

punishment, does not render such operative part of the verdict incomprehensible. Also, the Appellate Panel notes that the appellant's objection is unfounded where he claimed that he could not exercise his right to defend himself, as the appellant, given the facts and based on the confirmed Indictment, was fully aware of the charges and the factual averments on which the Indictment was based. According to this Panel, the fact that the Indictment also contained a legal definition with several differently qualified types of the criminal offense of murder did not in any way call into question the exercising of the appellant's right to defend himself, in both the formal and the material sense. Moreover, the Appellate Panel pointed out that it could be concluded beyond a doubt from the factual description in the operative part of the verdict that the appellant had acted with direct intent since he had fired at the victim with intent to kill the victim and he willed the prohibited consequence to occur.

37. Furthermore, as to the appellant's claims by which he was challenging the lawfulness of evidence, the Appellate Panel noted that the evidence to which the appellant pointed to in his appeal did not belong to the group of evidence that the law explicitly defined as the evidence on which a judicial decision could not be based. Also, the Appellate Panel pointed out that the principle of *tempus regit actum* was applied in the Criminal Procedure Code. This principle governs the evaluation of lawfulness of some procedural action (in the instant case of the crime scene investigation, forensic inspection, forensic analysis, and the like), which is conducted on the basis of the provisions of the procedure code that was in effect at the time the given action was taken. Therefore, the Appellate Panel evaluated the issue of lawfulness of the obtained evidence, as stated in the verdict, in view of the provisions of the Criminal Procedure Code (the *Official Gazette of the* SFRY 4/77, 14/85, 74/87, 57/89, 3/90, 27/90, and the *Official Gazette of Republika Srpska* 26/93, 14/94 and 6/97) in effect at the time the referenced procedural actions had been taken. In this connection, the Appellate Panel pointed out that all actions undertaken by the police authorities of the Bijeljina CJB in the period immediately following the commission of the relevant criminal offense with respect to the perpetrator, who had been unidentified at the time, had been undertaken in accordance with the CPC provisions in effect at the time (Articles 151 and 154). It was noted that pursuant to Article 151(1) of the CPC, "when there exist grounds for suspicion that a criminal offense that must be investigated *ex officio* was committed, the internal affairs bodies are obliged to take necessary measures to detect the perpetrator, to make sure that the perpetrator or a co-perpetrator does not hide or flee, to recover and secure the trace evidence of the criminal offense and objects that may serve as evidence, as well as to gather every piece of information that may be useful for a successful conduct of the criminal proceedings, while Paragraph (6) of the same Article stipulates that the evidence shall be submitted to the court only with the filing of

criminal report. Pursuant to Article 154(2) of the same code, the internal affairs bodies may order the necessary forensic analyses, except for autopsy and exhumation of a corpse“. It was stated that according to the Crime Scene Investigation Record made by Božo Peranović, an investigative judge of the County Court in Bijeljina, which was made in accordance with Article 80 of the CPC in every important aspect, contrary to the claims in the Appeal, it followed that the investigative judge had issued an order to transfer the recovered vehicle “Toyota” to the compound of the Bijeljina CJB and to conduct its forensic inspection, which had indeed been done. A report of the inspection was made as well as a photo-documentation. Therefore, contrary to the defence claims, all referenced actions were conducted upon the order of the investigative judge and in accordance with the CPC in effect at the time.

38. Furthermore, the Appellate Panel pointed out that the appellant’s objections were also unfounded where the appellant claimed the unlawfulness of the findings and opinion by expert witnesses Keckarević and Konjhodžić. In other words, the Appellate Panel fully agreed with the First Instance Panel's inference that, although certain shortcomings were obvious with respect to the formal procedures surrounding the appointment of expert witness Keckarević to conduct forensic examination in the instant case, they could not contest the lawfulness of his findings and opinion and their probative value, given the fact that the expert witness presented his finding and opinion at the main trial and that, pursuant to Article 270(5) of the BiH CPC, his written finding and opinion could therefore be admitted as evidence. The same applies to the claims related to the findings and opinion by expert witness Rijad Konjhodžić, as the Appeal reads that there was no order by the Court for taking an incontestable DNA sample, but that it was taken by an authorized official person, whereas the hair samples taken as material for obtaining an incontestable DNA sample were not marked properly. The Appellate Panel pointed out that, as follows from the case file, the appellant consented to have a mouth swab and his hair samples taken, with the hair sample not being used for forensic examination at all. Further, the Appellate Panel pointed out that expert witness Konjhodžić had also provided clarifications of the findings and opinion at the main trial during the cross examination.

39. With respect to the claims indicating the lack of "chain of custody" of evidentiary material, the Appellate Panel points out that, contrary to the claims, the identity of the rubber gloves (yellow) that were the subject of the forensic examination cannot be contested. Further, the Appellate Panel describes in details the actions of each body “working” on the mentioned gloves and that it follows from the presented evidence, according to the finding of the Appellate Panel concluded from the foregoing, that

the subject of all forensic analyses were the yellow rubber gloves found behind the passenger's seat in the vehicle *Toyota*, and that traces of every previous analysis were visible on the gloves at every subsequent analysis, which refutes the averment in the appeal that it was not one and the same pair of gloves that was the subject of every forensic examination. Finally, the Appellate Panel states that it fully accepts the arguments in the contested Verdict that expert witness Damir Marjanovic did not contest with his statement the accuracy of the conclusions from the findings and opinion of expert witnesses Keckarević and Konjhodžić, but only pointed at the shortcoming of expert witness Keckarević 's findings and opinion in terms of the absence of electropherograms, and emphasized the necessity of the existence of "chain of custody" of evidence with a view to a DNA forensic analysis. Furthermore, the Appellate Panel points out that it finds that the First Instance Panel inferred correctly that the appellant was not in the prison serving his sentence at the referenced time having conscientiously evaluated the statements of all examined witnesses on the absence of the Appellant from the Kula Correctional Facility in the relevant period and correlated the referenced statements with the contents of the daily occurrences logs and reports of duty officers.

40. The Appellate Panel points out that the First Instance Verdict provided valid and convincing reasons for the conclusions drawn on all decisive facts and that the First Instance Panel evaluated both the Prosecution and the Defence evidence in the manner stipulated in Article 281(2) of the BiH CPC. The Appellate Panel states that the fact that a certain witness' statement contains some inconsistencies or illogicalities does not always necessarily mean that such statement should be rejected in its entirety as unreliable. In the opinion of the Appellate Panel, the First Instance Panel took into account all the referenced circumstances when evaluating the statements of the witnesses examined in the course of the first instance proceedings and drew inference on the established decisive facts on the basis of the evaluation thus conducted. Although the defence counsel argues that the First Instance Panel did not evaluate the statement of witness M. C, that is, that it singled out from the statements of witnesses B. S. and S. C. only those facts that corroborated the Prosecution case, the Appellate Panel finds these defence claims to be unfounded. That is to say, witness M. C., who was an eyewitness to the relevant murder, said herself that she was in a state of shock, that she "ducked" next to the pavement curb when she heard a shot and that while she was getting up she saw a red automobile returning. Subsequently, she stressed in her statement that the red automobile passed by, turned around and that shots were heard. She also noted that she saw two persons with balaclava masks in the referenced vehicle. When evaluating her evidence insofar as contested by the appeal, the Appellate Panel finds that it must be regarded within the context of the condition in which the witness was, which implies a state of fear and

shock, as she said herself. However, what follows beyond a doubt from this statement and about what this witness is consistent, is that she saw a red vehicle passing by the halted vehicle driven by the victim and that from that vehicle fire was opened on the vehicle of the victim, as well as that there were two persons in the vehicle from which the fire was opened. The fact that this witness mentioned that the driver and co-driver wore balaclava caps, and that she stated that the vehicle from which it was fired first turned around and that then fire was opened on the victim from it, does not challenge, according to the opinion of the Appellate Panel, the credibility and reliability of this witness' statement, since such averments of the witness may be explained exactly with the state of fear and shock that the witness suffered during the relevant event. The First Instance Panel evaluated the correspondence of this witness' statement to the other pieces of presented evidence and on the basis of such evaluation reached the conclusions on facts that the Appellate Panel also finds to be correct.

41. Furthermore, the Appellate Panel emphasizes that the appeal points out a part of the statement of witness B. S. concerning the description of the persons who got out of the *Toyota* vehicle, which was abandoned in the settlement of Hase, and who drove off in another vehicle. That is to say, this witness stated, among other things, that the person who got out from the driver's seat reminded him of the late Vlatko Mačar, while the person who got out from the passenger's seat did not match the appellant since the appellant "is not as tall as the co-driver". In this regard, the Appellate Panel fully accepts as accurate the conclusion in the contested Verdict that this part of the statement of witness B. S. cannot be accepted as reliable given that, as it follows from it, he was watching the referenced event from the distance of 40-50 meters, that it was happening in the month of June at around 21.15 hrs when it started getting dark and visibility was reduced, and that the terrain on which the *Toyot*a vehicle pulled up was uneven. The Appellate Panel considers that the appeal objects without grounds the statement of witness B. S. In other words, the appeal incorrectly states that the witness said that two rifles were taken out of the *Toyota* vehicle on the scene. Having listened to the statement of this witness, the Panel found that witness Cvjetinović said that he had noticed two rifles on the back seat of the *Toyota* vehicle on the scene. Subsequently, in the forensic inspection of the vehicle, two rifles were found on the floor beneath the back seats, while two clips for automatic rifle were found on the seat itself (Exhibit T-19). The statement of witness S. C. is also corroborated by the Forensic Inspection Report relating to the *Toyota* vehicle with the accompanying photo-documentation, whereas, in the opinion of the Appellate Panel, the differences concerning the location where the rifles were found could also be explained by the passage of time from the relevant event to the moment of testifying, due to which it is unrealistic to expect that the witness would remember each and every detail in its entirety. It is noted that the Court

of BiH accepted as reliable the evidence of witness J. D., although he had indirect information on the relevant event, since he described clearly and almost spontaneously and in detail the manner of acquisition of the registration plates 099-J-206 that were fitted onto the *Toyota* vehicle at the time of the murder of victim, as emphasized in the contested verdict. He also described other activities of the appellant, Vlatko Mačar and Jovan Škrobo before and after the murder concerned. By comparing the facts and circumstances this witness testified about to the other presented evidence, the Court of BiH correctly concluded that the statement of this witness was credible and reliable. The fact that the Court of BiH did give full credence to the testimony of this witness in respect of the appellant's role in this event does not cost doubt on the admissibility of the remaining part of the statement given the arguments for such a position provided in the reasoning of the contested Verdict. Providing the arguments justifying the acceptance of the statement of this witness, as regards the evaluation of the statement compared with the other presented evidence, the contested verdict also offered the reasons for non-acceptance of the statements of witnesses R.J. and P.N, hence the averment in the appeal that these witnesses' statements were not considered in any way is unfounded. Therefore, in the opinion of the Appellate Panel, the Court of BiH, having evaluated all the evidence in the manner stipulated in Article 281(2) of the BIH CPC, properly and reliably established the facts on which the contested verdict was based.

42. Further, as regards the appellant's allegation that the principle of *in dubio pro reo* was violated as in the proceedings the standard of proof "beyond a reasonable doubt", which is not envisaged in the BIH CPC, the Appellate Panel pointed out that the meaning of Article 3(2) of the BiH CPC implies that the facts composing characteristics of a criminal offense or decisive for the criminal liability of the appellant must be established with absolute certainty so that no reasonable trier of facts could contest them. The Appellate Panel pointed out that the Court of BiH evaluated the evidence in the manner stipulated by Article 281(2) of the BIH CPC, that is, it conscientiously evaluated every relevant piece of evidence and its correspondence with the rest of the evidence and concluded, based on such evaluation, whether a fact had been proved, and, pursuant to Article 290(7) of the BIH CPC, provided appropriate reasons with respect to such an evaluation.

43. Finally, the Appellate Panel pointed out that the description of facts in the operative part of the contested verdict does not give rise to the conclusion contained in the reasoning behind the verdict relating to the existence of perfidiousness or cruelty in the manner of murdering the victim, as it does not contain subjective elements characterizing perfidiousness. Also, the appellant's behaviour cannot

objectively be referred to as cruel behaviour. However, as pointed out by the Appellate Panel, it follows from the factual basis of the operative part of the contested verdict that the appellant, by firing in the direction of the victim, endangered the life of a woman who was trying to get into the victim's vehicle, as well as the lives of a considerable number of passengers who were at the Railway Station, not far from the scene, which facts the Court of BiH considered proven based on the reasoning of the contested verdict. Therefore, the Appellate Panel pointed out that the appellant, while succeeding in his intention to deprive the victim of his life, had been aware that he had been thereby also endangering the lives of several persons, from which it could be concluded beyond a doubt that he had consented to such consequence of the action taken. In view of the aforesaid, the Appellate Panel found that the foregoing gave rise to the conclusion that the appellant had acted with indirect intent, with respect to such qualifying circumstance that surrounds the execution of the criminal offense he was found guilty of. Such act of the appellant contains all essential elements constituting the criminal offense of murder in violation of Article 36(2)(2) of the RS CC – Special Part. Based on the foregoing, the Appellate Panel partially upheld the appeal by the defence counsel and revised the contested verdict with respect to the legal definition of the criminal offense and rendered the decision as quoted in the operative part of the verdict. The Appellate Panel stated that it reviewed the first instance verdict, its part on the punishment, and concluded that only with the pronounced sentence of 20 years in prison can the purpose of general, and in particular of the special deterrence, be achieved in the instant case.

b) Facts from the supplement to the appeal no. AP 220/11

44. The appellant has been serving the prison sentence in the Foča Penal-Correctional Institution since 2 February 2011. On 27 January 2012 he was placed in the Special Prison Unit FOR Serving the Prison Sentence ("the Special Prison Unit"), which was opened within the Foča Penal-Correctional Institution.

c) Facts from Appeal no. AP 1505/12

45. The appellant is the wife of appellant Ždrale and visits him at Foča Penal-Correctional Institution.

46. Appellant Jokić represented appellant Ždrale during the ordinary court proceeding and visited him as his attorney at the Foča Penal-Correctional Institution on 24 February 2012, when, as he alleged, he was subjected to degrading treatment. According to the allegations stated in the submission

of appellant Jokić dated 17 August 2012, after 24 February 2102 he has had no communication with appellant Ždrale "because he does not want to be subjected again to degrading treatment and to engage in supervised visits and telephone calls with his client".

47. The Constitutional Court observes that it follows from the documentation submitted to the Constitutional Court by appellant Jokić that he lodged an appeal on 7 March 2012 on behalf of appellant Ždrale with the Institution of Human Rights Ombudsman of Bosnia and Herzegovina ("the Ombudsman of BiH"). In addition, on 2 April 2012 appellant Jokić submitted to the Foča Penal-Correctional Institution a request for the communication of information related to the treatment of appellant Ždrale and the conduct of the officers of the Foča Penal-Correctional Institution with him. Also, on the basis of the reply to the appeal submitted to the Constitutional Court by the Ministry of Justice of BiH it follows that on 12 March 2012 appellant Jokić lodged an appeal on behalf of appellant Ždrale, also with the said Ministry, because of the conduct of the officers of the Foča Penal-Correctional Institution towards them. Also, based on the documentation submitted to the Constitutional Court by the Ministry of Justice of BiH, it follows that the said Ministry established the case no. 06 15-1 2731/12 "Supervision of the execution of the prison sentence and the protection of human rights of the convicted person Đorđe Ždrale", and that on 17 April 2012 an Inspection was carried out on the premises of the Foča Penal-Correctional Institution, during which, among other things, an interview was conducted with appellant Ždrale.

IV. Appeal

a) Allegations stated in Appeal no. AP-220/11

48. The appellant holds that the challenged judgments are 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 and his right of appeal in criminal matters under Article 2 of Protocol No. 7 to the European Convention. In a rather extensive appeal the appellant, first and foremost, challenges the subject-matter jurisdiction of the Court of BiH. He alleges that his previous appeal lodged, among other things, also against the ruling on the subject-matter jurisdiction of the Court of BiH was rejected as premature in the case no. AP 3105/09. In addition, he mentions, *inter alia*, the violation of "the principle of retrospective applicability of the law", because the criminal act that he was found guilty of had been committed on 7 June 2000, and the Law on the Court of BiH entered into force on 1 February 2003. Also, he states that, by adopting the ruling dated 19 June 2008, the Court of BiH violated the principle of "objective impartiality by making it impossible for the appellant to voice his opinion about the allegations made by the BiH Prosecutor's Office", and then the Court of BiH, by the Ruling no. X-KO-08/540-1 of 25 August 2009, violated the presumption of innocence. Further, the appellant

alleges that he was not tried by an impartial tribunal. Furthermore, he holds that the provisions of the Criminal Procedure Code of BiH were also violated during the proceeding, as the court closed the main hearing for the public in the course of testimony of one witness. He emphasizes that the challenged judgments are based on unlawful evidence and clarifies in detail what evidence, in his opinion, were unlawful. He states that the reasons for the judgments do not comprise the assessment of all evidence presented and the reasons for not accepting all the evidence. He is of the opinion that the first-instance judgment is based on indications. Furthermore, as the appellant alleges, the judgment does not provide the reasoning about contradictory evidence. Thus, as the appellant claims, the principle of *in dubio pro reo* is violated. In addition, the mentioned principle was also violated because of "incorrect translation of the mechanism *proof beyond reasonable doubt*," by adding an attribute "any" reasonable doubt. The appellant alleges that the first-instance and second-instance courts have different standards (the first-instance – beyond reasonable doubt, and the second-instance – beyond a reasonable doubt), and none gives the answer as to what "reasonable doubt" is, thereby violating his right to a fair trial and the reasoning of such a standard "constitutes the most flagrant violation" of the principle *in dubio pro reo*. The appellant claims that the Appellate Panel, by granting his appeal and modifying the verdict with respect to the legal qualification, violated the objective identity of the accusation and the verdict and of the principle of prohibition of *reformatio in peius*. Besides, the appellant claims that the verdict and the reasoning thereof carry no word on his culpability. Also, the appellant objects to the punishment that was imposed on him. He points out that the 20-year prison sentence essentially substituted death penalty and it did not constitute an alternative, but a facultative power of the court to impose a 20-year imprisonment instead of death penalty, and it was linked to the imposition of death penalty. The appellant states that in addition to the violation of the right to a fair trial his right to appeal under Article 2 of Protocol No. 7 to the European Convention was violated, too. He holds that it follows from the second-instance verdict that his appeal against the first-instance verdict was not "reviewed in substance", rather it constitutes a decision which "observed only formally" the right to appeal.

