

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) and Article 61(1) and (3) 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:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Mr. Zlatko M. Knežević

Having deliberated on the appeal of Mr. **Gojko Janković** in case no. **AP 126/08** adopted at its session held on 19 November 2011 the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. **Gojko Janković** against the Judgment of the Court of Bosnia and Herzegovina no. X-KRZ-05/161 of 23 October 2007 and the Judgment of the Court of Bosnia and Herzegovina no. X-KR-05/161 of 16 February 2007 is hereby dismissed as ill-founded.

REASONING

I. Introduction

1. On 10 January 2008, Mr. Gojko Janković (“the appellant”) from Foča, represented by Mr. Milan Trbojević, an attorney at law practicing in Banja Luka, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) against the Judgment of the Court of Bosnia and Herzegovina (“the Court of BiH”) no. X-KRZ-05/161 of 23 October 2007 and the Judgment of the Court of BiH no. X-KR-05/161 of 16 February 2007. On 26 February 2010 and 14 October 2010, the appellant supplemented his appeal.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 21 January 2008, the Court of BiH and the Prosecutor’s Office of BiH were requested to submit their respective replies to the appeal.

3. On 12 February 2008 the Court of BiH submitted its reply to the appeal, while the Prosecutor’s Office of BiH submitted its reply to the appeal on 7 February 2008.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were transmitted to the appellant on 15 June 2008.

III. Facts of the Case

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

6. By the Judgment of the Court of BiH no. X-KR-05/161 of 16 February 2007, the appellant was found guilty of having committed the acts, within the widely spread or systematic attack directed against the Bosniak civilian population in the area of the Foča Municipality, being aware of such attack and knowingly participating in it by his acts, in the manner as described under counts 1 through 7 of the enacting clause of the judgment, thereby committing the criminal offence of Crimes against Humanity under Article 172(1) of the Criminal Code of Bosnia and Herzegovina ("the Criminal Code of BiH") and sentenced to a compound punishment of long term imprisonment of 34 years. The court specified in the enacting clause that the appellant committed with reference to Count 1 of the enacting clause forcible transfer of population and imprisonment under Article 172(1) items (d) and (e) in conjunction with Article 29 of the Criminal Code of BiH; with reference to Count 2 of the enacting clause he committed murders, tortures and forcible transfer of population under Article 172(1) items (a), (f) and (d) in conjunction with Article 29 of the Criminal Code of BiH; with reference to Count 3 of the enacting clause he committed torture and rape under Article 172(1) items (f) and (g) in conjunction with Article 29 of the Criminal Code of BiH; with reference to Counts 4, 5 and 7 of the enacting clause he committed torture and rape of the injured parties FWS-95 and FWS-87, of the injured parties D.B. and A.B. under Article 172(1) items (f) and (g) of the Criminal Code of BiH; and aided and abetted the torture and rape of the injured party FWS-87, the injured party D.B. and the injured parties FWS-75 and FWS-87 under Article 172(1) items (f) and (g) in conjunction with Article 180(1) of the Criminal Code of BiH; with reference to Count 6 he committed torture and sexual slavery of the injured parties FWS-186 and FWS-191 under Article 172(1) items (f) and (g) in conjunction with Article 29 of the Criminal Code of BiH. Pursuant to Article 56 of the Criminal Code of BiH, the Court decided that the time the appellant spent in custody pending trial as of 14 March 2005, shall be counted as part of the pronounced sentence of imprisonment. In addition, pursuant to Article 188(1) of the Criminal Procedure Code of Bosnia and Herzegovina ("the Criminal Procedure Code of BiH"), it was decided that the appellant must reimburse the costs of criminal proceedings and that will be settled by the Court in a separate Decision.

7. The Court of BiH acquitted the appellant of charges that he had committed the criminal offence of Crimes against Humanity under Article 172(1) of the Criminal Code of BiH with reference

to Count 1 of the acquitting part of the enacting clause, items (a) and (f) in conjunction with Article 180(1) of the Criminal Code of BiH, with reference to Count 2 of the enacting clause, items (e), (f) and (g) in conjunction with Article 180(2) of the Criminal Code of BiH.

8. It was stated in the reasoning of the judgment that by the amended indictment of the International Criminal Tribunal for the Crimes committed on the Territory of the former Yugoslavia (“ICTY”), case no. IT-96-23/2-1 of 5 October 1999, the appellant was charged with commission of Crimes against Humanity under Article 5 item (f) of the Statute of ICTY and a violation of the laws and customs of war under Article 3(1)(a) of the Geneva Convention, which he committed in the area of Foča. It is stated that the appellant voluntarily surrendered to the Republika Srpska authorities on 13 March 2005, whereupon on 14 March 2005 he was transferred to the ICTY detention. Furthermore, in keeping with Rule 11*bis* of the ICTY Rules of Evidence and Procedure, the ICTY Referral Bench decided to transfer the appellant's case to the authorities of the State of Bosnia and Herzegovina. On 8 December 2005, the appellant was transferred to Bosnia and Herzegovina.

9. It was further stated in the reasoning of the judgment that during the course of the main trial before the Court of BiH there were presented pieces of evidence of the Prosecution and the Defense, as well as those presented upon the order of the Court. Upon the Motion of the Prosecution, in addition to the witnesses whose identity was revealed, there were also examined the witnesses on whom certain identity protection measures were applied and there was also presented physical evidence, the admission of which was considered by the Court on individual basis. In those terms, and given that the case had been taken over from ICTY, the court determined the manner of examination and further protection of witnesses on whom certain identity protection measures were already applied, while in certain cases it made exceptions from imminent presentation of evidence by way of having the statements of certain witnesses read. This because Article 5 of the Law on Transfer provides for the admissibility to transcripts of testimonies of witnesses given before the ICTY and records of depositions of witnesses made before the ICTY, before the Courts in BiH. The Court of BiH concluded that use of evidence in the form of statements obtained at the stage of police investigation was not in itself inconsistent with Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”). In order to provide for the protection of certain witnesses, whose appearance and confrontation would have caused additional mental pain and stress, the Court of BiH, pursuant to the provision of Article 10 of the Law on Protection of Witnesses, decided that the accused should be removed from the courtroom during the examination of those witnesses. At the same time, the Court of BiH decided to afford the

accused the opportunity to receive the sound of the testimony through audio device, and he would be granted the opportunity to consult with his Defense counsel in respect of cross-examination of the witnesses. The court explained that such manner of examination of witnesses would be in complete compliance with the right of the accused to examine the witnesses who charged him, and the fact that the accused only heard the witnesses and did not see them, whereas his defense counsel had the opportunity to do both, in the opinion of the Court, does not reduce his capability to prepare his defense, i.e. conduct the cross-examination of the witnesses. Such decision of the Court did not violate the right provided for in Article 6(3)(d) of the European Convention. The court did not admit certain pieces of evidence for the reasons as stated in the first instance judgment.

