

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

Ms. Seada Palavrić, President

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Krstan Simić

Mr. Mirsad Ćeman

Having deliberated on the appeal of Mr. **Nermin Ćupina** in case No. **AP 3388/06**, at its session held on 17 March 2009 adopted the following

## DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by **Mr. Nermin Ćupina** against the Judgments of the Court of Bosnia and Herzegovina Nos. Kž-45/06 of 25 October 2006 and K-75/05 of 25 April 2006 is hereby 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 Brčko District of Bosnia and Herzegovina*.

## REASONING

### I. Introduction

1. On 22 December 2006, Mr. Nermin Ćupina ("the appellant") from Sarajevo, represented by lawyer Mr. Fahrija Karkin, filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") against the judgments of the Court of Bosnia and Herzegovina ("the Court of BiH") Nos. Kž-45/06 of 25 October 2006 and K-71/05 of 25 April 2006. The appellant also filed a request for an interim measure by which the Constitutional Court would postpone the enforcement of the imprisonment sentence pending a decision on the appeal. On 28 December 2007, the appellant supplemented the appeal.

### II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 22 January 2007, the Constitutional Court requested from the Court of BiH and the Prosecutor's Office of Bosnia and Herzegovina ("the Prosecutor's Office") to submit their respective replies to the appeal.

3. The Court of BiH submitted its reply to the appeal on 30 January 2007 while the Prosecutor's Office failed to submit its reply.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply to the appeal was communicated to the appellant on 27 January 2009.

### **III. Facts of the Case**

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

6. By the Judgment No. K-71/05 of 25 April 2006 the Court of BiH found the appellant guilty for the continued criminal offence – human trafficking under Article 186 paragraph 2 in conjunction with paragraph 1 of the Criminal Code of Bosnia and Herzegovina (“CC BiH”) and Article 54 of the CC BiH and sentenced him to imprisonment in duration of eight years. Considering that the legally binding Judgment of the Cantonal Court in Mostar No. K-3/02 of 25 March 2004 imposed a sentence of imprisonment in duration of four years on the appellant, the Court of BiH, by applying the provisions of Article 53 of the Criminal Code of BiH, sentenced the appellant to a single prison sentence in duration of 11 years and six months. Pursuant to Article 198 paragraph 2 of the Criminal Procedure Code of Bosnia and Herzegovina, the damaged persons E.Ć. and E.A. were advised to instigate a property-related litigation. Pursuant to Article 110 of the Criminal Code of BiH, in conjunction with Article 111 paragraph 1 of the Criminal Code of BiH, the property the appellant acquired by the perpetration of the criminal offence was confiscated from him, namely the apartment located in the street of Braće Fejić No. 58 in Mostar, which had been built using the funds in the amount of KM 61,481.55, as part of the material gain acquired through a criminal offence. The appellant was obligated to pay out the amount of KM 45,000.00 in respect of the material gain acquired by the perpetration of the criminal offence. In addition, the appellant was obligated to compensate the costs of the criminal proceedings, which are to be decided by a separate ruling, following the collection of data.

7. The Court of BiH concluded that the appellant, under counts 1, 2 and 3 of the indictment, had committed a continued criminal offence of human trafficking. He had committed a series of the same criminal actions for an extended period of time, which, each separately, contain relevant elements of this criminal offence. He recruited underage and one adult female, with the intention to acquire material gain for himself by exploiting and taking advantage of them, which he finally

