The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3) (b) of the Constitution of Bosnia and Herzegovina, Article 61(1) and (3) and Article 59(2)(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 60/05), in Plenary and composed of the following judges:

Ms. Hatidža Hadžiosmanovic, President
Mr. David Feldman, Vice-President
Mr. Miodrag Simović, Vice-President
Ms. Valerija Galić, Vice-President
Mr. Tudor Pantiru,
Mr. Mato Tadić,
Ms. Constance Grewe,
Ms. Seada Palavrić,

Having deliberated on the appeal of Mr. **Abduladhim Maktouf** in case no. **AP 1785/06,** at its session held on 30 March 2007 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. **Abduladhim Maktouf** lodged against the Verdict of the Court of Bosnia and Herzegovina, no. KPŽ-32/05 of 4 April 2006 is dismissed as ill-founded.

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 Brcko District of Bosnia and Herzegovina.*

REASONING

I. Introduction

1. On 19 June 2006, Mr. Abduladhim Maktouf ("the appellant"), represented by attorneys Messrs. Adil Lozo and Ismet Mehic, 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. KPŽ-32/05 of 4 April 2006. In addition to the appeal, the appellant submitted a request for interim measure whereby the Constitutional Court would order suspension of his sentence set forth in the verdict of the Court of BiH pending the conclusion of the proceedings relating to the appeal. On 12 September 2006, the Constitutional Court took a decision whereby it dismissed the appellant's request for an interim measure.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 15 September 2006 the Court of BiH and the Prosecutor's Office of Bosnia and Herzegovina ("the Prosecutor's Office of BiH") were requested to submit a reply to the appeal.

3. The Court of BiH and the Prosecutor's Office of BiH submitted their replies to the appeal on 2 October 2006.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were forwarded to the appellant on 19 January 2007.

III. Facts of the case

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

6. By Decision no. K-127/04 of 1 July 2005, the Court of BiH found the appellant guilty of criminal offence of War Crimes against Civilians referred to in Article 173 paragraph 1(e) in conjunction with Article 31 of the Criminal Code of Bosnia and Herzegovina ("the BiH Criminal Code") and sentenced him to five years' imprisonment.

7. The appellant lodged an appeal with the Appellate Panel of the Court of BiH which partially granted the appeal, quashed the verdict of the first-instance panel and set a hearing before the Appellate Panel of the Court of BiH.

8. Having held the hearing, the Court of BiH rendered verdict no. KPŽ-32/05 of 4 April 2006, whereby it found the appellant guilty of violation of Article 3 paragraph 1(b) of the IV Geneva Convention and Article 173 paragraph 1(e) in conjunction with Article 31 of the Criminal Code of Bosnia and Herzegovina - War Crimes against Civilians – and sentenced him to five years' imprisonment.

IV. Appeal

a) Statements from the appeal

9. The appellant complains that the appealed verdict of the Court of BiH has violated his right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and

right to a fair hearing in civil and criminal matters and other rights relating to criminal proceedings under Article II(3)(e) of the Constitution of Bosnia and Herzegovina.

10. In addition, the appellant complains of a violation of Article II(4) of the Constitution of Bosnia and Herzegovina and Articles 7 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"). .

11. In support of his complaints about the violation of the constitutional rights, the appellant alleges that the BiH Criminal Code was applied instead of the SFRY Criminal Code which is, in the appellant's opinion, more lenient and which was in force at the time when the criminal offences in question were committed. This indicates, he argues, a difference between the legal solutions and practical application of the substantive law at the level of the Entities.

12. The appellant further alleges that the participation of international judges, who were appointed by the OHR, in the work of the Panel which dealt with the appellant's case, breached the constitutional principle of "independence" and "impartiality" of the court.

13. Moreover, the appellant complains about the establishment of the facts and application of the substantive law by the Court of BiH.

b) Reply to the appeal

14. In reply to the appeal the Court of BiH alleges, *inter alia,* that the appellant failed to specify the circumstances pointing to a lack of impartiality and independence on the part of the judges. The Court of BiH alleges that the appellant's allegations, that the impartiality of two-instance proceedings cannot be guaranteed due to the fact that the premises of the Criminal and Appellate Divisions of the Court of BiH are located in the same building, are unfounded. The Court of BiH is therefore of the opinion that this part of the appeal should be dismissed. As to the alleged violation of the right to liberty and security, the Court of BiH alleges that the appellant did not specify his complaints. The Court of BiH points out that it took a decision imposing detention on the appellant on the grounds that there was a reasonable suspicion that the appellant committed criminal offence referred to in Article 358 and Article 368 of the Criminal Code of the Federation of BiH. The measure of detention was examined on several occasions by the Appellate Panel which established that the detention was justified as there were circumstances pointing to the danger of him escaping. Moreover, the Court of BiH alleges that

according to the jurisprudence of the European Court of Human Rights and Constitutional Court, the courts have the discretionary power to assess the presented pieces of evidence and to give credence to them. The Court took a decision against the appellant on the basis of the presented evidence presented, which were assessed separately and taken together, and incontestably concluded that the appellant was responsible for the criminal offence of which he was accused. As to the application of the substantive law, the Court of BiH, applying the provisions of the 2003 BiH Criminal Code, established an exemption from obligation to the apply more lenient law as referred to in Article 4(a) of the Criminal Code of BiH and Article 7(2) of the European Convention. In the instant case, the accused should have been aware of the fact that the application of the international rules have priority in time of war and that violation of internationally recognized values brings about serious consequences. Finally, the Court of BiH outlines that insofar as the instant case is concerned, it carefully analyzed the provisions of the European Convention and case-law of the European Court of Human Rights in respect of Article 4(a) of the BiH Criminal Code and concluded that a departure from the application of more lenient law in cases relating to a serious violation of internationals standards applicable in time of war was justified, as also specified in the appealed verdict of the Appellate Panel. For these reasons, the Court of BiH proposed that the Constitutional Court should dismiss the appeal as ill-founded.

15. In its reply to the appeal, the Prosecutor's Office alleges that the appellant's allegations relating to the appointment and impartiality of the members of the Court's Panel are manifestly unfounded as the appellant did not submit any evidence pointing to actions that violated the appellant's rights. Furthermore, the BiH Prosecutor's Office holds that the appellant's allegations relating to his detention and violation of his right to liberty and security are unfounded as a whole. In particular, the pre-trial detention was imposed on the appellant due to another criminal offence, not the offence of war crimes. The measure of detention in respect of the charge of war crimes was imposed after the indictment relating to that offence had been confirmed by the Preliminary Hearing Judge of the Court of BiH. The BiH Prosecutor's Office holds that in the instant case the Court of BiH correctly applied the substantive criminal law and that therefore those allegations of the appellant are unfounded. The BiH Prosecutor's Office therefore holds that this part of the appellant's appeal is unfounded as well since the appellant did not submit evidence establishing that it was probable that the alleged violations had occurred. Finally, the BiH Prosecutor's Office proposed that the appeal be dismissed as ill-founded.

V. Relevant Law

16. **Article 3(1)(b) of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War** reads:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(...)

(b) Taking of hostages;

(...).

17. 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).

Principle of Legality

Article 3

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

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

Time Constraints Regarding Applicability

Article 4

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

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

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

Article 4a

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

(...)

[*Note: the principle of legality and provision on time constraints regarding applicability of the criminal code are provided for in Articles 4 and 5 of the Criminal Code of F BiH, Articles 3 and 4 of the Criminal Code of the Republika Srpska, and Articles 4 and 5 of the Criminal Code of the Brcko District. However, the Entity Criminal Codes and the Criminal Code of the Brcko District do not contain a provision equivalent to Article 4a) of the Criminal Code of Bosnia and Herzegovina. This implies that they do not incorporate entirely the provisions of Article 7 of the European Convention. The reason for this is that these codes do not provide for the provisions relating to the criminal acts against humanity and values of international law, which is exclusively provided for by the Criminal Code of Bosnia and Herzegovina.]*

Accessory

Article 31

(1) Whoever intentionally helps another to perpetrate a criminal offence shall be punished as if he himself perpetrated such offence, but the punishment may be reduced.

(2) The following, in particular, shall be considered as helping in the perpetration of a criminal offence: giving advice or instructions as to how to perpetrate a criminal offence; supplying the perpetrator with tools for perpetrating the criminal offence; removing obstacles to the perpetration of criminal offence; and promising, prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence, to hide the perpetrator, the tools used for perpetrating the criminal offence, traces of the criminal offence, or goods acquired by perpetration of the criminal offence.

War Crimes against Civilians

Article 173

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

...

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, unlawfully bringing people into concentration camps and other illegal arrests and detentions, deprivation of rights to fair and impartial trial, or forcible service in the armed forces of enemy's army or in its intelligence service or administration; ...

18. 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).