10. It is further stated in the reasoning of the judgment that in respect of the application of substantive law and legal qualification of the act, the court was governed by the principles prescribed in Articles 3, 4 and 4(a) of the Criminal Code of BiH and established that the appellant had committed the criminal offence of Crimes against Humanity he was being charged with. As for the application of substantive law, the court considered relevant the principle of legality, pursuant to which 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 3 of the Criminal Code of BiH). The court further also deemed relevant the principle of the time constraints regarding applicability, pursuant to which the law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence and if the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied (Article 4 of the Criminal Code of BiH). The court highlighted that the principle of legality also prescribed by Article 7(1) of the European Convention, which the state of Bosnia and Herzegovina ratified as one of the successor states of the former Yugoslavia, made it also mandatory for the authorities of Bosnia and Herzegovina, including its courts. The cited provisions require that a criminal offence has to be prescribed and described as criminal offence by domestic law or international law, and that there may not be pronounced a more severe penalty than such as was applicable at the time when the criminal offence was perpetrated. Also, Article 15(1) of the International Covenant on Civil and Political Rights (“the International Covenant”) was indicated, pursuant to which if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby. The court concluded that the cited provisions “prohibit imposing of a heavier penalty, without establishing obligatory application of the (most) lenient law (if the law has been amended on one or more occasions) to the perpetrator than the

one that was applicable at the time when the criminal offense was committed”. It is further pointed out that both documents provide for exceptions from the cited rule as established by Article 7(2) of the European Convention and Article 15(2) of the International Covenant. Pursuant to those exceptions, nothing shall 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, i.e. according to the general principles recognized by the community of nations. In that regard, it was pointed out that the same exception is also established in Article 4(a) of the Criminal Code of BiH which uses the phrase “general principles of international law”. The cited phrase is a combination of the “principle of international law” as recognized by the General Assembly of the United Nations and the International Law Commission and “general principles of international law recognized by the community of nations” as stated in the Statute of the International Court of Justice and Article 7(2) of the European Convention.

11. The Court of BiH stated in the reasoning of the judgment that by evaluation of all the presented evidence individually and in their correlation (the contents of the evidence taken stated on pages 35 through 70 of the judgment) the Court established beyond any reasonable doubt that the appellant commanded a group of soldiers who attacked the hamlet of Brezine/Zubovići inhabited by civilians of Muslim nationality. The appellant ordered the group that he commanded the unlawful arrest and taking away of certain persons, who were then forcefully taken by other soldiers to detention in Brod where they were interrogated and beaten, and then transferred to the KPD camp in Foča. The aforementioned criminal offences are described in detail in Count 1 of the enacting clause of the first instance judgment. Then, on 3 July 1992, the appellant commanded a group of soldiers who attacked civilian population hiding in the woods on the Kremenik hills, wounding and capturing some of those civilians and killing some of them. The aforementioned criminal offences are described in detail in Count 2 of the enacting clause of the first instance judgment. On the same day the captured women and children were forced to walk to Buk Bijela, while specific women were threatened by gang-rape if they lied; he then allowed one of the soldiers to take one female detainee to another hut where she was raped by at least ten unidentified soldiers and lost consciousness. From mid July until mid August 1992, at Partizan Sport Hall in Foča, many Muslim civilians were detained in inhumane conditions, including female detainees FWS-87, FWS-95, FWS-48, FWS-105. In addition, the appellant raped in the manner as described in Counts 5, 6 and 7 a considerable number of women who are marked in the judgment by numbers FWS-105, FWS-186, FWS-191. By all the aforementioned acts, concluded the Court of BiH, the appellant, within a widespread or systematic attack against the Bosniak civilians in the area of Foča Municipality, committed the Criminal Offence of Crimes against

Humanity. The Court of BiH also concluded that all the presented evidence reliably and undoubtedly indicates that the appellant in taking the criminal acts he was charged with, did commit the Criminal Offence of Crimes against Humanity as charged.

12. The Court of BiH, further, concluded that on the basis of presented evidence it was established beyond any doubt that the appellant as a member of the Army of the Republika Srpska and as the leader of a small military unit took part at the critical time in the fighting and the acts he was being charged with in the area of Foča Municipality. Therefore, the Court of BiH established that the appellant was fully aware of the existence of the widespread and systematic attack targeting non-Serb civilian population at the critical time in the area of Foča Municipality and that, pursuant to the nature and consequences of the committed offence, it followed that he had agreed and wanted his actions to be the part of that attack. Thus, the Court of BiH concluded, all the essential elements of the criminal offence acts he was being charged with, were met.

13. In view of the fact that the accused was found guilty, the decision on the costs was issued in accordance with Article 188(1) of the Criminal Procedure Code of BiH. The accused was obligated to reimburse the costs of criminal proceedings because, in the opinion of the Court, it had not been proven that the accused was indigent. Therefore the Court could not apply the provision of Article 188(4) of the Criminal Procedure Code of BiH, pursuant to which he could have been relieved of the duty to reimburse all or part of the costs of criminal proceedings.

14. The appellant filed an appeal against the first instance judgment and the Judgment of the Appeals Chamber of Section I of the Court of BiH no. X-KRZ-05/161 of 23 October 2007 partially granted the appeal of the defense counsel of the appellant and the first instance judgment was modified in legal qualifications of the acts constituting the criminal offence of “Crimes against Humanity” under Article 172(1) of the Criminal Code of BiH of which he was found guilty. Such modified qualification reads: under Section I: the appellant committed: imprisonment in violation of Article 172(1)(e) as read with Article 29 of the Criminal Code of BiH; under Section 2: murder, torture and imprisonment in violation of Article 172(1)(a), (f) and (e) of the Criminal Code of BiH; and under Section 3: torture and rape in violation of Article 172(1)(f) and (g) as read with Article 31 of the Criminal Code of BiH. Pursuant to Article 138(3) of the Criminal Procedure Code of BiH and Article 56 of the Criminal Code of BiH, the time the appellant spent in custody shall be credited towards the sentence imposed, namely starting from 14 March 2005 until he was committed to serve the sentence. The first-instance judgment remained unaltered in the remaining part.

15. The Appeals Chamber of Section I of the Court of BiH dismissed as ill-founded the complaint relating to non-existence of constitutional powers for the establishment of the Court of BiH and appointment of international judges, invoking the decisions of the Constitutional Court in case no. *U 26/01* and no. *AP 1785/06* of 30 March 2007. The Appeals Chamber, further, stated that the appellant's complaint stating that the main trial had been held without the presence of a person whose presence was necessary in accordance with law was also ill-founded. Namely, it was submitted that the first instance chamber, upon a motion by the Prosecutor's Office and following the statements by the parties and the defense counsel, in terms of Article 235 of the of the Criminal Procedure Code of BiH, issued a decision to exclude the public during the testimonies of the witnesses E. and J., stating that it was for the sake of further protection of those witnesses in order primarily to protect their personal and intimate life and that for the further protection of the witnesses, pursuant to Article 10 of the Law on Protection of Witnesses to remove the appellant from the courtroom during the hearing of certain witnesses. However, the Appeals Chamber indicated that the first instance chamber enabled the appellant to follow their testimonies through technical means for transferring image and sound and, later on, their cross-examination, ensuring thereby compliance with the requirements of Article 6 of the European Convention. In view of the aforementioned, the Appeals Chamber concluded that in the present case the Law on Protection of Witnesses was *lex specialis*. Therefore, although the aforementioned rights have been partially restricted, they have been exercised in accordance with restrictions provided by the law, since the issued decision enabled the appellant to follow the course of the main trial adequately, without any violation of his right to defense.