achieved. In the reasoning of the judgment the court mentioned that, after completing the hearing of evidence during which it heard numerous witnesses for the prosecution and defense, and after carrying out various analysis and inspecting a large number of material evidence, it established that the appellant, in the manner described in the enacting clause of the judgment, committed a criminal offence which he was charged with. Namely, during the proceedings the damaged persons stated that they knew the appellant and that they provided sexual services for money. The court accepted the statements of the damaged persons as very convincing and clear, that is the manner in which they described their relationship with the appellant. The damaged persons mentioned in their statements that they agreed to work with the appellant out of fear for their own lives and lives of their family members. The statements of the damaged persons were confirmed by other statements, such as, for instance, the statement of a witness – a motel owner. On the basis of the statements of the damaged persons which were in agreement, the court established the manner in which they “worked”, that is provided sexual services for a daily wage of KM 400, the amount which they had to earn for the appellant. The court established that the appellant operated precisely through the damaged persons, especially on the basis of the statement of the damaged person E.Ć., which was confirmed by the witness D.P. On the basis of the statement of the witness A-S.B. who described his encounter with the appellant, the court concluded that the appellant wanted to sell D.P. for the amount of KM 2,500 and that she was under his full control. In addition, on the basis of the statements of witnesses the court established that the damaged persons were under his authority and that they wanted to flee from him. On the basis of a finding of an expert, the court established that the appellant’s earnings during the mentioned period were at least KM 100,000.

8. The appellant based his defense mainly on the fact that he was not familiar with the “work” of the damaged persons. The court did not accept the allegations of the defense that the damaged persons E.Ć. operated independently, or the allegations of the witnesses who claimed that E.Ć. borrowed a large amount of money from the appellant which she repaid him consequently. The court did not accept the statements of witnesses who claimed that E.Ć. was known from before as someone who provided sexual services, thereby assessing them as irrelevant for the criminal offence that the appellant was charged with. The court also mentioned that it suspected that some of the statements of witnesses for the defense were untrue, reasoning it with the fact that they were the appellant’s close friends, and suspecting that the appellant may have perhaps tried to influence certain witnesses, as well as the damaged persons. As to the count 2 of the indictment, the court established on the basis of the presented evidence that the appellant had a deal with A.L. to get him two girls, foreign citizens, from the owner of a night club in Kiseljak, to provide sexual services for

money. Next, the court established that the appellant was registered with the Employment Bureau from 2001 to 2006, and that he got a permit for and built an apartment in Mostar in 2002. Due to the lack of evidence that either the appellant or his wife had regular incomes, the Court concluded that the construction of the apartment was financed from prostitution, i.e. from taking advantage of other persons. Next, the court established that the appellant committed the criminal offence with premeditation. The court did not accept the legal qualification of the Prosecutor's Office that the appellant, under count 3 of the indictment, had committed a criminal offence of money laundering, finding instead that this offence was already incorporated in the offence of human trafficking.

9. The appellant and the Prosecutor's Office lodged appeals against the first instance judgment. By the Judgment No. Kž-45/06 of 25 October 2006, the Court of BiH granted the appeals of the appellant and of the Prosecutor's Office. The appellant's appeal was granted in the part relating to the confiscation of material gain, and thus the first instance judgment was modified so as to obligate the appellant to pay the amount of KM 38,518.45 in respect of the material gain acquired by the perpetration of the criminal offence. The appeal of the Prosecutor's Office, regarding the legal assessment of the offence and the decision on the punishment, was granted, thereby modifying the first instance judgment so as to declare the appellant guilty for the continued criminal offence – human trafficking under Article 186 paragraph 2 in conjunction with paragraph 1 and Article 54 of the Criminal Code of BiH, for which he was sentenced to imprisonment in duration of nine years, and for the criminal offence – money laundering under Article 209 paragraph 2 of the Criminal Code of BiH, for which he was sentenced to imprisonment in duration of three years. Taking into account the sentence of imprisonment in duration of four years which had been previously imposed on the appellant, pursuant to Article 53 of the Criminal Code of BiH, the appellant was sentenced to a single sentence of imprisonment in duration of 14 years. The remainder of the first instance judgment remained the same.