The SFRY Criminal Code, in Chapter XVI – Criminal Act against Humanity and International Law - Article 142 provided that a criminal act amounting to a war crime against civilian persons was punishable by imprisonment for not less than five years or by the death penalty. The same punishment was prescribed in case of other most serious criminal acts referred to in the same Chapter of the SFRY Criminal Code, such as: genocide (Article 141); war crimes against wounded and sick people (Article 143); war crimes against prisoners of war (Article 144). Unlike the applicable Criminal Code of BiH, the SFRY Criminal Code did not include in a special group of particularly grave offences some of the gravest acts considered as criminal offences at the international level, such as crimes against humanity

(Article 172 of the Criminal Code of Bosnia and Herzegovina), organizing a group of people and instigating the perpetration of genocide, crimes against humanity and war crimes (Article 176 of the Criminal Code of Bosnia and Herzegovina), violating the laws and practices of warfare (Article 179). According the Criminal Code of Bosnia and Herzegovina, by contrast, all those laws are punishable by imprisonment for not less than five years or long-term imprisonment.

Relevant documents regulating the appointment of foreign judges and prosecutors to the Prosecutor's Office and Court of Bosnia and Herzegovina

19. The **Law on the Court of Bosnia and Herzegovina** (*Official Gazette of BiH*, No. 29/00)

Article 3

Requisites of eligibility

1. The judges of the Court shall be citizens of Bosnia and Herzegovina who are graduates of law and have passed the qualifying examination for judges and have at least ten years work experience in judicial bodies or attorneys' chambers. ***[…]***

(Note: This provision became ineffective based on Article 73 of the Law on the High Judicial and Prosecutorial Council (Official Gazette of BiH, No. 15/02).

Article 65

If six months after the entry into force of the present law, judges are not elected pursuant to Article 4, the High Representative may appoint them for a maximum period of five years.

20. The **Law re-amending the Law on the Court of Bosnia and Herzegovina** (*Official Gazette of BiH*, Nos. 3/03 and 42/03).

Article 12

Article 65, as amended, shall be deleted and the following new Article 65 shall be inserted:

'1. During a transitional period, a maximum number of six (6) international judges may be appointed to the Special Panels for Organized Crime, Economic Crime and Corruption within the

Criminal and Appellate Division. International judges shall not be citizens of Bosnia and Herzegovina or of any neighboring state. The transitional period shall last not more than four years.

2. International judges shall not be held criminally or civilly liable for any act carried out within the scope of their duties pursuant to this law.

Article 13

This Law re-amending the Law on the Court of Bosnia and Herzegovina shall enter into force on 1 February 2003.

21. The **Law on the Amendments to the Law on the Court of Bosnia and Herzegovina** (*Official Gazette of BiH*, No. 61/04 dated 29 December 2004).

The Law on the Court of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina No.29/00, No. 16/02, No.24/02, No.3/03 No. 37/03, 42/03, 4/04, 9/04 and 35/04), is hereby amended as follows.

[…]

Article 17

Article 65 shall be amended and shall read as follows:

[…] 4. During the transitional period, a number of international judges may be appointed to Section I and Section II of the Criminal and Appellate Divisions. An international judge may be appointed to both Section I and Section II of the Criminal and Appellate Divisions. International judges shall not be citizens of Bosnia and Herzegovina or of any neighboring state.

5. An International judge of Section I and Section II of the Criminal and Appellate Divisions may serve as a preliminary proceeding judge, a preliminary hearing judge or as a single trial judge in proceedings before Section I and Section II of the Criminal and Appellate Divisions.

6. An International judge of Section I and Section II of the Criminal and Appellate Divisions may serve as a judge in the panel as referred to in Article 24 (6) of the Criminal Procedure Code of Bosnia and Herzegovina, including the panel as referred to in Article 16 of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses of Bosnia and Herzegovina, in proceedings before Section I and Section II of the Criminal and Appellate Divisions.

7. An International judge shall not participate in the work of any panel of the Criminal, Appellate or Administrative Division other than provided for in the previous paragraphs.

8. An international judge shall not be criminally prosecuted, arrested or detained, nor shall he/she be liable in civil proceedings for an opinion expressed or decision made in the scope of his/her official duties.

9. International judges shall be authorized to use the English language in any of the proceedings of the Court of Bosnia and Herzegovina. Translation/Interpretation into one of the official languages of Bosnia and Herzegovina shall be provided by a court interpreter."

Article 18

This Law shall enter into force eight days after the date of its publication in the "Official Gazette of Bosnia and Herzegovina.

22. The **Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina** (the Agreement was concluded on 1 December 2004)

Article 2

The Registry shall administer the recruitment and selection process of international judges to be appointed to Section I and Section II of the Criminal and Appellate Division ("hereinafter: international judges") and international prosecutors to be appointed to the Special Departments ("hereinafter: international prosecutors") and submit qualified candidates to the High Representative for appointment. In the event of termination of the High Representative's mandate, qualified candidates shall be appointed by the President of the High Judicial and Prosecutorial Council for Bosnia and Herzegovina. […]

23. **Annex amending the Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina dated 1 December 2004** (signed on 23 February 2006 and ratified on 27 July 2006 by the Presidency).

Amendment to Article 2 paragraph 1 of the Agreement on the Establishment of the Registry

Article 1

In Article 2 paragraph 1 of the Agreement on the Establishment of the Registry, in the second sentence, the words "the President of the High Judicial and Prosecutorial Council for Bosnia and Herzegovina" shall be replaced by the words "the High Judicial and Prosecutorial Council for Bosnia and Herzegovina. At the end of the second sentence a full stop shall be added. […]

24. The **Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina and Establishment of Transitional Council, which replaces the Agreement on the Establishment of the Registry of 1 December 2004 and Annex to**

that Agreement (the Agreement was concluded and entered into force on 26 September 2006 and was published in the *Official Gazette of Bosnia and Herzegovina*, no. 93/06).

Article 8

[...] (7) The international judges and prosecutors shall be appointed by the HJPC. The HJPC shall establish a committee of no less than three members of HJPC. No candidate shall be appointed without being previously interviewed. The interviews shall be conducted in person or over the telephone.

(8) Upon expiry of the term of office of international judge or prosecutor, the Office of the Registrar shall establish whether an international judge or citizen of Bosnia and Herzegovina shall be appointed to that position. Should an international candidate be nominated, the appointment procedure defined by the Rules of Procedure of HJPC shall be conducted in coordination with the Registrar and President of the Court or the Chief Prosecutor. Should a citizen of Bosnia and Herzegovina be nominated, the Office of the Registrar shall notify the HJPC about the nomination within six months prior to the expiry of the respective term of office so that the procedure of appointment which is to be conducted by HJPC may immediately commence.

(9) The Appointment Committee referred to in paragraph (7) of this Article shall check applications, evaluate and grade the candidates and give recommendations to the Council on a person to be appointed. Articles 14, 41 and 42 of the Law on High Judicial Prosecutorial Council shall be applied.

(10) Only those international candidates for whom the Office of the Registrar confirms that the financial requirements have been agreed upon shall be appointed or re-appointed.

(11) Prior to assuming a new office the candidate shall take a solemn oath in accordance with Article 47 of the Law on High Judicial Prosecutorial Council.

(12) An international judge or prosecutor shall be appointed to the longest term of two years and he/she may be re-appointed to another two-year term in office. None of the terms may last longer that the time-limit provided for by the Law on the Court of Bosnia and Herzegovina.

VI. Admissibility

25. 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.

26. 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.

27. In the instant case, the subject challenged by the appeal is the verdict of the Court of BiH, no. KPŽ-32/05 of 4 April 2006, against which there are no other effective legal remedies available under the law. Furthermore, the appellant received the challenged verdict on 26 April 2006 and the appeal was filed on 19 June 2006 i.e. within a time-limit of 60 days as laid down in 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 not manifestly (*prima facie*) ill-founded; nor is there any other formal reason that would render the appeal inadmissible.

28. 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 Constitutional Court's Rules, the Constitutional Court has established that the present appeal meets the admissibility requirements.

VII. Merits

29. The appellant’s appeal is directed against the verdict of the Court of BiH. He complains that the Court of BiH and BiH Prosecutor’s Office violated his right under Article II(2) in conjunction with Article II(3)(d) of the Constitution of Bosnia and Herzegovina. The appellant sees the violation of that right in the fact that he was initially detained on the ground that he committed criminal offence of abuse of his position or authority. Concurrently, while he was in detention, the BiH Prosecutor’s Office prepared the indictment relating to the criminal offence of war crimes of which he was found guilty and convicted.

1. The right to liberty of person

The Constitution of Bosnia and Herzegovina, so far as relevant, reads as follows:

Article II

Human Rights and Fundamental Freedoms

(...)

2. International standards

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

Article II(3)(d) of the Constitution reads as follows:

3. Enumeration of Rights

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:

(...)

d) The rights to liberty and security of person.