16. The Appeals Chamber further explained in detail why some of the testimonies of the witnesses referred to by both the defense and the Prosecutor's Office of BiH were relevant in their opinion, while they considered some other to be untrustworthy, all in accordance with the principles of free evaluation of evidence and the court's conviction in the quality of evidence. It was stated within that context that the first instance chamber had issued a decision partially granting the motion by the Prosecutor's Office of BiH for exception from imminent presentation of evidence in respect of specific witnesses pursuant to the provisions of Article 273(2) of the of the Criminal Procedure Code of BiH, Article 11 of the Law on Protection of Witnesses and Articles 5 and 7 of the Law on Transfer, stating that in that part the first instance decision contained a detailed explanation. It was stated that in the present case the standards of the European Convention had been correctly applied, including the reasons in the reasoning for such decision, since the reading of the witnesses' testimonies taken during the investigation itself did not amount to a violation of Article 6(3)(d) of the European Convention, if the rights of defense were complied with. Within that context, the Appeals Chamber

highlighted that the first instance judgment had given a detailed reasoning of all the steps taken by the Court to ensure the presence of the witnesses, “not basing their decision exclusively or crucially on those statements”. Therefore it was stated that pursuant to the opinion of the Appeals Chamber the Panel in the first-instance proceedings met the necessary requirements and it was concluded that, contrary to the complaint, the rights of the appellant had not been violated in that segment either. Also, regarding the complaint relating to the violation of Article 297(1)(i) of the of the Criminal Procedure Code of BiH, within the context of the testimonies of witnesses FWS-105, FWS-186, FWS-95 and FWS-75, it was pointed out that the appellant did not allege in his appeal the legal provisions pursuant to which the testimonies of the aforementioned witnesses would be inadmissible. It was alleged in relation to the testimony of the witness FWS-95 that this testimony was not evaluated by the first instance court in accordance with the principle of free evaluation of evidence, taking into account psychological problems as a result of the crimes that were carried over the witness, and that by correlating the testimony of that witness with the testimonies of the expert witness and the witness FWS-87, it was correctly concluded that this piece of evidence was reliable. It was further stated that the appellant’s complaint relating to the credibility of the witness FWS-75, in the sense that the witness had never before heard his voice, as it clearly follows from that witness’s testimony that she had recognized the appellant’s voice due to the fact that she knew it very well. In addition, it was stated that the first instance chamber admitted the testimonies of the witnesses FWS-105 and FWS-186 pursuant to the provisions of Article 273(2) of the of the Criminal Procedure Code of BiH and Article 11 of the Law on Protection of Witnesses based upon a detailed and careful consideration of the existence of statutory grounds for such decision, which is also explained in detail in the first instance judgment. Regarding the appellant’s objection relating to the testimony of Dr N. A., the Appeals Chamber emphasized that by his lump and unsubstantiated allegations the appellant “failed to challenge the credibility and reliability of this witness who, after all, did not testify on his direct knowledge of the events“ covered by Count 2 of the first-instance judgment, but he corroborated the testimonies of some of the witnesses who were injured parties, i.e. that his evidence amounted to corroborative evidence.

17. Pursuant to evaluation of the Appeals Chamber, the first instance judgment is neither incomprehensible nor contradictory to itself or to the grounds of the judgment. Namely, the chamber concluded in that sense that the existence of the armed conflict was not inconsistent with the existence of a widespread and systematic attack against the civilian population, and that the existence of victims outside the group which was the target of the attack did not contradict the existence of the attack, and therefore this argument of the appellant was dismissed. The complaint that someone else captured the

civilians and not the soldiers under the command of the appellant was also dismissed because the first instance chamber did not establish that someone else had captured the civilians other than the soldiers under the command of the appellant who acted in accordance with his explicit orders. The Appeals Chamber considered in its detailed analysis all the sections of the first instance judgment (Sections 1 through 7), explaining why some of the appellant's complaints could not be admitted and why, with the exception of the part relating to the legal qualification of the criminal offence, all the other paragraphs and statements of the first instance judgment ought to be accepted in its entirety.

18. Unfounded was also evaluated to be the appellant's argument that Article 298 of the Criminal Procedure Code of BiH was violated because the Court applied the Criminal Code of BiH instead of the Criminal Law of SFRY which was effective at the time when the criminal offence was committed and which, according to the appellant, was more lenient to the perpetrator. In terms of the application of substantive law, the first-instance Panel, states the Appeals Chamber, provided extensive and valid reasoning in terms of departing from the principle of lawfulness and the valid timeframe of the criminal code, and also in terms of the status of crimes against humanity in international customary law. The conclusion is that the punishment prescribed under the Criminal Code of BiH is nonetheless more lenient than the capital punishment which was prescribed at the time when the criminal offence was committed. The Appeals Chamber accepted this conclusion in its entirety and found that the appellate arguments were not sufficient to challenge the extensive and exhaustive reasoning of the first-instance court.

19. Notwithstanding the aforementioned, the Appeals Chamber accepted that Sections 1 and 2 of the enacting clause of the challenged judgment established the facts correctly and completely but drew an erroneous legal conclusion, which resulted in the wrong application of substantive law. For that reason, the appeal of was upheld in that part and the challenged judgment partly revised in as much as established by the enacting clause of the second instance judgment. Finally, in examining the challenged judgment in respect of the complaint relating to the decision about the punishment, contrary to the complaint, the Appeals Chamber held that the first instance panel, by application of Article 48 of the Criminal Code of BiH, properly meted out the sentence to the appellant. As for the decision on the proceedings costs, the Appeals Chamber found that the legal requirements were not met to relieve the appellant of the duty to reimburse the costs of the criminal proceedings as prescribed by Article 188(4) of the of the Criminal Procedure Code of BiH because it had not been proven in the criminal proceedings that the appellant was indigent. Therefore, as the appellant had

failed to substantiate his arguments based on which the Panel could find that the payment of the criminal proceedings costs would endanger the subsistence of his family members.