10. The Court of BiH stated in the reasoning of the judgment that the allegations that relate to the violations of the Criminal Procedure Code as being detrimental to the appellant, are ill-founded, whereby the court failed to assess the contradictory statements of witnesses. The Court of BiH stated that, on the basis of the reasoning of the challenged judgment, one may conclude that the Court assessed the mentioned statements, thereby relating logical reasons as to why it considered them irrelevant and consequently why it did not give them credence. In relation to the allegation stated in the appeal that not all elements of the criminal offence were established and who “was that second person controlling and taking advantage of other persons by way of prostitution”, the Court

of BiH stated that on the basis of the legal definition, one may conclude that the mentioned offence contains several alternative forms through which it might be realized. The Court of BiH referred to the provisions of Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which was amended by the UN Convention against Transnational Organized Crime. As to the complaint stated in the appeal relating to the violation of the Criminal Code resulting from the violation of the principle of prohibition of retroactivity under Article 4 of the Criminal Code, the Court of BiH established that it was ill-founded and that the first instance court correctly applied the rule of applicability of the Criminal Code, as well as the principle of lawfulness, the violation of which was also referred to in the appeal.

11. Namely, the Court of BiH stated that the criminal offence referred to in Article 186 of the Criminal Code, is the so-called permanent criminal offence by its nature, which falls within the domain of the so-called criminal offences not completed in material sense for as long as unlawful status arising from its perpetration, or from the action of perpetration, persists. By applying this to the present case, the Court of BiH concluded that the offence shall not be completed for as long as the status of subordination persists and, in this respect, sexual abuse of the victims of the offence. Thus, the very moment when that status ceases to exist is the moment of the completion of this offence. The Court of BiH stated that, even if actions were taken before the entry into force of the Criminal Code of BiH, the offence shall not be considered as completed for as long as the unlawful status arising from its perpetration persists. Therefore, the Court of BiH established that the appellant's complaint stated in the appeal that his actions do not contain elements of a criminal offence of human trafficking under Article 186 of the Criminal Code of BiH, is ill-founded. The Court of BiH also stated that the continued criminal offence constitutes a single criminal offence to which one applies the law which was applicable at the time the last action entering this construction has been completed, irrespective of whether that law is more lenient or severe. While examining the appeal of the Prosecutor's Office, the Court of BiH established that the first instance court violated the provisions of the Criminal Code of BiH, and thus declared the appellant guilty of concurrent criminal offences of human trafficking and money laundering.

#### **IV. Appeal**

##### **a) Allegations stated in the appeal**

12. The appellant complains that the challenged judgments violated his right to a fair trial under 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 European Convention”) and the right to retroactive application of the law under Article 7 of the European Convention, and the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. The appellant sees the violation of the mentioned rights in the failure of the ordinary courts to truthfully and thoroughly establish the facts relevant for adoption of a lawful decision, and in the erroneous and arbitrary application of the substantive and procedural law. The appellant challenges the position of the Court of BiH in relation to the element of a criminal offence and states that the courts failed to correctly assess which criminal offence it was. In relation to Article 7 of the European Convention the appellant complains that he was charged with the commission of a criminal offence during the time when such a criminal offence has not been provided for by law, and that the court did not apply the law which was more lenient for the appellant. The appellant also challenges the position of the court that the criminal offence was a permanent criminal offence. Namely, the appellant concludes that the action of perpetration and of unlawful status must be stipulated by law before the perpetration of the offence, which was not the case in the appellant’s case. The appellant states that he was tried for criminal offences committed during the course of 2002, and such criminal offences were only stipulated in the law which entered into force during 2003. He states that he may have been held accountable for the criminal offence referred to in Article 229 of the Criminal Code of FBiH. Also, he states that the apartment, which was confiscated from him, had been built in 2002 which is before the entry into force of the Criminal Code of BiH. Next, he refers to the obligation of retroactive application of the law if found to be more lenient for the defendant. In addition, the appellant complains of a violation of the right to property as a result of the decision to confiscate from him the property he acquired by the perpetration of the criminal offence, namely the apartment in Mostar, as well as the money earned through the criminal offence.