30. The Constitutional Court notes that according to its jurisprudence and the case-law of the European Court of Human Rights ("the European Court") the appellant must point to a violation of his rights safeguarded by the Constitution of Bosnia and Herzegovina and these violations must be deemed probable**.** The appeal shall be manifestly ill-founded if there is no *prima facie* evidence, which would, with sufficient clarity, indicate that the mentioned violation of human rights and freedoms is possible (see ECHR, the *Vanek vs. Slovakia* judgment of 31 May 2005, Application no 53363/99 and Constitutional Court, Decision no. *AP 165/05* of 18 May 2005) and if the facts in regard to which the

appeal has been submitted manifestly do not constitute the violation of rights that the appellant has stated, i.e. if the appellant has no "justifiable request" (see ECHR, the *Mezőtúr-Tiszazugi Vízgazdálkodási Társulat vs. Hungary* judgment of 26 July 2005, Application no 5502/02), as well as when it is established that the party to the proceedings is not a "victim" of a violation of the constitutional rights.

31. Having regard to the aforesaid, the Constitutional Court will examine the appellant's allegations given the importance of the right allegedly violated, *i.e.* the right to liberty under Article II(3)(d) of the Constitution of Bosnia and Herzegovina.

32. As to the procedural regularity of deprivation of liberty, the Constitutional Court holds that the appellant was deprived of liberty in accordance with the provisions of the Criminal Procedure Code, which meets the requirements laid down in Article 5(1) of the European Convention which provides that "no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law" which can apply to the provision of Article II(3)(d) of the Constitution of Bosnia and Herzegovina.

33. The appellant alleges that he was deprived of his liberty for one criminal offence in a "deceitful" manner while the Prosecutor's Office was preparing the indictment for another criminal offence. However, the appellant did not submit any evidence proving any procedural failure or any substantive failure relating to the deprivation of his liberty.

34. As to the reasonable doubt that the appellant committed the criminal offence in question, which is one of the main conditions for imposition of detention provided for in Article 5 of the European Convention and Criminal Procedure Code, the Constitutional Court holds that there was a reasonable doubt in the instant case as the appellant was convicted of the offence he was charged with according to a legally binding verdict.

35. Taking into account all the aforesaid, the Constitutional Court holds that in the instant case the facts in relation to which the appeal was lodged do not disclose appearances of violation of the right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention. The Constitutional Court therefore considered them unfounded.

2. The right to a fair trial

36. The appellant complains of a violation of the right to a fair trial in respect of several elements set out in this principle. The appellant alleges that the participation of international judges in the work of the Court Panel which dealt with his case is in violation of the principle of "independence" and "impartiality" of the court.

37. Article II(3) of the Constitution of Bosnia and Herzegovina reads as follows:

3. Enumeration of Rights

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.

Article 6(1) of the European Convention reads:

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

Independent and impartial tribunal

38. According to the standards relating to 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, every decision must be taken by an independent and impartial tribunal established by law. Given the fact that these standards are inseparably connected, they must be examined jointly.

Independence

39. In determining whether a tribunal can be considered to be independent, the Court has to consider the manner of appointment of judges and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (see ECtHR, the *Campbell and Fell vs. the United Kingdom* judgment of 28 June 1984,

paragraph 78). It follows from the aforesaid that first of all, the court must be independent from the executive power and its decision must be based on its free view, facts and adequate legal basis. Secondly, the judges do not have to be appointed for lifetime, but it is necessary to secure that the authorities cannot remove judges from their office in an arbitrary manner and on an inadequate basis (see ECtHR, *Zand, D&R* 15 (1979) Report of 12 October 1978, page 70). Thirdly, everything that appears to be impartiality must be avoided.

40. The jurisprudence of the European Court of Human Rights resulted in the following views: The presence of persons with judicial and legal qualifications in the court, constitute a strong indication of impartiality (see ECtHR, *Le Compte vs. Belgium* judgment of 23 June 1981, paragraph 57). The mere fact that the executive authority appoints the judges does not necessarily mean that the court is not independent (see ECtHR, the *Campbell and Fell vs. the United Kingdom* judgment of 28 June 1984, paragraph 79). In establishing the violation of Article 6 of the European Convention, it would have to be shown that that the practice of the authorities is as a whole unsatisfactory, or that at least the establishment of the particular court deciding a case was influenced by improper motives (see ECtHR, *Zand*, D&R 15 (1979) Report of 12 October 1978, page 70).

41. As to the risk of impartiality in the instant case, the appellant points to "the entities who made the appointment of the judges through imposed non-democratic actions". The appellant also alleges that „two members were appointed by the OHR so that it can be concluded that they have been partial in terms of taking a fair decision." The appellant alleged that "the court was not independent as two members were international judges and the third one had not sufficient professional experience (…) so that they could not take a fair decision". As to the status of the judges, the appellant alleges that the process for their "replacement has not been defined although it is necessary in order to establish their independence."

42. The Constitutional Court recalls that the Law on the Court of Bosnia and Herzegovina (*Official Gazette of BiH* Nos. 29/00, 16/02, 24/04, 3703, 37/03, 42/03, 4/04, 9/04, 35/04 and 61/04) whose initial text was imposed in a Decision taken by the High Representative and subsequently adopted by the Parliamentary Assembly of BiH, provides, in Article 65, that during the transitional period that cannot be longer than five years, the Panels of Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption shall be composed of national and international judges. The Criminal and Appellate Divisions can be composed of several international judges. The international judges must

not be the citizens of BiH or any other neighboring state. International judges will act in the capacity as panel judges in accordance with the relevant provisions of the Criminal Procedure Code of Bosnia and Herzegovina and in accordance with the provisions of the Law Protection of Witnesses and Vulnerable Witnesses of BiH and shall not be criminally prosecuted, arrested or detained, nor shall he/she be liable in civil proceedings for an opinion expressed or decision made in the scope of his/her official duties.

43. The High Representative "(…) in the exercise of the powers vested in the High Representative by Article V of Annex 10 (Agreement on Civilian Implementation of the Peace Settlement) to the General Framework Agreement for Peace in Bosnia and Herzegovina, (…) according to the terms of which the High Representative shall facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation (…), noting that the communiqué of the Steering Board of the Peace Implementation Council issued at Sarajevo on 26 September 2003 stated that the Board took note of the UN Security Council Resolution 1503, which, *inter alia*, called on the International Community to support the work of the High Representative in setting up the war crimes chamber (…), noting the Joint Recommendation for the Appointment of International Judges signed by the Registrar of the Registry (...) and President of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (...), bearing in mind the relevant provisions of the Law on the Court of BiH," on 24 February and 28 April 2005, took Decisions on Appointment of International Judges Finn Lynghjem and Peter Sper to Section I for War Crimes of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina.

44. According to the aforementioned Decisions on Appointment, international judges shall serve for a term of two years and they shall be eligible for reappointment as prescribed by law. International judges shall not discharge duties which are incompatible with their judicial service. All other requirements concerning judicial duty referred to in the Law on the Court of Bosnia and Herzegovina shall apply to these appointments to the greatest extent possible. The international Registrar of the Registry shall inform the High Representative of any event which may prevent the judge from discharging his/her duties. During the mandate, the judge shall comply with all standards relating to the professional conduct as prescribed by the Court of BiH. The appointed international judge shall discharge his/her duties in accordance with the laws of Bosnia and Herzegovina and shall take decisions according to his/her knowledge, skills and in a conscientious, responsible and impartial

manner, strengthening the rule of law and protecting individual human rights and freedoms guaranteed by the Constitution of Bosnia and Herzegovina and European Convention.

45. The Constitutional Court is informed of the 2005 Opinion of the Venice Commission relating to the constitutional situation in Bosnia and Herzegovina. A part of that Opinion relating to the decisions taken by the High Representative and the possibility of lodging appeals against them, i.e. their judicial review is set forth in the appeal. The Constitutional Court emphasizes that the obligations of Bosnia and Herzegovina in public international law to cooperate with the High Representative and to comply with the decisions of the UN Security Council cannot determine the constitutional human rights within the scope of competence of BiH. Article II of the Constitution of Bosnia and Herzegovina guarantees the highest level of internationally recognized human rights and fundamental freedoms which shall apply directly and shall have propriety over all other law. However, the appellant points out that the appointed international judges "exclusively depend of the entity which appointed them". The appellant explains his allegations by pointing out that "they wanted to satisfy expectations of the international prosecutors who participated in the procedure by presenting the indictment".

46. The competences of the Divisions of the Court of BiH to which international judges are appointed include, beyond any doubt, certain matters derived from international law. The acknowledgment of supranational nature of international criminal law, established through the case-law of Nuremberg and Tokyo Military Tribunals, Tribunal in The Hague and Tribunal for Rwanda, includes international criminal tribunals as well. This certainly includes the situation in which certain number of international judges is appointed to national courts. The High Representative appointed international judges to the Court of BiH in accordance with the powers vested in him according to the UN Security Council's resolutions adopted in accordance with Chapter VII of the UN Charter and the Recommendation of the Registry pursuant to the Agreement of 1 December 2004, which was also signed by the President of the High Judicial and Prosecutorial Council as an independent body competent to appoint national judges, which is particularly important as it implies involvement of that body in the procedure preceding the appointment.