IV. Appeal

a) Allegations in the appeal

20. The appellant holds that the challenged judgments have violated 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. The appellant considers that the Court of BiH, inconsistent with the principles of criminal law, retroactively applied the Criminal Code of BiH, the Law on Transfer and the Law on Protection of Witnesses. Namely, the provision of Article 4 of the Criminal Code of BiH prescribes that the law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence and if the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied. However, the Court of BiH applied in the present case the law applicable today, not Article 142 of the Criminal Law of SFRY, applicable at the time of commission of the criminal offence. The proceedings themselves, the appellant alleges, were not in accordance with law and did not respect the applicant's rights to defense. The appellant was removed from the courtroom upon the request by the protected witnesses "E" and "J" who "apparently did not tell the truth". Furthermore, the statements of the witnesses who "will not" testify and the testimonies of the witnesses "for whom it is not known why they had not responded to the summons by the prosecutor's office and the court" were admitted to the case file. The appellant holds that the witnesses' testimonies were in the present case evaluated to the detriment of the appellant which is "most obvious in respect of the witness FWS 95 for whom it was clearly established that she is not accountable". Furthermore, also the testimony of Dr N. A. was admitted who, the appellant alleges, had absolutely no knowledge of the occurrences concerned. Finally, the decision on remuneration of legal costs was issued to the detriment of the appellant's family because it was beyond dispute that the appellant had no funds to pay for the costs of criminal proceedings from serving of his sentence of long term imprisonment. In his supplement to the appeal, filed on 26 February 2010, the appellant explains in a more elaborate manner the facts he had indicted in the original application, including the violation of the principle of legality, the correctness of the established facts which he had previously indicated, the application of a more lenient law to the perpetrator, the challenging of the testimonies of some of the witnesses, the court's access to the

physical evidence and the violation of the principle *in dubio pro reo* (if in doubt then in favor of the accused).

b) Reply to the appeal

21. The Court of BiH, in its reply to the allegations in the appeal, highlighted that in respect of the application of the Criminal Code of BiH, the court invoked the reasoning given in the challenged judgments of that Court in respect of application of substantive law as well as the position taken by the Constitutional Court of BiH in the Decision no. *AP 1785/06* of 30 March 2007. Furthermore, in respect of the application of the Law on the Protection of Witnesses, the court highlights that Article 91 of the Criminal Procedure Code of BiH stipulates that with respect to protected witnesses in the proceedings before the Court, the provisions of the special law shall be applied. In that sense, the Court of BiH stressed in its reply to the allegations in the appeal that it followed clearly from the legal provisions that the Law on Protection of Witnesses was *lex specialis* in relation to the Criminal Procedure Code of BiH and that this law defined and regulated the procedural issues relating to the institute of protected witness and that the application of laws belonging to the area of criminal procedural law did not include the principle of retroactive application of law. That principle elusively relates to the application of substantive law. Therefore, the application of Article 4 of the Criminal Code of BiH or the provisions of Article 7 of the European Convention is not applicable to the provisions of the Law on Protection of Witnesses. Furthermore, in respect of the application of the Law on Transfer of Cases from the ICTY, Article 1 of the said law provides for the procedure of the transfer of cases to the courts. It follows that the Law on Transfer is *lex specialis* in relation to the Criminal Procedure Code of BiH and that it regulates specific procedural rules.

22. As for the appellant's allegations that the appellant was removed from the courtroom at the request of the protected witnesses, the Court of BiH maintained its position as given in the first instance judgment, holding it to be entirely in accordance with the principles of fair trial because "the accused was afforded adequate following of that trial without any violations of his right to defense". Furthermore, it was stated that the decision on partial granting of the motion by the Prosecutor's Office of BiH for the exemption from the imminent presentation of evidence, pursuant to the provisions of Article 273(2) of the Criminal Procedure Code of BiH, Article 11 of the Law on Protection of Witnesses and Articles 5 and 7 of the Law on Transfer had been reasoned in detail on page 20 of the first instance judgment.

23. In respect of the appellant's allegations relating to the evaluation of the testimonies of the heard witnesses, primarily the protected witnesses FW-95 and FW-75, the court highlights that the evidence taken has been evaluated in accordance with the principle of free evaluation of evidence as guaranteed by Article 15 of the Criminal Procedure Code of BiH and that every item of evidence was evaluated individually and in its correspondence with the rest of the evidence. Also, in respect of the evaluation of the testimony of the witness Dr N. A., it is stated that the evaluation of this witness's testimony is explained in detail in the first instance and second instance judgments, since he substantiated the testimonies of some of the other witnesses of the injured parties concerning the concrete circumstances, i.e. his testimony amounts to corroborative evidence. Finally, as for the appellant's allegations relating to the decision on remuneration of the costs of proceedings, the court emphasizes that the provision of Article 188(1) of the Criminal Procedure Code of BiH stipulates that "when the Court finds the accused guilty, it shall declare in the verdict that the accused must reimburse the costs of criminal proceedings". It follows from the cited provision of the Criminal Procedure Code of BiH that a conviction for the accused also means his obligation to pay the costs of criminal proceedings.

24. The Prosecutor's Office of BiH stated in its reply that, in the formal sense, the appeal did not set out or specifically describe complaints of provisions of the Constitution of BiH in conjunction with the European Convention deemed to have been violated. Furthermore, it lacks of insufficiently points out statements, facts and evidence upon which the appeal is based. Instead, the appellant complains generally about interpretations regarding the evaluation and use of evidence, assessment of facts and application of laws made by the Court of BiH which, following the jurisprudence of the Constitutional Court fall outside of its competence. Regarding the appellant's allegations that his right to attend the trial has been violated, the Prosecutor's Office of BiH holds that the restriction of the appellant's right to be present at the hearing was justified and did not in essence affect his right to defense. The appellant was afforded the opportunity to follow the proceedings by way of a link to the courtroom and could actively participate in the proceedings. Therefore, his right to a fair trial has not been violated.

25. As for the appellant's allegations that he did not have an adequate and proper opportunity to challenge the testimonies and question the witnesses, the Prosecutor's Office of BiH has entirely complied with the requirements and restrictions provided by Article 6(3)(d) of the European Convention and the appropriate case law. The decision to have the statements of some of the witnesses taken during the investigation read in accordance with Article 273(2) of the of the Criminal

Procedure Code of BiH, Article 11 of the Law on Protection of Witnesses and Articles 5 and 7 of the Law on Transfer has been carefully considered in terms of the protection of the appellant's rights. Maintenance of adequate standards of fair trial and principles of immediate presentation of evidence, submits the Prosecutor's Office of BiH, was the primary concern of the court which exhausted all available means to ensure the appearance of witnesses at the main trial. Finally, the trial panel did not render any part of its judgment solely or to a decisive extent on the basis of the investigative statements but rather ensured that corroborative evidence substantiating the allegations of the indictment be presented during the course of the main trial and corroborate such testimonies.