49. In the supplement to the appeal no. AP 220/11 of 24 April 2012, the appellant alleges a violation of his right under Article II(3)(e) and (f) of the Constitution of Bosnia and Herzegovina and Articles 6, 8 and 13 of the European Convention. The appellant states that he has been serving a sentence of long-term imprisonment in the Foča Penal-Correctional Institution and that at the time of lodging the appeal he was placed in the Special Prison Unit, where appellant Jokić visited him on 24 February 2012. On that occasion, as appellant Ždrale alleges, while entering the premises of the Foča Penal-Correctional Institution, appellant Jokić was searched and sent to the newly built wing where he removed his clothes and made it possible for the guard service to perform the search. Appellant Ždrale

states that the visit by the attorney Jokić was announced. He alleges that the visit by appellant Jokić is limited to 60 minutes and that he informed him on that occasion that he was not allowed unsupervised visits by his wife, that his telephone communication was restricted, that all his conversations (telephone and during visits alike) are tapped, including his conversations with the defence counsel, that he had to sign a consent form relating to surveillance of communications and visits in order to be permitted to have them. The appellant alleges that his [appellant's] wife (Spomenka Ždrale) was subjected to identical treatment during her visits and was also compelled to remove her clothes in order to be searched by the Foča Penal-Correctional Institution Guard Service. Also, he alleges that his three minor children are not in a position to visit him, given that the appellant and his wife "do not want to expose their minor children to degrading treatment", as well as for the reason that visits to the appellant are "possible only through glass partitions". Appellant Ždrale recalls that the Special Prison Unit had been founded in June 2011 and that it had been built and equipped in accordance with the contemporary European and global standards in the area of the execution of criminal sanctions and is one of the most modern institutions of this type in the region. Furthermore, the appellant notes that, although the House Rules of the Special Prison Unit stipulate the use of smoking and personal hygiene kit, the appellant is not allowed to have on him a lighter or a shampoo bottle. As to the right under Article 6(3)(c) of the European Convention, appellant Ždrale points out that his right to defence was violated since "his lawyer was not allowed access, unless he agreed to inhumane and degrading treatment". As to the violation of the right under Article 8 of the European Convention, the appellant alleges that due to the regime imposed on him, he is not in a position to maintain family ties. He is not allowed conjugal visits with his wife. As to the violation of Article 13 of the European Convention, the appellant points out that apart from the respective supplement to the appeal filed with the Constitutional Court, he had no other possibility of lodging a legal remedy, therefore Article 13 of the European Convention was violated in the present case.

50. Also, the appellant filed a request for interim measures and demanded that the Constitutional Court adopt an interim measure "ordering the RS Ministry of Justice (namely, the Foča Penal-Correctional Institution) as follows: the discontinuation of strip searches during the appellant Jokić's visits to his client [appellant Ždrale]; the discontinuation of the supervision of the communications between appellant Jokić and his client [appellant Ždrale]; the discontinuation of strip searches during the appellant's visits to her husband [appellant Ždrale]; making possible the appellant's conjugal visits to her husband [appellant Ždrale]; making possible visits allowing physical contact (not through glass partitions) between the minor children of the appellant Ms. Ždrale [and appellant Ždrale]". Besides, the appellant seeks that the Constitutional Court establishes that the State of Bosnia

and Herzegovina is responsible for the aforementioned violations and that, as a result thereof, it must pay damages to the appellant "in a fair amount", as well as all the costs that he incurred in relation to this Appeal.

b) Allegations stated in Appeal no. AP-1505/12

51. Appellant Jokić and the appellant (wife) state that their rights under Articles II(2) and II(3)(b), (e) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3, 6, 8 and 13 of the European Convention were violated. The appeal reads that appellant Ždrale has been serving the prison sentence in the Foča Penal-Correctional Institution, in the Special Prison Unit, which is justified for "security reasons", *i.e.* the protection of the appellant. In essence, appellant Jokić and the appellant (wife) reiterate the allegations stated in the supplement to the appeal that appellant Ždrale submitted to the Constitutional Court on 24 April 2012. They allege that the appellant "in the present proceedings, also pleads for human rights of her underage children, who have been denied any direct communication with their father due to the prison regime in question, although it has already been made difficult given the fact that their father has been serving his prison sentence". The indicated violations are reflected in the following: that appellant Jokić during the visit (the last visit took place on 24 February 2012) was searched in such a manner that he had to strip naked; during the visits by the appellant (wife), she was searched in such a manner that she had to strip naked; communication between appellant Jokić and appellant Ždrale was under supervision; the appellant (wife) has no possibility to exercise the right to conjugal visits with her husband; the children of spouses Ždrale have no possibility to visit their father in a separate room. Given the aforementioned conduct by "the responsible persons in the Foča Penal-Correctional Institution", the appellants are of the opinion that the human rights of appellant Jokić and the appellant (wife) were violated, in a way that due to the searches during the visits to appellant Ždrale they were both subjected to degrading treatment in terms of Article 3 of the European Convention. The respective treatment also violated the appellants' right to the protection of private life in terms of Article 8 of the European Convention. The treatment during the visits by appellant Jokić and the supervised communication violated Article 6(3)(c) of the European Convention. Also, appellant Jokić and the appellant (wife) allege that they did not oppose "the personal search", which, according to their allegations, can in no way be construed as their consent to the respective treatment, since they have never been offered any other option, except that by not agreeing to personal search their visits to appellant Ždrale would be made impossible. Further, as to the violation of Article 6(3)(c), appellant Jokić, first and foremost, states the position as to the applicability of Article 6 in the present case, since no decision has been adopted yet on his appeal and he has not yet filed a request for the renewal of the proceeding on the grounds of new facts in favour of the convicted person. The act of

imposing on appellant Jokić the situation in which he must be subjected to degrading treatment by the authorities in order to have access to the defendant constitutes a manifest interference by the State with the relationship between the defence counsel and the defendant. It is clear that the rights under Article 6(3)(c) of the European Convention also apply to the rights of appellant Ždrale, as well as to the rights of his defence counsel, *i.e.* appellant Jokić in the present case. It is true also that appellant Ždrale signed the consent form to have his communication supervised, however, as appellant Jokić indicates, he has not signed such a consent form. Appellant Jokić indicates that the present case entails a violation of Article 8 of the European Convention as regards himself and the appellant (wife), in such a way that, by being forced to remove his clothes in front of unknown persons, appellant Jokić's right to respect for privacy was violated; as to the appellant (wife), because she was also forced to remove her clothes while visiting her husband and she had no possibility to exercise her right to conjugal visits to her husband. Next, as to the alleged violation of Article 13 of the European Convention, appellant Jokić and the appellant (wife) allege that in the case at hand, appellant Jokić has never received answers to his written inquiries as to why appellant Ždrale has been subjected to the special prison regime. Consequently, the appellants request that the Constitutional Court adopts an interim measure identical to that requested by appellant Ždrale in the supplement to the appeal AP 220/11. In the end, the appellants demand that the Constitutional Court establishes the following: the violation of Article 3 of the European Convention, for the reason that appellant Jokić and the appellant (wife) were subjected to degrading and inhumane treatment for the search at the Foča Penal-Correctional Institution where they had to remove their clothes; the violation of Article 6(3)(c) of the European Convention for the reason that appellant Jokić's access to his client is made difficult and for the reason that the communication between appellant Jokić and appellant Ždrale is monitored; the violation of Article 8 of the European Convention for the reason that the Foča Penal-Correctional Institution staff, by searching appellant Jokić, breached his right to privacy, and for the reason that the appellant (wife) cannot exercise her right to conjugal visits with her husband; the violation of Article 13 of the European Convention as there is no effective legal remedy. Further, the appellants seek that, after the Constitutional Court establishes that the state of Bosnia and Herzegovina is responsible for the mentioned violations of human rights, that it must pay the damages and compensate the costs they incurred in relation to this appeal. In the supplement to the appeal no. AP-1505/12 of 7 June 2012, appellant Jokić reiterated the allegations stated in the initially lodged appeal relating to his appeal with the Ombudsman of BiH, in respect of which the Foča Penal-Correctional Institution sent "Information" to the RS Bar Association, appellant Jokić being the member thereof, "on the circumstances of inappropriate and unprofessional conduct by lawyer Jokić and his insulting and threatening words against the RS Minister of Justice".

b) Reply to the appeal

52. In its reply to the appeal the Court of BiH, *inter alia*, pointed out that the replies to the appellant's complaints were entirely given in the reasons for the second instance verdict. Furthermore, it was noted that in adopting its decision the Court was carefully and conscientiously assessing each piece of evidence individually and in their connection with other presented evidence taking care of the principle of lawfulness of evidence and the principle of margin of appreciation within the general rules of human thoughts and experience.

53. The Prosecutor's Office pointed out that the appellant's allegations were unfounded and that the challenged verdicts were rendered in compliance with the appellant's human rights.

54. In its response to the appeal of 8 May 2012, the Foča Penal-Correctional Institution stated that given the appellant's frequent disciplinary offences, the manner in which they were committed and caused consequences and exposed violent behaviour towards other convicted persons, the connection with criminal groups outside the institution and permanent and direct danger that he would organise and conduct the escape with assistance of other persons, as well as the difficulties in application of professional and educational methods of work, it was necessary to make changes in the treatment and supervision by security service. Given the mentioned circumstance and facts that there were no obstacles and limitations to apply Articles 1 and 54(3)(2) of the Law on the Execution of Criminals Sanctions of BiH, on 27 January 2012, the Minister of Justice of RS, at the proposal of the Director of the Foča Penal-Correctional Institution, pursuant to Article 5(1)(3) of the Law on Special Regime of Execution of Prison Sanctions, issued the Order on placement to the Special Prison Unit for the period of six months. It is precise in the Order that the appellant's treatment during his stay in the Special Prison Unit would be conducted according to the provisions of the Law on the Execution of Criminals Sanctions of BiH. This manner of execution of prisons sentence, *i.e.* the treatment of the convicted persons is in accordance with that law, which was confirmed by the Ministry of Justice of BIH in its opinion no. 06-15-1-838/12 of 13 February 2012 which was submitted to the RS Ministry of Justice.

55. It is noted that the visits of families and defence attorneys to the Foča Penal-Correctional Institution are made in appropriate premises which are designated for that purpose and equipped with necessary items, and that there is no video supervision and that there is no direct supervision by the security service and that the communication of the convicted persons with the members of their families, wives and children is also unimpeded. When it comes to conjugal visits of spouses or partners,

it is noted that the mentioned form of internal privilege which is in accordance with the Law on the Execution of Criminals Sanctions of BiH and Rulebook on House Rules in Institutions for Serving Criminal Sanctions, Detention Measures and Other Measures in BiH ("the Rulebook on House Rules") is envisaged as a possibility and not as a right of the convicted person, and given that the mentioned privilege is primarily connected with the classification - stimulation group and that appellant Ždrale has been placed in the worst "C" classification group, this privilege cannot be approved. As regards the visits of minor children to appellant Ždrale, it was noted that the appellant had a possibility to be visited and physical contact was also allowed. However, as it is stated in the mentioned response, appellant Ždrale has not used this possibility since the time he was placed in the Special Prison Unit. It is noted that since the time appellant Ždrale commenced serving the sentence in the Foča Penal-Correctional Institution (up to the time this response was submitted) he has had 31 visits of the members of his immediate family, four visits of his defence attorney and 11 exceptional visits of other persons. It is also noted that the appellant had five free visits of his wife and his children visiting him together with his wife, which means that his minor son visited him twice and his daughter visited him once. There were no complaints by the appellant as regards the conduct of the security service workers of the Foča Penal-Correctional Institution. Article 149 of the Law on the Execution of Criminals Sanctions of BiH prescribes that in exceptional cases, the Institution may, if need be, control letters and phone calls, about which the prisoner will be informed and appellant Ždrale was informed about that in writing and he confirmed that with his signature. Article 62 of the Law on the Execution of Criminals Sanctions of BiH prescribes search of visitors and official persons entering the area of the prison including the Special Prison Unit. It is stated that when entering the Special Prison Unit, if required by security, a detail search of persons and things is conducted. This search includes inspection of items and things brought in the ward and visual inspection of external parts of the body without inspecting body cavities. The act of search as an official act, depending on its intensity and scope, is conducted in accordance with applicable laws and by-laws while complying with the highest professional standards and privacy and personality of searched persons. The search is conducted by an official person of the same sex as is the person subjected to search and this search is conducted in a room designated for that purpose which is not covered by video supervision. It is noted that in the preceding period several cases of misuse of visits by foreign persons visiting convicts have been registered and on those occasions the visitors tried to bring in illicit items at the expense of the convicted persons. The aforementioned procedures of the search of persons entering the Special Prison Unit were applied on 24 February 2012 on occasion of visits by lawyer Dragiša Jokić to his client Đorđe Ždrale. It is mentioned that on that occasion lawyer Dragiša Jokić was strip-searched as stated in the appeal. Only the inspection of his clothes and external

parts of his body was conducted without revealing intimate parts of the body. The search of wife Spomenka Ždrale was conducted in the same manner, in which case an official person of female sex conducted the search. In the Foča Penal-Correctional Institution, wherein the convicted persons are located, which also includes Special Prison Unit, it is not allowed to bring in any item. These limitations apply to defence attorneys, in which case they can, because of their job, bring in notebooks, writing stationary, judicial files and defence attorney is under the obligation to make it clear that those items are relevant for the proceedings relating to the defendant. Appellant Jokić was informed about this procedure and in the previous period he had no objection when it comes to his visits to the convict Đorđe Ždrale and other persons who serve their sentence in the Foča Penal-Correctional Institution. It is noted that appellant Jokić was addressing the Foča Penal-Correctional Institution twice with request for the submission of data and documentation relating to placement and treatment of appellant Ždrale in the Special Prison Unit (names of official persons, copies of orders on placement of the convict, proposal of manager, *etc*.). On both occasions the responses were given that the requested data represented an official secret within the meaning of Article 53 of the BiH Law on Execution of Criminal Sanctions of RS and Article 45 of Law on Execution of Criminal Sanctions of BiH and provisions of the Book of Rules on the Manner of Keeping Official Secrets by Employees of the RS Ministry of Justice and in the RS Institutions for Execution of Criminal Sanctions, including the information that constitute an exception to being published within the meaning of Article 6 of the Law on Freedom of Access to Information of the Republika Srpska.

56. In its response of 5 March 2014, the Foča Penal-Correctional Institution repeats its statements given in the response of 12 May 2012. Moreover, it is noted that appellant Ždrale, while in the Special Prison Unit, was regularly and without impediments using the possibility of the visits made by his wife and minor children during the period 2012-2013. The visits were made in the room specially designated for that purpose and that room was equipped with special furniture and there was no audio or video supervision. On the occasions when these visits were made the contact with visitors was direct and the supervision of the members of the security service was visual. During the period 2012-2013 the total number of realized visits made by his wife and minor children was 16, of other member of immediate family – 18, extraordinary visits and visits of other persons – 14. In all of the mentioned cases there was no complaint by the convicted persons and visitors regarding the conduct of the members of the Security Service of the Foča Penal-Correctional Institution. The visit to convict Đorđe Ždrale by his defence attorney Dragiša Jokić was not announced and approved by the Directorate of the Institute. Despite that fact, the visit of 60 minutes was approved and he used that opportunity in an

appropriate room designated for the purpose of defence attorneys' visits. The members of the security service were monitoring the room only visually. Appellant Jokić had no objections as regards the treatment by the members of the security service neither before nor after the visit. Also, in the information submitted on 5 March 2014 it was stated that based on the records and written documents at their disposal, there was no verbal or written request sent to the competent service of the Foča Penal-Correctional Institution during 2012 by appellants Dragiša Jokić and Spomenka Ždrale and by the children of Đorđe and Spomenka Ždrale, for approval of visits to the convict Đorđe Ždrale", but that, during the mentioned period, appellant Ždrale was regularly and without impediments using the possibility relating to the visits and his wife and minor children, as well as other members of his extended family, the lawyer and other persons who were visiting him on the basis of the requests submitted by him (appellant Ždrale) and upon the approval of the Director of the Institution. It is noted that during 2012 there were total 7 visits of appellant Spomenka Ždrale with their minor children and 1 visit of defence attorney.