47. The Constitutional Court holds that the international judges, who were the members of the Panel which rendered the appealed verdict, were appointed in the manner and in accordance with the procedure complying with the standards relating to the fair trial provided for in Article 6 of the European Convention. In addition, the Law on Court of BiH, the Agreement of 1 December 2004 and

decisions on appointment, have created the prerequisites and mechanisms which secure the independence of judges from interference or influence by the executive authority or international authorities. The judges appointed in this manner are obliged to respect and apply all the rules which generally apply in national criminal proceedings and which are in conformity with the international standards. The term of office of these judges is defined, during which their activities are controlled. The motive behind their nomination was the need to establish and to strengthen national courts in the transitional period and to support the efforts of these courts to establish responsibility for serious violations of human rights and ethnically motivated crimes. It is therefore aimed at providing independence and impartiality of the judiciary and at administering justice. Even the fact that the manner of appointment was changed by the subsequent Agreement of 26 September 2006 so that the High Judicial and Prosecutorial Council of Bosnia and Herzegovina has become responsible for the appointment of international judges, does not itself automatically imply that their original appointments in the manner provided for at the time of the challenged verdicts was contrary to the principles of independence of the court in terms of Article 6(1) of the European Convention. The Constitutional Court holds that the appellant failed to submit convincing arguments and evidence in support of the allegations relating to the lack of independence of international judges. As to the appellant's allegations relating to the lack of independence of the national judge because of the fact that he is a person with "insufficient experience", the Constitutional Court holds that these allegations are *prima facie* ill-founded and do not require any extensive examination. Taking into account all the aforesaid, the Constitutional Court concludes that the appellant's allegations relating to the lack of independence and related violation of the standards relating to 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 are unfounded.

Impartiality

48. Impartiality implies that the court must not be burdened with prejudices in respect of the decision it takes. The court must not be under the influence of outside information or under any other pressure whatsoever but its view must be exclusively based on the matters presented during the trial. In determining whether a court was biased, it is necessary to make a distinction between the subjective and objective approach to impartiality. The subjective test relates to the personal impartiality of the members of the Panel and it must be presumed until there is proof to the contrary (see, ECtHR, the *Hauschildt vs. Denmark* case, paragraph 47). One can conclude that a judge is biased only when his

conduct during the proceedings proves it manifestly or when it follows from the content of the judgment. „Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held objectively justified" (see ECtHR, the *Fey vs. Austria* judgment of 24 February 1993, paragraph 30).

Objective impartiality

49. The appellant alleged that „ the Panels of the Court of BiH are located in the same building so that one has the impression that the Appellate Panel does not even exist (…) regardless of two-instance proceedings of the Court of BiH it is questionable whether everyday contacts and joint work guarantee the principle of unbiased two instance trial". The Constitutional Court deems that these allegations from the appeal constitute a complaint of absence of objective impartiality of the Court Panel in the particular case. In the jurisprudence of the Constitutional Court and the European Court for Human Rights a great number of cases was related to the situations whereby a judge had different procedural roles in the course of the proceedings (see European Court for Human Rights, *Piersack vs. Belgium*, Judgment of 1 October 1982, Constitutional Court Decision no. *AP 255/03* of 15 October 2004). However, in the case of the Constitutional Court no. *AP 767/04* the appellant, amongst the allegations referring to the impartiality of the court, stressed that the members of the Court Panel came to work by a vehicle for official use, also used by the Prosecutor, and that the offices of judges and prosecutors are in the same building. The Constitutional Court concluded that "indeed in a specific case, it does not bring into question either the subjective or objective impartiality of the court. Namely, one cannot only on the basis of a statement that the judge and the prosecutor came by the same car or that the judge's office is next to the prosecutor's, conclude that they have some sort of agreement, and that the court favors the Prosecution, as opposed to the Defense… Although in this specific case the Constitutional Court did not find the reasons indicating any sort of partiality of the court which would bring about a violation of the right to a fair trial… the court must refrain as much as possible, if objectively possible,

from any sort of unofficial contacts with the parties to the criminal proceedings as long as the trial is pending" (see Constitutional Court Decision, no. *AP 767/04* of 17 November 2005).

50. The Constitutional Court deems that the conclusion from above quoted decision can be applied to the specific case. All the more for the reason that this is a situation whereby two different panels of the same court are located in the same building and because an arbitrary allegation referred to in the appeal on "everyday contacts and joint work" in itself cannot constitute a violation of the impartiality of the court. In the same way one should consider the complaint referred to in the appeal, which refers to the fact that there is no hierarchical relationship between the Court of Bosnia and Herzegovina and other courts in Bosnia and Herzegovina, and that this court is competent for both, the first instance and second instance proceedings. Having considered all of the mentioned matters, the Constitutional Court concludes that the appeal allegations referring to the objective impartiality of the court are ill-founded, and, in conjunction with them, so are the allegations of a violation of 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.

Subjective impartiality

51. As regards the subjective impartiality of the court, the appeal states that "the court was biased and that the judges were burdened with prejudices, which they did not express directly. However, in the conducted probative proceedings, it is undisputable that the appellant is an Iraqi, of Arab origin, and that he, as a member of the Republic of Bosnia and Herzegovina Army, participated in the war in Bosnia and Herzegovina in 1993". Furthermore, a piece of evidence was presented through expert analysis by, and through hearing, an expert on the fight against terrorism, so it is "apparent that the judges had a subjective impression of a possibility that the appellant had an affiliation with some terrorist organizations". Also, it was mentioned that "in essence, evidence was presented but not accepted, for after the conclusion of the evidentiary proceedings, the arguments of the defense as well as the evidence refuting the allegations of the prosecution were not considered". As regards the bias of a member of the panel, Judge Finn Lynghjem, the appeal stated that in the course of the proceedings he proposed that the defense should give thought to the contents of the case *Naletilić vs. Croatia*, and "afterwards it turned out that actually the court had reached decisions prior to deliberation, for in the

reasoning of the unlawful decision the court actually referred to the aforementioned decision of the European Court for Human Rights".

52. The Constitutional Court deems that the appellant, apart from the arbitrary allegation on the prejudices of the court over his origin, gave no evidence whatsoever supporting such claims that the Court Panel or any of its members, in either stage of the proceedings, and in delivering the disputed verdict, had prejudices over either status of the appellant, nor were such prejudices expressed in the course of the work of the court. Even the appeal stated that the judges "did not directly express" their prejudices. Therefore, the existence of prejudice on the part of the judges remained only speculation and an assumption of the appellant. The fact that the court, in the course of the evidentiary proceedings, *inter alia*, presented a piece of evidence through expert analysis and through the hearing of an expert for terrorism, also, in itself cannot constitute grounds for a conclusion on the existence of prejudice on the part of the court regarding the appellant's affiliation with some terrorist organization. The Constitutional Court reiterates that the standards of the right to a fair trial include the freedom of the courts to decide which evidence need to be presented, and that they have to decide with equal attention on the presentation of evidence proposed by both the Defense and Prosecution. The appellant himself admitted in the appeal that the court had presented all the evidence but he, however, complains that the court failed to assess them in properly

53. The circumstance wherein a member of the Court Panel, in the course of the proceedings, pointed to the relevant case from the case-law of the European Court for Human Rights, as well as that the case is stated in the verdict, cannot be considered grounds for concluding that the judge was not impartial, or to a violation of the principle of the presumption of innocence, as implied by the appeal. Rather it indicates that the court followed the case-law of the European Court as the leading court in interpreting and applying standards referred to in the European Convention.

54. The Constitutional Court recognizes that the appellant has a subjective fear that the court was not impartial. However, from the appeal allegations and other documentation at the disposal of the court, one cannot conclude that such fear can be considered objectively justified, for there is no single evidence substantiating that. Therefore, the Constitutional Court concludes that the appeal allegations are ill-founded regarding the non-existence of impartiality of the court, and, in conjunction with it, the

allegation of a violation of 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.

Assessment of evidence and the principle of the presumption of innocence (*in dubio pro reo*)

55. Article 6 paragraph 2 of the European Convention stipulates that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law. This fundamental legal principle is elaborated also in the provisions of the Criminal Procedure Code, which was applied in the specific case. The European Court said of the principle of the presumption of innocence: *It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused* (see European Court for Human Rights, *Barbera, Messegue and Jobardo vs. Spain*, Judgment of 6 December 1988, paragraph 77). The Constitutional Court, in its case-law, has always affirmed this principle and the appeal in that connection justifiably points to the Decision of the Constitutional Court no. *AP 661/04*. The Constitutional Court in this Decision emphasised *If we consider constitutional right to a fair trial in the context of applicable positive law in Bosnia and Herzegovina, it has to be recognized that a substantive part of the right to a fair trial consists of conscientious and thorough evaluation of evidence and facts established in the proceedings before ordinary courts. This is one of the fundamental provisions referring to presentation and evaluation of evidence which finds its place in all applicable procedural laws in Bosnia and Herzegovina, as also in the Code of Criminal Procedure of the Republika Srpska. Article 287, paragraph 2 of that Law reads as follows: '[...] The Court shall be obliged to conscientiously evaluate each piece of evidence in isolation and in connection with other evidence [...]', so it appears as an inseparable element of the right to a fair trial* (see Decision of the Constitutional Court, no. *AP 661/04* of 21 April 2005).