26. The Prosecutor's Office of BiH further submits that the Court of BiH correctly applied the Criminal Law of BiH, responding to the issue of application of a "more lenient law". These allegations are substantiated by the position of the Constitutional Court as expressed in case no. AP 1785/06 in relation to the application of Article 7 of the European Convention. It was also submitted in the reply that there did not exist the retroactive application of Article 172 of the Criminal Code of BiH because the application of long-term imprisonment instead of death penalty did not amount of a more severe punishment than the one applicable at the time of commission of the criminal offence. Therefore, it was in accordance with the principle of *nulla poena sine lege*. In support of this, it was submitted that Article 1 of the Second Optional Protocol to the International Covenant, listed in Annex I to the Constitution of BiH, prescribed that no one should be executed. Pursuant to the Second Transitional Agreement of Annex II to the Constitution, all laws providing for the execution of persons are inconsistent with the Constitution and, therefore, could not have legal effect subsequent to 14 December 1995.

27. As for the issue of whether the prohibition of retroactive application pursuant to Article 7 of the European Convention may be extended to the Law on Transfer and the Law on Protection of Witnesses, the Prosecutor's Office of BiH recalls that the scope of application of Article 7 essentially encapsulates the principles of *nullum crimen* and *nulla poena sine lege* that primarily fall within the ambit of the substantive criminal law. It is understood that Article 7 of the European Convention may not be applied to the legislation that regulates the issues deriving from the criminal proceedings, such as the Law on Transfer and the Law on Witness Protection.

28. In its reply to the appeal, the Prosecutor's Office of BiH concludes that in the present case there has been no 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 as well as Article 7 of the European Convention.

V. Relevant Law

29. The **Criminal Code of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* nos. 37/03, 54/04, 61/04, 30/05, 53/06 and 55/06), as far as relevant reads:

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.

XVII Chapter Seventeen - Crimes against Humanity and Values Protected by International Law

Article 172

War Crimes against Civilians

(1) Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack perpetrates any of the following acts:

- a) Depriving another person of his life (murder);*
- b) Extermination;*
- c) Enslavement;*
- d) Deportation or forcible transfer of population;*
- e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- f) Torture;*
- g) Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity;*
- h) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognised as impermissible under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina;*
- i) Enforced disappearance of persons;*
- j) The crime of apartheid;*
- k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health, shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.*

Article 173

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

- a) Attack on civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people's health;*
- b) Attack without selecting a target, by which civilian population is harmed;*
- 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;*
- d) Dislocation or displacement or forced conversion to another nationality or religion;*
- e) Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape) or forcible prostitution, application of measures of intimidation and terror, taking of 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;*
- f) Forced labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic money or the unlawful issuance of money, shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.*

(2) The punishment referred to in paragraph 1 of this Article shall be imposed on whomever in violation of rules of international law, in the time of war, armed conflict or occupation, orders or perpetrates any of the following acts:

- a) *Attack 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;*
- b) *Targeting indiscriminately of civilian objects which are under specific protection of international law, of non-defended places and of demilitarised zone;*
- c) *Long-lasting and large-scale environment devastation, which may be detrimental to the health or survival of the population.*

(3) Whoever in violation of the 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 civilian population into the occupied territory, shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

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

Article 38

[...]

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

[...]

Chapter XVI - Crimes against Humanity and International Law (Note: included, inter alia, the following criminal offences: Article 141 Genocide; Article 142 War Crime against the Civilian Population; Article 143 War Crime against the Wounded and the Sick; Article 144 War Crime against the 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 rules of international law effective at the time of war, armed conflict or occupation, orders an attack against civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people's health; an indiscriminate attack without selecting a target, by which civilian population gets hurt; that civilian population be subject to killings, 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; 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 labor, 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 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) The sentence defined in paragraph 1 of this article shall be imposed also on those who in violation of rules of international law effective at 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 international law, undefended places and demilitarized zones be indiscriminately targeted; long-lasting and large-scale environment devastation which may be detrimental to the health or survival of the population, or whoever commits some of the aforementioned acts.

(3) Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders or carries out as an occupier the resettlement of parts of his civilian population into the occupied territory, shall be punished with a sentence of imprisonment for not less than five years

31. 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 and 76/06) as far as relevant reads:

Article 23

Material Jurisdiction of the Court

(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.

[...]

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

Article 449

Ceding of Cases Falling Under the Competence of the Court

(1) Cases falling under the competence of the Court that are pending before other courts prior to the entry into force of this Code shall be finalized by these courts if the indictment is confirmed or in legal effect in these cases.

(2) Cases falling within the competence of the Court which are pending before other courts or prosecutor's offices and in which the indictment is not legally effective

or confirmed, shall be finalized by these courts unless the Court, ex officio or upon the reasoned proposal of the parties or defense attorney, decide to take such a case.

(3) In cases referred to in Paragraph 2 of this Article, after decision of the Court to take over the case, the criminal proceedings shall be continued in accordance with this Code.

32. The **Law on Court of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* nos. 29/00, 24/02, 42/03, 4/04, 9/04, 35/04 and 61/04) as far as relevant reads:

Article 13

Criminal Jurisdiction

(1) The Court has jurisdiction over criminal offences defined in the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina. [...]

33. The **Law on Prosecutor's Office of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* nos. 24/02, 3/03, 37/03, 42/03, 9/04, 35/04 and 61/04) as far as relevant reads:

Article 12

Criminal Jurisdiction

1. The Prosecutor's Office shall be the authority competent to investigate the offences for which the Court of Bosnia and Herzegovina is competent, and to prosecute offenders before the Court of Bosnia and Herzegovina, in accordance with the Criminal Procedure Code of Bosnia and Herzegovina and other applicable laws.

[...]

3. The Special Departments shall inter alia undertake measures defined by law with a view to investigating and prosecuting the perpetrators of War Crimes, Organized Crime, Economic Crime and Corruption offences as provided by Law, when provision is made in the said laws that the Court of Bosnia and Herzegovina has such jurisdiction.

Article 18
Transitional Provision

When the Prosecutor's Office is established all courts and prosecutors' offices in the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brcko District in which criminal cases are pending that fall under the jurisdiction of the Court of Bosnia and Herzegovina, pursuant to Article 13, as amended, of the Law on the Court of Bosnia and Herzegovina, in which the indictment is not confirmed or in legal effect, shall be bound to inform the Prosecutor's Office of the cases.

34. The **Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH** (*Official Gazette of Bosnia and Herzegovina* no. 61/04) as far as relevant reads:

Article 3

The courts shall not base a conviction of a person solely or to a decisive extent on the prior statements of witnesses who did not give oral evidence at trial.

Article 4

Facts established by legally binding decisions by the ICTY

At the request of a party or proprio motu, the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings.

35. The **Law on Protection of Witnesses** (*Official Gazette of Bosnia and Herzegovina* no. 3/03) as far as relevant reads:

Article 10

Removal of the accused

(1) Where there is a justified fear that the presence of the accused will affect the ability of the witness to testify fully and correctly, the Court may, either ex officio or upon the motion of the parties or the defense attorney, and after hearing the other party and the defense attorney, order that the accused be removed from the courtroom.