#### **b) Reply to the appeal**

13. In its reply to the appeal, the Court of BiH stated that it stood by its allegations offered in the judgment proposing that the appeal is dismissed as ill-founded and that the appellant’s proposal for an interim measure rejected.

### **V. Relevant Law**

13. The **Criminal Procedure Code of Bosnia and Herzegovina** (*Official Gazette of BiH* Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07 and 76/06), in its relevant part reads as follows:

*Article 14*

*Equality of Arms*

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

*Article 15*

*Free Evaluation of Evidence*

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

14. The **Criminal Code of Bosnia and Herzegovina** (*Official Gazette of BiH* Nos. 3/03, 32/03, 37/03, 54/04, 61/04 and 30/05) in its relevant part reads as follows:

*Principle of Legality*

*Article 3*

1 (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.*

#### *Article 110*

##### *The Basis of the Confiscation of Material Gain*

*(1) Nobody is allowed to retain material gain acquired by the perpetration of a criminal offence.*

*(2) The gain referred to in paragraph 1 of this Article shall be confiscated by the court decision, which established the perpetration of a criminal offence, under the terms set forth under this Code.*

*(3) The court may also confiscate the gain referred to in paragraph 1 of this Article in a separate proceeding if there is a probable cause to believe that the gain derives from a criminal offence and the owner or possessor is not able to give evidence that the gain was acquired legally.*

#### *Article 186*

##### *Trafficking in Persons*

*(1) Whoever takes part in the recruitment, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to obtain the consent of a person having control over another person, for the purpose of exploitation, shall be punished by imprisonment for a term between one and ten years.*

*(2) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article against a juvenile, shall be punished by imprisonment for a term not less than five years.*

## **VI. Admissibility**

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

17. Pursuant 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 is 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 is served on him/her.

18. In the present case, the subject matter challenged by the appeal is the Judgment of the Court of BiH No. KŽ-45/06 of 25 October 2006, against which there are no other effective legal remedies available under the law. The appellant received the challenged judgment on 9 November 2006, and the appeal was filed on 22 December 2006, that is within the time limit of 60 days as stipulated by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court because it is not manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

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

## **VII. Merits**

20. The appellant challenges the mentioned judgments claiming that they violated his rights under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention and Article 7 of the European Convention.

### **No punishment without law**

21. One of the appellant's essential allegations relates to conducting the criminal proceedings at issue and a violation of Article 7 of the European Convention. The appellant states that he was

sentenced under the Criminal Code of BiH for the offence which was not prescribed as a criminal offence at the time he was charged. The appellant mentions that he could have been possibly charged only with a criminal offence referred to in Article 229 of the Criminal Code of FBiH.

Article 7 of the European Convention, in its relevant part, reads as follows:

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

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

22. Guarantee contained in Article 7 of the European Convention is one of the fundamental factors of the rule of law and it takes a prominent position in the system of the protection of rights safeguarded by the European Convention. Article 7 of the European Convention must be interpreted and applied in a way so as to ensure successful protection against arbitrary prosecution, conviction and punishment. The scope of Article 7 of the European Convention is determined by the concept of “a criminal offence” and the concept of “a heavier penalty”. It is obvious that the meaning of the term “criminal offence” is closely linked with the term of “criminal charges” under Article 6 of the European Convention. The term “punishment” ought to be interpreted autonomously in order for the protection arising from Article 7 to be effective. In order for a punishment to be covered by Article 7 of the European Convention, it has to be imposed after the judgment for “a criminal offence”.