57. In its response of 11 May 2012 the RS Ministry of Justice points out that upon the request of the Foča Penal-Correctional Institution, the Ministry of Justice of the Republika Srpska sent appellant Ždrale to serve his sentence in the Special Prison Unit. It is noted that in this ward, the sentence is served by male prisoners who substantially jeopardize order and discipline and persons in respect of whom it is established that all other undertaken measures were unsuccessful. It is noted that according to the Report of the Foča Penal-Correctional Institution it follows that appellant Ždrale continued with destructive activity and finding various possibilities for maintaining connections with criminal groups outside the Foča Penal-Correctional Institution, despite all undertaken measures of intensive work and intensified supervision. In particular, it is noted that he had a violent behaviour towards other convicts and he was imposed five disciplinary sentences and sent to solitary cell because of such behaviour and, after that, the conditions were met for appellant Đorđe Ždrale to be sent to serve his prison sentence in the Special Prison Unit. It is further noted that the visits and communication with appellant Ždrale were carried out in full compliance with the provisions of the Law on Execution of Criminal Sanctions of BiH. The scope and manner of using that communication, which includes communication with defence attorney, is regulated by the Rulebook on House Rules. Pursuant to the provisions of Article 149, paragraph 2 of the mentioned Law, it is regulated that in security related situations, the Institute may conduct control of letters and telephone conversations about which the prisoner is informed. Appellant Ždrale was informed about these rights – limitations and he gave his written consent, without being forced by official persons, and he confirmed that he was "previously" informed that his telephone

conversations might be eavesdropped. It is regulated by Article 62, paragraph 1 of the Law on Execution of Criminal Sanctions, Detention and Other Measures of BiH that an authorized officer of the Institution may carry out a search and confiscate property from all the premises where prisoners or detainees stay, work or spend their free time, as well as of the persons deprived of liberty, visitors and their personal belongings and official persons. Searches are conducted in a separate room without video recording, in which case a rule is complied with that the person searched and the person doing the search should be of the same sex. When entering the premises of the Foča Penal-Correctional Institution the search is conducted with a detector device and when entering Special Prison Unit the search is conducted again for the reason that the detector device discovers only metal items. In the instant case the mentioned rules were fully complied with and it should be noted that appellant Jokić was strip-searched. The search of clothes and external parts of his body was conducted without disclosing intimate parts of his body. While complying with these rules the search of Spomenka Ždrale was conducted in the same way. According to the Report made by the Foča Penal-Correctional Institution, during the time spent in person appellant Ždrale had 31 visits, and there were 11 exceptional visits of other people and there were four visits of his defence attorney. His wife also visited him for five times and his minor son visited him twice and his daughter visited him once. When it comes to the Special Prison Unit, the visits are carried out in the premises designated for that purpose and those premises are equipped with necessary items and there is no video supervision or supervision by the Security Service. The communication between a convict and immediate family members, wife and children is conducted without impediments, in which case personal and family privacy is respected. The visits of spouse or out-of-marriage partner in special premises are regulated by Article 152 of the Law of Bosnia and Herzegovina on Execution of Criminal Sanctions, Detention and Other Measures and Rule Book on Privileges and Annual Leave of Prisoners Serving Prison Sentences relating to Criminal Sanctions and Other Measures of BiH ("the Rulebook on Privileges"). These privileges represent, in essence, a group of incentive measures directed at offering confidence to a prisoner, soothing the consequences of deprivation, encouraging one's own participation in releasing the treatment program, strengthening responsibility and self-confidence for the purpose of making the convicted prisoner fit for independent life in accordance with the legal system and norms of civil society. This is not about an automatic right of a convict but rather about the possibility that the convict may use and acquire self-participation in the treatment program and positive attitude towards the efforts made to realize it. It is further noted that as regards the recent classification period and given the results of his behaviour, appellant Ždrale was placed in the worst "C" group and, therefore, he did not acquire the right to use these privileges.

58. In its response of 1 June 2012 the Ministry of Justice of BiH points out that on 12 March 2012 it received the petition from prisoner Đorđe Ždrale, represented by appellant Jokić, and that the Foča Penal-Correctional Institution was requested a response. It is stated that in the response of 5 April 2012 the Foča Penal-Correctional Institution stated that appellant Ždrale asked for separate treatment alleging that his safety was endangered by other convicts and that the Institute received the information that there were convicted persons serving the sentence in that Institution and those persons were the friends of the appellant, that there were the persons with whom he had no friendly relationship and that some of them might be the perpetrators of criminal offences ordered by the appellant and that those were the circumstances because of which he was subjected to separate treatment envisaged under Article 54 paragraph 3 item 3 of the Law of Bosnia and Herzegovina on Execution of Criminal Sanctions, Detention and Other Measures. Moreover, it is noted that the Administration of the Institution stated that on 12 August 2011 it received the confidential information from intelligence agencies and that information was submitted to the RS Ministry of Justice and was related to the preparation of escape from the institution with the help of other persons and that on 1 September 2011 the appellant established unpermitted contacts with the members of the security service of the Institution and that an official person who had been already punished because of the previous similar activities relating to the convict Radovan Stanković, in which case a disciplinary sanction had been imposed on him - conditional termination of employment and that upon the completion of the new proceeding the aforementioned member of the security service of the institution was imposed a disciplinary sanction and punished by termination of the employment. The Administration of the Institution particularly states that the appellant did not display exemplary conduct, but he rather continued with rude and violent behaviour due to which disciplinary sanctions were imposed on him several times –three times because of discovery of unpermitted possession of mobile phones due to which he was imposed the sanction of solitary cell for seven days and two times he was imposed solitary cell of 10 days and once, after he had physically attacked Jugoslav Eraković and inflicted aggravated bodily injuries upon the mentioned person, he was imposed the strictest disciplinary sanction again - solitary cell of 10 days. Finally, on 15 January 2012 appellant Ždrale attacked the convict N. K. and disciplinary sanction was imposed on him again - solitary cell of 10 days. Therefore, because of such conduct appellant Ždrale was placed in the worst "C" classification group and he was sent to the Special Prison Unit. As regards the allegations of the appellant about the visits and telephone communication, the Administration of the Institution points out that it acted in accordance with the law and Rulebook on House Rules and that the telephone calls were redirected only for security reasons, as envisaged by the positive laws, *i.e.* Article 65 of the Rulebook on House Rules, and that the defence

attorney's visits were also made in premises specially designated for that purpose without video and audio recording and without direct supervision by the Security Service, along with respect for the principle of confidentiality when it comes to the conversations between the defence attorney and his client. As regards the search of visitors to the Institution, the Administration of the Institution points out that the search of defence attorney was carried out in a professional and correct manner and that other persons are also subjected to the mentioned form of search and that security related reasons make it possible for the institutions to carry out two separate searches out of which one is a 'standard' search and is carried out in the institute's premises specially designated for that purpose after the visit is announced and the other one is a detailed search which is obligatory for all persons possessing the permit to enter Special Prison Unit and this search is also carried out in the premises specially designated for that purpose. It is because the Foča Penal-Correctional Institution is an institution with maximum security in which it is not allowed to bring in any technical devices and other items, except for the fact that defence attorneys are allowed to bring in notebooks, writing stationary, judicial files and so on. In the instant case, the aforesaid items were allowed to be brought in the past and the defence attorney had no objections in that regard. As regards the complaints of appellant Jokić about the limited visit only on one occasion, the Administration points out that the visit of defence attorney was announced for that specific day neither by him nor by the convict and neither was it approved by the Director of the Institution. However, he was approved the visit of 60 minutes and that visit could not last longer due to other organized and announced visits and upon the expiry of 60 minutes the defence attorney did not ask for prolongation of the visit. As regards the allegations that to the regulations of the Republika Srpska are applied to him, the Administration notes that the prison sentence is executed in accordance with the provisions of the Law of Bosnia and Herzegovina and that only the order of the RS Minister of Justice on sending the convict to the Special Prison Unit was issued by the Entity body and, in the opinion of the Administration of the Institute, that is not in contravention of the Law of Bosnia and Herzegovina. As to the procurement of personal hygiene products, it is noted that the convicted person is permitted to purchase them and have those products at his disposal.

V. Relevant Law

59. The **Criminal Code of the Republika Srpska - Special Part** (*Official Gazette of the SR BiH* nos. 16/77, 32/84, 40/87, 41/87, 33/89, 2/90 and 24/91 and *Official Gazette of the Republika Srpska* nos. 15/92, 4/93, 17/93, 26/93 and 3/96), as relevant, reads:

First Degree Murder

Article 36(2)(1) and (2)

The punishment of imprisonment for a term not less than ten years or long term imprisonment shall be pronounced against a person who:

1) deprives another person of his life in a particularly cruel or insidious way;

2) deprives another person of his life and in doing so intentionally endangers the lives of several persons;

60. The **Criminal Code of the Republika Srpska - General Part** (*Official Gazette of the Republika Srpska* no. 12/93), as relevant, reads:

Article 13

A criminal act is premeditated if the offender is conscious of his deed and wants its commission; or when he is conscious that a prohibited consequence might result from his act or omission and consents to its occurring.

Article 38

(1) The punishment of imprisonment may not be shorter than 15 days or 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.

61. The **Law on the Court of BiH** (*Official Gazette of BiH* no. 49/09 – Revised Text and nos. 74/09 and 97/09), as relevant, reads:

Article 7(2)(b)

(2) The Court has further jurisdiction over criminal offences prescribed in the Laws (...) of the Republika Srpska when such criminal offences:

(b) may have serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina or may have other detrimental consequences to Bosnia and Herzegovina or may cause serious economic damage or other detrimental consequences beyond the territory of an Entity or the Brčko District of Bosnia and Herzegovina.

62. The **Criminal Procedure Code of Bosnia and Herzegovina** *(Official Gazette of Bosnia and Herzegovina* nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 12/09, 16/09 and 93/09), as relevant, reads:

Article 1

This Code shall set forth the rules of the criminal procedure that are mandatory for the proceedings of the Court of Bosnia and Herzegovina (hereinafter: the Court) (...).

Article 10(2)

The Court may not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, nor on evidence obtained through essential violation of this Code.

Article 23

Subject-matter jurisdiction

(*1) The Court shall have jurisdiction to:*

a) adjudicate in first instance criminal matters within the scope of its material jurisdiction set forth by law;

b) decide appeals against first instance decisions;

(...).

Article 28

Consequences of Lack of Jurisdiction

(1) The Court shall be cautious of its jurisdiction and as soon as it becomes aware that it is not competent, it shall issue a decision that it lacks jurisdiction and once such decision has taken legal effect, it shall forward the case to the competent court. However, it shall be bound to undertake those actions in the proceedings with respect to which a delay poses a risk.

(2) The Court to which the case is forwarded shall be bound to conduct proceedings and render a decision.

Article 29

A judge cannot perform his duties as judge if:

- he is personally injured by the offense;

-if the suspect or accused, his defence attorney, the Prosecutor, the injured party, his legal representative or power of attorney is his spouse or extramarital partner or direct blood relative to any degree whatsoever, and in a lateral line to the fourth degree, or relative by marriage to the second degree;

- if he is a guardian, ward, adoptive parent, adopted child, foster parent or foster child with respect to the suspect or accused, his defence attorney, the Prosecutor or the injured party;

- if he has participated in the same case as the preliminary proceeding judge or preliminary hearing judge or if he participated in the proceedings as prosecutor, defence attorney, his legal representative or power of attorney of the injured party or if he was heard as a witness or expert witness;

- if, in the same case, he participated in rendering a decision contested by a legal remedy;

- if circumstances exist that raise a reasonable suspicion as to his impartiality.

Article 30(3)

The parties and defence attorney may file a petition for disqualification of a judge of the Panel of the Appellate Division in the appeal or in an answer to the appeal.

Article 114

Use of DNA Analysis Results in Other Criminal Proceedings

For the purpose of establishing the identity of the suspect or the accused, cells may be removed from his body in order to perform a DNA analysis. All data obtained thereby may be used in other criminal proceedings against the same person.

Article 235

From the opening to the end of the main trial, the judge or the Panel of judges may at any time, ex officio or on motion of the parties and the defence attorney, but always after hearing the parties and the defence attorney, exclude the public for the entire main trial or a part of it …if it is necessary to protect the interest of a witness.

Article 280

(1) The verdict shall refer only to the accused person and only to the criminal offense specified in the indictment that has been confirmed, or amended at the main trial or supplemented.

(2) The Court is not bound to accept the proposals regarding the legal evaluation of the act.

Article 307

Ban of reformatio in peius

If an appeal has been filed only in favour of the accused, the verdict may not be modified to the detriment of the accused.

63. The **Law of Bosnia and Herzegovina on the Execution of Criminal Sanctions, Detention and Other Measures** (*Official Gazette of BiH* no. 12/10 – Revised Text and no. 100/03), as relevant, reads:

Article 1(6)

The sanctions ruled by the Court of Bosnia and Herzegovina shall be executed in accordance with the provisions of this Law even when they are served in an Entity institution.

Article 46(1), (2) and (3)

(1) The Ministry of Justice shall supervise the work of the Institution (...).

(2) Supervision over the execution of detention and prison sentence shall include in particular: (...) legality and lawfulness of the treatment of detainees and prisoners, (...) protection of rights of detainees and prisoners (...);

(3) Supervision referred to in paragraph 2 of this Article shall be conducted by the Ministry of Justice through an Inspector who shall be an officer with special powers (hereinafter the Inspector).

Article 49(1) and (3)

(1) There shall be a written report on the inspection which shall include the inspection findings and shall order measures to be undertaken and the deadlines for elimination of identified irregularities, as well as measures for the improvement of the work of the Institution.

(3) The Governor of the Institution must act in accordance with the measures ordered.

Article 62(1), (2), (3), (4) and (6)

(1) The authorized officer of the Institution may carry out a search of (...), visitors and their possessions and official persons.

(2) The search of the premises and persons referred to in paragraph 1 of this Article shall be carried out in the manner so as to detect and prevent any attempt of escape and hiding of smuggled goods with respect for human dignity of the persons being the subject of the search and their possession.

(3) The persons being the subject of the search shall not be humiliated during the search.

(4) The search shall be carried out by the prison officers of the same sex as the person subjected to the search.

(5) (...)

(6) During the entry of visitors, the authorized prison officer may require the persons concerned to be subjected to search. If the visitor refuses to do so, the authorized prison officer shall refuse admission to the prison, where the security program must reflect the balance against the privacy of visitors or their official status according to the law or other regulations.

Article 80

(1) Detainees and prisoners shall be able to communicate confidentially with the Inspector, the Ombudsman of Bosnia and Herzegovina, competent State and regional courts and a lawyer of their choice, as regulated by the law.

(2) The communication shall be without the presence of the Institution authorities (...).

(3) Detainees and Prisoners shall be entitled to file requests, complaints and other submissions to the competent authorities for the protection of their rights. The Ministry of Justice shall issue a Rulebook regulating the internal consideration of such submissions.

(4) Requests and complaints shall be settled without delay.

(5) Notwithstanding the Rulebook for internal consideration of all submissions on prison matters, all detainees and prisoners ***may communicate any request and complaint to the Ombudsman of Bosnia and Herzegovina.***

Article 149

(1) Detainees shall be entitled to maintain contacts with their family members and persons and representatives who may be helpful for their treatment through letters or phone calls without restrictions.

(2) Exceptionally, the Institution may, if need be, control letters and phone calls, about which the prison shall be informed.

Article 150(1)

(1) Prisoners shall be entitled to visit by members of their family and friends, and visits by other persons upon consent given by the Governor of the Institution and in accordance with the House Rules.

Article 152(1) and (2)

(1) Prisoners may be granted privileges for good conduct and hard work.

(2) Privileges shall be a set of stimulating measures aimed at giving support to a prisoner, alleviating the consequences of deprivations, encouraging individual participation in treatment programs, strengthening responsibility and self confidence with the purpose of enabling a prisoner to live an independent life respecting the law and norms of civic society.

64. The **Law on the Execution of Criminal Sanctions of the Republika Srpska** (*Official Gazette of Republika Srpsk*a nos. 12/00, 117/11 and 98/13), as relevant, reads:

Article 13(4)

(4) As a rule the sentenced persons who are identified during the examination as representing a considerable threat to the security of other sentenced person and property of

the Institution or who considerably disturb order and discipline while serving the sentence and the sentenced persons against whom the taken measures remained without success shall serve the sentence in a Special Prison Unit.

65. The **Law on the Special Regime of Execution of Prison Sentence** (*Official Gazette of the Republika Srpska* no. 30/10) as relevant, reads:

Article 2

(1) The sentenced persons of the male sex who considerably endanger safety in the Institution, disturb order and discipline and sentenced persons against whom the taken measures remained without success shall serve the sentence in a Special Prison Unit.

(2) The purpose of the placement in the Special Prison Unit is the prevention of all forms of behaviour of the sentenced person who aim at disturbing the formal system and organization of the Penal-Correctional Institution s through the application of special methods and forms of work.

(3) The placement in the ward in regarded as disciplinary sanction.

Article 5(1) and (3)

(1) The Minister, on the proposal of the Head of the Institution in which a person serves the prison sentence, shall decide on the need to place that person in the ward.

(3) Following the consideration of the proposal referred to in paragraph 1 of this Article, the Minister may issue a warrant to place the sentenced person in the Ward.

Article 6(1), (2) and (3)

(1) Duration of placement in the Ward cannot be shorter than 6 months and can be extended several times for the same period, where the duration of placement in the Ward must be proportionate to threat which the sentenced person poses.

(2) Monitoring of behaviour and conduct of the sentenced person shall be carried out on a regular basis during the stay in the Ward and the assessment of degree of risk representing the basis of determining security conditions and measures within the Ward.

(3) The review of justification for further stay in the Ward shall be carried out on the expiry of each six-month period spent in the Ward, where the head of the Institution has the obligation to submit a proposal for the extension or termination of placement in the Ward to the Minister, a detailed report on behaviour and conduct, opinion of achieved results of the application of the measure of placement in the War and assessment of degree of risk.