(2) If removed from the courtroom the accused shall be enabled to follow the testimony through technical means for transferring image and sound, or the testimony shall be recorded and presented to the accused.

(3) The defense attorney shall be present at the hearing. After the testimony has been presented to the accused but before the witness is released, the defense attorney and the accused shall have the opportunity to consult.

(4) A decision pursuant to paragraph 1 of this Article is subject to appeal by the parties and the defense attorney. The Panel of the Appellate Division shall consider the appeal within 72 hours following the day the appeal is received.

Article 11

Exception from the imminent presentation of evidence

When determining whether the records on testimony given during the investigative phase may be read or used as evidence at the main trial, the Court shall also take into account the need to provide for the protection of a witness under threat who would expose himself or his family to great personal danger and the protection of a vulnerable witness who would expose himself to significant emotional distress by appearing at the main trial.

VI. Admissibility

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

37. 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 are 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.

38. In the present case, the subject-matter of challenging by the appeal is the Judgment of the Court of BiH no. X-KRZ-05/161 of 23 October 2007 against which there are no further effective remedies available under the law. Furthermore, the appellant received the challenged judgment on 16 November 2007, while the appeal was lodged on 10 January 2008, i.e. within 60 days time-limit, as provided for by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal fulfills the requirements set out in Article 16(2) 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 that would render the appeal inadmissible.

39. 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

40. The appellant challenges the aforementioned decisions claiming that the challenged decisions 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. Within that context, the appellant indicates a) the procedure of taking of evidence within the scope of fair trial, b) removal from the courtroom, c) application of substantive law, d) punishment solely upon the law and e) remuneration of the costs of criminal proceedings.

41. Article II(3) 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:

[...]

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

42. Article 6(1) of the European Convention reads as follows:

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. [...]

43. The Constitutional Court notes that in its earlier decisions, and following the case law of the European Court of Human Rights (“the European Court”), it concluded that the issue of whether the accused had had fair proceedings ought to be resolved in pursuance of an analysis of the entire proceedings (see the European Court, *Monnell and Morris*, decision of 2 March 1987, Series A, no. 115, p. 21, paragraph 54).

44. Also, the Constitutional Court highlights that, under the case-law of the European Court and the Constitutional Court, it is not the task of those courts to review the findings of the ordinary courts as to the facts and application of the substantive law (see the European Court, *Pronina vs. 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 the European Court, *Thomas vs. the United Kingdom*, judgment of 10 May 2005, Application no. 19354/02). It is the Constitutional Court's task to ascertain whether the constitutional rights (the right to a fair trial, the right of access to court, the right to an effective legal remedy, *etc.*) have been violated or disregarded, or whether the application of the law was arbitrary or discriminatory. Therefore, within its appellate jurisdiction, the Constitutional Court deals exclusively with the issue of possible violation of the constitutional rights or rights safeguarded by the European Convention in proceedings conducted by ordinary courts.

45. In addition, the Constitutional Court emphasizes that, in view of the aforementioned case-law of the European Court and the Constitutional Court, Article 6(1) of the European Convention obliges the courts to give reasons for their judgments, but 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 duty to give reasons applies may vary according to the nature of the decision (see the European Court, *Ruiz Torija vs. Spain*, the judgment of 9 December 1994, Series A, no. 303-A, paragraph 29). Both the European Court and the Constitutional Court have noted in numerous decisions that a domestic court has a certain margin of appreciation when choosing arguments and admitting evidence in a particular case. At the same time, courts is obliged to justify

its activities by giving clear and understandable reasons for its decisions (see the European Court, *Suominen vs. Finland*, the judgment of 1 July 2003, application no. 37801/97, paragraph 36 and *mutatus mutandis*, the Constitutional Court, Decision no. *AP 5/05* of 14 March 2006).

a) Evidentiary hearing

46. The appellant holds that his right to a fair trial has been violated because the challenged judgments were based upon the evidence which, in his opinion, had not been obtained in accordance with the relevant provisions of the Criminal Procedure Code of BiH and the principles of fair trial. In that regard, the Constitutional Court indicates the case-law of the European Court followed by the Constitutional Court (see the Constitutional Court, Decision no. *AP 525/04* of 18 January 2005), pursuant to which the court, in principle, sees its task as being not to express a view as to whether the statements in question were correctly admitted and assessed but rather to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair as required by Article 6 of the European Convention (see the European Court, *Kostovski vs. The Netherlands*, the judgment of 20 November 1989, Series A-166).

47. The appellant holds that his right to defense has been violated as, pursuant to his allegation, he had not been given a possibility to validly challenge the facts admitted by the first instance court as proven because they had not been established by the legally binding judgments of ICTY. In that regard, the appellant alleges that he did not have an equal position with the prosecutor in the proceedings. The Constitutional Court highlights that the equality of arms is one of the most important aspects of the right to a fair trial under Article 6(1) of the European Convention in conjunction with paragraph 3 item d of the same article of the European Convention. This means that the accused in the criminal proceedings ought to have identical rights as the authorized prosecutor. The second important principle, closely related to that right, is that the proceedings must be in accordance with the principle of adversary system. That means that the accused must have information on all allegations and evidence presented by the prosecutor, and the opportunity to reply to the presented allegations and put forward other evidence in favor of his defense.

48. In respect of the appellant's allegations concerning the testimonies of certain witnesses, the Constitutional Court notes that it follows from the reasoning of the second instance judgment that the Appeals Chamber, when examining those allegations of the appellant, analyzed in detail the manner in which individual witnesses had identified the appellant and that, in view of the established facts, it concluded that those procedural actions had been performed in their entirety in accordance with the

provision of Article 85 of the Criminal Procedure Code of BiH. Also, the Constitutional Court holds that the reasoning supplied in the challenged judgments do not appear to be arbitrary or inadmissible in this part either, but contain clear and unambiguous reasons for the evaluation that the appellant's identification had been carried out entirely in accordance with the legal provisions.

