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

Ms. Valerija Galić, President

Mr. 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. **Zoran Damjanović** in case no. **AP 325/08** at its session held on 27 September 2013, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. **Zoran Damjanović** is hereby granted.

A violation of Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Verdicts of the Court of Bosnia and Herzegovina nos. X-KRŽ-05/107 of 19 November 2007 and X-KR-05/107 of 18 June 2007 are hereby quashed because of the violation of Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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

The Court of Bosnia and Herzegovina is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 90 days from the date of delivery of this Decision, of the measures taken with the aim of executing this Decision, in accordance with Article 74(5) of the Rules of the Constitutional Court 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 29 January 2008, Zoran Damjanović ("the appellant"), represented by Fahrija Karkin, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") against the Verdict of the Court of Bosnia and Herzegovina ("the Court of BiH") no. X-KRŽ-05/107 of 19 November 2007 and the Verdict of the Court of BiH no. X-KR-05/107 of 18 June 2007. Along with his appeal, the appellant submitted a request for an interim measure, whereby the Constitutional Court would postpone the enforcement of the prison sentence pending the final decision on the appeal.

II. Procedure before the Constitutional Court

2. The Constitutional Court adopted a Decision on an interim measure no. AP 325/08 of 14 February 2008 dismissing the appellant's request for an interim measure.

3. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 2 April 2010 the Court of Bosnia and Herzegovina ("the Court of BiH") and the Prosecutor's Office of Bosnia and Herzegovina ("the Prosecutor's Office") were requested to submit their respective replies to the appeal.

4. The Court of BiH and the Prosecutor's Office submitted their replies to the appeal on 13 April and 8 April 2010 respectively.

5. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were forwarded to the appellant on 17 June 2010.

III. Facts of the Case

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

7. The Verdict of the Court of BiH no. X-KR-05/107 of 18 June 2007, found the appellant guilty and sentenced to imprisonment for a term of 10 years and six months for the criminal offence of war crime against civilians under Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina (“the Criminal Code of BiH”). After conducting the proceedings, the Court of BiH established that on 2 June 1992 the appellant, together with Goran Damjanović, in the settlement of Bojnik, as a member of the Army of the Serb Republic of Bosnia and Herzegovina, armed and in military uniform, had participated actively in the beating of a group of 20 to 30 male prisoners of Bosniac ethnicity, who had either surrendered or had been captured. On that occasion the appellant, using a rifle, had beaten up Elvir Jahić, a witness D. and other unidentified persons, because they had engaged in the resistance during the attack of the Serb forces on the place of Ahatovići. After the beating of the victims, the appellant, together with other persons, had placed the victims on board the buses taking them to the “Rajlovac” camp.

8. According to the reasoning of the first instance verdict it follows that the Court, in the evidentiary proceedings, presented numerous evidence at the proposal of the Prosecutor’s Office and the appellant’s defense. Having examined all the presented evidence, individually and by interlinking them, the Court of BiH established that the appellant, together with Goran Damjanović, had committed the criminal offences closely specified in the enacting clause of the verdict. In the reasoning of the verdict it was stated that the Court of BiH gave full credence to the heard witnesses, as the witnesses’ testimonies deposited before the Prosecutor’s Office and at the main hearing were clear and convincing, as well as mutually consistent and in concord. The Court of BiH further stated that it was established that witnesses “C” and “D” had been captured on 2 June 1992 by the Serb military forces during the attack on the settlement of Ahatovići and had been put out of action because they had either surrendered or had been captured. Some of them had been wounded, as had been the case with the witness Elvir Jahić and witnesses “C” and “D”. The Court of BiH also stated that the testimonies of the mentioned witnesses could not add up in full, which is completely normal and acceptable due to the psychological mechanisms of the perspective of human perception.

Therefore, the Court of BiH, as part of its discretion in assessing evidence, considered some inconsistencies or departures in the testimonies in their entirety in terms of substance and sense. The total credibility of the witnesses was also assessed comprehensively and systematically. Some testimonies of the witnesses are not identical, but they are consistent and correspond in their basic and important elements, that is, in respect of the essence of the respective criminal offence. The Court of BiH held that the testimonies were reliable, evidence credible, and that minor departures cannot be sufficient to find the entire testimony as unreliable. Actually, according to the Court of BiH the mentioned differences were not decisive, since some departures in their testimonies entirely represent the expected and normal differences in observations of persons with different ability to observe, memorize and remember information, particularly taking into account the fact that all of them had experienced very stressful and traumatic events during which they could not have observed identically all the important and consistent details, and it would not have been reasonable to expect such precision from witnesses.

9. In addition, the Court of BiH noted that the appellant and his brother Goran Damjanović had been very well known to their victims, to the mentioned witnesses that is, as they had been neighbors and had gone to school together. On the basis of the aforementioned, the Court of BiH reached a conclusion that the witnesses were reliable and that they spoke the truth when they said that the appellant and his brother Goran Damjanović had been at the crime scene and that they had committed the criminal offences related to the incriminated event.