Article 11(1), (2), (4) and (5)

(1) The sentenced persons are entitled to have contacts with the relatives connected to the horizontal relationship line and with the second-degree relatives connected to the sideline relationship and with his/her attorney representing him in business relationships and interests.

(2) The contacts referred to in paragraph 1 of this Article are exercised through visits, letters and phone in accordance with the Rulebook referred to in Article 8 of this Law;

(...)

(4) The visits paid to the sentenced person take place under surveillance of the security service.

(5) If the security reasons require it, the Head of the Ward may order surveillance of phone calls, about which it will inform the sentenced person.

66. The **Rulebook on the House Rules of the Institutions for Serving Criminal Sanction, Detention Other Measures of Bosnia and Herzegovina – Revised Text** (*Official Gazette of BIH* no. 55/09), as relevant, reads:

Article 58(1) and (3)

Free visits may be allowed for (...) the sentenced persons in accordance with the law regulating the procedure for granting privileges.

The visit referred to in paragraph 1 of this Article to a detainee or sentenced person may be allowed once a month.

Article 65

Detainees or sentenced persons shall have the right to free and undisturbed relations with his/her defence attorney in accordance with this Rulebook. Talks with the defence attorney may take place at any time between 8.00hrs and 20.00hrs. The governor of the institute shall recommend that the defence attorney schedule such talks in advance but he/she shall allow, if need be, the talks which are not scheduled to take place.

The talks between a defence attorney and detainee or sentenced person shall take place in special premises within the Institution.

The duration of talks referred to paragraph 2 of this Article is not limited.

(...)

Talks between a detainee or sentenced person and defence attorney shall be under surveillance of a guard.

The surveillance referred to in Article 5 of this Article encompasses only the aspect o security and the guard is not allowed to listen to the talk between a detainee and sentenced person and defence attorney.

67. The **Rulebook on Filing Requests, Complaints and Others Submissions of Prisoners and Detainees in the Institutions for Execution of Criminal Sanctions, Detention and Other Measures** (*Official Gazette of BiH* no. 42/05), as relevant, reads:

Article 1

This Rulebook regulates the manner in which requests, complaints and other submissions of prisoners and detainees in the institutions for execution of criminal sanctions, detention and other measures in Bosnia and Herzegovina are dealt with, the manner of gathering and checking data, time limit for deciding the aforementioned submission and all other actions relating to the resolution of each individual submission.

Article 12

As a rule prisoners shall file requests, complaints and other submissions through the administrative service of the Institution, and, in justified circumstances, they may address such submissions relating to the Institution to the Ministry of Justice of BiH, Inspector in charge of control of the work of the Institution or the State Ombudsmen.

Article 13

Prisoners and Detainees may submit their requests and complaints to the inspector of the institution during the inspection.

The persons referred to in Article 12 of this Rulebook may talk to the inspector without presence of the governor of the institution and other managers of the institution.

The governor of the institution shall act upon the measures ordered by the inspector.

Article 14

The persons referred to in Article 12 of this Rulebook must have the possibility every working day to file requests and complaints to the Governor of the institution or an employee of the management who replaces him/her or a person who has the authorization for the exercise of the aforementioned rights of prisoners and detainees.

During the admission of such persons to the institution, they shall be informed of their right to file requests, complaints and other submissions prescribed by the law and this Rulebook

68. The **Rulebook on Privileges and Annual Leave of Prisoners who Serve the Prison Sentence in the Institution for Execution of Criminal Sanctions and Other Measures of Bosnia and Herzegovina** (*Official Gazette of BiH* no. 34/05), as relevant, reads:

Article 1

This Rulebook specifies the criteria for approving privileges, conditions and manner of using privileges of the persons who serve the prison sentence (...), the use of privileges within the institution, type of privileges (ordinary or extraordinary) and other issues relevant to the approval of privileges, annual leave of prisoners in the institutions for execution of criminal sanctions and other measures in the institutions of Bosnia and Herzegovina (hereinafter the Institution).

Article 28(1)(3)

In addition to the privileges referred to in Article 27 of this Rulebook, the privileges to facilitate the conditions within the Institution are as follows:

3. stay with spouse or extramarital partner in special premises.

69. The **Recommendation Rec(2006) 2 of the Committee of Ministers to member states on the European Prison Rule** *(*Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies), as relevant, reads*:*

Considering that Recommendation No. R (87) 3 of the Committee of Ministers on the European Prison Rules needs to be substantively revised and updated in order to reflect the developments which have occurred in penal policy, sentencing practice and the overall management of prisons in Europe,

Recommends that governments of member states:

- be guided in their legislation, policies and practice by the rules contained in the appendix to this recommendation, which replaces Recommendation No. R (87) 3 of the Committee of Ministers on the European Prison Rules;

- ensure that this recommendation and the accompanying commentary to its text are translated and disseminated as widely as possible and more specifically among judicial authorities, prison staff and individual prisoners.

Appendix to Recommendation Rec(2006)2

52.2 Procedures shall be in place to ensure the safety of prisoners, prison staff and all visitors and to reduce to a minimum the risk of violence and other events that might threaten safety.

53.1 Special high security or safety measures shall only be applied in exceptional circumstances.

53.2 There shall be clear procedures to be followed when such measures are to be applied to any prisoner.

(...)

54.1 There shall be detailed procedures which staff members have to follow when searching:

(...)

c. visitors and their possessions; and

(...)

54.2 The situations in which such searches are necessary and their nature shall be defined by national law.

54.9 The obligation to protect security and safety shall be balanced against the privacy of visitors.

54.10 Procedures for controlling professional visitors, such as legal representatives, social workers and medical practitioners, etc., ***shall be the subject of consultation with their professional bodies to ensure a balance between security and safety, and the right of confidential professional access.***

VI. Admissibility

70. In accordance with 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.

A) As to the criminal proceedings concluded by the verdict of the Court of BiH, no. X-KŽ-08/540-1 of 14 October 2010

71. According to Article 18(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective remedies available under the law against a judgment or a 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 appellant received the decision on the last effective remedy he/she used.

72. In the present case, the subject matter of the appeal is the verdict of the Court of BiH, no. X-KŽ-08/540-1 of 14 October 2010, against which there are no other effective remedies available under the law. The appellant received the challenged verdict on 12 November 2010, and the appeal

was filed on 11 January 2011, that is 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, for it is neither manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

73. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 18(1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the admissibility requirements were met in this part of the appeal.

(B) ***As to the treatment in the Foča Penal-Correctional Institution***

74. According to Article 18(2) of the Rules of the Constitutional Court, exceptionally, the Constitutional Court may examine an appeal where there is no decision of a competent court, if the appeal indicates a grave violation of the rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina or by the international documents applied in Bosnia and Herzegovina.

B1) As to the appellants' allegations about a violation of the rights under Article II(3)(b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3, 8 and 13 of the European Convention

75. The appellants allege that the treatment to which they were subjected in the Foča Penal-Correctional Institution amounted to the violation of their rights under Article II(3)(b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3, 8 and 13 of the European Convention. Hence, in the present case, the subject of challenge is not the final and binding verdict of the ordinary court but the conduct of the relevant authorities towards the appellants after the placement of appellant Ždrale in the Special Prison Unit within the Foča Penal-Correctional Institution in which appellant Ždrale has been serving his prison sentence.

76. As to the remedies which were available to the appellants in accordance with the Law on Criminal Sanctions of BiH, the Constitutional Court notes that Article 80 of that Law specify that *detainees and prisoners shall be entitled to file requests, complaints and other submissions with the competent authorities for the protection of their rights, that the Ministry of Justice shall issue Rulebook regulating the internal consideration of such submissions and that notwithstanding the Rulebook for internal consideration of all submissions on prison matters, all detainees and prisoners may communicate any complaints or allegations of mistreatment to the Ombudsman of Bosnia and Herzegovina*. Furthermore, Article 12 of the Rulebook relating to Filing Requests,

Complaints and Other Submissions of Prisoners and Detainees in the Institutions for Execution of Criminal Sanctions, Detention and Other Measures of Bosnia and Herzegovina ("the Law on Criminal Sanctions of BiH") provides that *as a rule the prisoners shall file requests, complaints and other submissions through the administrative service of the Institution, and, in justified circumstances, they may address such submissions relating to the Institution to the Ministry of Justice of BiH, Inspector in charge of control of the work of the Institution or the State Ombudsmen.* The Constitutional Court notes that it follows from the aforementioned provisions that the persons who can complain of the conditions relating to the treatment in the institutions for the execution of prison sentences are solely prisoners (and possibly detainees). However, the Constitutional Court holds that persons visiting a prisoner must comply with the positive obligations applicable to them with regard to the execution of prison sentence so that, in the context of the visits to the sentenced persons, the rights of such persons derive from the rights of prisoners. Accordingly, the Constitutional Court holds that the appellants could file their complaints with any of the authorities mentioned in Article 80 of Law on Criminal Sanctions of BiH. The Constitutional Court holds that the appellants, *i.e.* appellant Ždrale, adequately availed themselves of legal remedies under the national law by filing a complaint with the Ministry of Justice of BiH and Ombudsman of BiH. However, information as to whether appellant Ždrale or appellant Jokić or appellant Spomenka Ždrale received any response in this respect was not submitted to the Constitutional Court.

77. In this connection, the Constitutional Court notes that Article 18(2) of the Rules of the Constitutional Court provides that exceptionally, the Constitutional Court may examine an appeal where there is no decision of a competent court, if the appeal indicates a grave violation of the rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina or by the international documents applied in Bosnia and Herzegovina. Taking into account the fact that this part of the appeal is filed because of the treatment by the officers of the Foča Penal and Correction Institution, thus not against a final and binding verdict of a court in BiH, and that the appeal points to serious violations of the rights under the Constitution of Bosnia and Herzegovina and European Convention, this part of the appeal is admissible according to the case law of the Constitutional Court within the meaning of Article 18(2) (*mutatis mutandis,* Constitutional Court, *AP 3376/07* of 28 April 2010, paragraph 29, available at www.ccbh.ba).

78. Finally, this part of the appeal meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court as it is not manifestly (*prima facie*) ill-founded, nor is there any other formal reason which would render the appeal inadmissible.

79. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 18(2), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the admissibility requirements were met in this part of the appeal.

B2) As to the admissibility *ratione materiae* - the right to a fair trial

80. The Constitutional Court first notes that appellants Ždrale and Jokić allege that their right to a fair trial under Article 6(3)(c) of the European Convention has been violated for treatment imposed in the Foča Penal-Correctional Institution where appellant Ždrale serves the prison sentence in accordance with the legal and binding verdict of the Court of BiH, no. X-KŽ-08/540-1 of 14 October 2010, thus for violation of the right to defence in those proceedings. According to the allegations from the appeal, the right to defence of appellant Ždrale has been violated as "his lawyer was prevented from having access to his client except on the condition that he accepts to be subjected to inhuman and degrading treatment", as a decision upon his appeal has not been taken yet, and he has not yet "filed a request for renewal of the proceedings for new facts in favour of the convicted person". Furthermore, it follows from the appeal that appellant Jokić also holds that "his right under Article 6 has been violated as the access to his client was rendered difficult and communication between him and appellant Ždrale was under surveillance". In this connection, the Constitutional Court holds that the present case raises an issue of applicability of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, *i.e.* the issue whether the case relates to a "criminal" charge against the appellants within the meaning of Article 6 of the European Convention.

81. In examining the admissibility of the appeal, insofar as these allegations are concerned, the Constitutional Court invoked the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 18(3)(h) of the Rules of the Constitutional Court.

Article 18(3)(h) of the Rules of the Constitutional Court reads as follows:

An appeal shall also be inadmissible in any of the following cases:

h) the appeal is ratione materiae incompatible with the Constitution;

82. Article 6(1) of the European Convention provides that *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 (...).* The question arises as to whether in the instant case there is a criminal charge against the appellants, *i.e.* whether the proceedings at issue concern their civil rights and obligations.

83. Taking into account the facts alleged in the previous paragraphs of this decision, the Constitutional Court concludes that in the instant case no criminal charge against appellant Ždrale was the subject of determination in the proceedings relating to the treatment of appellant Ždrale, nor were the appellant's civil rights and obligations the subject of determination in those proceedings as this was

determined in the proceedings concluded with the final and binding verdict of the Court of BiH. The Constitutional Court notes that the subject of proceedings must relate to the well-foundedness of a criminal charge under Article 6(1) of the European Convention. Therefore, the proceedings subsequent to the final and binding court decision, such as the proceedings upon extraordinary legal remedies, the conditional release proceedings or requests for renewal of proceedings do not fall within the ambit of Article 6(1) of the European Convention. As the present case does not relate to *the determination of his civil rights and obligations or of any criminal charge against him*, the prison sentence was not extended but imposed on appellant Ždrale by placing him in the Special Prison Unit, the Constitutional Court notes that the part of the appeal in which appellant Ždrale complains about the violation 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 is incompatible *ratione materiae* with the Constitution of Bosnia and Herzegovina.

84. Furthermore, in respect of the appellant Jokić's allegations that his right to a fair trial under Article 6(3)(c) of the European Convention has been violated for treatment to which he was subjected during the visits to appellant Ždrale in the Foča Penal-Correctional Institution, the Constitutional Court notes that the aforementioned Article of the European Convention relates exclusively to the rights of the persons as regards a "criminal charge". The Constitutional Court notes that appellant Jokić, in the case at issue, has the status of attorney of appellant Ždrale, meaning that the case in no way relates to his "civil rights and obligations or a criminal charge against him", within the meaning of Article 6 of the European Convention. As Article 6 of the European Convention protects the persons whose rights have been violated, the Constitutional Court holds that appellant Jokić was not the "victim" of a violation of Article 6 of the European Convention. Therefore, taking into account the fact that the case at issue does not concern a *determination of civil rights and obligations or a criminal charge* against appellant Jokić, appellant Jokić's allegations about the violation of his 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 are incompatible *ratione materiae* with the Constitution of Bosnia and Herzegovina.

VII. Merits

As to the criminal proceedings concluded with the challenged verdicts

85. Appellant Ždrale challenges the aforementioned verdicts by claiming that 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 and his right of appeal in criminal matters under Article 2 of Protocol No. 7 to the European Convention have been violated.

a) Right to a fair trial

86. Article II(3) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads:

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.

87. Article 6 of the European Convention, in its relevant part, reads:

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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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:

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

88. The instant case relates to the criminal proceedings in which the appellant was found guilty of the criminal offence prescribed by the law and was sentenced to imprisonment. Therefore, the Constitutional Court must examine whether the proceedings before the ordinary courts were fair as required by Article 6 of the European Convention. The Constitutional Court notes that the appellant's complaints about a violation of the right to a fair trial relate to his allegations that he was tried by the court which did not have the subject-matter jurisdiction to deal with the case, and that the court was biased, and that the court groundlessly excluded the public from the main trial, and that the collected evidence was unlawful, and that the court assessed the evidence in an arbitrary manner, and that the facts were wrongly established, and that the court failed to analyse the testimonies of each witness and other pieces of evidence, both separately and in conjunction with other evidence, and that the court failed to provide clear and thorough reasons for either admitting or rejecting the evidence, and that the appellant's right to equality was violated and, thus, his right to defence was violated, and that the court

wrongly determined that the appellant had acted with premeditation, and that the court misapplied the substantive law in pronouncing the 20-year prison sentence, which, according to the appellant, no longer existed. In addition, the appellant's claims that the principle of *in dubio pro reo* and the principle of *reformatio in peius* were violated.

89. As to the appellant's allegations that he was tried by the court which did not have the subject-matter jurisdiction to deal with the case, the Constitutional Court notes that the Court of BiH established its jurisdiction on the basis of Article 7(2)(b) of the Law on the Court of BiH. That provision prescribes, *inter alia*, that *the Court of BiH has further jurisdiction over criminal offences prescribed in the Laws of the Republika Srpska (...) when such criminal offences (...) may have other detrimental consequences to Bosnia and Herzegovina or (...) beyond the territory of an Entity (...).* In addition, the Constitutional Court notes that the Court of BiH, during the conduct of investigation against the appellant, established its jurisdiction to deal with this legal matter and that at that stage of the criminal proceedings the Panel of the Court of BiH, in accordance with the functional jurisdiction, passed the final decision, *i.e.* the Ruling no. X-K-08/540-1 of 25 August 2009 to that effect. Furthermore, the Constitutional Court outlines that subsequently, after the confirmation of the Indictment against the appellant, the Court of BiH considered in two instances all the respective objections raised by the appellant and provided the reasons for considering them ungrounded. In particular, the Constitutional Court notes that the Court of BiH pointed out that the evidence of the Prosecutor's Office of BiH presented during the main trial additionally confirmed the existence of "other detrimental consequences beyond the territory of an Entity", justifying the establishment of jurisdiction of the Court of BiH, as also corroborated by the Appellate Panel, which, contrary to the appellant's allegations, pointed out that the reasons offered in the Ruling no. X-K-08/540-1 of 25 August 2009 were correct and valid, as concluded by the First Instance Panel, too. Furthermore, the Constitutional Court outlines that the Appellate Panel considered also the appellant's allegations about a contradiction in terms of the reasons given in the challenged verdict as regards the content of the analysis of the Collegium of the Prosecutors of Istočno Sarajevo and the content of the evidence, and it concluded that the allegations were ungrounded. Besides, as to the appellant's allegations that the law was applied retrospectively, the Constitutional Court notes that the Appellate Panel highlighted that the Prosecutor's Office of BiH had issued the Order on the Conduct of Investigation on 6 March 2006 and that the Court of BiH, after the Law on the Court of BiH had come into effect, accepted jurisdiction over the present case; thus, as concluded by the Appellate Panel, the fact relating to the time of commission of the criminal offence is irrelevant and the decisive fact is the time at which the court's jurisdiction was established, and the Constitutional Court does not consider that the mentioned

conclusions are arbitrary. In addition, as to the appellant's allegations that the Court of BiH, in deciding on its jurisdiction and by adopting the ruling dated 19 June 2008, made it impossible for the appellant "to voice his opinion about the allegations made by the BiH Prosecutor's Office" and that the Panel of the Court of BiH, by the Ruling no. X-KO-08/540-1 of 25 August 2009, violated the presumption of innocence, the Constitutional Court, after inspecting the ruling concerned, notes that it granted the appeal of the Prosecutor's Office of BiH and modified the ruling of the Court of BiH no. X-KO-08/540-1 of 18 August 2009 (in which the Court of BiH had originally decided that it had not had jurisdiction over the case), so that the Court of BiH declared that it had jurisdiction over the case. Furthermore, the Constitutional Court notes that it follows from the reasoning of the ruling concerned that on 21 August 2009 the appellant's attorney submitted a reply to the appeal of the Prosecutor's Office of BiH, on the basis of which the final decision on jurisdiction of the Court of BiH was passed and, consequently, the appellant's allegations that he did not have the possibility to voice his opinion about the allegations made by the BiH Prosecutor's Office" are ungrounded. Furthermore, the Constitutional Court outlines that the appellant's right to presumption of innocence could not be violated by the ruling concerned, as it related to the procedural decision deciding which court was responsible to take a decision in the relevant legal matter and given that the appellant's culpability was not decided at that stage of the proceedings and by the decision concerned. Consequently, the Constitutional Court concludes that the appellant's allegations about a violation of the right to a fair trial in respect of the subject-matter jurisdiction of the Court of BiH are ungrounded.