56. In the instant case, from the appeal, despite its unusual extensiveness, one may conclude that the complaint about an alleged violation of this principle essentially relates to the court not assessing with equal attention the evidence presented to support the charge against the appellant and that benefiting him. Namely, the appeal stated that "the parties to the proceedings participated on an equal

footing in presenting evidence and in raising objections. Thus in that respect the provisions of the Criminal Procedure Code of Bosnia and Herzegovina were complied with in their procedural parts. Therefore in essence no objections can be raised against the procedure itself if the court decisions are, regarding their essence, in accordance with the contents of the presented evidence. Essentially, evidence was presented, but was not accepted, as after the conclusion of the evidentiary proceedings the arguments of the defense, as well as the arguments challenging the prosecution allegations, were not considered". Moreover, regarding the assessment of the allegations of some witnesses, the appeal stated "that regarding the assessment of this piece of evidence the Panel of the Appellate Division of the Court of Bosnia and Herzegovina was guided by subjective assessment of evidence, contrary to the binding principle *in dubio pro reo*, which brings the fairness of the trial into question".

57. The appeal used these arguments in the complaint over the impartiality of the court on which the Constitutional Court has already reached a conclusion. The Constitutional Court reiterates that it is not, in general, competent to check the established facts and the ways in which the ordinary courts interpreted positive legal regulations, unless the decisions of those courts violate constitutional rights. This will be the case when a decision of the ordinary court violates constitutional rights, i.e. if the ordinary court misinterpreted or misapplied some constitutional right, or disregarded that right, if the application of law was arbitrary or discriminatory, if procedural rights violations occurred (fair trial, access to court, effective legal remedies and in other cases), or if the established factual situation points to a violation of the Constitution of Bosnia and Herzegovina (see Constitutional Court, Decisions no. *U 39/01* of 5 April 2002, published in *Official Gazette of Bosnia and Herzegovina*, no. 25/02 and no. *U 29/02* of 27 June 2003, published in *Official Gazette of Bosnia and Herzegovina*, no. 31/03). Also, the Constitutional Court emphasizes that it is beyond its competence to assess the quality of conclusions of the ordinary courts regarding the assessment of evidence, if this assessment does not seem to be evidently arbitrary. The former Human Rights Chamber had such a case-law, deeming that "it is not within the competence of the Chamber to substitute the assessment of the national courts by its own assessment of facts, if such conclusions do not seem inadmissible or arbitrary" (see former Human Rights Chamber, *"Trgosirovina Sarajevo (DDT)" vs. the Federation of Bosnia and Herzegovina*, case no. *CH/01/4128*, Decision on Admissibility of 6 September 2000).

58. Thus, even though it has imposed limitations on itself regarding whether it would review ways in which the ordinary courts established factual situation and assessed evidence, the Constitutional Court did not entirely exclude that option. It rather limited its competence on that issue on the event that the review of the factual situation be carried out if *the procedure contained a violation of the right to a fair trial within the meaning of Article 6 of the European Convention*, that is *if the established factual situation points to a violation of the Constitution*, or if the assessment of evidence *seems manifestly arbitrary*. In that respect there are numerous instances in the case-law where the Constitutional Court interfered in the ways in which the ordinary courts assessed the factual situation and evidence (see Constitutional Court, Decisions no. *U 15/99* of 15 December 2000, *Official Gazette of Bosnia and Herzegovina*, no. 13/01, no. *U 14/00* of 4 May 2001, *Official Gazette of Bosnia and Herzegovina*, no. 33/01, Decision no. *AP 661/04* of 21 April 2005). However, in the particular case, the ordinary court explained in a satisfactory way how it assessed certain evidence and by which reasons it was guided in accepting or rejecting them. The Constitutional Court did not find that the assessment of evidence *seemed manifestly arbitrary* which would require departing from the case-law according to which the Constitutional Court does not assess the quality of conclusions of the ordinary courts regarding the assessment of evidence.

59. Due to the all of the abovementioned, the Constitutional Court concludes that the appeal allegations on the violation of the principle of the presumption of innocence are ill-founded, and, in conjunction with it, the violation of the right to a fair trial referred to in Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 2 of the European Convention.

No punishment without law

60. One of the essential allegations of the appellant refers to the relation between the respective criminal proceeding and Article 7 of the European Convention, that is, as the appellant stated, he was sentenced under the Criminal Code of Bosnia and Herzegovina, and not under the Criminal Code of the SFRY, valid at the time of the commission, which provided a more lenient sanction.

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."

61. The scope of Article 7 of the European Convention is determined by the concept of a "criminal offense" and by the concept of a "heavier penalty". It is apparent that the meaning of the term "criminal offense" is narrowly connected with the term "criminal charge" referred to in Article 6 of the European Convention. Therefore one can say that Article 7 is applicable to those disciplinary and administrative decisions which fall under the scope of Article 6 of the European Convention. The term "penalty" ought to be interpreted autonomously in order for the protection arising from Article 7 to be effective. For the punishment to be included under Article 7 of the European Convention, it has to be imposed following the sentence for a "criminal offense".

62. A guarantee contained in Article 7 of the European Convention is one of the fundamental factors of the rule of law and it has a prominent place in the system of protection of the rights safeguarded by the European Convention. Article 7 of the European Convention ought to be interpreted and applied in a way providing for a successful protection against arbitrary prosecution, conviction and punishment.

63. In the case of *Kokkinakis vs. Greece* (Series A, no. 260-A, page 22, paragraph 52), the European Court interpreted Article 7 of the European Convention in a way that that Article is not limited to prohibition of a retroactive application of the Criminal Code to the detriment of the applicant. Rather that article, more generally, contains a principle that only law can establish the existence of a criminal offense and that only law can prescribe a punishment (*nullum crimen, nulla poena sine lege*) as well as the principle that the Criminal Code should not be interpreted extensively to the detriment of the accused. In the mentioned case, the European Court specifically emphasized that this requirement of Article 7 of the European Convention is met when an individual referred to in the

relevant provision, if necessary, by means of the Court interpretation, can understand which criminal activities and mistakes can make him/her subject to criminal prosecution.

64. The Constitutional Court accepts the interpretation of Article 7 of the European Convention as interpreted by the European Court and it points to the necessity of a requirement for quality, accessibility and foreseeability of the laws in force and a compelling element of the court interpretation for the sake of clarifying possibly disputable provisions and giving certain terms sense and purpose in the real life, which essentially is the essence of regulating human behavior by laws. Thereby, Article 7 of the European Convention, in the opinion of the Constitutional Court, cannot be interpreted by preventing gradual development of the rules of criminal responsibility through court interpretations on a case by case basis, provided that the result of development is in accordance with the essence of a criminal offense and can be reasonably anticipated.

65. In this particular case, the appellant expressly alleges that according to the then applicable regulations, the offence he was convicted of, constituted a criminal offence at the time it was committed, but he expressly points to the application of the substantive law in his case and examines primarily the concept of a "more lenient punishment", *i.e.* "more lenient law". He deems that the Criminal Code of SFRY, which was in force at the time of the commission of the criminal offense that the appellant was convicted of, and concerning which, *inter alia*, a death penalty was prescribed for the severest forms, is more lenient law than the Criminal Code of Bosnia and Herzegovina, which prescribes a punishment of a long term imprisonment for the severest forms of the criminal offense that the appellant was convicted of.

66. Vis-à-vis these allegations of the appellant, the Constitutional Court reckons that it is not necessary to explain in detail the concept of "more lenient law", albeit it is a fact that the Statute of the International Criminal Tribunal for the former Yugoslavia, adopted by the UN in 1993, and which in Article 24 provides:

> *1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.*

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.…

67. Although adopted in 1993, the Statute in Article 1 provides:

Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Thus, the validity of the provisions of the 1991 Statute is retroactive.

68. In practice, legislation in all countries of former Yugoslavia did not provide a possibility of pronouncing either a sentence of life imprisonment or long-term imprisonment, as often done by the International Criminal Tribunal for the former Yugoslavia (the cases of *Krstic, Galic*, *etc*.). At the same time, the concept of the SFRY Criminal Code was such that it did not stipulate either long-term imprisonment or life sentence but death penalty in case of a serious crime or a 15 year maximum sentence in case of a less serious crime. Hence, it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law.

69. In this context, the Constitutional Court holds that it is simply not possible to "eliminate" the more severe sanction under both earlier and later laws, and apply only other, more lenient, sanctions, so that the most serious crimes would in practice be left inadequately sanctioned. However, the Constitutional Court will not provide detailed reasons or analysis of these regulations but it will focus on the exemptions from obligations under Article 7 paragraph 1 of the European Convention, which are regulated, according to generally accepted opinion, by Article 7 paragraph 2.

Exceptions to the application of Article 7 paragraph 1 of the European Convention

70. In such situation, the Constitutional Court holds that Article 7 paragraph 2 of the European Convention refers to "the general principles of law recognized by civilized nations", and the provision

of Article III(3)(b) of the Constitution of Bosnia and Herzegovina establishes that "the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities." It follows from this provision that these principles constitute an integral part of the legal system in Bosnia and Herzegovina even without special ratification of conventions and other documents regulating their application and thus including the 1993 Statute of International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former SFRY, too (UN Document No. S25704).