49. The Constitutional Court notes that the first instance court based its decision on admittance of the established facts which had been established by legally binding judgments of ICTY relating to the existence of a widespread and systematic attack against the civilian population as the essential element of the criminal offence the appellant was being charged with, upon the provision of Article 4 of the Law on Transfer of ICTY cases. The Constitutional Court also notes that the said law as *lex specialis* offers a possibility for such conduct by the court. In addition, the Constitutional Court notes that in the reasoning of the first instance judgment the first instance court clearly stated that during the course of the proceedings before that court a reasonable opportunity had been given to the appellant and his defense to challenge the conclusion on admittance of the aforementioned fact as being proven and that all the objections by the defense had been dismissed as arbitrary. It also follows from the reasoning of the first instance judgment that the conclusion on the said fact being proven, in addition to the judgments of ICTY, had also been substantiated by the other evidence taken, primarily by the testimonies of the heard witnesses for the prosecution who, in the opinion of the court, in describing how and where they had been expelled from their homes had additionally confirmed the veracity of the judgment. The appellant, however, had failed to substantiate either in his appeal against the first instance judgment or the appeal before this court that his rights in that regard had really been violated, particularly because the existence of the widespread or systematic attack targeting non-Serb civilian population in the area which places the concrete act of commission within a wider context of war occurrences and which as such does not confirm the appellant's responsibility. The Constitutional Court notes that the first instance court has conducted a comprehensive procedure of taking of evidence directed at proving of the appellant's individual guilt, while the conviction was not based solely or to a decisive extent on the facts accepted by the court in terms of Article 4 of the Law on Transfer (pursuant to which "[...] the courts [...] may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY [...]), but the courts have also, as already stated, evaluated the other evidence taken, both individually and in their correlation. In view of the aforementioned, the Constitutional Court holds that the principle of equality of arms in the proceedings has not been violated in any way to the appellant's detriment or that the appellant was prevented from equally participating in the hearing in the present case. The Constitutional Court also

notes that the appellant was afforded the opportunity to present his defense both personally and by way of his defense counsel, to propose taking of evidence, including, *inter alia*, the hearing of witnesses, which he did. He also had the opportunity to examine all the evidence of the prosecution and to challenge the manner in which the courts had evaluated the evidence. Finally, the appellant's defense counsel's appeal was partially granted and the first instance judgment modified in legal qualifications of the acts constituting the criminal offence, whereupon the second instance judgment offered valid and well-explained reasons.

50. The Constitutional Court considers that in the present case comprehensive analysis of the evidence taken was not absent but that the first instance court in its judgment completely described the process, individual evaluation of evidence, their correlation and drawing of the conclusion that the appellant had committed the criminal offence he was being charged with and that he was criminally liable for its commission. Namely, the Constitutional Court notes that the first instance court has conducted a very comprehensive procedure of taking of evidence and that on the basis of all the evidence taken it has established that the appellant at the critical time and in the manner as described in the enacting clause of the first instance judgment did undertake the criminal acts of commission of the criminal offence of Crimes against Humanity under Article 172(1) of the Criminal Code of BiH. The ordinary court has given a detailed and clear reasoning for such finding which does not appear in any part to be arbitrary or unacceptable in itself, neither does it bring into doubt the conclusions on the committed criminal offence the appellant was being charged with. Furthermore, the first instance court clearly explained that it had been established in no uncertain terms that there existed consent of the testimony of all witnesses regarding the appellant's acts and his participation in the commission of the criminal offence he was being charged with. Also, the first instance court has clearly explained the judgment in the part relating to the evaluation of all the evidence taken, providing clear reasons for not accepting the allegations of the defense. In that context and since the appellant particularly questions the testimonies of certain witnesses, the Constitutional Court notes that the first instance court's conclusions in respect of the evaluation of the testimony of witnesses FWS-75 and FWS-95 as well as other witnesses and all the other evidence taken, have been accepted by the second instance court and it stated in its decision the reasons for the complains being ill-founded. In addition, the Constitutional Court notes that the second instance court considered in its judgment all the appellant's complaints and stated its position thereof clearly and in detail, concluding that it followed clearly from the established facts that the appellant had committed in capacity of direct order-giving and executive officer the criminal acts as charged with. Therefore, the Constitutional Court notes that, contrary to the appellant's allegations, the ordinary courts based their decisions on the appellant's

guilt both upon the testimonies of the witnesses and other evidence in the manner that ensured their lawfulness and legal validity, those testimonies being also substantiated by the other evidence of the Prosecutor's Office of BiH.

51. Therefore, the Constitutional Court did not find in this part of the appeal any elements which would point to the 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.

b) Removal from the courtroom

52. The appellant specifically alleged that he had been removed from the courtroom upon the request of the protected witnesses "E" and "J" who "apparently did not tell the truth". Furthermore, it is alleged in the appeal, there were admitted into the case file the statements of the witnesses who "will not" testify and the testimonies of the witnesses "for whom it is not known why they had not responded to the summons by the prosecutor's office and the court". In respect of the appellant's allegations relating to the evaluation of the testimonies of the heard witnesses, the Constitutional Court notes that the evidence taken has been evaluated in accordance with the principle of free evaluation of evidence as guaranteed under Article 15 of the Criminal Procedure Code of BiH and it was evaluated both individually and in its correspondence with the rest of the evidence. Also, the evaluation of the testimonies of other witnesses has been explained in detail, including the testimony of Dr N.A. who substantiated the testimonies of some of the other witnesses of the injured. The Constitutional Court notes that the very act of the appellant's removal from the courtroom due to procedural reasons has not violated the lawfulness of the proceedings because the appellant was afforded the opportunity to follow the further course of the session by way of a video and could ask questions and give answers.

53. As already stated above, the Court took a decision to remove the accused from the courtroom during the hearing of those witnesses, pursuant to the provision of Article 10 of the Law on Protection of Witnesses. Such manner of hearing of the witnesses was entirely in compliance with the right of the accused to examine the witnesses who had charged him and the fact that the accused only heard but not saw the witnesses, whereas his defense counsel had both possibilities, did not, the Court holds, reduce his opportunity to prepare his defense, i.e. cross-examination. The court has not shown any arbitrariness in its conduct in these proceedings and nether has it violated the principles of lawfulness of conduct. Therefore, such decision by the Court has not violated the right to afford the appellant, within the guarantees of a fair trial, the opportunity to follow the course of the trial, examine the

witnesses and be examined in respect of the circumstances of the committed criminal offence. The Constitutional Court, therefore, concludes that it has been ensured that the appellant follows the course of the main trial adequately, without any violation of his right to defense and that, not even in this part of the appeal, has there been any 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.

c) Application of substantive law

54. The appellant objects in particular to the fact that the Court of BiH applied in the present case the law which was effective at the time of the trial, i.e. the provisions of the Criminal Code of BiH adopted in 2003 and not Article 142 of the Criminal Law of SFRY which had been applicable at the time of the commission of the criminal offence. It is further alleged in the appeal that the provision of Article 4 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.