90. As to the appellant's allegations about a violation of his right to be tried by an impartial tribunal on the ground that Judge Redžib Begić was a member of the Appellate Panel, the Constitutional Court emphasises that impartiality of a court within the meaning of Article 6(1) of the European Convention is assessed from the subjective and objective aspects of impartiality of the court. Subjective or personal impartiality is presumed, meaning that it is held that a court is always impartial toward parties, unless there is convincing evidence to the contrary. On the other hand, objective impartiality is not presumed but it is established based on the objective facts contained in the case itself, *i.e.* it is to be established whether the case-file contains the objective evidence sufficient to raise reasonable doubts as to the impartiality of the court. In the present case, the Constitutional Court recalls the provisions of Article 29 of the BiH CPC, containing a list of reasons for disqualification, both subjective and objective ones. Therefore, since the appellant alleges that the reason for raising doubts as to the impartiality of the court lies in the fact that Judge Redžib Begić was a member of the Supreme Court, which had decided the case (of the County Court in Bijeljina) against another accused person (Jugoslav Eraković), the Constitutional Court observes that there is not a single reason for

disqualification of the aforementioned Judge under Article 29 of the BiH CPC, as regards the Judge's objective impartiality. On the other hand, if the appellant called into question the subjective impartiality of the judge, the Constitutional Court notes that the appellant was unable to provide evidence, other than his allegations about the trial in the case of Jugoslav Eraković, to substantiate his assertion. Moreover, the Constitutional Court notes that during the proceedings the appellant did not seek the disqualification of the Judge named above, although he had such a possibility and, also taking into account the mentioned circumstance, the Constitutional Court holds that the respective allegations of the appellant are ungrounded, too.

91. As to the appellant's allegations that his right to a fair trial was violated on the ground that the facts were incorrectly established and that the substantive law was misapplied and that the evidence was erroneously assessed and that the challenged verdicts were based on the unlawful evidence, the Constitutional Court recalls the consistent practice of the European Court of Human Rights and the Constitutional Court according to which it is not these Courts' task to review ordinary court's findings of facts and application of the substantive law (see European Court of Human Rights, *Pronina versus Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01). Namely, the Constitutional Court cannot generally substitute its own appraisal of the facts or evidence for that of the regular courts but it is the regular courts' task to appraise the presented facts and evidence (see European Court of Human Rights, *Thomas versus United Kingdom*, Judgment of 10 May 2005, Application no. 19354/02). It is the Constitutional Court's task to ascertain whether the constitutional rights (fair trial, access to court, effective remedies, *etc*.) have been violated or disregarded and whether the application of a law was obviously arbitrary or discriminatory.

92. Therefore, within its appellate jurisdiction, the Constitutional Court exclusively deals with the issue of possible violations of the rights under the Constitution of Bosnia and Herzegovina or the European Convention in the proceedings before ordinary courts, thus in the present case the Constitutional Court will examine whether the entire proceedings have been fair in terms of Article 6(1) of the European Convention (see, the Constitutional Court, Decision no. *AP 20/05* of 18 May 2005, published in the *Official Gazette of BiH* no. 58/05). In addition, the Constitutional Court will not interfere with the manner in which the ordinary courts had accepted evidence as evidentiary material. In this regard, the Constitutional Court will neither interfere with the situation where the ordinary courts give credence to evidence of one party to the proceeding on the basis of the court's assessment (see, European Court of Human Rights, *Doorson v. The Netherlands*, Judgment of 6 March 1996, published in Reports no. 1996-II, paragraph 78).

93. According to the mentioned position, the Constitutional Court may exceptionally engage in examination of the manner in which the competent courts established the facts and applied positive legal regulations to such established facts, where it finds that ordinary courts acted arbitrarily in the proceedings of the establishment of the facts and the application of relevant positive legal regulations (see Constitutional Court, decision no. *AP 311/04* of 22 April 2005, paragraph 26). In the context of the aforementioned, the Constitutional Court recalls that it has indicated in a number of its decisions that manifest arbitrariness in the application of the relevant regulations can never result in a fair trial (see Decision of the Constitutional Court *AP 1293/05* of 12 September 2006, paragraph 25 *et seq.*). In view of the above, taking into account the issues raised by the appellant in the present case, the Constitutional Court will first examine whether the challenged decision is based on an arbitrary application of the substantive and procedural law.

94. In addition, the Constitutional Court underlines that according to the consistent case-law of the European Court of Human Rights and the Constitutional Court, Article 6(1) of the European Convention obliges the courts to give reasons for their judgments. This obligation, however, cannot be understood as requiring a detailed answer to every argument (see the Constitutional Court, Decisions no. *U 62/01* of 5 April 2002 and *AP 352/04* of 23 March 2005). The extent to which this obligation to give reasons applies may vary according to the nature of the decision (see the European Court of Human Rights, *Ruiz Torija versus Spain,* judgment of 9 December 1994, Series A No. 303-A, paragraph 29). The European Court of Human Rights and the Constitutional Court have indicated in a number of their 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 the European Court of Human Rights, *Suominen versus Finland*, judgment of 1 July 2003, Application no. 37801/97, paragraph 36 and, *mutatis mutandis*, the Constitutional Court, Decision no. *AP 5/05* of 14 March 2006).

95. By bringing the aforementioned positions into connection with the present case, and as to the appellant's allegations that his right to a fair trial was violated on the ground that the public was excluded from the main trial during the testimony of witness J.D., the Constitutional Court recalls that, in principle, a main trial before a court is held in public (Article 234 of the BiH CPC) and that Article 235 of the BiH CPC prescribes that the public may be excluded from all or part of a trial. In this regard, the Constitutional Court notes that in the present case, in order to protect witness J.D. and upon the motion of the Prosecutor's Office of BiH, the Court of BiH excluded the public while witness J.D. testified. Furthermore, the Constitutional Court notes that the Appellate Panel established that the

Court of BiH, before rendering the decision, had heard the parties and concluded that the hearing of the mentioned witness in public, given the specificity of the content of his testimony, could disturb public order and, as a result, the decision to exclude the public was passed. Given the reasons offered in the challenged verdict it follows that the Court of BiH fully complied with the procedure foreseen by the provisions of Article 235 of the BiH CPC and, therefore, it follows that the decision of the Court of BiH is not in violation of the provisions of the BiH CPC. Consequently, the Constitutional Court holds that the respective allegations of the appellant are ungrounded, too.

96. As to the appellant's allegations about the unlawfulness of evidence collected during "the pre-investigative procedure", the Constitutional Court outlines that the Appellate Panel considered thoroughly the identical allegations and provided the clear and detailed reasons in its decision as to why the respective complaints of the appellant were unfounded and why they could not lead to a different solution of the relevant criminal-legal matter. In this context, the Constitutional Court notes that the Appellate Panel pointed out that those pieces of evidence did not belong to the types of evidence in respect of which it was explicitly prescribed that they could not form the basis of a judicial decision. Besides, the Constitutional Court notes that the Appellate Panel also pointed out that the criminal procedural law was governed by the principle *tempus regit actum*, *i.e.* that the evaluation of lawfulness of some procedural action (in the instant case, it related to the crime scene investigation, forensic inspection, forensic analysis, and the like), was conducted on the basis of the provisions of the procedural code applicable at the time the given action was taken, and the Appellate Panel evaluated the issue of lawfulness of the evidence obtained, as stated in the verdict, in view of the provisions of the Criminal Procedure Code (the *Official Gazette of the* SFRY 4/77, 14/85, 74/87, 57/89, 3/90, 27/90, and the *Official Gazette of Republika Srpska* 26/93, 14/94 and 6/97), applicable at the time when the specific procedural actions had been taken. In connection with the aforementioned, the Appellate Panel pointed out that all the actions taken by the police authorities of the Bijeljina CJB in the period immediately following the commission of the relevant criminal offense in respect of the unidentified perpetrator at the time had been taken in accordance with the then applicable provisions of the CPC (Articles 151 and 154). It was stated that according to the Crime Scene Investigation Record made by Mr. Božo Peranović, the investigative judge of the County Court in Bijeljina, which, in the view of the Appellate Panel and contrary to the claims in the appeal, had been made in accordance with Article 80 of the then applicable CPC, it followed that the investigative judge had issued an order to transfer the recovered *Toyota* vehicle to the compound of the Bijeljina CJB and to conduct its forensic inspection, which had indeed been done. A report on the inspection was made as well as a photo-documentation. Therefore, the Appellate Panel concluded that, contrary to the objections raised by the defence, all the

investigative actions had been taken following the commission of the criminal offence in question and upon the order of the investigative judge and by the competent police authorities and in accordance with the then applicable CPC. In view of the above, the Constitutional Court holds that the appellant's allegations about the unlawfulness of evidence collected during the pre-investigative actions are also unfounded, taking into account the reasons given by the Court of BiH and the relevant provisions of the CPC applicable at the time when the said actions were taken.

97. Furthermore, as to the appellant's allegations that the documentation from the Kula Correctional Facility was evidence obtained unlawfully, the Constitutional Court underlines that the provisions of Article 21 of the BiH CPC stipulates, *inter alia*, that *all authorities of the Republika Srpska will be bound to maintain official cooperation with the Prosecutor and other bodies participating in criminal proceedings*. Moreover, the Constitutional Court points out that there is not a single provision of the BiH CPC prescribing that the documents constituting official records of state authorities (such as the Kula Correctional Facility) must be obtained by the Prosecutor's Office on Court's orders. Besides, the Constitutional Court points out that the Court established, not only on the basis of the documentation in question but also on the basis of witnesses' testimonies at the main trial, that the appellant had been absent from the Kula Correctional Facility at the relevant time. Consequently, the Constitutional Court holds that the appellant's respective allegations are also unfounded.

98. In addition, the appellant asserts that other findings and opinion relating to the expert evaluations conducted by expert witnesses are unlawful and that the fact is questionable as to the rubber gloves found at the spot and those presented before the Court of BiH with biological traces of the appellant. The appellant also asserts that the findings and opinion of expert witness Rijad Konjhodžić, as evidence, are unlawful, since the indisputable biological sample of the appellant was taken without an order of the Court of BiH, whereas the electropherograms submitted by the expert witness were unclear. In this regard, the Constitutional Court recalls that, when it comes to the presentation of evidence by way of an expert evaluation, a DNA analysis, as a specific testing of evidence, is referred to in the provisions of Articles 112 through 115 of the BiH CPC. The provisions of Article 112 of the BiH CPC prescribes that a *DNA analysis may be performed insofar as these are required to establish identity or facts as to whether discovered trace substances originate from the suspect, the accused or the injured party.* In addition, the Constitutional Court reiterates that the criminal procedural law applies the principle of *tempus regit actum*, meaning that any action taken in the course of proceedings (on-site investigation, expert examination, and the like) should be regulated in accordance with the law in force at the time it occurred. Furthermore, the Constitutional Court notes

that the Court of BiH provided a detailed description of the actions taken by the competent authorities in respect of the expert examination and specified the determination to which the findings and opinion related, including the sequence of the actions taken in that respect. It is further explained in the verdict that the DNA material isolated from the submitted gloves represented more or less a mixed DNA material, which was more clearly isolated in some samples, while in one sample the present material originated almost solely from the appellant and that the DNA material isolated from the black sweatshirt belonged to the appellant with a 1 in $2.57x10^{18}$ random match probability. It is stated that the expert witness Dušan Keckarević (from the Faculty of Biology), explained at the main trial the way in which the expert evaluation had been conducted, gave clear and convincing answers to the questions put by the prosecutor and the defence. With reference to the objection raised by the appellant that the Faculty of Biology could not use the indisputable biological traces of the appellant from another criminal case and previously determined DNA profiles, the Court of BiH pointed out that it established, based on the evidence adduced, that the indisputable biological material had been taken from the appellant on 17 November 2006 in accordance with the order of the investigative judge of the Belgrade District Court No. KRI-2275/06 dated 17 November 2006. In the BiH Court's opinion, the expert witness could use such obtained indisputably biological material in the subsequent expert analysis upon the request of the Prosecutor's Office of BiH because it is the evidence which was not obtained in violation of the appellant's right and which could not be regarded as unlawful evidence. In addition, the Court of BiH stated that expert witness Rijad Konjhodžić (from BiH) had conducted an identical expert evaluation of the appellant's biological evidence by taking his mouth swab and head hair "with his voluntary consent". The expert witness Konjhodžić, in his opinion, unambiguously contended that it was practically proven that the biological material from the left glove originated from the appellant and that there existed a medium strong indication that the biological material from the right glove originated from the appellant. The Court of BiH pointed out that expert Konjhodžić had thoroughly explained at the trial the way in which the expert evaluation had been conducted, expounded on the finding and, as stated by the Court of BiH, he convincingly and unambiguously answered the questions by the defence, entirely maintaining his opinion as presented. Bearing in mind the fact that expert witness Konjhodžić conducted the expert evaluation independently of the Belgrade Faculty of Biology and yet practically corroborated the finding and opinion of the Belgrade Faculty of Biology, the Court concluded that the presence of appellant Ždrale's traces on the gloves, sweatshirt and baseball cap found in the vehicle "Toyota" during the investigation after the murder of the victim was proven beyond a reasonable doubt. The Constitutional Court notes that the appellant, through his legal representative, had the possibility to challenge the aforementioned evidence, as he did so in the course of the first

instance proceedings and, subsequently, in his complaints. The Constitutional Court also notes that the ordinary courts considered the appellant's objections raised in respect of the "unlawfulness" of the findings and opinion on the DNA analysis by the Faculty of Biology and dismissed them as unfounded. Namely, the ordinary courts concluded that the evidence presented was lawful and that the unlawful nature of that piece of evidence did not stem from the fact that the expert examination had been carried out outside the territory of BiH.

99. As to the appellant's objections relating to the manner of communication between the Prosecutor's Office of BiH and the Faculty of Biology, the Constitutional Court observes that the Court of BiH also considered the appellant's respective complaints and provided the reasons concerning the correctness of that evidence. Therefore, the Constitutional Court holds that in the challenged judgments the ordinary courts offered the detailed answers to the appellant's objections relating to the lawfulness of evidence obtained through the DNA analysis, pointing out that it was not about unlawful evidence. The reason being that it indisputably follows from the reasoning of the challenged verdict that the content of the DNA findings, *i.e.* the quality of the evidence presented, was neither challenged nor did other evidence cast doubt on the evidence presented, as those findings did not call into question the DNA analysis establishing that the DNA material isolated from the submitted gloves represented more or less a mixed DNA material, which was more clearly isolated in some samples, while in one sample the present material originated almost solely from the appellant and that the DNA material isolated from the black sweatshirt belonged to the appellant with a 1 in $2.57x10^{18}$ random match probability. In addition, the Court of BiH presented the evidence by way of the expert analysis conducted by expert witness Rijad Konjhodžić, who had collected the appellant's DNA sample by way of the mouth swab consented to by the appellant and therefore, one cannot speak about the unlawfulness of evidence, as no violation of the appellant's human rights thus occurred. Furthermore, the Constitutional Court notes that the Appellate Panel took into account the appellant's respective objection and in that regard stated that it accepted the reasons given in the first instance verdict in that part, too. In view of the above, the Constitutional Court holds that the reasons offered in both challenged verdicts disclose no arbitrariness in considering the appellant's objections regarding the lawfulness of evidence. In view of the above and in the context of the relevant views of the European Court of Human Rights, it follows that the appellant had the opportunity to challenge the authenticity of the evidence and to oppose the use thereof. Also, it follows that the quality of the relevant evidence was taken into consideration and it was concluded that the circumstances in which the relevant evidence had been obtained cast no doubt on the reliability or accuracy thereof (see, ECHR, *Bykov v. Russia*, Judgment of 10 March 2009, [GC], Application no. 4378/02, paragraph 90; ECHR, *Lisica v. the Republic of C*roatia, Judgment of 25

February 2010, Application no. 20100/06, paragraph 49). Therefore, the Constitutional Court holds that the ordinary courts gave the detailed answers in the challenged verdicts as to the appellant's objections relating to the lawfulness of the evidence and that the appellant's allegations that the verdict was based on the unlawful evidence are ungrounded.

100. Furthermore, as to the appellant's allegations about the assessment of other evidence presented, the Constitutional Court notes that the Court of BiH presented all of the evidence offered at the trial by the parties to the proceedings. In particular, the Constitutional Court notes that the Court of BiH gave equal attention to the evaluation of all findings of the expert witnesses and witnesses and, contrary to the appellant's allegations, carried out a thorough analysis of the testimonies of each witness, of both the defence and prosecution witnesses, and of other evidence, both separately and in conjunction with other evidence, and that the Court of BiH gave the thorough reasons as to why it had admitted or dismissed the testimonies by the witnesses and, subsequently, made the conclusion that the appellant was criminally liable for the criminal offence of murder, of which the Court of BiH found him guilty.

101. In the present case, the Constitutional Court notes that, according to the Indictment, the appellant was charged with committing the criminal offence of murder in violation of Article 36(2)(1) of the RSCC (*whoever deprives another person of his life in a particularly cruel or insidious way)* and, by the final decision of the Appellate Panel, the appellant was found guilty of having committed, with the acts described in the operative section of the Indictment and of the first instance verdict, the criminal offence of murder referred to in Article 36(2)(2) of the RSCC (*whoever deprives another person of his life and in doing so intentionally endangers the lives of several persons)*. The Court of BiH based its conclusion on the evidence presented during the proceedings and assessed both separately and in conjunction with other evidence and further concluded that the appellant, who had already been serving his sentence in the Kula Correctional Institution, had obtained permission for furlough in the period from 5 to 12 June 2000, which had not been recorded in the required prison documentation and, then, he, together with a person known to him, while driving the vehicle "Toyota", had followed the victim to Bijeljina and, at an intersection of several streets where the victim had stopped his vehicle to allow another person into the vehicle, the appellant had opened fire from an automatic rifle in the direction of the victim and fired 13 bullets in total, of which 6 projectiles hit the victim causing his instant violent death; that at the same time that jeopardized the safety of the person who had been trying to get inside the vehicle driven by the victim and the passengers at the Railway Station not far from the scene; that the appellant and the co-perpetrator had fled the scene in the direction of the place of Hase where they left the *Toyota* vehicle leaving 2 automatic rifles, cartridges with unused ammunition and the rubber gloves they had used, whereupon they took off the clothes they were wearing and threw them

out of the vehicle while on the run towards Ugljevik. The reasons of the challenged verdict offered a detailed list of evidence presented in respect of those circumstances and showed that each piece of evidence had been assessed both separately and in conjunction with other evidence, so that the appellant's participation and role in the aforementioned acts was established on the basis of the aforementioned evidence.

102. Furthermore, the Constitutional Court notes that in the proceedings before the Court of BiH a large amount of evidence, proposed by the defence and the Prosecutor's Office of BiH, was presented and assessed, both separately and in conjunction with other evidence, and the presented evidence was examined, so that the Appellate Panel gave the clear reasons for its decision and undisputedly established that the appellant had committed the criminal offence of which he was found guilty. In so doing, the Appellate Panel offered the clear and substantiated reasons, which do not appear arbitrary, as regards both the facts and the application of the substantive and procedural law. The Constitutional Court cannot conclude from the reasons of the challenged verdicts that the provision of Article 281 of the BIH CPC, providing for the evidence upon which a verdict is to be based, was violated. Namely, in the present case, an exhaustive list of evidence presented at the trial was given in the reasoning of the verdict of the Court of BiH, indicating the evidence upon which the verdict was based and, as to the relevant pieces of evidence, they were evaluated carefully and in good faith, separately and together, and the reasons were provided in respect of each piece of evidence admitted, *i.e.* considered credible, as well as the detailed reasons relating to the evidence to which the Court of BiH did not give credence. Such reasons do not appear arbitrary nor can it be concluded that the Appellate Panel disregarded the principle of free evaluation of evidence. In particular, it cannot be concluded that the Appellate Panel acted in such a manner that could call into question the guarantees of the right to a fair trial.

103. Therefore, the Constitutional Court holds that the conclusion follows from the reasons of the challenged verdicts that other evidence undisputedly prove that the appellant had committed the criminal offence of which he was found guilty, *i.e.* that the challenged verdicts are not based solely on the evidence which the appellant considered unlawful. Therefore, the Constitutional Court concludes that the appellant's allegations relating to this aspect of the right to a fair trial are ungrounded.

104. In addition, as to the appellant's allegations that there is not a single word about his guilt in the operative part of the verdict or in the reasoning thereof, the Constitutional Court notes that the operative part of the first instance verdict states that the appellant "[…] for the reasons and motives known to him only, made an arrangement with the persons known to him – organizers, who agreed and organized themselves to kill Ljubiša Savić a.k.a. Mauzer, and agreed that he, as the perpetrator, together with other persons, co-perpetrators, would carry out the pre-planned and inter-connected

actions and that, with an implement prepared beforehand, he would kill the victim in an organised way[…]", and that it follows from the reasoning of the first instance verdict that the person trying to get inside the victim's vehicle was an old lady, J.Lj., who was standing next to the vehicle while bullets "whizzed" in the immediate proximity of the passengers at the Railway Station, due to which 6-7 passengers took shelter in the office of train dispatcher S.B. The Appellate Panel concluded that taking into account the aforementioned facts and given the fact that the appellant had fired from an automatic rifle, set to burst fire, and that 13 bullets had been shot, and given the aforementioned position of J.Lj. and the passengers at the Railway Station with respect to the direction of shooting, it could be concluded beyond a doubt that the appellant, in effectuating his intent to kill the victim, had been aware that he had thereby been endangering the lives of several persons, from which it could be concluded beyond a doubt that he had consented to such consequences of the act of commission. The foregoing gave rise to the conclusion by the Appellate Panel that the appellant had acted with indirect intent, with respect to such qualifying circumstance that surrounded the execution of the criminal offense he was found guilty of. Such act of the appellant contained all essential elements of the criminal offense of murder in violation of Article 36(2)(2) of the RS CC. In view of the above, the Constitutional Court holds that the appellant's allegations are unfounded where the appellant states that his guilt was mentioned neither in the operative part of the verdict nor in the reasoning thereof.

105. Furthermore, the Constitutional Court notes that it is obvious from the decision of the Appellate Panel that that Court considered all of the appellant's complaints, which were reiterated in the appellant's appeal, and gave the exhaustive reasons why the Court evaluated that the allegations were unfounded and why it upheld the first instance verdict, apart from modifying the decision with respect to the legal definition of the criminal offense. In view of the above, the Constitutional Court holds that the reasoning of the challenged verdict does not appear arbitrary and that it includes the clear and consistent reasons to support the conclusion that the appellant had committed the criminal offence in question. Given the aforementioned, the Constitutional Court holds that the reasoning offered by the ordinary courts meets the standards required by Article 6(1) of the European Convention.

106. In addition, as to the appellant's allegations that the substantive law was misapplied with respect to the ruling on the sentence, the Constitutional Court points out that it is indisputable that Article 38(1) of the RS CC (General Part) provides that a penalty of imprisonment may not be longer than 15 years, whereas Article 38(2) of the RS CC (General Part) provided the possibility that the court could impose a penalty of imprisonment for a term of 20 years for criminal offences eligible for the death penalty. In the view of the Constitutional Court it clearly follows from the quoted legal provision that the maximum prison sentence for the criminal offence concerned, in the situation where no

possibility of imposing the death penalty exists, is a 20 year prison sentence. Accordingly, the Constitutional Court concludes that the appellant's allegations relating to a misapplication of the substantive law are unfounded.

107. Furthermore, as to the appellant's allegations that the right to equality of arms in the proceedings was violated, the Constitutional Court holds that the appellant's allegations about a violation of the principle of equality of arms are unfounded, given that the Constitutional Court, in the preceding paragraphs of the present decision, has clarified that the appellant was treated equally in the proceedings and that all of the evidence proposed by the appellant were presented during the proceedings (main trial). Consequently, the Constitutional Court concludes that the appellant's right to equality of arms in the proceedings was not violated.

108. As to the appellant's allegations that in the present case the principle of prohibition of *reformatio in peius* was violated, the Constitutional Court points out that the provisions of Article 307 of the BiH CPC stipulate that *if an appeal has been filed only in favour of the accused, the verdict may not be modified to the detriment of the accused.* The Constitutional Court notes that, according to the rules of criminal procedure, a court is always bound by the factual description of acts amounting to the commission of an offence or offences mentioned in the indictment but not by the legal definition of the criminal offense mentioned in the indictment. Namely, the provisions of Article 280 of the BiH CPC stipulate that *the verdict shall refer only to the accused person and only to the criminal offense specified in the indictment that has been confirmed, or amended at the main trial or supplemented (paragraph 1)* and that *the Court is not bound to accept the proposals regarding the legal evaluation of the act* (paragraph 2). By connecting the aforementioned positions with the facts of the case and to the appellant's allegations, the Constitutional Court notes that the operative part of the verdict of the Appellate Panel reads: *The Appeal by the Defence Counsel for the [appellant] is hereby partially upheld, so the Verdict of the Court of BIH, No. X-K-08/540-1 dated 16 April 2010, is revised with respect to the legal definition of the criminal offense and the [appellant] thereby found guilty of having committed, with his acts factually described in the operative part of the referenced Verdict, the criminal offense of Murder, in violation of Article 36(2)(2) of the Criminal Code of Republika Srpska – Special Part [...]. The remaining part of the First Instance Verdict remains unchanged.* In the case at hand, the Constitutional Court notes that the Prosecutor's Office of BiH did not file an appeal against the verdict of the Court of BiH and that the appellant's appeal was partially granted and the first instance verdict was revised with respect to the legal definition of the criminal offense by the verdict of the Appellate Panel. Namely, the Constitutional Court notes that the Appellate Panel, deciding on the appellant's appeal, established that the Court of BiH, starting from the

factual description of the criminal offence mentioned in the indictment, had erroneously classified the acts amounting to the commission of the criminal offence and, as a result, the Appellate Panel revised the first instance verdict with respect to the legal definition of the criminal offense, whereas the remaining part of the first instance verdict of the Court of BiH remained unchanged. In addition, the Constitutional Court observes that in the challenged verdict, as to the reasons for revision of the legal definition of the criminal offense, the Appellate Panel offered the clear and thorough reasons which do not appear arbitrary. Therefore, the Constitutional Court concludes that the appellant's allegations relating to a violation of the principle of prohibition of *reformatio in peius*, including a violation of the principle of fairness under Article 6(1) of the European Convention in the present case, are ungrounded.

109. As to the appellant's allegations that in the present case the principle of *in dubio pro reo* was violated, the Constitutional Court highlights that the *in dubio pro reo* principle is guaranteed by Article 6(2) of the European Convention. According to the mentioned principle, everyone is innocent until proven guilty in accordance with law. In this context, if there is a doubt about a defendant's guilt, it must be interpreted in favour of the defendant. However, in the opinion of the Constitutional Court, the reference to the *in dubio pro reo* principle may be called into question if courts fail to give the reasons containing a thorough analysis of all adduced evidence to remove any possible doubt. In the preceding paragraphs of the present decision the Constitutional Court concluded that the ordinary courts had provided the clear analysis of all the evidence adduced, *i.e.* the reasoning of the challenged verdict cast no doubt on the conclusion of the Court that the appellant, in the manner described in the operative part of the verdict, had committed the criminal offence concerned. Therefore, the Constitutional Court holds that in the present case the appellant's allegations about a violation of the principle *in dubio pro reo* under Article 6(2) of the European Convention are unfounded.

110. In view of the above, the Constitutional Court holds that the challenged verdicts do not disclose any arbitrariness as to the establishment and evaluation of the facts or the application of the substantive and procedural law and that the challenged decisions include the reasoning which meets the requirement of Article 6(1) of the European Convention. Therefore, the Constitutional Court holds 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 of the European Convention.

Right of appeal in criminal matters

111. The Constitutional Court notes that appellant Ždrale alleges a violation of his right of appeal in criminal matters under Article 2 of Protocol No. 7 to the European Convention, which, as relevant, reads: *Everyone convicted of a criminal offence by a tribunal shall have the right to have his*

conviction or sentence reviewed by a higher tribunal. In the view of the Constitutional Court, the appellant was not deprived of the mentioned right given that he filed an appeal against the first instance verdict and the Appellate Panel reviewed the challenged verdict in respect of all the essential allegations in the appellant's appeal. Therefore, the Constitutional Court concludes that there is no violation of the appellant's right of appeal in criminal matters under Article 2 of Protocol No. 7 to the European Convention.

As to the treatment to which the appellant was subjected in the Foča Penal-Correctional Institution – Special Prison Unit

a) The right not to be subjected to torture or to inhuman or degrading treatment or punishment

112. Article II(3) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

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:

b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment

113. Article 3 of the European Convention reads as follows:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

114. Appellant Jokić and appellant Spomenka Ždrale complain about the violation of the right not to be subjected to torture or to inhuman or degrading treatment, since they are of the opinion that they were searched without justification, *i.e.* they were subjected to "strip search" while visiting appellant Ždrale in the premises of the Foča Penal-Correctional Institution. As to the aforementioned allegations, the Constitutional Court notes that the Ministry of Justice of BiH, having received complaints by appellant Jokić, requested the Foča Penal-Correctional Institution to submit a response to the allegations and that the Foča Penal-Correctional Institution submitted to the Constitutional Court a Report on the Inspection carried out in the Foča Penal-Correctional Institution of 17 April 2012.

115. The Constitutional Court recalls that Article 3 of the European Convention encompasses three rights, namely prohibition of torture, prohibition of inhuman treatment and punishment and prohibition of degrading treatment and punishment. As appellant Jokić and appellant Spomenka Ždrale complain about the violation of the right not to be subjected to degrading treatment, the Constitutional Court shall examine their allegations in the context of three segments of Article 3 of the European Convention. The Constitutional Court notes that treatment is degrading if it is such as to arose in the victims feelings of fear, anguish and inferiority capable of humiliating or debasing them and possibly breaking their physical or moral resistance, or if it drives the victim to act against his will or conscience

(see, among other authorities, *Keenan v. the United Kingdom,* no. 27229/95, paragraph 110, ECHR 2001-III).

116. Furthermore, the Constitutional Court refers to the judgment of the European Court of Human Rights in the case of *Štitić v. Croatia* (see, *Štitić v. Croatia*, judgment of 8 November 2007, Application no. 29660/05), wherein the European Court of Human Rights noted, *inter alia*, that *Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see Labita v. Italy [GC], no. 26772/95, § 119, ECHR 2000-IV). The Court further reiterates that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. Furthermore, in considering whether a treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (see Peers v. Greece, no. 28524/95, §§ 67-68, 74, ECHR 2001-III, and Valašinas v. Lithuania, no. 44558/98, § 101, ECHR 2001-VIII). The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.*

117. In this connection, the Constitutional Court notes first that appellant Jokić alleges that he was "strip-searched" during his visit to the appellant on 24 February 2012" and that appellant Spomenka Ždrale was subjected to such treatment every time she came to visit appellant Ždrale, which amounted to degrading treatment. Furthermore, the Constitutional Court notes that appellant Jokić and appellant Spomeka Ždrale allege in the appeal that "they did not oppose the search" as they knew that the visit to appellant Ždrale could have been refused if they had opposed. They further allege that they were searched by the persons of the opposite sex. In this connection, the Constitutional Court notes that it follows from the allegations of appellant Jokić and response to the appeal, which was submitted to the Constitutional Court by the Foča Penal-Correctional Institution, that appellant Jokić did not file requests to visit appellant Ždrale after 24 February 2012 and that he did not address complaints about such treatment to the Administration of the Foča Penal-Correctional Institution either during the search or immediately after the search, but he did it only on 2 April 2012 when the Foča Penal-Correctional Institution filed a request for delivery of information relating to the treatment of appellant Ždrale and

conduct towards him by the officers of the Foča Penal-Correctional Institution. In this connection, the Constitutional Court notes that Article 62(1) of the Law on the Execution of Criminal Sanctions of BiH prescribes that the authorized official persons may carry out a search of visitors and their possessions and that *the search of the premises and persons referred to in paragraph 1 of this Article shall be carried out in the manner to detect and prevent any attempt of escape and hiding of smuggled goods with respect for human dignity of the persons and their possessions subjected to search*.

118. Furthermore, the Constitutional Court observes that in respect of the search of visitors of the Foča Penal and Constitutional Institution, the Foča Penal and Constitutional Institution alleges in response to the appeal that the search of appellant Jokić and appellant Spomenka Ždrale was carried out in a professional and correct manner, that such searches were carried out in respect of other persons in the same manner and that the security reasons makes it possible for the Institution to carry out two separate searches, one of which is ordinary and is carried out in the premises for such purpose after the visit is announced and the other one is detailed and obligatory for all persons who are allowed to enter the Special Prison Unit. Furthermore, the Constitutional Court notes that it was noted in the response that appellant Jokić was not strip-searched but his clothes were checked and external part of the body without uncovering the intimate part of the body. The appellant Spomenka Ždrale was searched in the same manner in compliance with those rules.