71. Further, the Constitutional Court recalls the fact that the Constitution of Bosnia and Herzegovina is part of an international agreement and, although this fact does not diminish its importance, it clearly points to the position of international law within the BiH legal system so that a number of international conventions, such as the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Geneva Conventions I-IV Relative to the Protection of Civilian Persons in Time of War (1949), and its Additional Protocols I-II (1977), have a status equal to that of constitutional principles and are directly applied in Bosnia and Herzegovina. It is necessary to mention that the former SFRY was signatory to the said conventions and that Bosnia and Herzegovina, as an internationally recognized subject that declared its independence on 6 March 1992, accepted all conventions ratified by the former SFRY and, thereby, the aforementioned conventions which were subsequently taken over by Annex 4, *i.e.* the Constitution of Bosnia and Herzegovina.

72. The wording of Article 7 paragraph 1 of the European Convention is limited to the cases in which an accused person is found guilty and convicted of a criminal offence. However, Article 7 paragraph 1 of the European Convention prohibits neither the retrospective application of laws nor does it exclude the *non bis in idem* principle. Also, Article 7 paragraph 1 of the European Convention could not be applied to the cases such as those referred to in the War Damages Act of 1965 of the United Kingdom, according to which, the common law rule, that stipulated compensation for private property in certain circumstances at time of war, was amended with retrospective effect.

73. The Constitutional Court notes that Article 7 paragraph 1 of the European Convention concerns criminal offences "under national or international law". Identically, the Constitutional Court particularly points to the interpretation of Article 7 provided in a number of texts dealing with this issue, and which are based on the European Court's position that a conviction, resulting from a

retrospective application of national law, shall not constitute a violation of Article 7 of the European Convention if the conviction is derived from the crime under "international law" at the time when it was committed. This position is particularly relevant for the present case as well as similar cases given that the essential point of the appeal refers to the application of primarily international law, *i.e.* the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Geneva Conventions I-IV Relative to the Protection of Civilian Persons in Time of War (1949), and its Additional Protocols I-II (1977), and not to the application of one or another criminal law, irrespective of their contents or stipulated sanctions.

74. In addition to the aforementioned and as to the retrospective application of criminal legislation, the Constitutional Court highlights that Article 7 of the European Convention, immediately after World War II, was formulated with particular intention to encompass the general principles of law recognized by civilized nations where the notion of "civilized nations" was taken over from Article 38 of the Statute of the International Court of Justice, which is generally recognized as the third formal source of international law. In other words, the Statute of the International Court of Justice relates to the member states of this court and, the rules established by it, are regarded as source of law, which even concern the municipal authorities. Within the context of the Statute of the International Court of Justice, likewise Article 7 of the European Convention, it exceeds the framework of its national law and refers to the "nations" in general. Accordingly, the Constitutional Court holds that the standards for their application should be looked for in this context and not just within a national framework.

75. The Constitutional Court further recalls that the *travaux préparatoires* refer to the formulation in paragraph 2 of Article 7 of the European Convention, which is calculated to "make it clear that Article 7 does not have any effect on the laws which were adopted in certain circumstances after World War II and intended for punishment of war crimes, treason and collaboration with enemy, and it is not aimed at either moral or legal disapproval of such laws." (see *X vs. Belgium*, No. 268/57 , 1 Yearbook 239 (1957); the translation in the third digest 34 *Cf. De Becker vs. Belgium* No. 214/56), 2 Yearbook 214 (1958)). In fact, the wording of Article 7 of the European Convention is not restrictive and it has to be construed dynamically so to encompass other acts which imply immoral behavior generally recognized as criminal according to national laws. In view of the above, the War Crimes Act of 1991 of the United Kingdom confers retrospective jurisdiction on United Kingdom courts in respect of certain

grave violations of the laws such as murder, manslaughter or culpable homicide committed in German-held territory during the Second World War

76. In the Constitutional Court's opinion, the aforementioned would not be inconsistent with Article 7 paragraph 1 of the European Convention as it clearly determines that war crimes are "crimes according to international law" in terms of the universal context of jurisdiction to conduct proceedings so that the convictions for such offences, under the law which subsequently defined and determined certain acts as criminal and stipulated criminal sanctions, but which did not constitute criminal offences under the law that was applicable at the time the criminal offence was committed. In the case No. 51891/99, *Naletilić vs. the Republic of Croatia*, the European Court of Human Rights took a decision on 4 May 2000. It follows from the said decision that the applicant was charged by the Prosecutor's Office of the International Criminal Tribunal for the former Yugoslavia with war crimes committed in the territory of Bosnia and Herzegovina and that he submitted identical complaints as those of the appellant in the present case, i.e. he pointed to the application of "more lenient law", *i.e.* he highlighted that the criminal Code of the Republic of Croatia stipulates a more lenient criminal sanction than the Statute of the International Criminal Tribunal for the former Yugoslavia and he specified the application of Article 7 of the European Convention. In its judgment, the European Court of Human Rights considered the application of Article 7 of the European Convention and underlined the following: "As to the applicant's contention that he might receive a heavier punishment by the ICTY than he might have received by domestic courts if the latter exercised their jurisdiction to finalize the proceedings against him, the Court notes that, even assuming Article 7 of the Convention to apply to the present case, the specific provision that could be applicable to it would be paragraph 2 rather than paragraph 1 of Article 7 of the Convention. This means that the second sentence of Article 7 paragraph 1 of the Convention invoked by the applicant could not apply. It follows that the application is manifestly ill-founded … and, therefore, must be rejected…"

77. Finally, the Constitutional Court recalls that Nuremberg and Tokyo War Crimes Trials were conducted in 1945 and 1946, after World War II, for the crimes that were only subsequently, *i.e.* by the Geneva Convention, defined as acts amounting to war crimes, crimes against humanity, crimes of genocide, *etc*. and which defined aggressive war as an "international crime", as confirmed by the International Law Commission in its Yearbook of 1957, Vol. II. Related discussions on the principle "*nullum crimen nulla poena sine lege*" were held at that time, too. The same applies to the 1993 Statute

of International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former SFRY (UN Document No. S25704).

78. It is quite clear that the concept of individual criminal responsibility for acts committed contrary to the Geneva Convention or appropriate national laws is very closely related to the concept of human rights protection since the human rights and the related conventions concern the right to life, the right to physical and emotional integrity, prohibition of slavery and torture, prohibition of discrimination, *etc*. In the Constitutional Court's opinion, it seems that a lack of the protection of victims, *i.e.* inadequate sanctions for perpetrators of crime does not comply with the principle of fairness and the rule of law, embodied in Article 7 of the European Convention, and which, in paragraph 2 allow this exemption from the rule set forth in paragraph 1 of the same Article.

79. In view of the above, and having regard to application of Article 4(a) of the Criminal Code of BiH in conjunction with Article 7 paragraph 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 conducted before the Court of BiH does not constitute a violation of Article 7 paragraph 1 of the European Convention.

As to discrimination relating to Articles 6 and 7 of the European Convention

80. The appellant deems that he has been a victim of discrimination with regard to the respect for the right to a fair trial and the application of Article 7 of the European Convention. He mentioned that his case was decided by the Court of BiH differently compared to identical cases decided by entities' courts in other court proceedings. The appellant holds that he is entitled to an identical judicial outcome.

81. Article II(4) of the Constitution of Bosnia and Herzegovina reads:

The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion,

political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 of the European Convention reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

82. Under the case-law of the European Court of Human Rights, discrimination occurs when a person or a group in an analogous situation are subject to differential treatment based on sex, race, colour, language, religion, (…), in the enjoyment of the rights and freedoms safeguarded by the European Convention if it has no objective and reasonable justification, or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized (see European Court of Human Rights, *Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" vs. Belgium*, Judgment of 9 February 1967, Series A, No. 6, paragraph 10). In addition, it is irrelevant whether discrimination results from a difference of treatment permitted by legislation or arose from the mere application of laws (see European Court of Human Rights, *Ireland vs. the United Kingdom*, Judgment of 18 January 1978, Series A, No. 25, paragraph 226).

83. A difference of treatment in view of the identical laws applied differently in identical situations should be taken into account in those cases where courts do not enjoy right to a margin of appreciation, such as in the case of meting out of a criminal sanction in similar criminal cases. In such cases, it is necessary to respect the judicial independence of a judge in deciding cases (see the application filed to the former European Commission of Human Rights, E 15252, *K. vs. FR Germany*, dated 21 November 1990). Nevertheless, if there is no margin of appreciation, identical cases should be decided alike. This obligation arises from the principle of legal certainty which operates as an integral part of the rule of law, which is one of the fundamental principles of a democratic society concerning all constitutional rights (see *mutatis mutandis* Judgment of the European Court of Human Rights, *Iatridis vs. Greece*, dated 25 March 1999, Reports and Decisions 1999-II, paragraph 58).