10. As to the appellant's alibi, the Court of BiH established that the appellant could not have been in the encirclement in Potkraj, as he said in his defense, since there is no evidence showing that the Bosnian Serbs had to leave their homes and be in hiding. The evidence given by the witness Zoran clearly indicated that Serbs had controlled Rakovica and the area around Rakovica in April, May and June 1992, which also followed from the statements of the prosecution witnesses Ibrahim Baberović, Abdulah Koldžo and Elza Livančić. All these witnesses stated that it was not possible that any single Serb family in the area of the entire local community of Rakovica could have been captured or blocked in the period from 6 April to July 1992 and that Serbs could freely move around during that period. The fact relating to the injury of Luka Damjanović did not support the appellant's alibi, because, based on the statements of the defense witnesses, the stories about how the appellant had learned about the wounding of his father and when he had actually left Potkraj to go to Bojnik to

visit him were rather unclear, confusing and inconsistent. Given the aforementioned, the Court of BiH decided as stated in the operative part of the verdict.

11. As to the application of the substantive law, the Court of BiH found that two legal principles – the principle of legality (Article 3 of the Criminal Code of BiH) and the principle of time constraints regarding the applicability of the Criminal Code (Article 4 of the Criminal Code of BiH) were relevant. The principle of legality is prescribed by Article 7(1) of the European Convention and Article 15(1) of the International Covenant on Civil and Political Rights ("the ICCPR"). This provision, as indicated by the Court of BiH, provides for the prohibition of imposing a heavier penalty without prescribing a mandatory application of a more lenient law for the perpetrator in comparison to the penalty applicable at the time of the perpetration of the criminal offence. However, Article 7(2) of the European Convention and Article 15(2) of the ICCPR comprise the provisions which are exceptions to the rule established by Article 7(1) of the European Convention and Article 15(1) of the ICCPR. In addition, the same exception is contained in Article 4(a) of the Criminal Code of BiH, which stipulates that Articles 3 and 4 of the Criminal Code of BiH shall not prevent the trial and punishment of any person for any act or omission to act which, at the time when it was committed, constituted a criminal offence in accordance with the other principles of the international law. Thus, the provisions of Article 7(2) of the European Convention Article 15(2) of the ICCPR were practically taken over, which enabled exceptional departure from the principle under Article 4 of the Criminal Code of BiH, as well as the departure from the mandatory application of a more lenient law in the proceedings constituting criminal offences according to the international law. The Court of BiH concluded that this was the case in the respective proceedings, because it concerned incrimination involving the violation of international law rules.

12. Furthermore, the Court of BiH clarified that Article 173 of the Criminal Code of BiH prescribes "a war crime against civilians" (grave breaches of the 1949 Geneva Convention) as a criminal offence, and so does Article 2 of the ICTY Statute. At the critical time, a war crime against civilians was also strictly prescribed by the Criminal Code of SFRY, which had been in force in Bosnia and Herzegovina at the time. The fact that the criminal offences prescribed by Article 173 of the Criminal Code of BiH can also be found in Article 142(1) of the Criminal Code of SFRY allows one to conclude that the criminal offence of war crimes against civilians was prescribed by law. However, as the provisions suggest, the pronounced punishment prescribed by Article 173 of the

Criminal Code of BiH is surely more lenient than the death penalty stipulated by Article 142 of the Criminal Code of SFRY, which was applicable at the time the criminal offence had been committed. Finally, in relation to Article 7(1) of the European Convention, the Court of BiH noted that the application of Article 4(a) of the Criminal Code of BiH was still justified and met the principle of time constraints regarding the applicability of the criminal code, in other words the application of a more lenient law for the perpetrator.

13. Also, the Court of BiH pointed out that, at the time the criminal offences had been committed, Bosnia and Herzegovina as a successor of the state of SFRY was a signatory to all the relevant international conventions on human rights and international humanitarian and criminal law. Likewise, the customary status of punishability of crimes against humanity and holding individuals criminally liable for the perpetration thereof since 1992 was acknowledged by the UN Secretary-General, the International Law Commission, and the jurisprudence of the ICTY. These institutions have established that punishability of crimes against humanity constitutes a peremptory norm of the international law or *jus cogens*. Therefore it is indisputable that crimes against humanity in 1992 constituted a part of the customary international law. Therefore, as the Court of BiH concluded, the criminal offence of a crime against humanity may in any case be subsumed under “the general principles of the international law” referred to in Article 3 and Article 4(a) of the Criminal Code of BiH. That is why, regardless of the fact of whether it is viewed from the standpoint of the customary international law or “the principles of the international law”, it is indisputable that a crime against humanity constituted a criminal offence at the incriminated time, that is to say that the principle of legality was complied with.

14. In meting out the punishment for the appellant the Court accepted as extenuating circumstances the fact that the appellant acted correctly and conducted himself properly before the Court, that he was a family man with no criminal record to date, and that he was a father of a minor child. The Court did not find particularly extenuating circumstances which, within the meaning of Article 49(1)(b), would indicate that the purpose of punishment might be attained by a lesser punishment. The Court found no aggravating circumstances relating to the appellant.

15. The appellant lodged an appeal with the Court of BiH, the Appellate Division Panel of Section I for War Crimes (“the Appellate Division”). By its Verdict no. X-KRŽ-05/107 of 19 November 2007, the Appellate Division dismissed the appeal as unfounded and upheld the first

instance verdict, which had imposed on the appellant the sentence of imprisonment for a term of 10 years and six months for the criminal offence of a war crime against civilians under Article 173(1)(c) of the Criminal Code of BiH, which prescribes that a perpetrator of this criminal offence (a war crime against civilians under Article 173) … *shall be punished by imprisonment for a term not less than ten years or long-term imprisonment*…. The Appellate Division established that the challenged verdict contained a valid analysis of all the decisive facts and that the presented pieces of evidence were assessed in the manner stipulated by the Criminal Procedure Code of BiH. The Appellate Division underlined that the fact that the first instance panel had not assessed evidence in the manner in which the defense wanted it to be assessed, and that it had not separately analyzed each sentence of the statements given by the witnesses either during the numerous hearings of various persons at the investigation stage, or at the main hearing, did not make the verdict deficient and incomplete, but clear and focused on the essential elements of the criminal offence he was tried for. The assessment of evidence, as an important element of the contents of the verdict, should contain the reasoning as to why and on what basis the Court established (or did not establish) the existence of essential elements of a criminal offence and in which manner it assessed the contradictory evidence presented in that context, but that does not mean that the Court was obliged to clarify separately each and every, even the smallest inconsistency in the statements of the witnesses. What is important is that their testimonies correspond in all essential elements related to the event concerned, which the first instance panel correctly concluded as well, while certain differences only corroborate the conclusion that they testified about the event they had experienced and not about the event they learned about subsequently. In the present case, the witnesses unanimously confirmed that after they had been captured, they were taken in front of the supermarket in Bojnik where the soldiers, amongst whom the appellant and Goran Damjanović were, beat them with automatic rifles and batons, broke bottles against their heads and such like. The Appellate Division also found that the inconsistencies in the witnesses' statements were not of such a nature as to challenge the credibility and reliability of the witnesses' statements, and shared the conclusion of the first instance panel that the statements were sufficiently precise with regards to all crucial moments and essential elements of the criminal offence concerned, while minor discrepancies only reinforced the position of the Court that the witnesses were honest who recounted before the Court the facts and details which they could objectively memorize.

16. Furthermore, the second instance court stated that the defense of the appellant regarding the alibi he referred to is not convincing, while, on the other hand, all decisive facts relating to the appellant's guilt have been convincingly established and clearly reasoned. Namely, when compared to the prosecution witnesses, the defense witnesses who were heard regarding these circumstances appeared completely unconvincing and they evidently adjusted their statements to the needs of the alibi for the appellant. There were many discrepancies in their statements, both with regard to the alleged encirclement of Potkraj and with regard to the appellant's stay in that place at the time covered by the Indictment. The defense thesis was that the accused had been in the encirclement in Potkraj and that because of that he had been unable to visit his wounded father, let alone be in front of the supermarket in Bojnik on the relevant occasion. However, the witnesses whom the Court heard in relation to these circumstances, including the appellant himself, seriously challenged the sustainability of such a thesis. This refers in the first place to the fact that the appellant himself, when asked how the inhabitants of Potkraj obtained food while they were in the alleged encirclement, admitted that they could go to Rakovica freely. Furthermore, the statement of the appellant's father-in-law that he lived with him in the house at the time of the incriminated event, given their family ties, in comparison with the precise allegations by the Prosecution witnesses, is by no means sufficiently reliable for the Court to grant it unconditional credibility. Besides, the defense witness Salem Koldžo, who had stayed in the house of the appellant's father-in-law precisely during the time covered by the Indictment, said in his statement that he had not seen the appellant in the house. In view of the aforementioned, the Appellate Division concluded that the evidence on which the defense based the alibis for the accused is not reliable, so that the objections in the appeals suggesting the opposite are unfounded and, therefore, dismissed as such.

IV. Appeal

a) Allegations of the Appeal

17. The appellant asserts 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 for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") and his right not to be punished without law under Article 7 of the European Convention have been violated.

18. The appellant sees a violation of his right to a fair trial in the arbitrary assessment of evidence and in the violation of the provisions of the Criminal Procedure Code. In the appeal, while analyzing in detail the verdicts of the first instance and the second instance courts, the appellant stated that the Trial Chamber and the Appellate Division of the Court of BiH arbitrarily assessed the presented evidence and that, based on the evidentiary proceedings conducted in such a manner, they arbitrarily and erroneously established the facts of the case. The appellant holds that the courts should not have refused the presentation of evidence by hearing defense witnesses, which would contribute to the establishment of the real truth surrounding the event for which the appellant was found guilty and sentenced to imprisonment. Therefore, the appellant holds that the Court of BiH has violated the provisions of the Criminal Code Procedure, as it failed to assess completely and truthfully the aggravating facts and those which are favorable for him.

19. As to the violation of his right under Article 7 of the European Convention, the appellant underlines that he was sentenced by a legally binding verdict for the criminal offence of a war crime against civilians referred to in Article 173(1)(c) in conjunction with Article 180(1) of the Criminal Code of BiH. The appellant holds that the courts, through an incorrect interpretation of the mandatory application of a more lenient law, applied the criminal law which was more severe to the appellant and which was enacted 10 years after the criminal offence for which the appellant was sentenced had been committed. The appellant points out that Article 7 of the European Convention, as well as Article 4(1) of the Criminal Code of BiH, clearly stipulate that the criminal indictment and verdict might only be based on the norm that has been in force at the time the incriminated act had occurred, and that a heavier punishment cannot be imposed than the one that had been applicable at the time of the when the act concerned had been committed. In addition, Article 4(2) of the Criminal Code of BiH prescribes that *if the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.* Furthermore, the appellant emphasizes that he was sentenced for the criminal offence committed on 2 June 1992, *i.e.* at the time when the acts he was charged with had been incriminated under Article 142 of the Criminal Law of SFRY, which Bosnia and Herzegovina took over in 1992, and that after the end of the war the criminal legislation has been amended on several occasions so that, for a certain period of time (1998-2003), the substance of “war crimes” had been regulated by the Entity laws and after that by the Criminal Code of BiH. However, the identical criminal act for which the appellant was sentenced existed in the national legislation also at the time of the perpetration as well

as at the time of the trial for that offence and, therefore, in the appellant's opinion, all the mechanisms of criminal law and guaranteed constitutional rights as well as the rights safeguarded by the European Convention should have been applied.

20. In the view of the appellant, the reference that the Court of BiH made to Article 7(2) of the European Convention is not of relevance in the case at hand. The appellant underlines that Article 7(2) of the European Convention has, primarily, a function to "cover" the criminal prosecution for the violation of the Geneva Conventions before the international bodies established for such cases, such as the International Criminal Tribunal for the former Yugoslavia and Ruanda and "to cover" the cases before the national courts where the national legislation failed to provide for such incriminations as criminal acts, *i.e.* where it failed to cover all the elements of those acts under the Geneva Conventions, which is not the case here. The appellant further states that the basic issue here is which law is more lenient as the identical criminal offence existed (Article 142 of the taken over Criminal Law of SFRY with a prescribed sentence provided for was 5 years of imprisonment or the death penalty) in the previous criminal legislation of the former Yugoslavia, which Bosnia and Herzegovina had taken over by its Decree in 1992, as well as in the new legislation applied to the present case (Article 173 of the Criminal Code of BiH, punishment of 10 years of imprisonment or long term imprisonment). At first glance, the more lenient is the law of 2003 as it does not provide for the death penalty. However, since the death penalty has been abolished already from the date of the entry into force of the Constitution of the Federation of BiH in 1994, which was confirmed in the Constitution of BiH of 1995, and having in mind the opinions of the ordinary courts in Bosnia and Herzegovina, the Entities and the Brčko District of BiH (the Supreme Court of the Federation of BiH, the Supreme Court of Republika Srpska and the Appellate Court of the Brčko District) that the death penalty may not be imposed (such a position had also been taken by the Human Rights Chamber in the case of *Damjanović and Herak v. the Federation of Bosnia and Herzegovina*), it follows that the law of 1992 is the more lenient law. In view of the above, the appellant holds that his right guaranteed by Article 7(1) of the European Convention has been violated as he was sentenced under the more severe law.

b) Reply to the Appeal

21. In its reply to the appeal, the Court of BiH underlines that the appellant's allegations on the violation of his rights under Articles 6 and 7 of the European Convention are unfounded. As to the

appellant's allegations relating to the violation of his right to a fair trial under Article 6 of the European Convention, the Court of BiH holds that, contrary to the appellant's allegations, it offered clear and comprehensible reasons on which it relied in adopting its decisions in both verdicts. The first instance verdict, which was upheld in the part relating to the appellant, is a result of a logical and psychological evaluation of evidence, individually and by interlinking them, whereby the Trial Chamber took into account the legality and the principle of the free evaluation of evidence. In so doing, the Trial Chamber relied only upon the assessment of the relevant evidence necessary for the adoption of the verdict, with a remark that the fact that it did not deal with a piece of evidence individually for which it found to be of secondary importance, does not mean that it was neglected or arbitrarily evaluated, which is consistent with the case-law of the ICTY. Therefore, the Court of BiH holds ill-founded the appellant's allegations relating to the violation of the right to a fair trial.

22. As to the appellant's allegations relating to the violation of his right safeguarded by Article 7 of the European Convention, the Court of BiH notes that in the present case, bearing in mind that the act for which the appellant was found guilty represented a part of the general principles of the international law, the Trial Chamber and subsequently the Appellate Division Panel applied the Criminal Code of BiH. Namely, Article 4(a) of the Criminal Code of BiH prescribes that Articles 3 (the principle of legality) and 4 (the principle of time validity of the Criminal Code) of the Criminal Code of BiH shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, constituted a criminal offence in accordance with the general principles of the international law. In that sense, the Court of BiH referred to the Decision of the Constitutional Court in the case no. *AP 1785/06*.

23. In addition, the Court of BiH points out that the appellant's allegation that the death penalty, as a punishment, had been abolished by the enactment of the 1994 Constitution of FBiH, is not correct having in mind that the death penalty was abolished only in 2002 by way of Article 1 of Protocol No. 13 to the European Convention and that it still remained in force under the law applicable at the time of the perpetration of the criminal offence. However, even if the death penalty were abolished, it is not possible through simple elimination of a sanction (the death penalty in the present case) to apply other, more lenient, sanctions, thereby leaving the most serious crimes inadequately sanctioned, which is the case here. As a result, in the opinion of the Court of BiH, the principles of fairness and the rule of law would be violated.

24. In its reply to the appeal, the Prosecutor's Office states that the Court of BiH correctly applied the Criminal Code of BiH and fully answered the question relating to the application of "the more lenient law". These assertions are corroborated by the conclusion taken by the Constitutional Court in the case no. *AP 1785/06* in relation to the application of Article 7 of the European Convention. Namely, there is no doubt, and the appellant does not claim otherwise, that the war crime against civilians under Article 173 of the Criminal Code of BiH is a criminal offence under the customary international law, *i.e.* the general principles of the international law. Therefore, it is clear that Article 4(a) of the Criminal Code of BiH is applicable to the present case and that the international criminal offences are exempted from the provision stipulating a more lenient punishment contained in Article 4 of the Criminal Code of BiH and, consequently, the appellant's allegations are irrelevant. Therefore, the Prosecutor's Office concluded that the appellant's allegations are unfounded in their entirety.

V. Relevant Law

25. The **Criminal Code of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, nos. 37/03, 54/04, 61/04, 30/05, 53/06, 55/06 and 32/07), in the relevant part, reads as follows:

Article 3

Principle of Legality

(1) Criminal offences and criminal sanctions shall be prescribed only by law.

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

Article 4

Time Constraints Regarding Applicability

(1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.

(2) If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

Article 4a

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

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

Article 42

Imprisonment punishment

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

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

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

(4) Long-term imprisonment cannot be imposed on a perpetrator who has not reached twenty-one years of age at the time of perpetrating the criminal offence.

(5) Juvenile imprisonment may be imposed under the conditions prescribed by Chapter X (Rules Relating to Educational Recommendations, Educational Measures and Punishing Juveniles) of this Code. Juvenile imprisonment is in its purpose, nature, duration and manner of execution a special punishment of deprivation of liberty.

(6) Imprisonment shall be imposed in full years and months; however, the punishment of imprisonment for a term not exceeding six months may also be measured in full days. Long-term imprisonment shall be imposed only in full years.

(7) If long-term imprisonment has been imposed, amnesty or pardon may be granted only after three-fifths of the punishment has been served.

Article 173

War Crimes against Civilians

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

c) Killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture), inhuman treatment, biological, medical or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health;

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

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

Article 37

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

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

(3) The death penalty may not be imposed on a pregnant woman or on a person who was not aged 18 or over at the time of the commission of a criminal act.

(4) The death penalty may be imposed on an adult person who was under 21 years of age at the time of the commission of a criminal act, under conditions referred to in paragraph 2 of this article, only for criminal acts committed against the bases of the socialist self-management social system and security of the SFRJ, for criminal acts against humanity and international law, and for criminal acts against the armed forces of the SFRJ.

(5) The death penalty shall be executed by shooting, without members of the public present.

Article 38(1), (2) and (3)

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

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

(3) For criminal acts committed with intent for which the punishment of fifteen years imprisonment may be imposed under statute, a punishment of imprisonment for a term of 20 years may be imposed when so provided by statute.

Chapter XVI – Criminal Act against Humanity and International Law

(Note: encompassed, inter alia, the following criminal offences: Article 141 – Genocide; Article 142 – War crime against the civilian population; Article 143 - War crime against the civilian population; Article 144 – War crime against prisoners of war; *Article 145 - Organizing a group and instigating the commission of genocide and war crimes; Article 146 - Unlawful killing or wounding of the enemy; Article 147 – Marauding; Article 154 - Racial and other discrimination; Article 155 - Establishing slavery relations and transporting people in slavery relation).*

Article 142

War crime against the civilian population

(1) Whoever in violation of rule of international law applicable at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts,

shall be punished with a sentence of imprisonment for not less than five years or by the death penalty.

(2) Punishment defined under paragraph 1 of this Article shall be pronounced also on those who in violation of rules of international law applicable in the time of war, armed conflict or occupation, order: that an attack be launched against objects specifically protected by the international law as well as objects and facilities with dangerous power, such as dams, embankments and nuclear power stations; that civilian objects which are under specific protection of the international law, non-defended places and demilitarized zones be indiscriminately targeted; long-lasting and large-scale environment devastation which may be detrimental to the health and survival of the population, or whoever commits some of the aforementioned acts.

(3) Whoever in violation of rules of international law applicable in the time of war, armed conflict or occupation, orders or carries out as an occupier the resettlement of parts of his/her civilian population into the occupied territory,

shall be punished with a sentence of imprisonment for not less than five years.

27. The **Criminal Procedure Code of BiH** (*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, 58/08, 12/09 and 16/09), in the relevant part, reads as follows:

Article 3

Presumption of Innocence and In Dubio Pro Reo

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

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

Article 14

Equality of Arms

The Court, the Prosecutor and other bodies participating in the proceedings are bound to objectively study and establish with equal attention facts that are exculpatory as well as inculpatory for the suspect or the accused.

Article 15

Free Evaluation of Evidence

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

VI. Admissibility

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

29. According to Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective legal remedies available under the law against a judgment/decision challenged by the appeal were exhausted and if the appeal was lodged within a time-limit of 60 days as from the date on which the decision on the last effective legal remedy used by the appellant was served on him/her.

30. In the instant case, the subject-matter challenged by the appeal is the Verdict of the Court of BiH no. X-KRŽ-05/107 of 19 November 2007, against which there are no other effective legal remedies available under the law. Next, the appellant received the challenged verdict on 3 December 2007 and the appeal was lodged on 29 January 2008, *i.e.* within a time-limit of 60 days as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court, because it is neither manifestly (*prima facie*) ill-founded, nor is there any other formal reason rendering the appeal inadmissible.

31. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that the present appeal meets the admissibility requirements.

VII. Merits

32. The appellant challenged the mentioned verdicts, claiming that they were 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 that Article 7 of the European Convention was violated to his detriment.

33. The Constitutional Court will first examine whether Article 7 of the European Convention has been violated.

Article 7 of the European Convention

34. Article 7 of the European Convention reads as follows:

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

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

35. According to the allegations set forth in the appeal, the challenged decisions of the Court of BiH are not in accordance with Article 7 of the European Convention given that the appellant was convicted under the provisions of the Criminal Code of BiH, whereas he (the appellant) holds that he should have been convicted under the provisions of the Criminal Code of SFRY, because that law was in force at the time of the perpetration of the criminal offence in question (war crime against civilians) and because that law, allegedly, prescribes a more lenient punishment for the criminal offence in question, so that it is more favorable, i.e. more lenient to the appellant. Therefore, the Constitutional Court will examine the challenged decisions from the aspect of their compatibility with Article 7 of the European Convention.

36. The Constitutional Court recalls that the relevant cases in its hitherto case-law relating to the war crimes, wherein the Constitutional Court examined the challenged court decisions in accordance with the standards of Article 7 of the European Convention are the following: *AP 1785/*06 of 30 March 2007 (Decision on Admissibility and Merits published in the *Official Gazette of BiH* no. 57/07*,* hereinafter referred to as *Maktouf*) and *AP 519/07* of 29 January 2010 (Decision on Admissibility and Merits published in the *Official Gazette of BiH* no. 20/10, hereinafter referred to as *Samardžić*).

37. Furthermore, the Constitutional Court observes that on 18 July 2013 the European Court of Human Rights rendered a judgment in the case of the applicants Abduladhim Maktouf and Goran Damjanović (see ECHR, *Maktouf and Damjanović v. Bosnia and Herzegovina,* Applications nos. 2312/08 and 34179/08, Judgment of 18 July 2013) wherein it has found the violation of Article 7 of the European Convention.

38. In the aforementioned judgment the European Court of Human Rights has noted, first and foremost, that some crimes, notably crimes against humanity, were introduced into the national law only in 2003 so that the courts, therefore, have no other option but to apply the 2003 Criminal Code of BiH in such cases. However, the court noted that the respective applications raise the issues entirely different from those in the *Šimšić* case given that the war crimes committed by the applicants Maktouf and Damjanović constituted criminal offences under the national law at the time when committed (paragraph 55).

39. The European Court of Human Rights noted that is not its task to review *in abstracto* whether the retroactive application of the 2003 Criminal Code of BiH in the war crimes cases was, *per se*, incompatible with Article 7 of the European Convention and that this matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each individual case and, particularly, whether the domestic courts had applied the law the provisions of which were most favorable to the defendant (paragraph 65).

40. The cited decision further reads that the definition of war crimes is the same in Article 142(1) of the 1976 SFRY Criminal Code, which was applicable at the time the respective criminal offences were committed, and in Article 173(1) of the BiH Criminal Code, which was applied retroactively in this particular case. It was noted, however, that these two Criminal Codes provide for different sentencing frameworks regarding war crimes. In that respect it was noted that the applicant Damjanović was sentenced to 11 years' imprisonment, slightly above the minimum of ten years prescribed by the BiH Criminal Code. While, under the SFRY Criminal Code, it would have been possible to impose a sentence of only five years. (paragraphs 67- 68).

41. The European Court of Human Rights did not accept the argumentation that the BiH Criminal Code was more lenient to the applicants than the SFRY Criminal Code, given the absence of the death penalty. In that respect, it was noted that only the most serious instances of

war crimes were punishable by the death penalty under the SFRY Criminal Code. As neither of the applicants was held criminally liable for any loss of life, the crimes of which they were convicted obviously did not fall in that category. Moreover, the applicant Maktouf received the lowest sentence possible and the applicant Damjanović a sentence which was only slightly above the lowest level set for war crimes by the BiH Criminal Code. In those circumstances, the European Court of Human Rights held that it was of particular significance in the mentioned case to establish which Code was more lenient in respect of the minimum sentence, and this was, without any doubt, the SFRY Criminal Code (paragraph 69).

42. The European Court of Human Rights further noted that the sentences imposed on the applicants were within the latitude of sentencing provided by both the SFRY Criminal Code and the BiH Criminal Code. It thus cannot be claimed with certainty that either applicant would have received lower sentences had the 1976 SFRY Criminal Code been applied. In addition, however, the European Court of Human Rights noted that: *What is crucial, however, is that the applicants could have received lower sentences had that Code (note: SFRY Criminal Code) been applied in their cases* (paragraph 70). In that sense the European Court of Human Rights referred also to the case-law of the Court of BiH in its more recent war crimes cases in which they applied the SFRY Criminal Code rather than the BiH Criminal Code, specifically with a view to applying the most lenient sentencing rules (*note: Kurtović*). Considering the aforementioned, the European Court of Human Rights concluded that *(…) since there exists a real possibility that the retroactive application of the 2003 Code operated to the applicants' disadvantage as concerns the sentencing, it cannot be said that they were afforded effective safeguards against the imposition of a heavier penalty, in breach of Article 7 of the Convention* (paragraph 70).

43. Furthermore, the European Court of Human Rights did not agree with the argument that if an act was criminal under "the general principles of law recognized by civilized nations" within the meaning of Article 7(2) of the European Convention at the time when it was committed, then the rule of non-retroactivity of criminal legislation did not apply. Namely, the European Court of Human Rights noted that this argument is inconsistent with the *Travaux préparatoires* which imply that Article 7(1) can be considered to contain the general rule of non-retroactivity and that Article 7(2) is only a contextual clarification of the liability limb of that rule, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war. It is thus clear that the drafters of the European

Convention did not intend to allow for any general exception to the rule of non-retroactivity, and the European Court of Human Rights has held, in that respect, in a number of cases that the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner (paragraph 72).

44. The European Court of Human Rights did not accept the argument that a duty of a state under the international humanitarian law to punish war crimes adequately required that the rule of non-retroactivity be set aside in this case. In that respect it was noted that the rule of non-retroactivity of crimes and punishments also appears in the Geneva Conventions and their Additional Protocols. Moreover, as the applicants' sentences were within the compass of both the 1976 Criminal Code and 2003 Criminal Code, the European Court of Human Rights held that the argument that the applicants could not have been adequately punished had the 1976 Code been applied is a clearly unfounded argument (paragraph 74).

45. In view of all the aforementioned, the European Court of Human Rights concluded that there has been a violation of Article 7 of the European Convention with respect to both applicants. However, the European Court of Human Rights clearly emphasized that that does not mean that lower sentences ought to have been imposed in the applicants' cases, but simply that the 1976 SFRY Criminal Code should have been applied.

46. The Constitutional Court, first and foremost, notes that the case of the appellant Zoran Damjanović, as regards both the factual substrate and the legal issue, is not different from the case of *Maktouf and Damjanović,* which was considered by the European Court of Human Rights in the aforementioned decision. In that respect the Constitutional Court notes that the appellant Zoran Damjanović too was found guilty and convicted of the same crime by the same Verdict of the Court of BiH as the applicant Goran Damjanović. Furthermore, the appellant Zoran Damjanović was convicted of a criminal offence of a war crime against civilians in accordance with Article 173 of the BiH Criminal Code, although it was an offence which had been committed on 2 June 1992, that is at the time when the SFRY Criminal Code had been in force, which prescribed the same criminal offence in Article 142 in an identical manner. Thus, the BiH Criminal Code was applied retroactively also in the appellant's case (see, *Maktouf and Damjanović*, paragraph 67).

47. The Constitutional Court further observes that based on the reasons adduced in support of the challenged verdicts it follows that the Court of BiH based the application of the substantive law, specifically the BiH Criminal Code, and the assessment that this law was more lenient to the appellant, on argumentation which may be subsumed as follows: that Article 7(2) of the European Convention allows for an exception to the general rule of non-retroactivity contained in paragraph 1 of the same Article; that, given the prescribed punishment, the BiH Criminal Code was more lenient law to the appellant, as the provisions of Article 173 of that law do not prescribe the death penalty for the respective criminal offence, unlike the provisions of Article 142 of the SFRY Criminal Code, which had been in force and applicable at the time the respective criminal offence had been committed, and that a duty of a state under the international humanitarian law to punish war crimes adequately required that the rule of non-retroactivity be set aside in this case.

48. Thus, these are identical arguments as those considered before the European Court of Human Rights in the case of *Maktouf and Damjanović* (paragraphs 69-74). Accordingly, the Constitutional Court holds that there is no reason not to accept, in this part, the reasons and reasoning provided by the European Court of Human Rights in the present case.

49. Namely, the appellant Zoran Damjanović was sentenced to ten years and six months' imprisonment under the provisions of Article 173(1)(c) of the BiH Criminal Code. The Constitutional Court observes that the imposed sentence falls within the latitude of both the BiH Criminal Code and the SFRY Criminal Code. Pursuant to the SFRY Criminal Code, war crimes were punishable by imprisonment for a term of five to fifteen years or, for the most serious cases, the death penalty, instead of which a twenty-year prison term could have also been imposed. Pursuant to the BiH Criminal Code, war crimes attract imprisonment for a term of ten to twenty years or, for the most serious cases, long-term imprisonment for a term of twenty to forty five years. Further, the Constitutional Court observes that based on the challenged verdicts it follows that the offences which the appellant Zoran Damjanović was found guilty of having committed and punished do not belong to the category of the most serious war crimes cases *(loss of life)* for which it was possible, under the SFRY Criminal Code, to impose a death penalty. Namely, the Court of BiH found the appellant guilty and convicted him for having actively participated in the beating of the group of captured men of Bosniac ethnicity. Thus, these do not concern the most serious cases of the respective criminal offence, for which it was possible to impose on the appellant the maximum prescribed penalty for the respective criminal offence. Moreover, the

appellant received an imprisonment penalty slightly above the minimum provided for by the BiH Criminal Code for war crimes (ten years and six months), wherefrom one may conclude that the court's intention was to impose a more lenient sentence on the appellant. Therefore, it was not necessary to establish in the present case which Code provided a more lenient maximum penalty, instead it was necessary to establish which Code was more lenient in respect of the minimum sentence (see, *Maktouf and Damjanović*, paragraph 69). Given that the minimum sentence of imprisonment under the SFRY Criminal Code was five years, and under the BiH Criminal Code ten years, it unambiguously follows that, in the circumstances of the present case, the SFRY Criminal Code was more lenient, irrespective of the fact that, given the prescribed range of the prison term, this does not mean that the appellant would have received a lower imprisonment sentence had the SFRY Criminal Code been applied in his case. Namely, it is of crucial importance that the appellant *could have* received a lower sentence had this Code been applied (see, *Maktouf and Damjanović*, paragraph 70).

50. The Constitutional Court recalls that guarantees contained in Article 7 of the European Convention constitute one of the fundamental factors of the rule of law and occupy a prominent position in the system of the exercise of rights safeguarded by the European Convention. The importance of Article 7 of the European Convention is reflected also in the fact that, in accordance with Article 15 of the European Convention, no derogation from the application of the guarantees set forth in Article 7 of the European Convention shall be allowed either in the time of war or other public threat. Article 7 of the European Convention must be construed and applied in such a manner as to ensure successful protection against arbitrary prosecution, conviction and punishment. Furthermore, the Constitutional Court recalls that Article 7(1) guarantees not only the principle of non-retroactivity of more stringent criminal laws but also, implicitly, the principle of retroactivity of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and the criminal laws which were enacted and entered into force thereafter but before a final judgment was rendered, the courts must apply the law which provisions are most favorable to the defendant (see, ECHR, *Scoppola v. Italy, No. 2,* Judgment of 17 September 2009, paragraph 109). Lastly, according to the standpoint of the European Court of Human Rights, States are free to decide their own penal policy, they must however comply with the requirements of Article 7 of the European Convention in doing so (see, *Maktouf and Damjanović*, paragraph 75).

51. By interlinking the circumstances of the present case to the aforementioned standpoints of the European Court of Human Rights, and the positions taken in the case of *Maktouf and Damjanović,* the Constitutional Court holds that there is a realistic possibility in the present case that the retroactive application of the BiH Criminal Code was to the detriment of the appellant in respect of the sentencing, which is contrary to Article 7(1) of the European Convention.

52. The Constitutional Court concludes that the challenged verdicts of the Court of BiH have violated Article 7(1) of the European Convention, due to the erroneous application of law in relation to the guilt and punishment, thus the challenged verdicts must be quashed in full.

Other allegations

53. In view of the conclusion in relation to the violation of Article 7 of the European Convention and the order for the ordinary court to adopt a new decision in a new proceeding, the Constitutional Court holds that it is not necessary to examine separately the portion of the appeal relating to the right to a fair trial referred to in Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention.

VII. Conclusion

54. The Constitutional Court concludes that there has been a violation of Article 7(1) of the European Convention, on the ground that there is a realistic possibility in the present case that the retroactive application of the BiH Criminal Code was to the detriment of the appellant in respect of the sentencing, which is contrary to Article 7(1) of the European Convention, irrespective of the fact that, given the prescribed range of the prison term, this does not mean that the appellant would have received a lower imprisonment sentence had the SFRY Criminal Code been applied in his case. Namely, it is of crucial importance that the appellant could have received a lower sentence had this Code been applied.

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

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