119. In this connection, the Constitutional Court notes that in the present case, appellant Ždrale was placed in the Special Prison Unit for Serving Prison Sentence after being classified as belonging to group C of sentenced persons given the frequent disciplinary breaches, the manner in which they were committed, consequences caused and violent behaviour towards other convicted persons, his connections to crime groups outside the Institution, continuous and immediate danger that he would organize and commit escape with the help of other persons and difficulties in applying professional correctional work. Furthermore, the Constitutional Court notes that the appellant was placed in the Special Prison Unit for security reasons and for the reason that on 12 August 2011 the Foča Penal-Correctional Institution, as stated in response to the appeal, received a confidential information by the intelligence agencies, which was submitted also to the Ministry of Justice of the RS, on the appellant's preparations for escape with help of other persons and that on 1 September 2011 the appellant made unauthorized contacts with a member of security service of the Institution, which was the reason why a disciplinary measure, namely termination of employment, was imposed on that person.

120. Taking into account the aforementioned provisions of the Law on Execution of Criminal Sanctions of BiH, the views expressed in the case-law of the European Court and the facts of the case,

the Constitutional Court holds that the present case does not disclose anything which would indicate that the authorities of the Foča Penal-Correctional Institution treated appellant Jokić or appellant Spomenka Ždrale in a degrading manner. In particular, it follows from the aforementioned that the taken measures do not disclose anything which would lead to the conclusion that the measures were taken with the aim of humiliating appellant Jokić or appellant Spomenka Ždrale or that they were done against their will. In this connection, the Constitutional Court holds that given the circumstances as a whole, the fact that the search was carried out is not the reason for concluding that the treatment of appellant Jokić or appellant Spomenka Ždrale was degrading. It indisputably follows from the facts that in the case of appellant Jokić and appellant Spomenka Ždrale, bearing in mind the aforementioned case law of the European Court, the suffering and humiliation involved *did not go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment,* since it is obvious that in the present case the prescribed procedure was fully complied with during the search of appellant Jokić and appellant Spomenka Ždrale, and that in respect of appellant Jokić, as it follows from the submitted documentation, the search was carried out only once.

121. Given the aforementioned, the Constitutional Court recalls that the European Court, in the case *of Van der Ven v. the Netherlands* (Application no. 50901/99, judgment of 3 February 2003), considered the application relating to the treatment towards a prisoner and members of his family in a prison with strict security measures. The applicant complained about the violation of Article 3 of the European Convention as he had been "strip-searched" in the prison. The European Court concluded that the combination of routine strip-searching and the other stringent security measures on a weekly basis for three and a half years amounted to inhuman or degrading treatment of applicant *Van der Ven* in breach of Article 3 of the Convention. On the other hand, the European Court concluded in that case that although the conditions under which the visits of other applicants take place caused emotional disturbance, the circumstances complained of did not go beyond the threshold so as to constitute inhuman or humiliating treatment falling under Article 3 of the European Convention. Taking into account the aforementioned, the Constitutional Court holds that given the circumstances in the instant case, the conduct of official persons in the Foča Penal-Correctional Institution did not attain a minimum level of severity, which is the reason why the appellants' allegations on the violation of the right not to be subjected to torture or inhuman or humiliating treatment or punishment under Article II(3)(b) of the Constitution of Bosnia and Herzegovina, or Article 3 of the European Convention are unfounded as a whole.

122. Taking into account the aforesaid, the Constitutional Court holds that in the present case there is no violation of the right not to be subjected to torture or inhuman or degrading treatment or

punishment under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention.

123. However, irrespective of the fact that the Constitutional Court concluded that given all circumstances of the present case Article 3 of the European Convention was not violated, as the search was carried out in accordance with the relevant provisions, the Constitutional Court notes that the Ministry of Justice of BiH and Ministry Justice RS are obliged to review whether the regulations based on which the search of persons who come to visit prisoners are in full compliance with the provisions of the European Prison Rules. In particular, the Constitutional Court notes that the relevant ministries are obliged to review whether, within the meaning of the European Prison Rules, the procedure for control of visitors who come to a prison *ex officio* are necessary, within the meaning of the independence of the legal profession, and to consult the Bar Association in order to ensure a balance between order, discipline and personal security, and the right of confidential professional access within the meaning of Article 54.10 of the European Prison Rules.

b*)* The right to private and family life, home, and correspondence

124. The appellants complain about the violation of the right under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8(1) of the European Convention. In particular, appellant Jokić claims that his right to private life and correspondence has been violated because of the search and surveillance of communication and recording of telephone calls between him and appellant Ždrale. The appellant Spoenka Ždrale claims that her right to private life has been violated because of the search carried out during the visits she paid to appellant Ždrale. Furthermore, appellant Spomenka Ždrale and appellant Ždrale claim that their right to family life has been violated as they are not allowed to have "conjugal visits".

125. Article II(3)(f) of the Constitution of Bosnia and Herzegovina reads:

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:

(f) The right to private and family life, home, and correspondence.

126. Article 8 of the European Convention reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

127. The Constitutional Court notes that that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities (see, ECtHR, *Kroon v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-c, paragraph 31).

128. Turning to the instant case, the Constitutional Court has to establish whether the public authorities, by the conduct complained of, interfered with appellant Jokić's and appellant Spomenka Ždrale's right to respect for their private and family life and, if so, whether that interference was justified. This condition, within the meaning of terms of the European Convention, consists of several elements: (a) the interference has to be based upon national or international law; (b) the law concerned must be widely available thus enabling an individual to be familiarized with the circumstances of the law that could be applied in the case concerned; (c) the law also has to be formulated with the adequate accuracy and clarity to allow an individual to adjust his/her actions in accordance therewith (see ECtHR,, *Sunday Times vs. the United Kingdom*, judgment of 26 April 1979, Series A, no. 30, paragraph. 49).

129. The Constitutional Court recalls that the demand to respect for private life is automatically restricted to the extent to which an individual connect his/her private life with public life or if it is closely related to other protected interests.

130. Furthermore, the Constitutional Court holds that the fact that appellant Jokić and appellant Spomenka Ždrale removed their clothes in front of unknown persons (the officers of the Foča Penal-Correctional Institution), and that communication between appellant Jokić and appellant Ždrale (notably that over the phone) was under surveillance, indisputably constitute an interference by the public authority with their right to private life within the meaning of Article 8(1) of the European Convention. Furthermore, the Constitutional Court holds that the fact that the appellant Spomenka Ždrale and appellant Ždrale are not allowed to have conjugal visits constitutes an interference by the public authorities with the right to their private and family life under Article 8(1) of the European Convention.

131. Therefore, the Constitutional Court must establish whether that interference is justified within the meaning of Article 8(2) of the European Convention, *i.e.* whether it is in accordance with the law and is necessary in a democratic society in order to achieve one of the aims referred to in Article 8(2) of the European Convention.

132. The Constitutional Court notes that the actions in question taken by the officers of the Foča Penal and Correction Institution are foreseen by the provisions of the Law on the Execution of Criminal

Sanctions of BiH, which stipulate the cases in which rights and freedom may be restricted. Furthermore, the Constitutional Court notes that the provision of Article 62(1) of the Law on the Execution of Criminal Sanctions of BiH stipulates that the authorized official persons may carry out a search of visitors and their possessions and that *the search of the premises and persons referred to in paragraph 1 of this Article shall be carried out in the manner to detect and prevent any attempt of escape and hiding of smuggled goods with respect for human dignity of the persons subjected to search and their possessions*. Moreover, the provisions of Article 149 of the same Law provides that *detainees shall be entitled to maintain contacts with their family members and persons and representatives who may be helpful to their treatment through letters or phone calls without restriction* (paragraph 1) but that *exceptionally, the Institution may, if need be, control letters and phone calls, about which the prisoner shall be informed* (paragraph 2). Therefore, the Constitutional Court holds that the "interference" with the appellants' right to their private and family life is stipulated by the law. Furthermore, the Constitutional Court notes that the Law on the Execution of Criminal Sanctions of BiH is published in the Official Gazette, that the text thereof is clear, available and foreseeable, which meets other elements of the "lawful interference" with the appellants' right under Article 8 of the European Convention.

133. The interference which is in accordance with the law must also be a measure necessary in a democratic society for the purpose of achieving legitimate aims under Article 8(2) of the European Convention. "Necessary" in this context means that the "interference" corresponds to "pressing social needs" and that there is a reasonable relationship of proportionality between the interference and the legitimate aim pursued (see ECtHR, *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251).

134. The Constitutional Court notes that the aim to be achieved by taking the measures restricting rights and freedoms of prisoners and their visitors in the manner prescribed by the Law on the Execution of Criminal Sanctions of BiH is to ensure the undisturbed execution of a prison sentence imposed by legally binding judgments against prisoners in order to achieve general and special prevention, which is the legitimate aim in a democratic society. However, in order to achieve that aim it is necessary to strike a fair balance of proportionality between that legitimate aim, on the one hand, and the protection of the right to private and family life, on the other hand. In this connection, the Constitutional Court notes that the law in general provides that a prisoner has the right to visit by a person on his/her choice. Furthermore, the law prescribes that the rights and freedoms of prisoners may be restricted only to the extent necessary to achieve the aim for which the punishment has been imposed. Turning to the instant case, the Constitutional Court notes that the administration of the Foča

Penal and Correction Institution held that the very purpose of the execution of the prison sentence would not have been achieved in an appropriate manner if appellant Ždrale had been allowed to receive visits without prior search of the persons visiting him, which is in accordance with the relevant provisions of the Law on the Execution of Criminal Sanctions of BiH and Rules adopted on the basis of that law.

135. The Constitutional Court also notes that according to the case-law of the European Court, any detention entails by its very nature a limitation on private and family life. However, it is an essential part of a prisoner's right to respect for family life that the prison authorities assist him in maintaining contacts with his close family. At the same time, the European Court of Human Rights recognises that some measure of control over prisoners' contacts with the outside world is called for and is not of itself incompatible with the Convention (see, ECtHR, *Ostrovar v. Moldova,* judgment *of* 15 February 2006, paragraph 105; ECtHR, *Messina v. Italy,* (no. 2), judgment of 28 September 2000, paragraphs 66 and 72). Taking the aforementioned view into account, the Constitutional Court notes that in the present case the measure of placement in the Special Prison Unit was imposed on the appellant after he had been classified as belonging to Category C, since it was noted that other measures imposed on him did not have effect on his behaviour, *i.e.* the measures which were timely restricted and depended solely on the conduct of appellant Ždrale. As to the allegations that his right to respect for his private life was violated because of the search, the Constitutional Court notes that the interference with the aforementioned right of the appellant is lawful as being based on the provision of Article 62 of the Law on the Execution of Criminal Sanctions of BiH, which is clear, unambiguous and the application of which is not arbitrary.

136. Furthermore, the Constitutional Court holds that the search which was carried out constituted an action undertaken with the aim of preventing eventual prohibited items from being brought in. As the Constitutional Court has already concluded in this Decision, in the context of consideration of the appellants' allegations on a violation of Article 3 of the European Convention due to the search of appellant Jokić and appellant Spomenka Ždrale, that the aforementioned measure (the search of body), although it could cause emotional disturbance, did not attain a minimum level of severity of inhuman or degrading treatment, the Constitutional Court concludes that the search constituted in that sense a measure necessary in a democratic society with the aim of ensuring the rule of law and that there was a reasonable relationship of proportionality between the legitimate aim relating to the protection of public peace and order, on the one hand, and the protection of the right of appellant Jokić and appellant Spomenka Ždrale to their private life, on the other hand, all the more so since that measure was of temporary nature. For the aforementioned reasons, the Constitutional Court concludes that there is no

violation of Article 8 of the European Convention as regards the body searches carried out on appellant Jokić and appellant Spomenka Ždrale during their visits to appellant Ždrale.

137. Furthermore, as to the allegations of appellant Jokić about a violation of Article 8 of the European Convention due to the "eavesdropping on phone", the Constitutional Court notes that the interference with the aforementioned right was lawful as being based on the provisions of Article 149 of the Law on the Execution of Criminal Sanction. Moreover, the Constitutional Court notes that it is indisputable in the present case that appellant Ždrale was informed of that measure in accordance with the aforementioned provision and that he gave written consent to the execution of that measure. Furthermore, the Constitutional Court notes that appellant Ždrale, as it follows from the appellant Ždrale's allegations, informed appellant Jokić of that fact. Therefore, taking into account all the facts of the case, notably the reasons for which appellant Ždrale was placed in the Special Prison Unit, the Constitutional Court holds that the reasons for considering that the aforementioned measure of eavesdropping on phone calls of appellant Ždrale with all persons, including appellant Jokić, was necessary in a democratic society for ensuring respect for the rule of law, were sufficient and valid and that there was a reasonable relationship of proportionality between the protection of the legitimate aim concerning the protection of public peace and order, on the one hand, and protection of the right of appellant Jokić to his private life, on the other hand, all the more so as the measure was of temporary character of which appellant Jokić had been informed.

138. Besides, as to the allegations of appellant Ždrale and appellant Spomenka Ždrale that their right to respect for their family life is violated as they are not allowed to have conjugal visits, the Constitutional Court notes that the interference with the appellant's right is lawful as being in accordance with the provisions of Article 152 of the Law on the Execution of Criminal Sanctions and Rulebook on Privileges, from which it follows that, as to the privileges, it is not an automatic right of the sentenced person but it is a possibility which he can acquire only by taking part in the treatment program and by positive attitude towards the efforts made to implement the program. Furthermore, the Constitutional Court notes that it is indisputable in the present case that appellant Ždrale, as a result of his behaviour and conduct, was assigned to the maximum security category C so that he did not acquire the privileges. In this sense, the Constitutional Court holds that the aforementioned constitutes a measure necessary in a democratic society for ensuring respect for the rule of law and that there is a reasonable relationship of proportionality between the protection of legitimate aim relating to the protection of public order and peace, on the one hand, and the protection of the right of appellant Ždrale and appellant Spomenka Ždrale, all the more so as that measure was of a temporary character.

139. In addition, the Constitutional Court notes that appellants Đorđe Ždrale and Spomenka Ždrale alleged in the appeal that their right and right of their children to family life is violated as they have been prevented from having a direct meeting. In this connection, the Constitutional Court notes that it is noted in the supplement to the appeal and the appeal that appellant Đorđe Ždrale and appellant Spomenka Ždrale "do not want their children to be subjected to such treatment". The Constitutional Court notes that it follows from the aforementioned that the minor children of appellant Đorđe Ždrale and appellant Spomenka Ždrale in that period, thus after the appellant had been placed in the Special Prison Unit until 24 April 2012, did not come to the Foča Penal-Correctional Institution so that their allegation on the violation of the right of their minor children to their family life are therefore unfounded. Furthermore, the Constitutional Court notes that it follows from the information submitted to the Constitutional Court by the Foča Penal-Correctional Institution that, subsequently, during 2012 and 2013, the total number of the visits paid to appellant Ždrale by his wife and minor children was 16; by other close family members: 18; exceptional visits and visits of other persons: 14. In all those cases, there was no objection either by appellant Ždrale or by other visitors to the treatment of the security service of the Foča Penal-Correctional Institution. Furthermore, the Constitutional Court notes that the 2012 Annual Report on the Results of the Activities of the Institution, which was drafted by the Ombudsman for Human Rights of BiH, indicated, *inter alia,* that "As a positive example of the attitude of the administration of the Penal-Correctional Institution s with regards to the visits, Ombudsmen indicate the Foča Penal-Correctional Institution in which there is a special room adapted to the visits of children of the sentences persons (see www.ombudsman.gov.ba).

140. Taking into account the aforesaid, the Constitutional Court concludes that there is no violation of the appellants' right to respect for their private and family life, home and correspondence under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

Other allegations

141. With regards to appellant Jokić's allegations in case AP 1505/12 that the decision based on which appellant Ždrale was placed in the Special Prison Unit was not delivered to appellant Ždrale, the Constitutional Court notes that it follows from the response of the Foča Penal-Correctional Institution that appellant Jokić, within the meaning of the provisions of the Law on Free Access to Information, in a letter of 2 April 2012, requested the delivery of the aforementioned decision but he obtained a response that the Foča Penal-Correctional Institution was obliged to deliver documentation and information to ministries of justice only, so that he was instructed to address his request to the relevant Ministry of Justice. However, the Constitutional Court notes that appellant Ždrale failed to indicate that

fact in his appeal (AP 220/11), nor did appellant Ždrale address complaints about it to the inspector of the Ministry of Justice on 17 April 2012 when an inspection was carried out, which included an interview with him. Therefore, the Constitutional Court will not consider these allegations of the appellants.

Right to an effective legal remedy under Article 13 of the European Convention

142. Article 13 of the European Convention, in its relevant part, reads:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority (...).

143. With regards to the allegations of the appellants that their right under Article 13 in conjunction with Article 3 and Article 8 of the European Convention has been violated, the Constitutional Court notes that Article 13 has a subsidiary character. This means that Article 13 of the European Convention does not guarantee the right to an effective legal remedy by itself, nor can it be regarded as being independent of a right safeguarded by the European Convention. Taking into account the aforesaid and already expressed view in the present decision, namely that there is no violation of the appellant's right under Articles 3 and 8 of the European Convention, the Constitutional Court concludes that the appellant Spomenka Ždrale's allegations on the violation of these rights are unfounded and that there is no violation of the appellants' right under Article 13 of the European Convention, in conjunction with Articles 3 and 8 of the European Convention.

As to compensation for non-pecuniary damages

144. As to the request of the appellants for Bosnia and Herzegovina to pay "the damages" for the violations of their human rights and to compensate the costs they incurred in relation to the appeals, the Constitutional Court points to the provision of Article 74(1) of the Rules of the Constitutional Court, which prescribes that the Constitutional Court may award the compensation for non-pecuniary damage in a decision granting the appeal. Given that the Constitutional Court did not grant the appeals of the appellants in the present case, their request for compensation for non-pecuniary damages is ill-founded. In addition, as to the request of all the appellants for compensation of the costs they incurred in relation to the appeals, the Constitutional Court recalls that the Rules of the Constitutional Court do not prescribe that the appellants are entitled to the compensation of the costs of the preparation of the appeal, wherefrom it follows that the costs related to the preparation of the appeal are covered solely by the appellants.