84. Nevertheless, courts are allowed to apply the law to similar cases differently if they have objective and reasonable justification for doing so. This is the case, for example, when the challenged decision is lawful and constitutional (see Constitutional Court, Decision No. *U 149/03* of 28 November 2003). In the said decision, the Constitutional Court found no discrimination in the situation where the appellants referred to differential treatment, *i.e.* different court judgments taken on the same or similar issues and by which the appellants' claims were dismissed while in other cases (other proceedings) the plaintiffs' claims were granted. It was established that the court verdicts relating to the appellants were delivered in accordance with the law and the Constitution of Bosnia and Herzegovina, and that the other decisions referred to by the appellants to establish differential treatment, although not directly the subject matter of the Constitutional Court's examination, indicated unlawful and unconstitutional conduct by the ordinary courts.

85. It follows from the aforementioned that an appeal manifestly lacks a legal foundation in the situations when the competent court established a decision challenged by the appeal as constitutional while the appellant refers to differential treatment in terms of other cases in which constitutionality was not challenged**.** Such an interpretation restricts the principle of the prohibition of differential treatment in terms of the principle of legal certainty but it is in compliance with the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina. Actually, the principle of the rule of law prevails in such cases.

86. In order for the Constitutional Court to establish discrimination, in terms of the *Belgium Linguistic Case*, it must examine the present case to come to the conclusion as to whether it concerns: (a) differential treatment, (b) an analogous situation; (c) any reasons as enumerated in the provisions on the prohibition of discrimination; (d) objective and reasonable justification for such treatment. However, for the reasonableness of the proceedings, the Constitutional Court shall first determine as to whether the challenged verdict is in compliance with the Constitution of Bosnia and Herzegovina and, if so, it can result in dismissing the appeal as ill-founded due to a lack of legal arguments whereby the appellant would be able to prove discrimination.

87. As to the related allegations of the appellant, the Constitutional Court underlines that the subject matter under consideration in the present case is the application of the constitutional rights and the rights safeguarded by the European Convention to the instant case in the light of the Criminal Code of BiH, and not the legal arrangements or the case-law applied at the level of the Entities. In any case, in

the context of the appellant's allegations, the Constitutional Court holds that the laws applied by the Entities must be in harmony with the laws at the state level because other legal arrangements would possibly result in discrimination of the persons who are subject to the criminal proceedings for the same criminal acts at the level of the Entities. Accordingly, the present case cannot be a reason for the Constitutional Court to determine whether or not the proceedings conducted in similar cases before the courts of the Entities are in accordance with the Constitution of Bosnia and Herzegovina. In addition, the Constitutional Court particularly points to the fact that the criminal laws at the level of the Entities do not comprise any provisions relating to "criminal offences against humanity and values protected by international law" (those are contained in the Criminal Code of BiH) nor do they incorporate a provision that is equivalent to Article 4(a) of the Criminal Code of BiH, *i.e.* they do not incorporate Article 7 of the European Convention into their provisions.

88. The Constitutional Court notes that criminal legislation at the level of the Entities does not contain provisions on criminal offences against humanity and war crimes. This is justified by the fact that it involves criminal offences relating to a breach of the rules of international law and those are uniformly regulated by the state, *i.e.* by the state law. On the other hand, the fact is that these criminal offences, provided for by the state law, shall also be subject to the proceedings before the courts of the Entities. This means that the mentioned courts have to apply the principles and safeguards provided for by international criminal law which is incorporated into the Criminal Procedure Code of BiH (and thus also Article 7 of the European Convention, *i.e.* Article 4(a)), and particularly in view of the constitutional obligation to directly apply the European Convention.

89. For the reasons stated above**,** the Constitutional Court considers that "a lack of" the entity laws stipulating these offences and safeguards at the level of the Entities imposes an additional obligation to the courts of the Entities to apply, when deciding on the criminal offences of war crimes, the Criminal Code of BiH and other relevant laws and international documents applicable in Bosnia and Herzegovina. It follows from the aforementioned that the courts of the Entities are also obligated to pursue the case-law of the Court of BiH. Otherwise, by acting differently, the courts of the Entities would breach the principle of legal certainty and the rule of law.

90. In the proceedings conducted before the Court of BiH based on the Criminal Code of BiH and Criminal Procedure Code of BiH, *i.e*. the laws which have not been determined as being in violation of the constitutional rights or the rights safeguarded by the European Convention, it is unfounded to refer

to discrimination based on the courts' proceedings and legislation at the level of the Entities. Such practice of the courts in the proceedings at various levels is probably the result of lack of a court at the level of Bosnia and Herzegovina, which would harmonize the case-law of all courts in Bosnia and Herzegovina and contribute to the full expansion of the rule of law in Bosnia and Herzegovina. Moreover, in the Constitutional Court's opinion, incompatibility of the laws and the case-law at different levels may raise an issue as to the compatibility of the laws of the Entities with the laws of Bosnia and Herzegovina but by no means may it raise an issue as to the compatibility of the laws of Bosnia and Herzegovina with the laws of the Entities. However, differential treatment by the courts of the Entities does not necessarily constitute discrimination against the persons subject to the proceedings at the level of Bosnia and Herzegovina unless it is possibly established that the laws applied at the level of Bosnia and Herzegovina are in violation of the Constitution of Bosnia and Herzegovina or the European Convention. The Constitutional Court has observed such practice and differential legal arrangements at the level of the Entities but it cannot exercise its jurisdiction under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina since no request for a review of constitutionality has been filed by authorized persons in the present case.

91. Accordingly, taking into account the conclusion relating to the previous consideration of Article 7 of the European Convention and the conclusion relating to the alleged "partiality" of the Court of BiH as well as other aspects of Article 6 of the European Convention, for which the Constitutional Court has not established a violation of the constitutional rights and the rights safeguarded by the European Convention, it follows that the verdict of the Court of BiH is based on the legal provisions which are in the view of the Constitutional Court undisputedly constitutional. In accordance with the aforementioned, the Constitutional Court concludes that the appellant lacks legal arguments to prove that he was discriminated against in the proceedings before the Court of BiH, and the Constitutional Court has already established that those proceedings were conducted in accordance with Articles II(3)(d) and II(3)(e) of the Constitution of Bosnia and Herzegovina and Articles 5, 6 and 7 of the European Convention. Therefore, it is not necessary to examine whether there has been a differential treatment or an analogous situation or any grounds of discrimination with regard to other citizens who have exercised their rights in the proceedings before other courts in Bosnia and Herzegovina and, particularly, considering the fact that the appellant has not referred to the application of other relevant provisions on the non-discrimination, which are applicable in Bosnia and Herzegovina.

92. The Constitutional Court concludes that the challenged verdict of the Court of BiH is not in violation of the appellant's right to a fair trail under Article II(3)(e) in conjunction with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 6(1) in conjunction with Article 14 of the European Convention as well as Article 14 in conjunction with Article 7 of the European Convention.

VIII. Conclusion

93. The Constitutional Court concludes that there is no violation of the right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina in the situation when the applicant has been in detention for one criminal offence while an indictment for another criminal offence has been concurrently prepared. The Constitutional Court has concluded that the facts that the High Representative appointed the judges who adjudicate cases in the War Crimes Panels as well as that the Court of BiH and the Prosecutor's Office are located in the same building are not in breach of the principle of "independence" and "impartiality" of the court. Further, the Constitutional Court has established that in the present case there is no violation of the right to a fair trial with regard to the principle *in dubio pro reo* when the court, having evaluated all evidence, gives credence only to some evidence on the basis of which it passes the convicting verdict. In addition, the Constitutional Court has concluded that there is no breach of Article 7 of the European Convention since paragraph 2 of the mentioned Article allows exemptions in the cases relating to the war crimes and crimes in violation of humanitarian law recognized by "civilized nations" and the present case embodies the exemption from obligations under Article 7 paragraph 1 of the European Convention. Finally, the Constitutional Court has ascertained that the appellant has no legal arguments for referring to alleged discrimination when no violation of either the constitutional rights or the rights guaranteed by the European Convention has been established in the present case.

94. Pursuant to Article 61(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision. Separate Dissenting Opinion of Judge Mato Tadić makes an integral part of this Decision.

95. Pursuant to Article VI(4) of the Constitution of Bosnia and Herzegovina, the decisions of Constitutional Court shall be final and binding.

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Attachment:

- Separate Dissenting Opinion of Judge Mato Tadić

SEPARATE DISSENTING OPINION OF JUDGE MATO TADIĆ IN CASE NO. 1785/06, DECISION OF CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA OF 30 MARCH 2007

Pursuant to Article 41(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 60/50), I hereby give my separate dissenting opinion, in which I am dissenting from the opinion of the majority of the Judges of the Constitutional Court of Bosnia and Herzegovina in the aforesaid decision for the following reasons:

1. This case has raised several constitutional issues with regards to the protected rights, as well as several issues relating to the rights safeguarded under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2. In taking a decision on open legal issues in this case, the Constitutional Court did not reach a consensus. I am one of those who did not quite fully agree with the adopted decision.