23. The Constitutional Court notes that the aim of Article 7 of the European Convention is to offer “essential guarantees” against arbitrary prosecution, conviction and punishment. In addition to the principles *nullum crimen sine lege* and *nulla poena sine lege*, the European Court of Human Rights established the third principle, namely that the authority applying the criminal code does not interpret that law too broadly, or by analogy, unless such application is in favor of the accused. On the basis of the third principle it follows, according to the European Court of Human Rights, that the legislation shall clearly formulate the standard of the criminal code (see European Court of

Human Rights, *Kokkinakis*, judgment of 25 May 1993, Series A, No. 260-A, p. 22). Accordingly, only law may stipulate a criminal offence. Its provisions must be sufficiently foreseeable and accessible (see European Court of Human Rights, *G. vs. France*, judgment of 27 September 1995, Series A, No. 325-B, p. 38). The purpose of this requirement is to avoid a criminal sentence which is based on a norm which the person at issue could not, or did not have to, be aware of in advance. The requirement shall be met in the event where the formulation of the provision, if necessary and by way of court interpretation, informs an individual clearly as to the conduct that subjects one to the prosecution (see European Court of Human Rights, *Kokkinakis*, judgment of 25 May 1993, Series A, No. 260-A, p. 22).

24. The Constitutional Court emphasizes that it is necessary to require quality, accessibility and foreseeability of the applicable laws as well as to require a court interpretation of laws with the aim to clarify possibly disputable provisions and give certain terms sense and purpose in real life, which is the essence of regulating the human behavior by law.

25. In the present case, the appellant explicitly alleges that the offence he was convicted for did not constitute a criminal offence at the time of the commission, as he was charged with the commission of the criminal offences of “human trafficking” and “money laundering” which were stipulated only in the Criminal Code of BiH which went into force on 1 March 2003.

26. The Constitutional Court observes that the Court of BiH, while deciding the appellant’s appeal, concluded that Article 4 of the Criminal Code of BiH, i.e. provisions stipulating the temporal applicability of the criminal code, was correctly applied in the proceedings. The Court of BiH stated that the criminal offence of human trafficking is a complex and permanent criminal offence. The consequences of the mentioned criminal offence shall last for as long as the unlawful situation arising from its perpetration lasts. Accordingly, even when the criminal offence is completed in a formal and legal sense, the criminal offence shall not be completed in material sense for as long as the unlawful situation arising from it continues. In the present case it concerns subordination and abuse of the victim. Thus, according to the position of the Court of BiH and in a situation where actions were taken prior to the entry into force of the Criminal Code of BiH and the consequences continued after the entry into force of the Criminal Code of BiH, the entire criminal event should be legally estimated under the Criminal Code of BiH, i.e under Article 186 paragraph 2 in conjunction with Article 1.

27. The Constitutional Court observes that the Criminal Code of BiH, which was applied in the appellant's case, went into force on 1 March 2003 and identified criminal offences of human trafficking and money laundering, for which the appellant was convicted. The judgment of the Court of BiH reads that the appellant had committed the criminal offence during 2002 and 2003, i.e. before and after the entry into force of the law. The Court of BiH stated that it concerned such a criminal offence which lasted at the time of the entry into force of the Criminal Code of BiH. As the Court of BiH undoubtedly established during the proceedings, the appellant undertook certain actions in March, April and even July 2003, that is after the entry into force of the Criminal Code of BiH.

28. The Constitutional Court recalls the position taken by the European Court in the case *S.W. vs. The United Kingdom* (see European Court of Human Rights, *S.W. vs. The United Kingdom*, judgment of 22 November 1995, A-335-B), where it established that there was no violation of Article 7 of the European Convention. In the mentioned case the appellant complained that he had been convicted of a criminal offence of rape of his wife, for which he had immunity at the time of the commission, i.e. that he was not criminally liable. However, the European Court found that the decision of domestic courts constituted "a reasonably foreseeable development of the law" and that because of the character of rape, as extremely degrading, the applicant could not claim that he was exposed to arbitrary prosecution. The Constitutional Court considers that such a position can be applied in its entirety to the present case. Moreover, as reasoned by the Court of BiH, at the time when the Criminal Code of BiH entered into force, the appellant continued to "commit" the criminal offence he was charged with and which, as already stated, is of permanent character, and accordingly he was charged under the mentioned law. The Constitutional Court holds that this position of the Court of BiH is in accordance with the principles of Article 7 of the European Convention and that this in no way concerns a violation of the aim for the purpose of which Article 7 was laid down, namely "to offer substantial guarantees against arbitrary prosecution, conviction and punishment". In addition, the Constitutional Court recalls the case-law of the European Court, according to which it is the responsibility of the domestic courts to establish what constitutes "a criminal offence" which the Court of BiH did in the present case.

29. In view of the aforementioned, the Constitutional Court concludes that the Court of BiH did not violate Article 7 of the European Convention when convicting and punishing the appellant for the criminal offence under Articles 186 and 209 of the Criminal Code of BiH.

**As to the right to a fair trial**

30. The appellant complained that the challenged judgment violated his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

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

*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:*

*(...)*

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

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

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

33. The essence of allegations about the violation of the right to a fair trial lies in that the appellant challenged that the court correctly established the facts of the case and correctly applied the substantive law. The appellant sees the violation of the right to a fair trial in the fact that the ordinary courts, in his opinion, failed to examine with equal attention the facts against him and the facts supporting his defense and that all evidence of the prosecution were accepted.

34. The Constitutional Court, first and foremost, suggests that according to the case-law of the European Court of Human Rights (“the European Court”) and of the Constitutional Court, the mentioned courts are not called upon to review the conclusions of the ordinary courts regarding facts of the case and the application of the substantive law (see European Court, *Pronina vs. Russia*, Decision on Admissibility of 30 June 2005, Application No. 65167/01). Namely, the Constitutional Court is not competent to substitute ordinary courts in the assessment of facts and evidence, but in general it is the task of the ordinary courts to assess facts and evidence that were presented (see

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European Court, *Thomas vs. United Kingdom*, judgment of 10 May 2005, Application No. 19354/02). The task of the Constitutional Court is to examine whether a violation or neglect of the constitutional rights occurred (the right to a fair trial, the right of access to court, the right to an effective legal remedy etc.), and whether the application of the law was possibly arbitrary or discriminatory. Thus, within its appellate jurisdiction, the Constitutional Court exclusively deals with the issues of possible violation of constitutional rights or rights under the European Convention in the proceedings before the ordinary courts. Thus, in the present case the Constitutional Court shall examine whether the proceedings were fair as a whole in the manner required by Article 6 paragraph 1 of the European Convention (see Constitutional Court, Decision No. *AP 20/05* of 18 May 2005, published in the *Official Gazette of BiH*, No. 58/05).

35. Further, the Constitutional Court states that it is beyond its jurisdiction to assess the quality of conclusions of the courts with regards to the assessment of evidence, if such assessment does not appear manifestly arbitrary. Likewise, the Constitutional Court shall not interfere with the manner in which the ordinary courts granted evidence as evidentiary material. The Constitutional Court will not interfere with what sort of evidence are given credence by the courts on the basis of a judge's margin of appreciation. That is exclusively the role of the ordinary courts, even when the statements of witnesses at the public hearing and under oath are contradictory (see European Court, *Doorson vs. The Netherlands*, judgment of 6 March 1996, published in the Reports No. 1996-II, paragraph 78). The Constitutional Court emphasizes that the right to a fair trial includes, *inter alia*, the necessity to present reasons for adopting a court decision in a certain direction, given that it enables the appellant to efficiently use the available legal remedies.

36. While considering the appellant's allegations in relation to the erroneously established facts of the case and erroneous application of the substantive law, the Constitutional Court considers that in the criminal proceedings at issue, following the completion of the evidentiary proceedings before the ordinary court, it was established that the appellant's actions amounted to relevant elements of the criminal offence of human trafficking and money laundering. The Constitutional Court observes that the Court of BiH analyzed as to what a criminal offence of human trafficking implied and what forms it may take, and it established that the actions with which the appellant was charged may be qualified as the actions of the perpetration of a criminal offence of human trafficking, particularly actions under count 2 of the indictment. The same applies to the actions of the perpetration of a criminal offence of money laundering and for the conclusion of the Court of BiH that this is a separate criminal offence regarding the offence of human trafficking. In the present case, the

Constitutional Court holds that the Court of BiH offered clear and precise reasons for its positions in the reasoning of the challenged judgments, which does not appear to be arbitrary or unacceptable in any part. The Constitutional Court did not find anything suggesting that the substantive and procedural laws were arbitrarily applied in the appellant's case. Particularly so when bearing in mind that the first instance court presented numerous evidence (which were listed in detail) in order to establish the real facts of the case, which evidence, contrary to the appellant's allegations, were assessed while adopting the challenged decision. The mentioned fact must be linked to the lawful authority of the ordinary courts to establish facts which they consider relevant for the adoption of a decision and to their right to assess such facts in terms of which evidence to admit and which not to admit.

37. The Constitutional Court recalls that Article 14 of the Criminal Code of BiH prescribes that the court, prosecutor and other bodies shall, with equal attention, examine and establish facts incriminating a suspect, as well as facts which are beneficial for a suspect. Article 15 of the Criminal Code of BiH prescribes the right of a court, prosecutor and other bodies taking part in the criminal proceedings to assess the existence or lack of facts, which is not related to or restricted by special formal rules of evidence. In this respect, the Constitutional Court recalls that Article 6 paragraph 1 of the European Convention does not prescribe that an ordinary court shall examine all arguments presented by the parties during the proceedings, but only arguments that the court finds relevant. The court must take into account arguments of the parties to the proceedings, but not all of them have to be presented in the reasoning of the judgment (see Constitutional Court, Decisions No. *U 62/01* of 5 April 2002 and No. *AP 352/04* of 23 March 2005).

38. In the present case, the Constitutional Court observes that the ordinary courts reasoned their respective decisions, and offered clear reasons why they granted the statements of certain witnesses, and refused the statements of other witnesses. Therefore, the appellant's allegations as to "the partiality of the court" due to accepting all evidence of the prosecution in a situation where the ordinary courts, following extensive evidentiary proceedings, had adopted judgments where all necessary reasons were stated and detailed reasoning provided, are ill-founded. It follows, on the basis of the judgments, that the court examined evidence offered by the defense, and provided clear and convincing reasons why it refused them. Also, all the appellant's allegations stated in the appeal are identical to the complaints stated in the appeal against the first instance judgment, and were subject of assessment by the second instance court. The Constitutional Court holds that the appellant was allowed to participate in the respective criminal proceedings and present his evidence.

Thus, it is not possible to conclude on the basis of the allegations stated in the appeal or evidence attached, that the appellant's constitutional rights were violated in the respective criminal proceedings. When adopting judgments, the courts applied the applicable procedural and substantive regulations. The challenged judgments, in their respective reasoning, contain clear and detailed reasons on the basis of which the laws, on which they are founded, were applied. Hence, it is not possible to conclude that the application of the mentioned laws was arbitrary.

39. In view of the aforementioned, and considering the proceedings as a whole, the Constitutional Court concludes that there is no violation of the appellant's constitutional right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

**As to the right to property**

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

*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:*

*(...)*

2 k) *The right to property.*

Article 1 of Protocol No. 1 to the European Convention reads as follows:

1. *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

2. *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

41. The Constitutional Court recalls its earlier decisions and the jurisprudence of the European Court which established that Article 1 of Protocol No. 1 to the European Convention comprises

three distinct rules. The first rule, set out in the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property. The second rule, contained in the second sentence of the same paragraph, stipulates that the deprivation of one's possessions may take place subject to certain conditions. The third rule, contained in paragraph 2 of the same article, allows to the Contracting States the right, among other things, to control the use of property in accordance with the general interest. The three rules are not disconnected and mutually contradictory, whereas the second and the third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property (see European Court, *Holy Monasteries vs. Greece*, judgment of 9 December 1994, Series A, No. 301-A, page 29, paragraph 51).

42. As to the appellant's allegations stated in the appeal that the decision to confiscate his apartment violated his right to property, the Constitutional Court observes that the appellant alleged that violations of rights under Articles 6 and 7 of the European Convention "were reflected" also in the violation of the right to property.

43. In relation to this appellant's allegation, the Constitutional Court observes that the apartment, which was confiscated from the appellant, undisputedly constitutes "property". Also, the challenged judgments deprived the appellant of his property. Next, the Constitutional Court must examine whether depriving the appellant of his property can be considered as justified. In order for the interference with the right to property to be justified, it has to: (a) be provided for by law, (b) have a legitimate aim of the public or general interest, and (c) be in accordance with the principle of proportionality.

44. In the present case, the Constitutional Court observes that the appellant's apartment was confiscated on the basis of the legally binding judgment of the Court of BiH. The Court of BiH adopted its decision by applying Article 110 in conjunction with Article 111 of the Criminal Code of BiH, which stipulates that nobody is allowed to retain material gain acquired by the perpetration of a criminal offence, and that such gain shall be confiscated if established that the criminal offence is perpetrated. Thus, the Constitutional Court observes that the decision on the confiscation of property acquired by the perpetration of the criminal offence is prescribed by law. In addition, the Constitutional Court observes that the deprivation of the appellant's property was the result of the criminal proceedings conducted against the appellant, which the Constitutional Court found to be fair in conjunction with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention.

45. The Constitutional Court is to examine whether the lawful deprivation of the appellant's property was carried out in the public interest and in accordance with the principle of proportionality.

46. The Constitutional Court holds that there is a general interest of the state to sanction the perpetrators of criminal offences. By sanctioning criminal offences the state acts restrictively against a particular perpetrator of a criminal offence and preventively against other possible perpetrators. The Constitutional Court notes that the provision of Article 110 of the Criminal Code of BiH prescribes obligatory confiscation of material gain acquired by the perpetration of a criminal offence and the aim of this provision is to prevent persons "from enjoying the results" of the criminal offence or the material gain acquired through the criminal offence. Thus, on the basis of the aforementioned, it follows that the appellant was deprived of his property in the public interest. Also, the Constitutional Court observes that in the present case the burden imposed on the appellant, which is reflected in the deprivation of property, is proportionate to the aim sought to be achieved, all the more so because only that property which the courts established to have been acquired by the perpetration of the criminal offence, was confiscated from the appellant.

47. In view of the aforementioned, the Constitutional Court concludes that the challenged judgment are not in violation of the appellant's right under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

### **VIII. Conclusion**

48. The Constitutional Court concludes that there is no violation of the appellant's right under Article 7 of the European Convention, as the criminal offence of human trafficking is a permanent criminal offence, which perpetration started before the entry into force of the new Criminal Code of BiH which prescribes that offence which perpetration and consequences continued even after the entry into force of the mentioned law. Also, the Constitutional Court concludes that the appellant's right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention was not violated, as the court offered clear reasons and reasoning for its respective decisions, and it is not possible to establish that procedural errors were made in the proceedings, which would have resulted in a violation of the right to a fair trial. Also, the Constitutional Court concludes that the decision to confiscate the appellant's apartment, which was acquired by the perpetration of the criminal offence, does not violate the right to property under

Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, since the interference with the appellant's property was in accordance with the law, i.e. it was done in the public interest and that the principle of proportionality was complied with.

49. Having regard to Article 61(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this Decision.

50. Given the decision of the Constitutional Court in this case, it is not necessary to consider separately the appellant's request for an interim measure.

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

Seada Palavrić  
President  
Constitutional Court of Bosnia and Herzegovina