VIII. Conclusion

145. The Constitutional Court concludes that there is no violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European

Convention, in the situation where appellant Ždrale had the possibility to be tried before the court that had subject-matter jurisdiction and was impartial and where the Constitutional Court, based on the reasoning of the challenged verdict, established that the appellant's guilt of the criminal offence he had been adjudged guilty and sentenced had not been ascertained in an arbitrary manner, but on the contrary, after the direct and comprehensive analysis and assessment of the evidence, both separately and in conjunction with other evidence, leading to the indisputable conclusion that the appellant had committed the criminal offence as charged, and based on which not a single important issue was left unclarified within the meaning of the principle of presumption of innocence and the principle of *in dubio pro reo*. In addition, the Court gave the clear and detailed reasons in the challenged verdict as to the objection made with regard to the lawfulness of the evidence admitted or dismissed by the Court, offering the reasoning which does not appear arbitrary and applying the substantive and procedural law in accordance with the guarantees under Article 6 of the European Convention. Furthermore, the Constitutional Court concludes that there is no violation of the right of appeal in criminal matters under Article 2 of Protocol No. 7 to the European Convention, given that appellant Ždrale filed an appeal with the Appellate Court, which examined the challenged verdict in respect of the appellant's complaints and, therefore, the appellant was not deprived of the right of appeal in criminal matters.

146. The Constitutional Court concludes that there is no violation of the right of a person not to be subjected to inhumane and degrading treatment or punishment under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention, in cases where visitors of prisoners housed at the Special Prison Unit are searched in accordance with the provisions of the Law on the Execution of Criminal Sanctions.

147. Also, the Constitutional Court concludes that there is no violation of the right to respect for private and family life, home and correspondence under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, as the interference by the public authorities with this right of the appellant, due to the stay of appellant Ždrale in the Special Prison Unit, is based on the law and is necessary in a democratic society for the purpose of achieving a legitimate aim. Thereby, there is a reasonable relationship of proportionality between the interference with the right of the appellant and the legitimate aim sought to be achieved.

148. In view of the aforementioned, as well as the stance already presented in this decision that no violation of the appellant's rights under Articles 3 and 8 of the European Convention occurred, the Constitutional Court concludes that there is no violation of the appellants' right under Article 13 of the European Convention in conjunction with Articles 3 and 8 of the European Convention.

149. Pursuant to Article 18 paragraph 3(h), Article 57 paragraph 2(b) and Article 59 paragraphs 1 and 3 of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

150. Given the decision of the Constitutional Court in this case, it is not necessary to consider separately the proposals of the appellants for the adoption of an interim measure.

151. Pursuant to Article 43 of the Rules of the Constitutional Court, a Separate Dissenting Opinion of Judges Constance Grewe, joined by the Vice-President Tudor Pantiru and Separate Dissenting Opinion of Judge Margarita Tsatsa-Nikolovska, as regards the part of the decision on the appeals filed by reason of the appellants' treatment in the Foča Penal-Correctonal Institution, are annexed to the present decision.

152. 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
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of Judge Margarita Tsatsa-Nikolovska

As the judge who was the member of the chamber deciding on in this case, I hereby present my partially dissenting opinion on the part of the Decision relating to Article II(3)(e) and (b) of the Constitution of Bosnia and Herzegovina and Articles 6, 3 and 13 of the European Convention for the following reasons:

In my opinion, the Court took an incorrect view that the case relates to a *ratione materiae* appeal filed by Dragiša Jokić and Đorđe Ždrale in respect of the violation of Article 6 for treatment imposed in the Foča Penal-Correctional Institution as the criminal proceedings were concluded with the legally binding verdict of the Court of BiH, where the subject of proceedings must relate to the well-foundedness, and the proceedings subsequent to the final and binding court decision, such as the proceedings upon extraordinary legal remedies, the conditional release proceedings or requests for renewal of proceedings do not fall within the ambit of Article 6(1) of the European Convention (paragraph 83 of the Decision). As to Article 6(3), the Court took the view that appellant Jokić was not the victim of the violation of Article 6 of European Convention (paragraph 84 of the Decision).

According to my interpretation, the allegation of appellants Jokić and Ždrale relate to the right to defence. The appellants refer to Article 6(3)(c) of the European Convention (paragraph 80 of the Decision) and my separate opinion concerns exactly that right. The communication that was prevented between the lawyer and his client due to the manner of search to which the lawyer was subjected on the occasion of the visit in the prison is an issue which should be examined, not rejected. Such manner of conduct should also be considered from the aspect of the issue whether this potentially prevented the lawyer from preparing the request for renewal of proceedings for new facts in favour of the convicted person. All these circumstances fall within the scope of Article 6 of the European Convention for several reasons deriving from the case-law of the European Court:

1. The safeguards under Article 6 of the European Convention apply not only to the court proceedings but also to the proceedings before and after the court proceedings. The restrictive interpretation of Article 6 would not favour the achievement of the aim and purpose of this Article.
2. When a State foresees the right to a legal remedy under its national law, such proceeding must be in compliance with the safeguards encompassed by Article 6, where the manner in which they apply must depend on the special characteristics of the proceedings.

3. Theoretical or illusory rights provided for by the legislation but prevented in practice, not for legal reasons, are not in accordance with the standards of the right to a fair trial taken as a whole.
4. Article 6 encompasses the proceedings for enforcement of the court verdicts.

Separate opinion on the appellant's allegations relating to Article 3 of the European Convention – the manner of search ("strip search") during the visit to the convicted person in the premises of the prison amounted to a degrading treatment

The Court stated the reasons for which it holds that there has been no violation of Article 3 of the European Convention and noted that the treatment is degrading if it is such as to arose in the victims feelings of fear, anguish and inferiority by referring to case *Keenan v. the United Kingdom* and without examining how that relates to the present case. Such approach also applies while determining a "minimum level of severity". In my view, the circumstance that the search was carried out in the professional and correct manner is not relevant to the determination of the aforementioned minimum level of severity. The strip search itself is something needed to be analysed from the aspect of the level of severity. The security reasons are not elaborated in the sense of necessity and issue whether there are other ways of search in order to achieve the same aim (paragraph 111 of the Decision). In my view, in the present case, the mere statement that the present case does not disclose anything which would indicate a humiliating treatment" (paragraph 111 of the Decision) has no relevant and concrete arguments and is unacceptable. I hold that the "strip search" in the given situation and despite the fact that the appellants did not oppose it has attained a minimum level of severity. Both appellants disclose the elements of suffering and humiliation. Appellant Jokić is a lawyer and professional whose legal profession requires the communication with his client, and when there are no elements of abuse of the profession, such searches are humiliating and, as stated in his submission, there are elements of sufferance. The appellant Spomenka Ždrale as the wife who was exercising the right to visit sustained the humiliating measures of "strip search" only in order to exercise that right. The precautionary measures taken because of the behaviour of appellant Ždrale, i.e. the placement in a special unit for serving the sentence cannot be justification for the aforementioned conduct of the authorities of the Foča Penal-Correctional Institution, namely the "strip search" of his lawyer and his wife. At the present time characterized by sophisticated technology, other precautionary measures are known in theory and practice. Namely, it is noted in the Decision (paragraph 114) that it should be reviewed whether the regulations based on which the search has been carried out are in full compliance with the provisions of the European Prison Rules in order to ensure a balance between order, discipline and personal security,

and the right to professional approach and, I would add, in relation to other rights given to other persons such as spouses and close family members.

Taking into account the foregoing, in my opinion, there has been a violation of Article 3 of the European Convention, since a minimum level of severity has been attained in the present case in order to consider the treatment to which appellant Jokić and appellant Ždrale were subjected as humiliating.

Given such situation, the examination of the issue whether the right to an effective legal remedy under Article 13 of the European Convention, in conjunction with Article 3 of the European Convention, has been violated would not be called into question for its subsidiary character.

As to the appellants' allegations that their right under Article 8, alone and in conjunction with Article 13 of the European Convention, has been violated due to the manner in which the authorities of the Foča Penal-Correctional Institution carried out the search, I hold that there is no need to examine these allegations as this has been considered in relation to the issue of violation of Article 3 of the European Convention.

Separate Dissenting Opinion of Judge Constance Grewe joined by Vice-President Tudor Pantiru

I - In the present case the Constitutional Court of Bosnia and Herzegovina has decided:

1 – To declare admissible the appeal of Mr. Đorđe Ždrale against the verdicts of the Court of Bosnia and Herzegovina no. X-KŽ-08/540-1 of 14 October 2010 and X-K-08/540-1 of 16 April 2010 (§§70-73) alleging a violation of the fair trial.

To admit the latter's request against the treatment in the Foča Penal-Correctional Institution as well as the appeals initiated by his attorney Mr. Dragiša Jokić and his wife Ms. Spomenka Ždrale, namely because their rights are derived from those of the prisoner (§§74-79).

2 – To reject as inadmissible ratione materiae the appeal lodged by Mr. Dragiša Jokić and Mr. Đorđe Ždrale against the treatment they were subjected to in the Foča Penal-Correctional Institution, as regards the right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(c) of the European Convention on Human Rights (§§80-84).

3 – As to the merits, to hold that there is no violation of art. 6 (§§ 85-111).

4 – To dismiss the appeals of Ms. Spomenka Ždrale and Mr. Dragiša Jokić against the treatment they were subjected to in the Foča Penal-Correctional Institution, as regards the right under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the appeals of Mr. Đorđe Ždrale, Ms. Spomenka Ždrale and Mr. Dragiša Jokić as regards the right under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Articles 8 and 13 of the European Convention (§§112-140).

II – The scope of dissent

In agreement with the majority I think that the criminal procedure before the Court of BiH is to be considered a fair trial (points 1 and 3 above) and that the verdicts of 14 October and 16 April 2010 are not arbitrary. My disagreement relates to points 2 and 4 referring to the detention conditions of the appellant. More precisely I think that the complaint in respect of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(c) of the European Convention is admissible and that the violation of Article II(3)(b) of the Constitution and Article 3 of the Convention as well as of Article II(3)(f) of the Constitution and 8 of the Convention should have been analyzed in a different way.

III – The admissibility of the appeal alleging a violation of Article 6 in relation with the treatment in the Foča Penal-Correctional Institution

The reasoning of the majority relies on the fact that Article 6(3)(c) of the European Convention relates only to the determination of a criminal charge and that the applicability of this provision ceases with the final and binding verdict of the Court of BiH. If this is certainly the principle, the European Court of Human Rights has nevertheless a wide conception of the determination of a criminal charge. It considers especially that a revision appeal (*Meftah and others v. France,* GC, no. 32911/96, 35237/97 and 34595/97*,* 26 July 2002; *Vanyan v. Russia*, no. 53203/99, 15 December 2005) or a procedure before the Constitutional Court (*Gast and Popp v. Germany,* no. 29357/95, 25 February 2000; *Caldas Ramirez de Arrellano v. Spain,* decision on admissibility no. 68874/01, 28 January 2003) extends the application of Article 6(3)(c) in as much as this procedure can influence the issue of the criminal procedure and therefore the criminal charge.

This is precisely happening in the present case. Mr. Đorđe Ždrale, not satisfied by the verdict of the Court of BiH, is addressing the Constitutional Court hoping that by this way his penalty could be reduced. In order to prepare his appeal and his arguments before the Constitutional Court, he needs a strong and continuous contact with his attorney which is guaranteed by his defence rights and especially by Article 6(3)(c). While it is true that this Article does not apply in principle to the measures taken by the prison service, however when these measures are likely to prevent a regular and easy contact between the prisoner and his attorney in order to prepare the prisoner's defence before the Constitutional Court, then Article 6(3)(c) seems to be relevant granting the necessary defence rights to the prisoner.

Therefore I am of the opinion that at least the admissibility of this appeal should have been admitted and that it is not at all incompatible ratione materiae with the Constitution. Indeed, the fact that Mr. Ždrale's phone calls including those with his attorney were supervised and that Mr. Jokić had to suffer a search every time he wanted to visit Mr. Ždrale and that therefore he ceased its visits represent a serious obstacle for maintaining a regular contact and the confidential relationship necessary between an attorney and his client. But even if one considers that in the circumstances of the present case there has been no detrimental interference into the defence rights, it would have been sufficient to reject the appeal as ill-founded.

IV – As to the alleged violation of Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention, the majority has not examined the positive obligations inherent to this provision.

Regarding this subject matter the majority holds that the suffering and humiliation of appellant Jokić and appellant Spomenka Ždrale did not "*go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment"* (§ 120) and that instead of the alleged "*strip search*" when they paid visits to appellant Ždrale in the premises of the Foča Penal and Correctional Institution, "*it is obvious that in the present case the prescribed procedure was fully complied with*" (§ 120). This conclusion is drawn by the Court from the "*submitted documentation*" which is a Report of 17 April 2012 on the Inspection carried out by the Foča Penal and Correctional Institution on the request of the Ministry of Justice of BiH (§ 114) after the complaint of appellant Jokić.

It seems clear to me that such an inspection cannot satisfy at all the procedural obligations under Article 3 (see for instance ECtHR, GC, *Kudla v. Poland,* no. 30210/96, 26 October 2000). As there was no independent and impartial enquiry about the searches undertaken in the Foča Penal and Correctional Institution, how is it possible to know what have been exactly the modalities of search (strip-search or only inspection of the clothes, presence or not of persons of the other sex)? It is difficult to imagine the inspection carried out by the Foča Penal and Correctional Institution concluding to a degrading treatment. Therefore, in presence of a defendable allegation of degrading treatment, the European Court of Human Rights requires an independent, impartial and effective enquiry in order to establish the facts (*Valasinas v. Lithuania,* no. 44558/98, 24 July 2001). Not only has this not been done in the present case neither is it prescribed by the applicable law nor has it been pointed out or criticized by the Court.

To the contrary, when appellant Jokić was addressing the Foča Penal-Correctional Institution twice with request for the submission of data and documentation relating to placement and treatment of appellant Ždrale in the Special Prison Unit (names of official persons, copies of orders on placement of the convict, proposal of manager, etc)., the responses were given that the requested data represent official secret, namely within the meaning of Article 53 of the BiH Law on Execution of Criminal Sanctions of RS and Article 45 of Law on Execution of Criminal Sanctions of BiH (§ 55). He also lodged an appeal on 7 March 2012 on behalf of the appellant Ždrale with the Institution of Human Rights Ombudsman of Bosnia and Herzegovina but no information about whether appellant Ždrale or appellant Jokić or appellant Spomenka Ždrale received any response in this respect was submitted to the Constitutional Court (§ 76). Finally the Court mentions the obligations of the Ministry of Justice of

BiH and Ministry of Justice of RS to check the national legislation with regard to the European Prison Rules but without drawing any consequence of this statement (§ 123).

Bearing in mind all these elements, there is no certainty about the facts and therefore no certainty about the violation or the non-violation of Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention. In consequence, neither the verdicts of the Court of BiH nor the decision of the Constitutional Court give sufficient arguments for dismissing the appeals on this ground, even if it is plausible that the required level of suffering is not amounted in this case.

V – As to the alleged violation of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Articles 8 and 13 of the European Convention, the majority has not thoroughly examined the presented allegations.

It is true that, given the security threats represented by the appellant Ždrale, the visits in the Foča Penal and Correctional Institution amounted inevitably to an interference in private and family life of the visitors which is prescribed by the law with the legitimate aim to prevent crimes and to preserve public order. The question is whether these interferences are necessary in a democratic society.

On this point the Court does not give any convincing argument, stating that "*the aforementioned measure (the search of body), although it could cause emotional disturbance, did not attain a minimum level of severity of inhuman or degrading treatment, the Constitutional Court concludes that the search constituted in that sense a measure necessary in a democratic society with the aim of ensuring the rule of law and that there was a reasonable relationship of proportionality between the legitimate aim relating to the protection of public peace and order, on the one hand, and the protection of the right of appellant Jokić and appellant Spomenka Ždrale to private life, on the other hand, all the more so since that measure was of temporary nature*"(§136). In the framework of Article 8, the European Court of Human Rights does not require the minimum level of severity of inhuman or degrading treatment since precisely the violation of private or of family life is not equivalent to an inhuman or degrading treatment! It should have been necessary in the case at hand to balance the rights of the appellants with the public interest.

It is this omission as well as the very formal reasoning on the information about controls of phone calls and the "consent" to the searches (§ 137) which I regret in the decision of the Court whereas it is obvious that appellants Jokić and Spomenka Ždrale had no alternative if they wanted to visit Mr. Ždrale. Concerning furthermore the possibility of conjugal visits, the conception of the Law on the Execution of Criminal Sanctions and Rulebook on Privileges adopt a quite surprising vision (the "privileges") of the social rehabilitation of prisoners which is perhaps not in conformity with the

Convention's requirements (§ 138). As concerns finally the visits of Mr. Ždrale's children (§ 139), it is not very surprising that under the perspective of a compulsory search preliminary to a visit to Mr. Ždrale, these visits have been very scarce but this does not remove the possible violation of family life. This very superficial and formal reasoning prevents finally the Court of examining a possible violation of Article 13 while the requests of Mr. Jokić and Ždrale especially before the Ombudsman of BiH do not seem to have provoked any response.

Therefore, even if the final solution could be rather similar to the one adopted by the majority, this decision seems not well founded and reasoned enough with regard to the case law of the European Court of Human Rights.