3. First of all, I must emphasize that I agree with the most part of the decision of Constitutional Court of BiH. I agree with the majority that voted in favor of such a decision in relation to the legal opinion and arguments that were given with regards to the appellants' allegations as to the violations of Article II(2) (Human Rights and Fundamental Freedoms – International Standards) and II(3)(d) (Right to liberty and security of person) of the Constitution of Bosnia and Herzegovina.

4. With reference to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – the right to a fair hearing in civil and criminal matters and other rights relating to criminal proceedings, the part relating to the impartiality of the court is fully acceptable.

5. As for the part of the mentioned legal issue which is related to the independence of judges, in principle I support it. However, I would like to draw the attention to the fact that this part should have been worked out in a different manner and other arguments should have been offered. Namely, during the period prior to signing the Agreement of 26 September 2006 the issue of independence of judges was very questionable when compared to the independence of international judges. It should be recalled that at the very beginning the judges were appointed by the High Representative for the term of office in duration of two years and they could have been reappointed for another two years of term of office without being subject to any domestic control or review of their knowledge of national legislation. In addition, at the beginning they were not even obligated to take a solemn oath within the meaning of compliance with the Constitution of BiH and laws of Bosnia and Herzegovina, which would guarantee them an absolute immunity for all their actions, etc. All of this raises doubts as to the standard governing the independence of judges. One of the reasons for signing the Agreement of 26 September 2006 was*, inter alia*, removing any doubts concerning the judges' independence and including as many domestic institutions as possible in the procedure of their appointment, although, even by this Agreement, the provision was not incorporated with regards to their accountability for any errors they may have made while performing this duty. However, with the 2004 Agreement

a significant step ahead was made in meeting the standards governing the independence of judges. Therefore, the Constitutional Court should have used the arguments from the Law on the Court of BiH and the 2004 Agreement to a larger extent, as well as the fact that there was no definite statement that would bring the independence of judges into question. Finally, for all the aforesaid reasons and regardless of these partial deficiencies, I can give my support to the conclusion of majority with respect to non-existence of violation.

6. I also support a part relating to the assessment of evidence and principle of presumption of innocence (*in dubio pro reo*) referred to in the Reasons of the Decision, paragraphs 55 through 59.

7. As for the part where I disagree with the majority of judges, it is related to **"no punishment without law" -** Reasons of the Decision, paragraphs 60 through 92.

8. It is my opinion that more lenient law should be applied before the domestic courts, i.e. the law that was in force at the time of commission of criminal offence. It is not easy to give an answer as to which law is more lenient and this legal issue is much more complex than it appears. Taking into account around ten criteria that have been worked through the theory and practice, one may conclude that in the instant case the prescribed penalty is a key moment which is relevant to the question which law is more lenient. Given that in the former criminal legislation of ex Yugoslavia, which Bosnia and Herzegovina inherited by its Decree in 1992, the same criminal offence existed (Article 142 of the inherited SFRY Criminal Code) and provided for the imprisonment penalty in duration of five years or death penalty, while the new criminal legislation applied in the instant case (Article 173 of the BiH Criminal Code) provides for an imprisonment penalty in duration of 10 years or long-term imprisonment, the basic question is which law is more lenient. At first impression, the 2003 Law is more lenient since it does not provide for the death penalty. However, taking into account that after the Washington Agreement and the Constitution of the Federation BiH had entered into force in 1994, the death penalty was abolished, which was only confirmed by the Constitution of BiH from 1995 and taking into account the positions of ordinary courts in Bosnia and Herzegovina, in the Entities and the Brčko District (Supreme Court of Federation of BiH, Supreme Court of Republika Srpska and Appellate Court of Brčko District) that death penalty shall not be pronounced (this position was also taken by the Human Rights Chamber in case *Damjanović and Herak vs. Federation of Bosnia and Herzegovina*), it appears that the 1992 law is more lenient. According to the aforesaid positions and the law, the maximum imprisonment sentence that may be pronounced for to this criminal offense is 20 years.

9. Referring to Article 7 paragraph 2 of the European Convention is irrelevant in the instant case. Article 7 paragraph 2 of the European Convention has a primary task to cover the criminal prosecution for the violations of Geneva conventions before the international bodies established to deal with such cases, for example before the International Criminal Tribunal for Former Yugoslavia and Rwanda and to legally cover the cases pending before domestic courts when domestic legislation failed in prescribing the said incriminations as criminal offenses. In other words, this is the case when the courts failed to include all the elements characterizing the said offenses referred to in Geneva conventions. This case is not raising that issue. The criminal offense of that kind existed in the domestic legislation both at the time of commission of offense and at the time of trial and therefore all the mechanisms of criminal law and

safeguarded constitutional rights should be consistently applied, which includes the rights guaranteed under the European Convention. The *Naletelić* case is irrelevant here because it was an international prosecutor who accused the said person before the international tribunal which is established on the special basis and is vested with the powers defined by the Resolution of the United Nations and Statute and it does not apply national legislation but rather its own procedures and sanctions/penalties. If it were any different, a very small number of accused persons would respond to summons for proceedings before the court. Therefore, I am of the opinion that the position of European Court of Human Rights in *Naletelić* case is absolutely correct, but this position cannot be applied in the instant case.

10. I consider that an extensive reference to international court is absolutely unnecessary, for example: reference to its jurisdiction etc., since the issue here concerns simply the domestic court conducting a trial in compliance with national legislation and it does not involve the case which was transferred by an international tribunal.

11. For the most part, the decision deals with history (Nuremberg, Tokyo) and generally with an international aspect which is completely unnecessary in the instant case because our national legislation, as already pointed out, had this criminal offence incorporated and, at the time of commission of the offense, the sanction was prescribed unlike the Nuremberg case. Moreover, the appellant is not challenging the aforesaid. It is in fact the appellant himself who pointed out that the national legislation had the incriminated acts coded as criminal offense and sanction and the appellant is only requesting it to be applied, i.e. and he also stated that due to the failure to apply Article 142 of the inherited SFRY Criminal Code as BiH Criminal Code the violation of the Constitution and European Convention was committed in relation to Article 7 paragraph 1.

12. Wishing to make this elaboration short I will recall the opinion of Mr. Antonio Cassese, the esteemed professor of the State University in Florence, who, at some point was appointed the President of International Criminal Tribunal in The Hague. In his expertise he was doing in 2003 entitled **"Opinion on the Possibility of Retroactive Application of Some Provisions of New Criminal Code of Bosnia and Herzegovina**", Professor Cassese concluded the following: "**Finally, let us deal with the issue whether the Court of BiH should apply the more lenient sanction in case of crime for which new criminal code prescribes a graver penalty than the one envisaged by former law. The reply to this question can only be affirmative. This conclusion rests on two legal basis: first, there is a general principle of the international law according to which if one crime is envisaged in two successive provisions with one imposing less stricter penalty, that penalty should be determined according to *favor libertatis* principle; secondly, this principle is explicitly mentioned in Article 7.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms wherein it is stated that no heavier penalty shall be imposed than the one that was applicable at the time the criminal offence was committed. Accordingly, "the Court of BiH should always apply more lenient penalty whenever there is a difference in length of penalty when a former is compared with the new criminal provision. It is clear that retroactive application of criminal code is related to the penalty only and not to other elements of this Article."**

13. It is an interesting point that the Constitutional Court actually avoided answering the legal question posed by the appellant about the more lenient law. In its decision the Constitutional Court states that the former law is indeed more lenient, without explaining the reasons for this opinion, but that in the instant case Article 7 paragraph 2 of the European Convention should be applied, which makes an exception to the application of more lenient law.

14. I believe that the first question to be answered is "which law is more lenient": the 1992 Law or 2003 Law? Then, depending on the given answer, the answer to the second open question should follow. Namely, if the Law from 1992 is not more lenient, then the issue of discrimination is the only issue that remains pending. Nevertheless, if the Law from 1992 is in fact more lenient, then it should be answered why that law is not going to be applied in the instant case. The Constitutional Court chose another direction claiming that the more lenient law should not be applied without previously determining which law is more lenient. Regretfully, that is the point at which I disagree with the majority of judges.

15. With reference to the issue of discrimination, the appellant points out that as to the majority of persons in Bosnia and Herzegovina that have been accused for the same offenses committed at the same time, they are processed in accordance with the more lenient law from 1992. According to the appellant's allegations, there is no objective or reasonable justification for this differential treatment and it is not proportionate to the aim sought to be achieved. I do agree with the said allegations since the analysis of the completed proceedings in BiH with respect to this criminal offense indicates that an absolute majority is treated in a different manner, i.e. according to a more lenient law, when compared with minority. In particular, I disagree with the opinion presented in our decision that the Entity courts must harmonize their jurisprudence with the Court of BiH since this implies that the minority will dictate the principles of behavior of majority, which is in a more favorable position, instead of being the other way around, that the minority is brought in a position of majority.

16. For the aforesaid reasons, I could not agree fully with the opinion of majority which is presented in this decision.

Mato Tadić
Judge
Constitutional Court of Bosnia and Herzegovina