55. However, the Constitutional Court notes that Article 4a of the Criminal Code of BiH prescribes that Articles 3 and 4 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, “*was criminal according to the general principles of international law*”. Also, Article 7(2) of the European Convention provides for an exception to the condition contained in paragraph 1 of the same article stating that “*nothing shall 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*”. This, therefore, establishes the possibility of departure, under prescribed conditions, from the principles established in Articles 3 and 4 of the Criminal Code of BiH and, thereby, departure from the application of the criminal law applicable at the time of commission of the criminal offence and application of a more lenient law in the proceedings conducted for the acts which are recognized as criminal acts under international law. In view of the above, the Constitutional Court, contrary to the appellant’s allegations, does not find any arbitrariness in the application of substantive law in the situation when the Court of BiH, basing its decision upon the provision of Article 4a of the Criminal Code of BiH, pronounced the appellant responsible for the criminal offence of crimes against humanity under Article 172 of the Criminal Code of BiH. This particularly having in mind that the Criminal Law of SFRY, referred to by the appellant, did not have any provisions explicitly relating to the crimes against humanity, while the provision of Article 142 of the Criminal Law of SFRY, also indicated by the appellant, treated crimes against civilian population.

d) Punishment solely upon the law

56. The appellant alleges in his appeal that “the regulation under Article 4 of the Criminal Code of BiH prescribes that the law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the criminal offense if the law has been amended on one or more occasions“ and that if the court “applied correctly the Criminal Law which was in effect in 1992 it would have been possible to correctly qualify all the acts of the convicted person as the criminal offence against the civil population under Article 142 of the Criminal Law of SFRY”. In view of the contents of these allegations, the Constitutional Court concludes that the appellant holds that the challenged decisions also violated his right under Article 7 of the European Convention.

Article 7 of the European Convention reads:

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.

57. As for the appellant’s objections relating to the retroactive application of the Criminal Code of BiH, the Constitutional Court notes that identical legal issues have been considered by the Constitutional Court in its Decision no. AP 519/07 of 29 January 2010 (Decision on Admissibility and Merits available on web-page of the Constitutional Court www.ustavnisud.ba). In that Decision, the Constitutional Court explained the application relating to the interpretation of Article 7 of the European Convention. The Constitutional Court concluded that Article 7 of the European Convention embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*), that offences and the relevant penalties must be clearly defined by law and that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. The Constitutional Court further concluded that the accused are not entitled to justify the conduct which has given rise to their conviction simply by showing that such conduct did in fact take place and therefore formed a practice. It was further pointed out that with regard to Article 7(2) of the European Convention, this

paragraph constitutes an exceptional derogation from the general principle laid down in the first paragraph. The two paragraphs are thus “interlinked and must be interpreted in a concordant manner”.

58. In paragraph 69 of the decision no. *AP 519/07*, analyzing the recent case-law of the Court of BiH, the Constitutional Court highlighted “Namely, in the cited Verdict, the Court of BiH states (see, paragraphs 120 and 122 of the Verdict cited above) that Article 4a of the Criminal Code of BiH applies to the criminal offence of crimes against humanity, as a criminal offence under the general principles of international law, committed at the time when the adopted Criminal Code was in effect, since the latter law did not provide for that criminal offence at all. In this regard, the Court of BiH further underlines that it is necessary to apply directly Article 7(2) of the European Convention, which, pursuant to Article II(2) of the Constitution of BiH, is directly applicable in Bosnia and Herzegovina and has primacy over all other laws and does not allow the perpetrators to evade trial and punishment in cases where specific conduct, which constitutes criminal offence according to the general principles of international law, is not criminalized”. The Constitutional Court further states that “in view of the aforementioned and having regard to the application of Article 4a of the Criminal Code of BiH in conjunction with Article 7(1) of the European Convention, the Constitutional Court concludes that, in the case at hand, the application of the Criminal Code of BiH in the proceedings conducted before the Court of BiH does not give rise to a violation of Article 7 of the European Convention.

59. In view of the fact that the challenged judgment was based upon the provisions of Article 4a of the Criminal Code of BiH in conjunction with Article 7 of the European Convention, and that the appellant was found guilty of the criminal offence of crimes against humanity, committed at the time when the Criminal Law of SFRY was in effect, which, as already stated above, did not prescribe the concerned criminal offence, the Constitutional Court in respect of the appellants complaint, instead of offering a specific reasoning, refers to the explanation and reasoning provided in its Decision no. *AP 519/07* of 29 January 2010 because they are entirely applicable to this decision and concludes that in the proceedings which were concluded by the challenged judgments there has been no violation of the appellant’s rights as guaranteed by Article 7 of the European Convention.

e) Decision on remuneration of the costs of criminal proceedings

60. The appellant also complained about the costs of criminal proceedings holding that he was not obliged to pay them due to his being indigent. However, the Constitutional Court, contrary to the appellant’s allegations, holds that the ordinary courts did not apply the law arbitrarily when they

obligated the appellant, by applying Article 188(1) of the Criminal Procedure Code of BiH, to pay for the costs of criminal proceedings, since the appellant was pronounced guilty of the committed criminal offence and, during the course of the proceedings, the court determined, it had not been proven that he was indigent.

61. Finally, in respect of the appellant's allegations contained in the supplement to his appeal, the Constitutional Court indicates its previous case law (see *AP 1426/05* of 9 September 2006, item 49), i.e. Article 16(1) of the Rules of the Constitutional Court which as a condition of admissibility prescribes the obligation to lodge an appeal 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. This time-limit of 60 days also necessarily relates to the filing of a supplement to appeal and may only exceptionally be admitted if it relates to new legal circumstances which came about subsequently to the expiry of the said time-limit. In view of the fact that the supplement to appeal was lodged after the expiry of the prescribed time-limit and does not relate to any new legal circumstances but is related to the same factual situation and challenged decisions, the Constitutional Court will not consider these allegations of the appellant.

VIII. Conclusion

62. In the present case 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. The Constitutional Court finds that there is nothing in the challenged decision which would point to the arbitrariness in establishing of facts and evaluation of evidence because the Court of BiH based its decision on the appellant's guilt both upon the testimonies of the witnesses and the other evidence in the manner which ensured their lawfulness and legal validity, while the testimonies have also been substantiated by other evidence of the Prosecutor's Office of BiH. Furthermore, the decision by the Court of BiH to have the appellant removed from the courtroom has not violated the appellant's right to defense because it was ensured that the appellant may follow the further course of the session by way of video-link, including the possibility to ask questions and give answers. Also, in respect of the application of substantive law, the Constitutional Court concludes that there has been no arbitrariness in the application of that law because the Court of BiH sentenced the appellant for the criminal offence of crimes against humanity which had been provided for by the Criminal Code of BiH of 2003 for the first time, while the Criminal Law of SFRY did not prescribe the aforementioned criminal offence. And finally, the Constitutional Court holds that the ordinary courts correctly issued the decision on the appellant's obligation to pay for the costs of criminal proceedings, since the

appellant was found guilty of the committed criminal offence and, during the course of the proceedings, the court determined, it had not been proven that he was indigent.

63. There is no violation of the rules of punishment based only upon the law provided for in Article 7 of the European Convention because paragraph 2 of that Article provides for exception if the case involves war crimes and crimes violating the international humanitarian law recognized by “civilized nations” and the appellant’s case is just such an exception from the rules set in Article 7 paragraph 1 of the European Convention. Having also in mind the application of Article 4a of the Criminal Code of BiH in conjunction with Article 7(1) of the European Convention, the Constitutional Court concludes that in the present case the application of the Criminal Code of BiH in the proceedings before the Court of BiH does not give rise to a violation of Article 7 of the European Convention.

64. Pursuant to Article 61(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

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

Prof Dr Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina