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FOREWORD

Dear Readers,

It is a great honor to write a short foreword to the second edition of the Bulletin of decisions of the Constitutional Court of Bosnia and Herzegovina in the English language. This Bulletin is a means of exercising a principle of public work of the Constitutional Court of BiH introducing the national constitutional case-law to the international public at large, especially in terms of promotion and protection of fundamental human rights and freedoms. Another important reason for publishing the Bulletin in the English language lies in the fact that the English language is the working language of the Constitutional Court of BiH in all of the cases in which international judges are involved. This issue will be examined again briefly later on.

With a view to better understanding of decisions and circumstances surrounding the activities of the Constitutional Court of BiH, it would be useful to provide, at the very beginning, some basic information on the Constitutional Court of BiH.

The constitutional jurisprudence in Bosnia and Herzegovina has a tradition of over 40 years. Namely, the Constitutional Court of BiH was founded in 1963 in the then Socialist Republic of Bosnia and Herzegovina, one of the republics of the former Yugoslavia. The present Constitutional Court of BiH was established in May 1997 pursuant to Annex IV (Constitution of Bosnia and Herzegovina) to the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement).

The position of the Constitutional Court is regulated by Article VI of the Constitution of BiH. The Constitutional Court is composed of nine judges with six national judges (four from the Federation of Bosnia and Herzegovina and two from the Republika Srpska) selected by the Entity Parliaments and three international judges appointed by the President of the European Court of Human Rights after consultations with the Presidency of Bosnia and Herzegovina. The term of office of the first composition was five years whereas the term of office of the newly appointed judges is until the age of 70.

The jurisdiction of the Constitutional Court is stipulated by Articles VI(3)(a), (b) and (c). The Constitutional Court has jurisdiction over:

- Organic disputes between the Entities or between Bosnia and Herzegovina and an Entity or Entities or between institutions of Bosnia and Herzegovina, including the question whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina [Article VI(3)(a) of the Constitution];
- Abstract control of constitutionality of norms [Article VI(3)(a) of the Constitution];
- Appellate jurisdiction over issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina [Article VI(3)(b) of the Constitution];
- Concrete control of constitutionality of norms over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence or the scope of a general rule of public international law pertinent to the court's decision [Article VI(3)(c) of the Constitution];
- Protection of the so called "vital interest of constituent people" within the parliamentary procedure of adoption of a decision when such issue is raised by one of the Caucuses at the House of Peoples [Article IV(3)(f) of the Constitution].

The procedures, organization and some status issues are regulated by the Rules adopted, by virtue of a provision of the Constitution, by the majority of votes of all judges of the Constitutional Court. In view of the fact that there is no law governing the work of the Constitutional Court, the Rules are the most important legal act for the Constitutional Court (full text of the Rules is available at: http://www.ustavnisud.ba/eng).

Following the establishment of the Constitutional Court in 1997, the Court resolved a rather small number of cases in the first two to three years of its work. After that, the number of cases brought before the Court began to increase rapidly. For example, in 2006, the Constitutional Court of BiH received 3,458 cases, deciding 2,365 cases. In the last year of its work (2010), the Constitutional Court of BiH received 6,056 cases, deciding 4,057 cases. Out of a total number of decided cases in 2010, the Constitutional Court of BiH reached decision in 4,038 cases arising under its appellate jurisdiction. Out of a total number of decided cases, the Constitutional Court of BiH decided a total of 333 cases on the merits finding a violation of the Constitution of BiH in 232 cases. Consequently, the work of the Constitutional Court is becoming increasingly impressive not only in

terms of its significance but also its quantity. The aforementioned imposes a requirement on the Constitutional Court to constantly adjust to new situations and challenges while nevertheless maintaining quality of its work and its efficiency.

For both practical and financial reasons, the Constitutional Court of BiH is presently not in a position to print all adopted decisions. Therefore, the Constitutional Court of BiH has, as it has been a practice to date, decided to publish in this Bulletin the decisions that contain important and novel constitutional positions. The first bulletin in the English language that was published in 2005 included all significant decisions covering the period from 1997 to 2005, incorporating case-law arising under different jurisdictions of the Constitutional Court of BiH. This Bulletin includes decisions covering the period from 2006 to 2010. The Bulletin includes 50 different decisions which have, in some way, marked the past period. Out of that number, 27 decisions concern the appellate jurisdiction while 22 concern other jurisdictions of the Constitutional Court of BiH. All other decisions of the Constitutional Court of BiH not included in this Bulletin and adopted at the plenary sessions of the Constitutional Court of BiH, are available on the Constitutional Court's web page: <www.ccbh.ba>.

The decisions included in the Bulletin are classified as per the jurisdiction of the Constitutional Court of BiH. Within that classification they are classified as per the legal grounds under the Rules of the Constitutional Court of BiH. An integral part of this Bulletin are three registers of the decisions classified as per the jurisdiction of the Constitutional Court of BiH, admissibility requirements, catalogue of rights and alphabetical index of the keywords.

This Bulletin, as it has been a practice to date, represents an opportunity for all interested parties, primarily legal practitioners, to learn more about the way of work and results of the Constitutional Court of BiH. The Constitutional Court of BiH interprets constitutional-legal standards and represents one of the mechanisms for their practical application. This is especially important in terms of constitutional instruments of fundamental rights and freedoms protection, considering that this is a mandatory component of democracy and rule of law. Taking into account all the aforementioned, we are hopeful that the new legal opinions of the Constitutional Court of BiH, presented in this Bulletin, shall contribute to a better understanding of the constitutional reality.

Sarajevo, January 2011

Prof. Dr. Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

DECISIONS AND RULINGS OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

Jurisdiction – IV(3)(f) of the Constitution of Bosnia and Herzegovina

Case no. U 7/06

DECISION
ON MERITS

Request of Mr. Mustafa Pamuk, Chairman of the House of Peoples of Bosnia and Herzegovina, for review whether there were constitutional grounds for the Statement that the Agreement beetwen Bosnia and Herzegovina and Republic of Croatia on Cooperation in terms of the Rights of the Victims of War in Bosnia and Herzegovina who were members of the Croat Defense Council and members of their families is considered to be destructive to a vital national interest of the Bosniac people in Bosnia and Herzegovina

Decision of 31 March 2006

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article IV(3)(f) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (5) 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:

Mr. Mato Tadić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Hatidža Hadžiosmanović, Vice-President

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Ms. Constance Grewe,

Ms. Seada Palavrić,

Having deliberated on the request of **Mr. Mustafa Pamuk, the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina** in case no**. U 7/06,** at its session held on 31 March 2006, adopted the following

DECISION ON MERITS

It is hereby established that the Statement of the Bosniac Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina on destructiveness to the vital national interest of the Bosniac people in Bosnia and Herzegovina does not meet the requirements as to the procedural regularity under Article IV(3)(f) of the Constitution of Bosnia and Herzegovina as the Agreement between Bosnia and Herzegovina and Republic of Croatia on Cooperation in terms of the Rights of the Victims of War in Bosnia and Herzegovina who were members of the Croat Defense Council and members of the their families, is not destructive to the vital national interest of the Bosniac people in Bosnia and Herzegovina.

The procedure of adoption of the Agreement between Bosnia and Herzegovina and Republic of Croatia on Cooperation in terms of the Rights of the Victims of War in Bosnia and Herzegovina who were members of the

Croat Defense Council and members of the their families shall be carried out to comply with the procedure under Article IV(3)(d) of the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 16 March 2006, Mr. Mustafa Pamuk, the Chair of the House of Peoples of Bosnia and Herzegovina („the applicant"), filed a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the procedural regularity, *i.e.* the applicant requested the Constitutional Court to review whether there were constitutional grounds for the Statement that the Agreement on Cooperation between Bosnia and Herzegovina and the Republic of Croatia in terms of the Rights of Victims of War in Bosnia and Herzegovina, who were members of the Croat Defense Council and members of their families („the Agreement") is to be considered as destructive to a vital national interest of the Bosniac people in Bosnia and Herzegovina.

II. Request

a) Statements from the request

2. The Presidency of Bosnia and Herzegovina, at its 23rd urgent session held on 16 December 2005, accepted the Agreement and authorized Mr. Bariša Čolak, Deputy Prime Minister of the Council of Ministers of Bosnia and Herzegovina, to sign the aforementioned Agreement. On 5 January 2006, the Presidency of Bosnia and Herzegovina requested the House of Representatives and House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina to give its consent to the ratification of the Agreement as provided for in Article 16 of the Law on the Procedure of Concluding and Implementing International Agreements.

3. The House of Peoples of the Parliamentary Assembly („the House of Peoples"), at its 54th session resumed on 10 March 2006, considered the 5th item on the Agenda, *i.e.* the consent to the ratification of the Agreement. The Bosniac Caucus to the House of Peoples („the Bosniac Caucus"), in accordance with Article IV(3)(e) of the Constitution of Bosnia

and Herzegovina and Article 134 paragraph 1 of the Rules of Procedure of the House of Peoples, made a statement in writing no. 02-50-1-15-54/06 of 10 March 2006 asserting that granting consent would be destructive to the vital national interest of the Bosniac people.

4. The essence of the Statement, according to which the ratification of the Agreement would be destructive to the vital national interest of the Bosniac People in Bosnia and Herzegovina, is based on the following:

5. According to item I of the Statement of the Bosniac Caucus („the Statement"), the provisions of Article 4 paragraph 1, Article 5 paragraph 1, Article 8 and Article 14 paragraph 2 of the Agreement impose additional liabilities on Bosnia and Herzegovina and no assistance to the Disability Insurance Funds in Bosnia and Herzegovina. Namely, the basis for concluding the Agreement is the Law on the Rights of Veterans and their Families of the Federation of BiH (*Official Gazette of the FBiH* no. 33/04) („the Law on the Rights of Veterans") which, in Article 65, stipulates the assistance provided for by another state to Bosnia and Herzegovina or to an individual from Bosnia and Herzegovina, intended for individual incomes to be paid out to certain veterans' categories. However, Article 4 paragraph 1 of the Agreement provides that the persons to whom the Agreement applies, who are nationals of the Republic Croatia and who acquired their right to pension under the regulations of the Republic of Croatia, shall exercise their rights under the legal regulations of Bosnia and Herzegovina until the date of the Agreement's entry into force. According to Article 5 paragraph 1 of the Agreement, Bosnia and Herzegovina shall be obliged to confirm the status of the persons, which is established by the legally valid ruling of the Republic of Croatia, by way of recognizing the right to the persons in accordance with its legal regulations. Article 8 of the Agreement additionally determines the absoluteness in recognizing the rights established in the Republic of Croatia under its legal regulations. Article 14 paragraph 2 does not even provide for the place of residence in Bosnia and Herzegovina to be a requirement to oblige Bosnia and Herzegovina to recognize that person their rights established in the Republic of Croatia. The Bosniac Caucus holds that when viewed jointly, the application of mentioned Articles in Bosnia and Herzegovina would give rise to the establishment of liabilities, material and other allowances, towards the persons who are the citizens of the Republic of Croatia, who are its residents and whose rights have been established or will be established in the Republic of Croatia under the laws of the Republic of Croatia. The result would be a burden placed on the Disability Insurance Funds in BiH, inconsistent with Article 65 of the Law on the Rights of Veterans, which is the basis for concluding the Agreement.

6. According to item II of the Statement, Article 1 paragraph 1 item 11 of the Agreement provides for the relevant period which is the *period of suffering, i.e. the period from 18*

September 1991 to 23 December 1996 shall be acknowledged as basis for a payment of cash allowance. Moreover, Article 4 paragraph 1 of the Agreement provides *inter alia* that the *Contracting States agree that the persons who became the victims of war in the period during the defense of the Contracting States' sovereignty (the period of suffering) under Article 1(1) (...).* In that regard is also Article 4, paragraph 1 of the Contract that, *inter alia*, provides that the *Contracting States agree that the persons who became the victims of war in the period during the defense of the Contracting States' sovereignty (the period of suffering) under Article 1(1 (...).* The Bosniac Caucus holds that the „big issue" arises as to whose sovereignty is implied herein when it is referred to the defense of 18 September 1991 considering that Bosnia and Herzegovina was internationally recognized on 6 April 1992, which is also the date considered as the beginning of the war in BiH. Moreover, the Bosniac Caucus finds that shifting of „the period of suffering" to 18 September 1991 results in additional liabilities of the Disability Insurance Funds in Bosnia and Herzegovina. The Bosniac Caucus finally concludes that the definition of the period of suffering is „inconsistent with the internationally recognized and generally known facts".

7. It is alleged in item III of the Statement that the Constitution of Bosnia and Herzegovina provides in Article 1(d) that *citizens of Bosnia and Herzegovina may hold the citizenship of another state, provided that there is a bilateral agreement, approved by the Parliamentary Assembly in accordance with Article IV(4)(d), between Bosnia and Herzegovina and that state governing this matter*. As there is not yet any bilateral agreement on dual citizenship between Bosnia and Herzegovina and the Republic of Croatia, no citizen of BiH would be able to exercise the rights under this Agreement without violating the Constitution of BiH and the beneficiaries are put in a position of legal uncertainty.

8. The Bosniac Caucus alleges in item IV of the Statement that under Article 1(1) subparagraphs 7 and 8 of the Agreement, the persons who are entitled to the relevant right are subject to holding the citizenship of the Republic of Croatia. In that respect the Bosniac Caucus alleges that Article 65 of the Law on the Rights of Veterans provides that assistance shall be provided for certain veterans' categories (disabled persons, the families of killed defenders, etc.) and that no parts of the Armed Forces (BiH Army, Croat Defense Council, etc.) are mentioned in that Article. The Bosniac Caucus further alleges that the aforementioned provision would result in discrimination against the members of same veterans' categories, persons who hold a citizenship of the Republic of Croatia and who were members of another parts of the Armed Forces of Bosnia and Herzegovina and that the Agreement which discriminates against the citizens of Bosnia and Herzegovina must not be ratified.

9. Thereupon, in accordance with Article 134(3) of the Rules of Procedure of the House of Peoples, the deliberation relating to granting consent to the ratification of the Agreement was terminated and the discussion regarding the Statement was opened. In accordance with Article 135(1) of the Rules of Procedure of the House of Peoples, the Croat Caucus to the House of Peoples expressed its disagreement with the Statement during the session and filed an Objection on 10 March 2006. The Objection was registered under no. 02-50-1-15-54/06. It is stated in the Objection that the legal basis for concluding the Agreement is contained in Articles 62 and 65 of the Law on the Rights of Veterans and that the Agreement has passed all necessary procedures pertinent to the process of concluding international contracts and agreements in Bosnia and Herzegovina, which means that it has not been disputed by either the Presidency of BiH or Council of Ministers of BiH or the House of Representatives of the Parliamentary Assembly of BiH and that the Agreement has already been ratified by the Assembly of the Republic of Croatia. As to the challenged Article 4 paragraph 1, Article 5 paragraph 1 and Article 8 of the Agreement, the Croat Caucus alleges in the Objection that the allegations expressed in the Statement are unfounded as the persons who were the members of Croat Defense Council who suffered in the territory of BiH, exercise their rights in accordance with the regulations of BiH, with no threat to anybody's vital national interests as this implies only the individual human rights.

10. As to the challenged Article 14 paragraph 2 of the Agreement, it is alleged in the Objection that the application of this provision might not additionally burden the Disability Insurance Funds in BiH because it implies no citizens of another country but the citizens who exercise their rights on the basis of the Law on the Rights of Veterans. According to the Objection, the allegations relating to the disputed period of suffering are unfounded as that period has been established in accordance with Article 2 of the Law on the Rights of Veterans. Moreover, the objection that the citizens of BiH are not allowed dual citizenship prior to the entry into force of the international agreement on dual citizenship are unfounded as the time limit for the process of concluding bilateral agreements on dual citizenship until 2012 is provided for by the decision of the High Representative for BiH in order to convalidate all dual citizenships acquired by BiH citizens in various countries.

11. According to the Objection, the allegations relating to the discrimination against certain veterans' categories are unfounded as Article 62 paragraph 3 of the Law on the Rights of Veterans provides that the Agreement applies to the members of the Croat Defense Council whose units had the members of all three constituent peoples and members of „Others". Finally, the Croat Caucus concludes that that the issue involves „a clear and transparent assistance to the mentioned veterans' population" and that the

Agreement is based on the Contracting States' determination and provisions of the Law on the Rights of Veterans. The Croat Caucus therefore sees no destructiveness to a vital national interest of any people in BiH or harm for BiH because it involves the funds designated for financial assistance from the budget of the Republic of Croatia

12. Having filed the Objection, the Caucuses in the House of Peoples, in accordance with Article 136 paragraph 1 of the Rules of Procedure of the House of Peoples, appointed one member to the Joint Commission from each of the Caucuses. The Joint Commission composed of Mr. Halid Genjac (the Bosniac Caucus), Mr. Velimir Jukić (the Croat Caucus) and Mr. Vinko Radovanović (the Serb Caucus) met on 15 March 2006 but without finding a solution. It concluded that the whole case would be referred to the Constitutional Court of Bosnia and Herzegovina for further proceedings. On 16 March 2006, the applicant filed a request with the Constitutional Court of Bosnia and Herzegovina in accordance with Article IV(3)(f) of the Constitution of Bosnia and Herzegovina.

III. Relevant Law

13. The relevant provisions of the **Constitution of Bosnia and Herzegovina** read as follows:

Article 4

3. (...)

(e) Proposed decision of the Parliamentary Assembly may be declared to be destructive to a vital national interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate, the Bosniac, Croat, or Serb Delegates selected in accordance with paragraph 1 (a) above. Such a proposed decision shall require for approval in the House of Peoples a majority of the Bosniac, of the Croat, and of the Serb Delegates present and voting.

(f) When a majority of the Bosniac, of the Croat, or of the Serb Delegates objects to the invocation of paragraph (e), the Chair of the House of Peoples shall immediately convene a Joint Commission comprising three Delegates, one each selected by the Bosniac, by the Croat, and by the Serb Delegates, to resolve the issue. If the Commission fails to do so within five days, the matter will be referred to the Constitutional Court, which shall in an expedited process review it for procedural regularity.

(...)

14. The relevant provisions of the **Constitution of the Republika Srpska** read as follows:

Amendment LXXVII

The vital national interests of the constituent peoples are defined in the following manner:

(...)

- the equal rights of the constituent peoples in decision making process;

- education; religion; language; promotion of culture; tradition and cultural heritage;

(…)

15. The relevant provisions of the **Constitution of the Federation of Bosnia and Herzegovina** read as follows:

Amendment XXXVII
Definition of vital national interest

The vital national interests of the constituent peoples are defined in the following manner:

(...)

- the equal rights of the constituent peoples in decision making process;

- education; religion; language; promotion of culture; tradition and cultural heritage;

(…)

16. The relevant provisions of **Law on Rights of the Veterans and their Families** (*Official Gazette of the F BiH* nos. 33/04 and 56/05) read as follows.

Article 2 paragraph 1

For the purposes of this Law, veterans shall be the members of the Army of Bosnia and Herzegovina, Croat Defense Council and police of the competent body of internal affairs („the Armed Forces") who participated in defense of Bosnia and Herzegovina (the beginning of the aggression on the Municipality of Ravno) from 18 September 1991 to 23 December 1996 (...).

Article 62 paragraph 3

With the exception of paragraphs 1 and 2 of this Article, the payment of compensation to the members of the Croat Defense Council (Croat Defense Council) according to the regulations relating to the protection for disabled veterans applicable until the date of entry into force of this Law shall cease on the date of entry into force of the Agreement on cooperation Bosnia and Herzegovina and the Republic of Croatia regarding the

rights of victims of war in Bosnia and Herzegovina, relating to the previous members of the Croat Defense Council and their families, which is to be concluded not later than 31 December 2005.

Article 65

The funds obtained as a financial support to the state or to an individual and intended for personal incomings of certain veterans' categories, may be used according to the donor's choice.

The use of the funds under paragraph 1 of this Article shall be regulated by international agreement between Bosnia and Herzegovina and the donor state.

17. The **Law on the Procedure of Concluding and Implementing International Agreements** (*Official Gazette of BiH* no. 63/00) in its relevant part reads as follows:

Article 16

The Parliamentary Assembly of Bosnia and Herzegovina makes decision on giving previous approval for ratification of any international agreement.

Article 19

The provisions of the Law on External Debt (...), Law on Treasury of the Institutions of Bosnia and Herzegovina (...) and this Law shall apply to the negotiation and concluding international agreements with which Bosnia and Herzegovina takes over credit and other financial liabilities.

18. The **Agreement between Bosnia and Herzegovina and the Republic of Croatia on Cooperation in terms of the Rights of Victims of War in Bosnia and Herzegovina, who werw members of the Croat Defense Council and members of their families** in its relevant part reads as follows:

Article 1

(1) The meanings of the terms used in this Agreement are as follows:

(...) 7. „persons"

Members of Croat Defense Council (Croat Defense Council) that were injured in the territory of Bosnia and Herzegovina and thus, acquired status of the war invalid, on the basis of being injured or detained if they were citizens of the Republic of Croatia;

8. „family members"

- spouse, children born during marriage outside of marriage, adopted children and step children(members of close family), parents, step father, step mother and adoptive parent of the killed, detained or missing member of Croat Defense Council, provided they were citizens of the Republic of Croatia;

- the following is considered close family member: common-law spouse of the killed, detained or missing Croat Defense Council member who has child with the Croat Defense Council member and who, until his/her getting killed, death, detainment or disappearance used to live with him in the mutual household for at least three years, provided he is citizen of the Republic of Croatia while status of the common law marriage is determined in extrajudicial court proceedings; (…)

11. „period of suffering"

- the period from 18 September 1991 to 23 December 1996 that is acknowledged as basis for a payment of cash allowance (…)

13. „confirming status"

- acknowledging degree of physical disability to the persons from item 7 of this paragraph;

- acknowledging status of family members from item 8 of this paragraph (…)

Article 4

(1) The Contracting States agree that the persons who became the victims of war in the period during the defense of the Contracting States' sovereignty (the period of suffering) under Article 1(1) subparagraphs 7 and 8 of this Agreement, and who acquired their right to pension under the regulations of the Republic of Croatia, shall exercise their rights under Article 2 of this Agreement from the date of the entry into force of this Agreement and under the legal regulations of Bosnia and Herzegovina.

(2) The Republic of Croatia is obliged to pay pension to the persons from paragraph (1) of this Article from the day of entry into force of this Agreement.

Article 5

(1) Bosnia and Herzegovina shall be obliged to confirm a status of the person, which is established by the legally valid ruling of the Republic of Croatia, by way of recognizing the right to the persons under Article 1(1) subparagraphs 7 and 8 of this Agreement in accordance with its legal regulations.

(2) Bosnia and Herzegovina shall be obliged to submit to the Republic of Croatia, legally valid rulings on the recognized right in accordance with its regulations for members of Croat Defense Council from Article 1, paragraph (1), items 7 and 8 of this Agreement.

Article 6

(1) Republic of Croatia shall be obliged to terminate the procedure of recognizing the right to pension in accordance with the provisions of the valid Law on Rights of Croat War Veterans from the Homeland War and their families' members and in accordance with the provisions of this Agreement to the persons from Article 1, paragraph (1) item 7 of this Agreement that, until taking into force of this Law, submitted requests for recognizing rights from disability insurance on the basis of partial or total loss of ability to work, that is, those persons that have already gone through the procedure of medical expertise with regard to the assessment of their ability to work, in accordance with previous legal regulations on right of Croat war veterans.

(2) Republic of Croatia shall be obliged to pay, to the persons from Article 6, paragraph (1) of this Agreement, the differential amount between monthly amount of the personal disability allowance obtained on the basis of legally valid ruling of the competent authority of Bosnia and Herzegovina and monthly amount of disability pension that the same person would realize on the basis of the rights in the Republic of Croatia.

(3) The provisions from this Article shall be appropriately applied to persons from Article 1, paragraph (1), item 7 of this Agreement that submit the request from paragraph (1) of this Article within 30 days from the day of entering into force of this Law.

(4) Republic of Croatia shall be obliged to terminate the procedure of recognizing right to pension of the killed or exhumed members of Croat Defense Council that were killed in offering direct armed resistance and it shall be obliged to pay, to the persons from Article 1, paragraph (1), item 8 of this Agreement, the differential amount between the monthly amount of the family disability pension, obtained on the basis of the legally valid ruling of the competent authority of Bosnia and Herzegovina and monthly amount of disability pension that the same person would acquire in accordance with the regal regulation in the Republic of Croatia (...)

Article 9

Persons from Article 1, paragraph (1), items 7 an 8 of this Agreement shall have right to health care in accordance with the legal regulations and to the expenses of the contracting state in the territory of which he/she gets medical treatment.

Provisions of paragraph (1) of this Article shall be equally applied to members of the family of beneficiaries.

The provisions of paragraph (1 and 2) of this Article shall be equally determined by the special implementing regulation of the Ministry of Health and Social Welfare in the Republic of Croatia and the authorities of the competent Ministry in Bosnia and Herzegovina.

Article 14

(1) Payment in cash, in accordance with provisions of this Agreement shall be determined and paid in the currency that is valid in that contracting state.

(2) Payments of allowances under paragraph 1 of this Article to the persons under Article 1(1) subparagraphs 7 and 8 of this Agreement, who are residents of the other Contracting State, shall be paid in internationally recognized currency. (...).

IV. Admissibility

19. The request was submitted by the Chair of the House of Peoples. Therefore, the request meets the admissibility requirement as to the authorized person to submit a request to the Constitutional Court. With regard to remaining admissibility requirements, the Constitutional Court deems that they depend on the interpretation of the jurisdiction of the Constitutional Court provided under Article IV(3)(f) of the Constitution of Bosnia and Herzegovina.

20. The Constitutional Court recalls that the substance of the jurisdiction of the Constitutional Court laid down in Article IV(3)(f) of the Constitution of Bosnia and Herzegovina is the resolution of „procedural regularity" arising out of a request of the House of Peoples. A purposeful and systematic interpretation of the provisions of Article IV(3) of the Constitution of Bosnia and Herzegovina should be used in the first place in order to conceive the meaning of the term of „procedural regularity".

21. Pursuant to Article IV(4)(d) of the Constitution of Bosnia and Herzegovina and Article 16 of the Law on the Procedure of Concluding and Implementing International Agreements, the Parliamentary Assembly shall have the responsibility for deciding whether to consent to the ratification of agreements. According to Article IV(3)(d) of the Constitution of Bosnia and Herzegovina, the Parliamentary Assembly shall adopt all decisions in both chambers *by majority of those present and voting (...). If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity*.

22. According to Article IV(3)(e) of the Constitution of Bosnia and Herzegovina, *a proposed decision of the Parliamentary Assembly may be declared to be destructive to a vital national interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate,*

the Bosniac, Croat, or Serb Delegates. A decision can be declared destructive by referral of the Caucus of one people (at least three candidates) to Article IV(3)(e) of the Constitution of Bosnia and Herzegovina. The consequence of that is a stricter voting criterion compared to the criterion set out in Article IV(3)(e), more precisely *such a proposed decision shall require for approval in the House of Peoples a majority of the Bosniac, of the Croat and of the Serb Delegates present and voting*. The continuation of parliamentary procedure is provided in that way regardless of the statement with respect to the destructiveness to the vital national interest of one constituent people, although in accordance with stricter democratic requirements because the notion of parliamentary majority appears in another dimension. If the House of Peoples does not obtain the required majority, the law may not be passed in the House of Peoples since it has not obtained its confidence.

23. Should there be no voting since *a majority of the Bosniac, of the Croat, or of the Serb Delegates objects to the invocation of paragraph IV(3)(e), the Chair of the House of Peoples shall immediately convene a Joint Commission comprising three Delegates, one each selected by the Bosniac, by the Croat, and by the Serb Delegates, to resolve the issue. If the Commission fails to do so within five days, the matter will be referred to the Constitutional Court, which shall in an expedited process review it for procedural regularity.* It means that after objecting to the invocation of Article IV(3)(e) of the Constitution of Bosnia and Herzegovina, the procedure of voting on the proposed decision shall be suspended and the House of Peoples shall act in accordance with Article IV(3)(f) of the Constitution of Bosnia and Herzegovina.

24. It follows from the quoted provisions that the procedure of protection of vital national interest of one people is clearly and precisely stipulated by the quoted provisions. This procedure must be complied with. The role of the Constitutional Court should be the control of whether the aforementioned procedure is being followed if that is requested from the Court. On the other hand, it clearly follows from the cited provisions that this type of dispute arises out of a situation in which the representatives of constituent peoples cannot reach an agreement on whether a decision is destructive to the vital national interest of one of the peoples. This results in a blockage of the work of the Parliamentary Assembly since the proposed decision cannot get the confidence of a majority of delegates of certain people. In this regard, the role of the Constitutional Court as the highest state court and guardian of the Constitution of Bosnia and Herzegovina (Article VI(3) of the Constitution of Bosnia and Herzegovina) is to contribute to de-blocking the work of the Parliamentary Assembly of Bosnia and Herzegovina by its decision on the merits, if the Parliamentary Assembly is not capable to overcome the problem by itself. This procedure is urgent since the prompt intervention of the Constitutional Court is necessary to enable

the work of the legislative body. This second role of the Constitutional Court, *i.e.* adoption of the decision on the merits regarding whether or not the decision is destructive to the vital national interest of one people, is very important in a situation when the state needs a decision to regulate certain field, whereas voting on that decision is blocked by the objection raised with regard to a vital national interest of one people.

25. The protection of vital national interests of one people mechanism is very important in the states with multiethnic, multilingual and multi-religious communities or communities which are distinctive due to their differences. On the other hand, each invocation of vital national interest has for a consequence a stricter criterion for adoption of general acts (Article IV(3)(e) of the Constitution of Bosnia and Herzegovina) or, as a last resort, procedure before the Constitutional Court. The consequences are the interruption of parliamentary procedures, which may have an adverse effect on the work of the legislative body and functioning of the state. For that reason, as established by the Constitutional Court in the following decisions: *U 2/04* (28 May 2004, *Official Gazette of BiH* no. 98/04, paragraph 18) and *U 8/04* (25 June 2004, *Official Gazette of BiH* no. 40/04, paragraph 22), the procedure under Article IV(3)(f) of the Constitution of Bosnia and Herzegovina should be invoked if there is a reason for the opinion that the proposed decision of the Parliamentary Assembly is destructive to the vital national interest of constituent peoples or if there is a serious controversy in opinions or a doubt about whether the procedures from Article IV(3)(e) and (f) have been complied with.

26. In the case at hand, the request and the Statement of Bosniac Caucus contain several reasons for which it is considered that consenting to ratification of the Agreement is destructive to the vital national interest of the Bosniacs. The reasons essentially pertain to placing additional burden on disability insurance funds in Bosnia and Herzegovina by acknowledging the status and rights in the Republic of Croatia, in which case there would be no possibility for the authorities of Bosnia and Herzegovina to control these funds although they would be obliged to recognize the status and rights established in that way. Also, the Statement raises a question of discrimination against certain categories of war veterans' population in Bosnia and Herzegovina because the Agreement applies only to the citizens of the Republic of Croatia who used to be the members of Croat Defense Council. The question of legal security is also raised due to non-existence of bilateral agreements on dual citizenship. The Statement also questions the period of war hardships (18 September 1991 through 23 December 1996).

27. The Constitutional Court holds that the request is sufficiently reasoned to meet this admissibility requirement as well. It follows from the analysis of procedural regularity

that the Statement of the Bosniac Caucus no. 02-50-1-15-54/06 of 10 March 2006, was signed by all five delegates, namely Messrs. Osman Brka, Hasan Čengić, Halid Genjac, Hilmo Neimarlija and Mustafa Pamuk. The Objection of the Croat Caucus no. 02-50-1-15-54/06 of 10 March 2006 was signed by all five delegates, namely: Messrs. Anto Spajić, Velimir Jukić, Tomislav Limov, Branko Zrno and Ilija Filipović. The Joint Commission was formed at the session of the House of Peoples on 10 March 2006 consisting of Messrs. Halid Genjac, Velimir Jukić and Vinko Radovanović. The Joint Commission met on 15 March 2006 and was in session for one day, but as it did not find any solution, it decided to refer the whole case to the Constitutional Court for further procedure. The applicant submitted a request to the Constitutional Court on 16 March 2006 along with the following attachments: unverified transcript of the Agreement in question, a part of unauthorized transcript of the continuation of the 54th session of the House of Peoples, unauthorized transcript from the session of the Joint Commission, as well as the text of the Law on the Rights of Croat War Veterans, in accordance with Article 21 of the Rules of the Constitutional Court.

28. The Constitutional Court established that the request was submitted by an authorized person, that the procedural regularity in the sense of Article IV(3)(e) and (f) of the Constitution of Bosnia and Herzegovina was complied with and that the formal requirements under Article 16(2) of the Rules of the Constitutional Court were met.

29. It follows that the request is admissible.

V. Merits

30. The applicant requested the review of procedural regularity or more precisely finding out whether there were constitutional grounds for the statement that consenting to ratification of the Agreement was destructive to vital national interest of the Bosniac people. In order to examine this request, the Constitutional Court first has to define the term of „vital national interest" within the meaning of Article IV(3)(f) of the Constitution of Bosnia and Herzegovina.

31. The Constitutional Court recalls that the Statement of Bosniac Caucus on the destructivity of vital national interest of the Bosniac people raises in particular the following substantial issues: a) the Agreement will impose new obligations on Bosnia and Herzegovina including financial and other forms of assistance to the persons who have already established or are about to establish their status regarding the said rights in the Republic of Croatia in accordance with its respective laws, which does not mean that the assistance will be provided for disability insurance funds, but that these funds will

be additionally burdened; b) the period of war sufferings, as defined by the Agreement, places additional burden on disability insurance funds because it is related to the period prior to the official beginning of the war in Bosnia and Herzegovina and prior to the international recognition of the sovereignty of Bosnia and Herzegovina as a state; c) non-existence of bilateral agreement on dual citizenship between Bosnia and Herzegovina and Republic of Croatia restricts the exercise of rights regulated by the Agreement; d) the issue is raised with regards to the discrimination of citizens of the Republic of Croatia who were the members of another units of the Armed Force of Bosnia and Herzegovina in relation to those who were the members of the Croat Defense Council.

32. Having regard to the aforesaid, the Constitutional Court should examine whether each of the raised issues represents the issue of vital national interest of one of the constituent peoples of Bosnia and Herzegovina, and if that be the case, whether it is destructive to the respective vital national interest.

V.1. Notion of vital national interest of constituent people

33. With reference to the fact that there is no definition of „vital national interest" in the Constitution of Bosnia and Herzegovina, the Constitutional Court was previously refusing to define or to additionally enumerate the elements that constitute vital national interests of constituent peoples. On the other hand, the Constitutional Court enumerated several factors shaping the perception of the mentioned term (see the Decision of the Constitutional Court in case *U 4/02*, paragraph 31, ff). First, the notion of vital national interest is the functional category which cannot be viewed separately from the notion „constituency of peoples" whose vital national interests are protected under Article IV(3)(e) and (f) of the Constitution of Bosnia and Herzegovina. The last line of the Preamble of the Constitution of Bosnia and Herzegovina defines Bosniacs, Serbs and Croats as „constituent peoples (along with Others), and citizens of Bosnia and Herzegovina". In its Third Partial Decision *U 5/98* (Decision of 7 January 2000, *Official Gazette of Bosnia and Herzegovina* no. 23/00, paragraph 52), the Constitutional Court concluded that *however vague the language of the Preamble of the Constitution of BiH may be due to this lack of definition of the status of Bosniacs, Croats, and Serbs as constituent peoples, it clearly designates all of them as constituent peoples, i.e. as peoples.* Furthermore, the Constitutional Court concluded that *taken in conjunction with Article I of the Constitution, the text of the Constitution of BiH thus distinctly distinguishes constituent peoples from national minorities with the intention of affirming the continuity of Bosnia and Herzegovina as a democratic multi-ethnic state* (*ibid*, paragraph 53). In connection therewith, one may conclude that the notion of constituent status of peoples is not an abstract notion but it

incorporates certain principles without which a society with differences protected under its respective constitution could not function efficiently (Decision of the Constitutional Court no. *U 4/02*, paragraph 33). Accordingly, the term „constituent status" has a direct effect on the term of „vital national interest" (see the decision of Constitutional Court that has been already cited, no. *U 8/04*, paragraph 30) and, therefore, the proposed decision of the Parliamentary Assembly that affects the ability of the state to function efficiently while protecting such differences is more likely to affect the vital national interests of a constituent people than other proposed decisions (see the Decision of the Constitutional Court no. *U 10/05* of 22 July 2005).

34. Furthermore, the meaning of „vital national interest" is partially interpreted by Article I(2) of the Constitution of Bosnia and Herzegovina, which provides that Bosnia and Herzegovina shall be a democratic state, *i.e.* „that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society" (line 3 of the Preamble). In connection with the aforesaid, the interest of constituent peoples to participate in full capacity in the government system and in the activities of public authorities may be viewed as a vital national interest. The Constitution of Bosnia and Herzegovina contains the provisions in this regard wherein it is stated that *officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina* (Article IX(3)). The Constitution of Bosnia and Herzegovina also imposes the quota-based system in determining the composition of the House of Peoples (Article IV(1)), appointment of the Chair and Vice-Chair of two chambers of the Parliamentary Assembly (Article IV(3(b)), composition of the Presidency of Bosnia and Herzegovina (Article V) and the first composition of the Management Board of the Central Bank of Bosnia and Herzegovina (Article VII, paragraph 1, item 2). In addition to the quota-based system, Article IV(1)(b) of the Constitution of Bosnia and Herzegovina set forth the decision-making process in the House of Peoples conditioning it with minimum presence and representation of delegates of each constituent people. Finally, Article IV(3)(e) and (f) and Article V(2)(d) of the Constitution of Bosnia and Herzegovina introduce the principle of protection of the vital national interest of constituent peoples as an additional safeguard of constitutional protection.

35. The meaning of these safeguards was interpreted by the Constitutional Court in the aforementioned Decision no. *U 5/98*, underlining therein that *it is a generally recognized principle to be derived from the list of international instruments in Annex I to the Constitution of BiH that a government must represent the whole people belonging to the territory without distinction of any kind, thereby prohibiting – in particular according to Article 15 of the Framework Convention on the Protection of National Minorities which is incorporated*

into the Constitution of BiH through Annex I – a more or less complete blockage of its effective participation in decision-making processes. Since effective participation of ethnic groups is an important element of democratic institutional structures in a multi-ethnic state, democratic decision-making would be transformed into ethnic domination of one or even more groups if, for instance, absolute and/or unlimited veto-power would be granted to them, thereby enabling a numerical minority represented in governmental institutions to forever endures its will on the majority (*ibid*, paragraph 55). Accordingly, the Constitutional Court infers that efficient participation of constituent peoples in adopting political decisions in terms of prevention of absolute domination of one people over the other one represents the vital national interest of each constituent people.

36. Finally, the issue of interpreting the notion of „efficient participation of constituent peoples in state authorities", by applying it outside of the constitutional provisions quoted above, should be applied functionally and in line with Article IX(3) of the Constitution of Bosnia and Herzegovina, according to which *officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina*. On the one hand, this means that the state authorities should, in principle, be a representative reflection of advanced co-existence of all peoples in Bosnia and Herzegovina, including minorities and others. On the other hand, „efficient participation of constituent peoples in the authorities", if it falls outside the constitutional framework, must never be carried out or imposed at the expense of efficient operation of the state and its authorities. To that end, the Constitutional Court reasoned that *no provision of the Constitution allows for the conclusion that these special rights for the representation and participation of the constituent peoples in the institutions of BiH may be applied also for other institutions or procedures. On the contrary, insofar as these special collective rights might violate the non-discrimination provisions, […] they are legitimized solely by their constitutional rank and therefore have to be narrowly construed. In particular, it cannot be concluded that the Constitution of BiH provides for a general institutional model which could be transferred to the Entity level or that similar, ethnically-defined institutional structures on an Entity level need not meet the overall binding standard of non-discrimination according to Article I(4) of the Constitution of BiH or the constitutional principle of collective equality of constituent peoples* (*ibid,* item 68). Accordingly, a correct conclusion to be inferred from this is that this is the only way to establish a compromising relationship between constituent people affiliation and declaring oneself as a citizen.

37. In addition to the constitutional element of „effective participation of the constituent peoples in the state bodies", the Constitutional Court has repeatedly considered the issue

of collective rights of the constituent peoples. Accordingly, the Constitutional Court has concluded that a vital national interest of the constituent peoples implies the protection of various rights and freedoms, which provide a significant support in securing that the constituent people may present their interests within a framework of collective equality and participation in state functioning. In addition to being the constitutional right (see Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles I(4)), II(3)(m) and II(5) of the Constitution of Bosnia and Herzegovina, the European Charter For Regional or Minority Language and the Fourth Partial Decision of the Constitutional Court no. *U 5/98* of 18 and 19 August 2000, published in *Official Gazette of BiH* no. 36/00, paragraph 34), the freedom to use one's own language in participation and access to education, information and ideas expressed on that language falls within the scope of vital national interests (see the above-cited Decision of the Constitutional Court *U 8/04*, paragraphs 38-41). The same includes the freedom to multicultural religious life (*ibid*. paragraph 34; the Fourth Partial Decision of the Constitutional Court no. *U 5/98* of 18 and 19 August 2000, paragraph 44).

38. Hence, though the Constitutional Court has already decided on the issues relating to the protection of vital national interest, the Constitutional Court has never listed elements of a vital national interest of any of the peoples. However, the Constitutional Court has indicated that the notion of vital national interest implies functional category that should be approached in this context. Therefore, in accordance with Article VI(3)(1) of the Constitution of Bosnia and Herzegovina, the Constitutional Court safeguards the Constitution and is limited thereof with regard to the functional interpretation. Actually, in the consideration of any specific case, the Constitutional Court shall apply, within the assigned constitutional framework, the values and principles essential to a free and democratic society that incorporates, *inter alia*, the inherent dignity of every person and accommodates a wide range of diversity in beliefs and respect for the cultural identity of a person or groups as well as the confidence in social and political institutions that are promoting the participation of individuals and groups in the society. On the other hand, the protection of vital national interest must not imperil the state sovereignty and its functionality, which is closely related to the neutral and essential notion of citizenship, as the criterion of affiliation to a „nation". In other words, the protection of vital national interest must not lead to unnecessary disintegration of civil society, as the indispensable element of modern statehood.

39. Finally, the Constitutional Court notes that the Constitutions of the Entities identically define the notion of vital national interest of the constituent peoples so as, *inter alia*, it is stated that *equal rights of constituent peoples in the process of decision-making; education,*

religion, language, promotion of culture, tradition and cultural heritage (see, Amendment LXXVII to the Constitution of the Republika Srpska and Amendment XXXVII to the Constitution of the Federation of Bosnia and Herzegovina). Although the Constitution of Bosnia and Herzegovina does not contain such provision, the Constitutional Court deems that the explicit language used in the Entities' Constitutions is convincing in this context.

V.2. Existence of the vital national interest of the Bosniac people relating to item I of the Statement

40. Article 4 paragraph 1 of the Agreement provides for that the persons who became the victims of war *in the period during the defense of the Contracting States' sovereignty*, and who were members of Croat Defense Council having the citizenship of the Republic of Croatia, and who acquired the right to disability pension in the Republic of Croatia under its legal regulations, shall acquire the right to disability allowance also under the regulations of Bosnia and Herzegovina. Further, Article 5 of the Agreement stipulates that Bosnia and Herzegovina shall be obliged *to confirm a status of the persons, which is established by the legally valid ruling of the Republic of Croatia,* by way of recognizing the right to the persons in accordance with its legal regulations. Therefore, the Agreement provides for automatism in relation to the recognition of the status and the rights of the persons concerned in Bosnia and Herzegovina, including an additional obligation by Bosnia and Herzegovina to submit the legally valid rulings on status recognition to the Republic of Croatia (Article 5 paragraph 2). It is asserted in the Statement that such obligation of the automatic status and right recognition is destructive to a vital national interest of the Bosniac people and especially in view of the fact that the Agreement implies *the persons who became the victims of war in the period during the defense of the Contracting States' sovereignty*.

41. With regard to the allegations under item I of the Statement, the Constitutional Court observes that, in the present case, there is no issue regarding additional obligations being imposed to Bosnia and Herzegovina by the international agreement but the Agreement involves assistance to the citizens of Bosnia and Herzegovina who are also holding citizenship of another country, *i.e.* in the instant case the Republic of Croatia. Actually, by an analysis of the Agreement's provision, the Constitutional Court considers that the present case involves the recognition of right in the Republic of Croatia to those who had such right already recognized in Bosnia and Herzegovina. Only those citizens of Bosnia and Herzegovina, whose right to the disability pension has been already recognized under the regulations of Bosnia and Herzegovina, may realize their right to disability pension in the Republic of Croatia if they were members of Croat Defense Council or members of

their families and if in possession of the Republic of Croatia's citizenship. Therefore, only to these persons and under the above conditions, shall the Republic of Croatia recognize the right to disability pension and shall pay the difference between such pension and the previously established disability allowance realized in Bosnia and Herzegovina.

42. In view of the aforementioned and taking into account the notion of vital national interest as stated in paragraphs 33-39 of the present Decision, the Constitutional Court finds the allegations under item I of the Statement as ill-founded. In addition, no issue arises under Article 4 and Article 5 paragraph 1 and, consequently, Article 8 and Article 14 paragraph 2 of the Agreement that would be of vital national interest of any of the constituent peoples and, in the present case, of the Bosniac people in Bosnia and Herzegovina.

V.3. Existence of the vital national interest of the Bosniac people relating to item II of the Statement

43. Under item II of the Statement it is alleged that granting of consent for ratification of the Agreement in relation to Article 1 paragraph 1 subparagraph 11 of the Agreement, which defines the period of suffering, would be destructive to a vital national interest of the Bosniac people. The Constitutional Court notes that that Article 2 of the Law on the Rights of Veterans undisputedly defines this period in the same manner, as justifiably alleged also in the Objection. Hence, the Constitutional Court cannot accept the allegations under item II of the Statement that such period would increase the obligations of Bosnia and Herzegovina inasmuch as the Agreement does not impose anything that has not already been defined by the competent authorities in Bosnia and Herzegovina.

44. In view of the aforementioned and taking into account the notion of vital national interest as stated in paragraphs 33-39 of the present Decision, the Constitutional Court considers the allegations under item II of the Statement as ill-founded as no issue arises under Article 1 paragraph 1 subparagraph 11 of the Agreement that would be of vital national interest of any of the constituent peoples and, in the present case, of the Bosniac people in Bosnia and Herzegovina.

V.4. Existence of the vital national interest of the Bosniac people relating to item III of the Statement

45. Under item III of the Statement it is asserted that the absence of a bilateral agreement on dual citizenship between Bosnia and Herzegovina and the Republic of Croatia would prevent the exercise of the rights regulated by the Agreement. With regard to this allegation,

the Constitutional Court considers the Objection justified as to the statement that the lack of a bilateral agreement on dual citizenship between Bosnia and Herzegovina and the Republic of Croatia place no obstacle to enforcement of this Agreement. Particularly, as correctly indicated by the Objection, the time limit for the process of concluding such agreement is 2012 and, by Article 62 paragraph 3 of the Law on the Rights of Veterans, the obligation to conclude international agreement relating to the protection of disabled veterans has already been provided for, *i.e.* before a bilateral agreement on dual citizenship enters into force.

46. In view of the aforementioned and taking into account the notion of vital national interest as stated in paragraphs 33-39 of the present Decision, the Constitutional Court considers the allegations under item III of the Statement as ill-founded as there is no indications that the absence of a bilateral agreement on dual citizenship between Bosnia and Herzegovina and the Republic of Croatia rises the issue that would be of vital national interest of one of the constituent people and, in the present case, the Bosniac people in Bosnia and Herzegovina.

V.5. Existence of the vital national interest of the Bosniac people relating to item IV of the Statement

47. Under item IV of the Statement it is alleged that the Agreement relates only to the citizens of the Republic of Croatia who were members of Croat Defense Council, while Article 65 of the Law on the Rights of Veterans and their Families provides for assistance to certain veterans' categories without mentioning parts of the Armed Forces, which Croat Defense Council used to be part of. Thus, as stated under this item of the Statement, the citizens of the Republic of Croatia who were members of other parts of the Armed Forces have been discriminated against and, consequently, Bosnia and Herzegovina should not ratify the Agreement which discriminates its citizens.

48. The Objection indicates that the allegations on discrimination are ill-founded and especially those relating to the provision of Article 62 paragraph 3 of the Law on the Rights of Veterans. In addition, it follows from the allegations stated in the Objection that all three constituent peoples and the Others served in Croat Defense Council.

49. The Constitutional Court has already pointed out, in its Third Partial Decision in the case no. *U 5/98* III, paragraph 79, the principles for examination whether a law demonstrates „discriminatory intent or effect". The principles defined in the mentioned Decision, which must be applied in deciding whether or not there is „discriminatory intent or effect", are the following:

a) The law discriminates *prima facie*, *i.e.* in its explicit terms, by using criteria such as language, religion, political or other opinion, national origin, association with a national minority or any other status for the classification of categories of people which will then be treated differently on that basis. However, it would lead to obviously absurd results if every difference on those grounds were prohibited. There are situations and problems that, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities are sometimes needed to correct factual inequalities. Hence, the European Court of Human Rights elaborated a standard of interpretation, according to which the principle of equality of treatment is violated if the distinction has no reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration. Accordingly, a difference of treatment in the exercise of a right must not only pursue a legitimate aim regarding the principles which normally prevail in democratic societies. The non-discrimination provision is likewise violated when it is clearly found that there is no reasonable relationship of proportionality between the means used and the aim sought to be achieved. The principle of proportionality thus presupposes four steps of consideration: whether there is a justified public aim, whether the means employed can achieve a legitimate goal, whether the means are necessary, i.e. do they have the minimum of relevance to achieve the aim, and finally, whether the burdens imposed are proportional in comparison to the significance of the aim;

b) The law, although *prima facie* neutral, is administered in a discriminatory way;

c) The law, although it is *prima facie* neutral and is applied in accordance with its terms, was enacted with the purpose of discrimination, as follows from the law's legislative history, statements made by legislators, the law's disparate impact, or other circumstantial evidence of intent;

d) The effects of past *de jure* discrimination are upheld by respective public authorities at all state levels, not only by their actions but also through their inaction.

50. First of all, the Constitutional Court points out that it is not within its competence to ascertain the constitutionality of present or possible solutions of the Agreement in the context of the requirements under Article IV(3)(f) of the Constitution of Bosnia and Herzegovina. In assessing the mentioned arguments, the Constitutional Court is neither obliged nor authorized by Article IV(3) of the Constitution of Bosnia and Herzegovina to decide whether the proposed Agreement, if the decision on consent for ratification were granted, would result in discrimination and thus violate the constitutional rights or would be unconstitutional on some other grounds. If so, it would be possible to initiate the proceedings so that the constitutional rights would be exercised in the ordinary manner.

However, the Constitutional Court is not competent to ascertain the constitutionality of present or possible solutions in the context of the requirements under Article IV(3)(f) of the Constitution of Bosnia and Herzegovina (see, the above cited Decision of the Constitutional Court no. *U 10/05*). This decision aims to give the final answer to the question which neither the House of Peoples nor its Joint Commission were able to offer and which primarily relates to the issue of the existence of vital national interest of one or several constituent peoples and then, if established so, to the issue regarding the existence of destructiveness of that particular vital national interest.

51. So as to determine whether the issue mentioned under item IV of the Statement in the present case implies the issue of vital national interest of one constituent people in Bosnia and Herzegovina, it should be first examined whether the provision of the Agreement, wherein it is stated that the „persons" under this Agreement, the previous members of Croat Defense Council and members of their families having the citizenship of the Republic of Croatia, is discriminatory against other citizens of the Republic of Croatia in Bosnia and Herzegovina who used to be members of other units of Armed Force, when it comes to receiving the assistance from the Republic of Croatia, which is the subject of this Agreement. If so, it might involve the issue of vital national interest of one or several constituent peoples and after that it might be ascertained whether the issuance of the decision granting of consent for ratification of Article 1 paragraph 1 subparagraphs 7 and 8 of the Agreement would be destructive to vital national interest of one or several constituent peoples in Bosnia and Herzegovina. Therefore, the issue arises as to whether such definition under the Agreement is *prima facie* discriminatory since it determines affiliation of the citizens of the Republic of Croatia to certain parts of the Armed Forces?

52. The Constitutional Court points out that Article 62 paragraph 3 of the Law on the Rights of Veterans provides for that *the payment of compensation to the members of the Croat Defense Council according to the regulations relating to the protection for disabled veterans applicable until the date of entry into force of this Law shall cease on the date of entry into force of the Agreement on cooperation Bosnia and Herzegovina and the Republic of Croatia regarding the rights of victims of war in Bosnia and Herzegovina, relating to the previous members of the Croat Defense Council and their families,* and which shall be concluded between Bosnia and Herzegovina. Therefore, the Federation of BiH has regulated by its provision that the right of members of Croat Defense Council and their families, relating to the protection for disabled veterans, shall be determined by the Agreement with the Republic of Croatia. Consequently, it follows that the Agreement pursues, in its definition of the persons entitled to the relevant right under Article 1 paragraph 1 subparagraphs 7 and 8, the legal regulation of the Federation of BiH.

53. With regard to the aforementioned, the Constitutional Court points out that the fact that the Agreement refers to those members of Croat Defense Council and their family members that are, at the same time, citizens of the Republic of Croatia is not a significant one. Actually, as it has already been said, this present case refers to the international agreement between two equal, sovereign states and refers to the assistance that one country, the Republic of Croatia, wants to give to another country, Bosnia and Herzegovina, in resolving very delicate and important issues of the war victims' disability rights. When concluding such agreements, contracting states enjoy wide margin of appreciation and, although agreements must be in accordance with the valid legal regulations of every contracting state, regulation of one state cannot impose any liability to the other state. Interstate agreement may obligate contracting states in the scope and manner that they mutually agree upon, in accordance with their regulations. In that regard, the Republic of Croatia determined the assistance that it, with its sovereign will, wants to give to the individuals in Bosnia and Herzegovina and also, indirectly to war veteran disability funds, may be distributed to Croat Defense Council members and their families' members that are, at the same time, its citizens. With regard to that, the Constitutional Court has already indicated that funds, in accordance with Article 65 of the Law on Rights of War Veterans may be used „in accordance with funds providers' will". By referring this Article with previously stated liability from Article 62 paragraph 3 of the Law on the Rights of Veterans of Croat Defense Council members through international agreement and in accordance with wide margin of appreciation that the states enjoy in concluding international agreement on providing assistance, the Constitutional Court does not find anything that would point to the fact that the Agreement has „discriminating effect or intention".

54. On the basis of the aforementioned and taking into consideration the notion of vital national interest, as stated in items 33-39 of this Decision, the Constitutional Court finds assertions from item IV of the Statement as ill-founded and also finds that there is nothing that would indicate that Article 1 paragraph 1 items 7 and 8 of the Agreement raises the issue that would be of a vital national interest of one constituent people, in the instant case, the Bosniac people in Bosnia and Herzegovina.

55. Pursuant to this Decision, the House of Peoples is obliged to continue and terminate its blocked procedure of giving consent to the Agreement, under the procedure in Article IV(3)(d) of the Constitution of Bosnia and Herzegovina.

VI. Conclusion

56. The Constitutional Court concludes that the Statement of the Bosniac Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina on the destructiveness to a vital national interest of the Bosniac people in Bosnia and Herzegovina failed to meet the requirements of procedural regularity under Article IV(3)(f) of the Constitution of Bosnia and Herzegovina, since the Agreement on Cooperation between Bosnia and Herzegovina and the Republic of Croatia in terms of the Rights of Victims of War in Bosnia and Herzegovina, who were members of the Croat Defense Council and members of their families, is not destructive to the vital national interest of the Bosniac people in Bosnia and Herzegovina and the procedure for adoption should be carried out in compliance with Article IV(3)(d) of the Constitution of Bosnia and Herzegovina.

57. Having regard to Article 61(1) and (5) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

SEPARATE DISSENTING OPINION OF JUDGE PALAVRIĆ

I give my separate opinion with reference to the Court's majority decision in the case no. U 7/06 **and I consider that granting the consent to Article 1 paragraphs 7 and 8, Article 4 paragraph 1, Article 5, Article 8 and Article 14 paragraph 2 of *the Agreement on Cooperation between Bosnia and Herzegovina and the Republic of Croatia regarding the rights of victims of war in Bosnia and Herzegovina, relating to the previous members of the Croat Defense Council and their families („the Agreement")* is destructive to a vital national interest of the Bosniac people in Bosnia and Herzegovina, as asserted in the Statement of the Bosniac Caucus of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina. I also consider that the procedure of granting the consent to ratification of the Agreement should be carried out according to the procedure under Article IV(3)(e) of the Constitution of Bosnia and Herzegovina.**

In fact, Article 62 paragraph 3 of the temporary and final provisions of the Law on the Rights of Veterans and their Families, cited in the Court's Decision, Chapter: „Relevant Law", stipulates as follows „With the exception of paragraphs 1 and 2 of this Article, the payment of compensation to the members of the Croat Defense Council (HVO) according to the regulations relating to the protection for disabled veterans applicable until the date of entry into force of this Law shall cease on the date of entry into force of the Agreement on cooperation Bosnia and Herzegovina and the Republic of Croatia regarding the rights of victims of war in Bosnia and Herzegovina, relating to the previous members of the Croat Defense Council and their families, which is to be concluded no later than 31 December 2005."

Article 65 paragraph 1 of this Law provides that the funds obtained as a financial support to the state or to an individual and intended for personal incomes of certain veterans' categories may be used according to the donor's choice, and paragraph 2 of the same Article provides that the use of the funds under paragraph 1 of the above Article shall be regulated by international agreement between Bosnia and Herzegovina and the donor state.

It follows from the above provisions that the goal of the authorities of the Federation of Bosnia and Herzegovina has been to resolve the issue of additional financial support based on affiliation of the citizens of Bosnia and Herzegovina to the Croat Defense Council (HVO), insomuch that the Agreement between the two states should have been concluded to the end that the Republic of Croatia provided the financial assistance to the members of Croat Defense Counicl (HVO) and their families, who were already the beneficiaries

of the war veteran disability funds of Bosnia and Herzegovina, more precisely, of the relevant funds of the Federation of Bosnia and Herzegovina.

However, instead of desired goal, the presented text of the Agreement between the Republic of Croatia and Bosnia and Herzegovina stipulates as follows:

- Article 4 paragraph 1 provides that the two contracting states agree *that the persons who became the victims of war in the period during the defense of the Contracting States' sovereignty (the period of suffering) under Article 1(1) subparagraphs 7 and 8 of this Agreement, and* ***who acquired their right to pension under the regulations of the Republic of Croatia, shall exercise their rights under Article 2 of this Agreement*** (this implies the rights contained in the regulations relating to the rights of war veterans and their families in the Federation of BiH, the protection of disabled veterans in the Federation of BiH, and the pension and disability insurance rights in the Federation of BiH), *from the date of the entry into force of this Agreement* ***and under the legal regulations of Bosnia and Herzegovina.***

Indisputably, the persons under Article 1 paragraph 7 of the Agreement refer to the members of the Croat Defense Council who were injured in the territory of Bosnia and Herzegovina and thus acquired the status of the war invalid, on the basis of being injured or detained, but only if they were the citizens of the Republic of Croatia. The offered text of this provision does not refer to the members of the Croat Defense Council (HVO) that are the citizens of Bosnia and Herzegovina who have been injured in the territory of Bosnia and Herzegovina and thus have acquired the status of the war invalid, on the basis of being injured or detained. Actually, the following wording „if they were citizens of the Republic of Croatia;" cannot be understood as implying the citizens who hold dual citizenship. If that were the case, the wording would be as follows: „if they have been the citizens of Bosnia and Herzegovina and the Republic of Croatia" or, at least, „if they have also been the citizens of the Republic of Croatia."

The situation is same as to the persons mentioned under Article 1 paragraph 8 of the Agreement. However, it is unclear whether family members of the killed, detained or missing member of Croat Defense Council (HVO), the citizens of the Republic of Croatia, should presently be the citizens of the Republic of Croatia or they had to be the citizens of the Republic of Croatia during the „period of suffering".

Obviously, this does not imply assistance but the obligation to be imposed on Bosnia and Herzegovina!

Moreover, this obligation is accepted without meeting the requirements under Article 19 of the Law on the Procedure of Concluding and Implementing International

Agreements. In fact, although Bosnia and Herzegovina takes over financial obligations, there is nothing to indicate the application of the provisions of the Law on External Debt or the Law on Treasury of the Institutions of Bosnia and Herzegovina as well as of other relevant provisions of the Law on the Procedure of Concluding and Implementing International Agreements.

Consequently, I consider that the issue of imposing additional obligations on Bosnia and Herzegovina by the agreement between two states intended to provide the assistance also to the citizens of Bosnia and Herzegovina, and especially if it acknowledges only the citizens of another contracting state as in the present case, as well as the issue of non-discrimination against all persons in Bosnia and Herzegovina, do not include the vital national interest of only one constituent people. On contrary, **effective participation of the constituent peoples in the decision-making process, aimed at the preservation of Bosnia and Herzegovina's sovereignty and its functionality, represents the vital national interest of each constituent people and, therefore, of the Bosniac people, as well.**

In view of the above, I conclude that the issue of granting consent to ratification of the Agreement and the Statement of the Bosniac Caucus **raise the legitimate issues inherent to the notion of vital national interest of all constituent peoples and, in the present case, of the Bosniac people in Bosnia and Herzegovina.**

Therefore, granting the consent to ratification of the Agreement is also destructive to the vital national interest of the Bosniac people in Bosnia and Herzegovina.

In fact, in addition to the obligation of Bosnia and Herzegovina under Article 4 paragraph 1 of the Agreement, Article 5 paragraph 1 of the Agreement stipulates that Bosnia and Herzegovina *shall be obliged to confirm a status of the person, which is established by the legally valid ruling of the Republic of Croatia, by way of recognizing the right to the persons under Article 1(1) subparagraphs 7 and 8 of this Agreement in accordance with its legal regulations.*

In addition to automatism as to the confirmation of status and rights of the persons in question, Article 5 paragraph 2 of the Agreement imposes the obligation on Bosnia and Herzegovina *to submit to the Republic of Croatia, legally valid rulings on the recognized right in accordance with its regulations*! Such burden of automatic recognition of the status and rights is destructive of vital national interest of the Bosniac people. Actually, even if the Agreement were interpreted so that it concerns the members of Croat Defense Council (HVO) who hold the citizenship of both Bosnia and Herzegovina and the Republic of Croatia, and taking into account the provision of Article 65 of the Law on the Rights of Veterans and their Families providing for a possibility that the funds may be used according to the donor's choice as regulated by international agreement, an issue may

arise as to what are the acceptable limits with regard to the conditions set forth by the donor in view of the sovereignty of the state which is the beneficiary of these funds.

In fact, the conditions set forth by the Republic of Croatia, as the donor of the funds, exclude the fact that Bosnia and Herzegovina, under Article I.(1) of the Constitution of Bosnia and Herzegovina, *shall continue its legal existence under international law as a state*, with all elements and characteristics of full sovereignty. Therefore, the state sovereignty must never be put in question when there is an agreement, either bilateral or multilateral, to be concluded with any state or organization.

In the present case, I deem that this entails the Agreement to be concluded between the two sovereign states, which unilaterally imposes new obligations on Bosnia and Herzegovina, as the alleged beneficiary of the financial assistance. In addition, the Agreement contains no provision relating to control mechanisms that would ensure that Bosnia and Herzegovina may review the status and rights that have been recognized to the persons in questions and the results thereof although, the persons who became the victims of war in the period during the defense of sovereignty of the two states, the Republic of Croatia and Bosnia and Herzegovina, are mentioned in Article 4 paragraph 1 of the Agreement.

Contrary to the objective of agreements between states anticipated by the Federal Law on the Rights of Veterans, by granting of consent to ratification of the Agreement which contains the challenged provisions, Bosnia and Herzegovina would undisputedly take over liabilities in opposition to Article 19 of the Law on the Procedure of Concluding and Implementing International Agreements. This would further burden the already difficult financial situation of the war veteran disability funds of Bosnia and Herzegovina and, thereby, the realization of the rights of all beneficiaries of these funds.

Furthermore, the fact is that the Agreement stipulates that the persons mentioned in the Agreement may address only the relevant authority of the Republic of Croatia whose legally valid ruling subsequently obliges Bosnia and Herzegovina, without providing a possibility for its relevant authority to review the request. Thus, in the future, under Article 4 paragraph 1 and Article 5 and Article 8 and, consequently, Article 14 paragraph 2, new obligations are created for the funds of BiH providing no possibility of control by Bosnia and Herzegovina, as the second contracting state.

Bearing in mind the fact that effective participation of the constituent peoples in the decision-making process, aimed at the preservation of Bosnia and Herzegovina's sovereignty and its functionality, represents the vital national interest of each constituent people, I consider that the allegations of the Statement of the Bosniac Caucus are well-founded, i.e. that unconditional recognition of the status and rights to the persons whose

status and rights have been recognized by the relevant authority of the Republic of Croatia in accordance with the Law on Rights of Croat War Veterans from the Homeland War and their families' members without providing the possibility that the relevant authority of Bosnia and Herzegovina can perform control, assessment and review thereof, is destructive to the vital national interest of all constituent peoples and, in the present case, of the Bosniac people in Bosnia and Herzegovina.

As to the allegation of the Statement that the Agreement applies only to the citizens of the Republic of Croatia who used to be the members of Croat Defense Council (HVO), though Article 65 of the Law on the Rights of Veterans stipulates a financial support to certain veterans' categories, I recall that Article 62 paragraph 3 of the Law on the Rights of Veterans stipulates that the Agreement on cooperation between Bosnia and Herzegovina and the Republic of Croatia shall be concluded in order to secure additional compensation to the victims of the war in Bosnia and Herzegovina who were the previous members of Croat Defense Council (HVO) and their families. Therefore, it does not refer to the citizens of the Republic of Croatia but to the victims of the war in Bosnia and Herzegovina who were the previous members of Croat Defense Council (HVO) and their families without the requirement of having the citizenship of the Republic of Croatia. In fact, it is well known that the Croats but also the Serbs, the Bosniacs and the Others were members of Croat Defense Council (HVO) as well as that all members of Croat Defense Council (HVO), in addition to the citizenship of Bosnia and Herzegovina, do not hold the citizenship of the Republic of Croatia. Consequently, even if the relevant Agreement includes persons with dual citizenship, the fact remains that a number of the citizens of Bosnia and Herzegovina, although the previous members of Croat Defense Council (HVO) within the meaning of Article 62 paragraph 3 of the Law on the Rights of Veterans, will not realize compensation provided for by the relevant Agreement.

This situation cannot be called anything but discrimination. Actually, it implies discrimination with no justification at all.

Vital national interest of each constituent people is, and must be, non-discrimination. Every involvement in decision-making process with discriminatory intention or effect would certainly be destructive of vital national interest of each constituent people, including the Bosniacs as well.

Jurisdiction – VI(3)(a) of the Constitution of Bosnia and Herzegovina

Case no. U 5/04

DECISION ON ADMISSIBILITY

Request of Mr. Sulejman Tihić, at the time Chair of the Presidency of Bosnia and Herzegovina, for a review of conformity of the provisions of Articles IV.(1), IV.(1)(a), IV.(3)(b) and V.(1) of the Constitution of Bosnia and Herzegovina with the provision of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 3 of Protocol No. 1 to the European Convention

Decision of 27 January 2006

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 17(1)(1) and Article 59(2)(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of BiH* no. 60/05), in Plenary composed of the following Judges: Mr. Mato Tadić, President, Mr. Tudor Pantiru, Mr. Miodrag Simović and Ms. Hatidža Hadžiosmanović, Vice-Presidents, Mr. David Feldman, Ms. Valerija Galić, Mr. Jovo Rosić, Ms. Constance Grewe and Ms. Seada Palavrić, Judges, having deliberated on the request of **Mr. Sulejman Tihić, the Chair of the Presidency of Bosnia and Herzegovina, at the time of filing the request,** having deliberated the request in case no. **U 5/04**, at its session held on 31 March 2006, adopted the following

DECISION ON ADMISSIBILITY

The request lodged by Mr. Sulejman Tihić, the Chair of Presidency of Bosnia and Herzegovina at the time of filing the request, for a review of conformity of Articles IV(1), IV(1)(a), IV(3)(b) and V(1) of the Constitution of BiH with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as with Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is rejected as inadmissible because the Constitutional Court of Bosnia and Herzegovina is not competent to take a decision.

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

1. On 27 April 2004, Mr. Sulejman Tihić, at the time, the Chair of the Presidency of Bosnia and Herzegovina (hereinafter: „the applicant"), lodged a request with the Constitutional Court of Bosnia and Herzegovina (hereinafter: „the Constitutional Court") for a review of conformity of the provisions of Articles IV(1), IV(1)(a), IV(3)

(b) and V(1) of the Constitution of Bosnia and Herzegovina (hereinafter: „BiH") with the provision of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: „the European Convention") and Article 3 of Protocol No. 1 to the European Convention.

2. The applicant states that Article IV(1) of the Constitution of BiH reads as follows: „The House of Peoples shall comprise 15 delegates, two-thirds from the F BiH (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs)." Such provision of the structure of the House of Peoples is not in conformity with the right to non-discrimination under Article 14 of the European Convention in conjunction with the right to free elections within the meaning of Article 3 of Protocol No. 1 to the European Convention, which provides for the principle of equal treatment of all citizens in the exercise of their rights to vote and be elected under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. Article IV(1) of the Constitution of BiH does not guarantee the right to free elections within the meaning of Article 3 of Protocol No. 1 to the European Convention in view of the fact that it does not ensure equal treatment of all citizens of BiH in the exercise of their right to vote.

3. In fact, according to Article IV(1) of the Constitution of BiH, only the members of three constituent peoples in BiH, *i.e.* Bosniacs, Croats and Serbs, may be the delegates to the House of Peoples of the Parliamentary Assembly of BiH. Not one single member of the Others, *i.e.* who does not belong to one of the three constituent peoples, can be a delegate to the House of Peoples. Thereby, all persons who are not Bosniacs, Croats or Serbs are denied the access to these public offices, thus the citizens of BiH from amongst the Others are directly discriminated against on the ethnical, religious and racial ground. Therefore, without any objective and reasonable justification a distinction was made between the three constituent peoples and the Others in BiH whereby the latter were discriminated against in the exercise of their right guaranteed under Article 3 of Protocol No.1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4. Furthermore, it follows from the provisions of Article IV(1) of the Constitution of BiH that only Bosniacs and Croats from the F BiH, *i.e.* only Serbs from Republika Srpska („hereinafter: „RS") may be the delegates to the House of Peoples of the Parliamentary Assembly of BiH. This means that the Serbs from the F BiH and Bosniacs and Croats from RS are not provided with the possibility to stand for election to the House of Peoples of the Parliamentary Assembly of BiH, thereby they have been prevented from exercising their passive election right, *i.e.* the right to stand for election in this legislature on the level of the State of BiH. In this manner, the Serbs in F BiH as well as Bosniacs and Croats in

RS are directly discriminated against in the exercise of their right guaranteed under Article 3 of Protocol No. 1 to the European Convention.

5. In addition, the applicant states that Article IV(1)(a) of the Constitution of BiH provides for as follows: „The designated Croat and Bosniac delegates from the Federation shall be selected, respectively, by the Croat and Bosniac delegates to the House of Peoples of the Federation. Delegates from the RS shall be selected by the National Assembly of the RS." This Article of the Constitution of BiH is not in conformity with Article 14 of the European Convention and Article 3 of Protocol No. 1 to the European Convention. In fact, it follows from Article IV(1)(a) of the Constitution of BiH, which regulates election of delegates to the House of Peoples of the Parliamentary Assembly of BiH, that the citizens of F BiH from amongst Serb peoples and Others are discriminated against on ethnical, racial and/or religious grounds in relation to Croats and Bosniacs as they have been denied the right to elect the delegates to the House of Peoples of the Parliamentary Assembly of BiH, *i.e.* they are deprived of the active election right guaranteed under Article 3 of Protocol No. 1 to the European Convention. Moreover, this Article confirms the allegations that Serbs from the F BiH and Bosniacs and Croats from RS cannot, according to the procedure under Article IV(1)(a), be elected to the House of Peoples of the Parliamentary Assembly of BiH, whereby they have been prevented from the exercise of the right guaranteed under Article 3 of Protocol No. 1 to the European Convention. After the provisions of the entity constitutions were put in conformity with the decision of the Constitutional Court of BiH on constituency of peoples, Bosniacs, Croats and Serbs are constituent peoples in both entities. Accordingly, they are entitled to elect and stand for election to the House of Peoples of the Parliamentary Assembly of BiH, including also the Serbs from F BiH and Bosniacs and Croats from the RS.

6. The applicant states that Article IV(3)(b) of the Constitution of BiH stipulates as follows: „Each chamber shall by majority vote adopt its internal rules and select from its members one Serb, one Bosniac, and one Croat to serve as its Chair and Deputy Chairs, with the position of Chair rotating among the three persons selected." This Article is not in conformity with Article 14 of the European Convention and Article 3 of Protocol No. 1 to the European Convention. Actually, only a Bosniac, Croat and Serb may be elected the chair or deputy chair of the House of Representatives and the House of Peoples of the Parliamentary Assembly of BiH. The access to these public offices has been denied to the citizens from amongst the Others, whereby they are directly discriminated against in the exercise of their passive election right on ethnical, religious and racial grounds, which constitutes an interference with the essence of the protected rights guaranteed under Article 3 of Protocol No. 1 to the European Convention.

7. The applicant asserts that Article V(1) of the Constitution of BiH reads as follows: „The Presidency of BiH shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the F BiH, and one Serb directly elected from the territory of the RS”. This Article is not in conformity with Article 14 of the European Convention and Article 3 of Protocol No.1 to the European Convention. It follows from this provision that no citizen from amongst the Others, *i.e.* who does not belong to one of the three constituent peoples can be a member of the Presidency of BiH. It means that only a Bosniac, Croat and Serb have the access to these public offices, whereas the citizens from amongst the Others are prevented from being elected into this authority. In that manner they have been directly discriminated against in the exercise of their passive election right on the ground of ethnicity, religion and race. Also, only a Bosniac and Croat from the F BiH and a Serb from the RS can be members of the Presidency of BiH, thereby the Serbs in the F BiH and Bosniacs and Croats in the RS have been prevented from standing for election to these public offices.

8. A citizen of Serb origin from the F BiH can never be a member of the BiH Presidency who is directly elected from the F BiH nor can a citizen of Bosniac or Croat ethnicity from RS ever be a member of the Presidency who is directly elected form the RS territory. This means that in the first instance, the citizen of Serb origin from the F BiH and in the second instance the citizen of Bosniac and Croat origin from the RS have been prevented from exercising their passive election right, *i.e.* the right to run for election to the Presidency of BiH. In this manner, a number of citizens have been discriminated against by having been prevented by the constitutional provisions from exercising their political rights, particularly the rights of taking part at the elections.

9. In support of the assertions advanced in this request is the reasoning of the third partial decision of the Constitutional Court of BiH, no. *U 5/98*, from which it follows that „if a system of government is established which reserves all public offices only to members of certain ethnic groups”, the right to participation in elections, to take part in government as well as in the conduct of public affairs at any level and to have equal access to public service is seriously infringed for all those persons or citizens who do not belong to these ethnic groups insofar as they are denied the right to stand as candidates for such governmental or other public offices.

10. Moreover, all provisions reserving a public office for a Bosniac, Croat or Serb without any possibility for election of a citizen from amongst the Others are in violation of Article 5 of the International Convention on Elimination of All Forms of Racial Discrimination which, according to Annex I to the Constitution of BiH, has to be applied in BiH and

does not represent merely an obligation of the State of BiH but also guarantees individual rights, political rights, particularly the right to participate in elections – the right to vote and stand for elections according to the system of general and equal right of vote, the right to participate in the government, as well as in the management of public offices at all levels and the right of access under the equal conditions to public offices. It is clear from the definition of Article 1 of the European Convention that the expression „racial discrimination" is related to any exclusion, limitation, differentiation or giving priority on the grounds of race, color, birth, national or ethnical origin serving for or intending to violate and/or compromise the recognition, enjoyment or exercise under the equal conditions of human rights and fundamental freedoms in the political, economic, social and cultural field, or in any other sphere of public life.

11. The applicant proposes that the Constitutional Court adopt the decision as follows: a) to establish that Articles IV(1), IV(1)(a), IV(3)(b) and V(1) of the Constitution of BIH are not in conformity with Article 14 of the European Convention and Article 3 of Protocol No. 1 to the European Convention and b) to order the Parliamentary Assembly of BiH to bring into line Articles IV(1), IV(1)(a), IV(3)(b) and V(1) of the Constitution of BiH, in accordance with Article 63(2) of the Constitutional Court's Rules, with Article 14 of the European Convention and Article 3 of Protocol No. 1 to the European Convention no later than three months from the date of publication of the Constitutional Court's decision.

12. In examining the admissibility of the present request, the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of BiH and Article 17 (1)(1) of its Rules.

Article VI(3)(a) of the Constitution of BiH reads as follows:

The Constitutional Court shall uphold this Constitution.

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between BiH and an Entity or Entities, or between institutions of BiH, including but not limited to:

- Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of BiH.

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity."

Article 17(1)(1) of the Rules of the Constitutional Court reads as follows:

A request shall be inadmissible in any of the following cases:

The Constitutional Court is not competent to take a decision;

13. In view of the applicant's allegations it appears that he requests examination of conformity of certain provisions of the Constitution of BiH with European Convention and its Protocols. Therefore, the Constitutional Court must establish whether it is competent to examine constitutional provisions to establish their compatibility with the European Convention. Admissibility of the present request depends primarily upon the relation between the Constitution of BiH and the European Convention. The status of the European Convention stems from Article II(2) of the Constitution of BiH which clearly states that the rights and obligations provided for by the European Convention are directly applicable in BiH. This provision points to the general phenomenon of the internalization of the domestic legal system in BiH. It follows from the case-law of the European Court of Human Rights that the domestic law must meet the requirements stipulated by the European Convention. According to Article VI(3) of the Constitution of BiH, the Constitutional Court „shall uphold this Constitution". In order for the Constitutional Court to uphold the Constitution of BiH, it may refer to the text of that Constitution and to the European Convention which derives also from Article VI(3)(c) of the Constitution of BiH.

14. In order to establish jurisdiction of the Constitutional Court under Article VI(3)(a) of the Constitution of BiH, it is necessary to establish that there is „a dispute" within the meaning of this constitutional provision. The present case does not involve „any dispute that arises under this Constitution between the Entities or between BiH and an Entity or Entities, or between institutions of BiH" but a possible conflict between international and domestic law. In addition, where as in the present case an examination of conformity of certain provisions of the Constitution of BiH with the European Convention is requested, the Constitutional Court notes that the rights under the European Convention cannot have a superior status to the Constitution of BiH. The European Convention, as an international document, entered into force by virtue of the Constitution of BiH, and therefore the constitutional authority derives from the Constitution of BiH and not from the European Convention itself.

15. Although the Constitution of BiH does not expressly provide for the Constitutional Court's jurisdiction as to the interpretation of the Constitution, it is clear that the Constitutional Court cannot exercise its jurisdiction unless it has first interpreted the relevant constitutional provisions and the provisions of the law subject to abstract review by the Constitutional Court on a request lodged with the Constitutional Court, as well as the provisions relating to its own jurisdiction. The Constitutional Court must always adhere to the text of the Constitution of BiH, which in the present case does not allow for wider interpretation of its jurisdiction, in view of the obligation of the Constitutional Court to „uphold this Constitution".

16. In light of the aforesaid, the Constitutional Court concludes that it falls out of the scope of its competence to decide in the present case on the conformity of certain provisions of the Constitution of BiH with the European Convention and its Protocols.

17. In view of the provision of Article 17(1)(1) of the Rules of the Constitutional Court, according to which a request shall be rejected as inadmissible if it is established that the Constitutional Court is not competent to take a decision, the Constitutional Court decided as stated in the enacting clause of this Decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case no. U 13/05

**DECISION
ON ADMISSIBILITY**

Request of Mr. Sulejman Tihić, Member of the Presidency of Bosnia and Herzegovina, for a review of conformity of Article 8.1 paragraphs 1 and 2 of the Election Law of Bosnia and Herzegovina with Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 12 to the European Convention, and Articles 2(1)(c) and 5(1)(c) of the International Convention on Elimination of All Forms of Racial Discrimination

Decision of 26 May 2006

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 17(1)(1) and Article 59(2)(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), in Plenary composed of the following Judges: Mr. Mato Tadić, President, Mr. Tudor Pantiru, Mr. Miodrag Simović and Ms. Hatidža Hadžiosmanović, Vice-Presidents, Mr. David Feldman, Ms. Valerija Galić, Mr. Jovo Rosić, Ms. Constance Grewe and Ms. Seada Palavrić, Judges, having deliberated on the request of **Mr. Sulejman Tihić, Chair of the Presidency of Bosnia and Herzegovina,** having deliberated the request in case no. **U 13/05**, at its session held on 26 May 2006, adopted the following

DECISION ON ADMISSIBILITY

The request lodged by Mr. Sulejman Tihić, Chair of Presidency of Bosnia and Herzegovina, for a review of conformity of Article 8.1 paragraphs 1 and 2 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05 and 52/05) with Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol no. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Articles 2(1)(c) and 5(1)(c) of the International Convention on Elimination of All Forms of Racial Discrimination, is rejected as inadmissible because the Constitutional Court of Bosnia and Herzegovina is not competent to take a decision.

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

1. On 6 September 2005, Mr. Sulejman Tihić, Member of the Presidency of Bosnia and Herzegovina („the applicant"), filed a request with the Constitutional Court of Bosnia

and Herzegovina („the Constitutional Court") for a review of conformity of Article 8.1 paragraphs 1 and 2 of the Election Law of Bosnia and Herzegovina („the Election Law) with Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") and Article 1 of Protocol No. 12 to the European Convention, and Articles 2(1)(c) and 5(1)(c) of the International Convention on Elimination of All Forms of Racial Discrimination.

2. The applicant states that according to the challenged provisions of the Election Law only a Bosniac or a Croat from the Federation of BiH and a Serb from the Republika Srpska can be a member of the Presidency whereby the Serbs in the Federation and Bosniacs and Croats in the Republika Srpska are prevented from running for elections for these public offices. In fact, a citizen of Serb ethnicity from the territory of the Federation can never be a member of the Presidency of Bosnia and Herzegovina who is directly elected from the Federation nor can a citizen of Bosniac or Croat ethnicity from the Republika Srpska ever be a member of the Presidency who is directly elected from the territory of the Republika Srpska. This implies that in the first case a citizen of Serb ethnicity from the Federation and in the second case a citizen of Bosniac ethnicity or a citizen of Croat ethnicity, both from the Republika Srpska, have been prevented from exercising their passive electoral right, *i.e.* the right to run for elections and be elected to the Presidency of Bosnia and Herzegovina.

3. In addition, it follows from the challenged provisions of Article 8.1 paragraphs 1 and 2 of the Election Law that no citizen from amongst the Others, *i.e.* who does not belong to one of the three constituent peoples, can be a member of the Presidency of Bosnia and Herzegovina. This implies that only a Bosniac, Croat and Serb have the access to these public offices, while the citizens from amongst the Others are prevented from being elected into this office. In that manner the citizens from amongst the Others have been directly discriminated against in the exercise of their passive electoral right on the grounds of ethnicity.

4. The applicant concludes that, by the challenged provisions of the Election Law, certain number of BiH citizens are prevented from representing themselves as candidates for the Presidency, thereby being limited in exercising their passive voting right. On the other hand, all citizens are prevented to avail themselves of their active voting right as members of one or two constituent peoples are not in the position to vote for the members of the Presidency.

5. Having regard to the above, the applicant proposes that the Constitutional Court adopt the decision by which it would establish that provisions of Article 8.1 paragraphs 1

and 2 of the Election Law are inconsistent with Article 3 of Protocol No. 1 to the European Convention and Article 1 of Protocol No. 12 to the European Convention as well as with Articles 2(1)(c) and 5(1)(c) of the International Convention on Elimination of All Forms of Racial Discrimination. In addition, the applicant suggests that the Constitutional Court order the Parliamentary Assembly of Bosnia and Herzegovina, in accordance with Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to bring into line the provisions of Articles 8.1 paragraphs 1 and 2 of the Election Law of Bosnia and Herzegovina with the European Convention and the International Convention on Elimination of All Forms of Racial Discrimination.

6. In examining the admissibility of the request, the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1)(1) of the Rules of the Constitutional Court.

Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads as follows:

The Constitutional Court shall uphold this Constitution.

a) The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

Article 17(1)(1) of the Rules of the Constitutional Court reads as follows:

A request shall be inadmissible in any of the following cases

The Constitutional Court is not competent to take a decision;

7. The Constitutional Court observes that the challenged provision of Article 8.1 paragraphs 1 and 2 of the Election Law, which reads: „The members of the Presidency

of Bosnia and Herzegovina directly elected from the territory of the Federation of Bosnia and Herzegovina – one Bosniac and one Croat shall be elected by voters registered to vote for the Federation of Bosnia and Herzegovina. A voter registered to vote in the Federation may vote for either Bosniac or Croat Member of the Presidency, but not for both. The Bosniac and Croat member that gets the highest number of votes among candidates from the same constituent people shall be elected. The member of the Presidency of Bosnia and Herzegovina that shall be directly elected from the territory of RS - one Serb shall be elected by voters registered to vote in the Republika Srpska. Candidate who gets the highest number of votes shall be elected", embodies, in fact, a slightly expanded version of Article V of the Constitution of Bosnia and Herzegovina, which reads: „The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation and one Serb directly elected from the territory of the Republika Srpska."

8. In view of the above, it is undisputed that the challenged provision of Article 8.1 paragraphs 1 and 2 of the Election Law is founded on Article V of the Constitution of Bosnia and Herzegovina and therefore, if the Constitutional Court would examine the merits of the case, it would actually examine the provisions of the Constitution of Bosnia and Herzegovina in relation to the provisions of both European Convention and International Convention on Elimination of All Forms of Racial Discrimination.

9. In that context, the Constitutional Court recalls its case law from the case *no. U 5/04* of 27 January 2006, in which the subject matter of the request was a review of conformity of certain provisions of the Constitution of Bosnia and Herzegovina with the provision of the European Convention. At that time, the Constitutional Court highlighted that, when interpreting its jurisdiction, it must always abide by the text of the Constitution of Bosnia and Herzegovina, which in the relevant case does not allow for a wider interpretation relating to its jurisdiction considering the Constitutional Court's obligation to „uphold this Constitution" as well as considering that the provision of the European Convention cannot have a superior status in relation to the Constitution of BiH. This is so because the European Convention, as international document, entered into force on the basis of the Constitution of BiH and thereby the constitutional powers derive from the Constitution of BiH and not from the European Convention.

10. Consequently, although the subject matter of the case at hand is not a review of conformity of the provisions of the Constitution of Bosnia and Herzegovina but of the Election Law, it cannot be ignored that that the challenged provision of the Election Law, *de facto*, derive fully from the provisions of Article V of the Constitution of BiH, which

remove any doubts as to its unconstitutionality. For these reasons, the Constitutional Court has no competence to decide because this would otherwise imply a review of conformity of the constitutional provision with the provisions of the international documents relating to the human rights, and it has already took the position that these, *i.e.* the European Convention, could not have a superior status in relation to the Constitution of BiH (Decision in case no. *U 5/04* of 27 January 2006).

11. In view of the provision of Article 17(1)(1) of the Rules of the Constitutional Court, according to which a request shall be rejected as inadmissible if it is established that the Constitutional Court is not competent to take a decision, the Constitutional Court decided as stated in the enacting clause of this Decision.

12. In accordance with Article VI(4) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

13. In accordance with Article 41 of the Rules of the Constitutional Court, this Decision is annexed with Separate Concurring Opinion of Judge David Feldman and Separate Dissenting Opinions of Judges Constance Grewe and Seada Palavrić.

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

SEPARATE CONCURRING OPINION OF JUDGE FELDMAN

1. I concur with the decision of the Constitutional Court in Case no. U 13/05 that the Constitutional Court cannot hold that a piece of legislation implementing a clear, unequivocal and unambiguous constitutional provision is unconstitutional when the legislation precisely and loyally gives effect to that constitutional provision, even if the result might appear to be inconsistent with the requirements of a different provision of the Constitution. Nevertheless, in view of the difficulty of the issues I wish to add a few observations of my own.

2. My first comment relates to the issue of admissibility. For my part, I would have preferred to hold that that the application in this case was admissible. It is in form a challenge to the constitutional validity of a law, since rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms have constitutional status under the Constitution of Bosnia and Herzegovina by virtue of Article II of that Constitution. Such a challenge to a law falls within the jurisdiction of the Constitutional Court under Article VI.(3)(a) of the Constitution of Bosnia and Herzegovina. The position would be different had the challenge been to the constitutional validity of part of the Constitution by reference to other constitutional provisions or values: as the Constitutional Court has held, no such challenge is admissible.

3. I would therefore have preferred to hold that the application was admissible, but would then have dismissed it on the merits as being ill-founded. Nevertheless, as the outcome would have been the same, and the challenge to the law was for practical purposes a challenge to part of the Constitution (since invalidating the Law would have made it impossible ever to give effect to the requirements of the opening sentence of Article V of the Constitution), I did not press my opinion to the point of a dissent.

4. My second comment relates to an argument that the Constitutional Court should be willing to declare that provisions of a law are inconsistent with rights under the European Convention even if that would not affect the constitutional validity of the law in question. I can appreciate that it might be useful for the Constitutional Court to be able to make advisory declarations of this kind in order to facilitate the process of bringing the laws (or, indeed, the Constitution) of Bosnia and Herzegovina into line with the State's international obligations. However, in my view that would be an inappropriate extension of judicial activity beyond the proper functions of a court (even a special court such as the Constitutional Court). The function of judges is to decide what the law is and to enforce the limits of the powers of public bodies and people's rights and obligations under the law and the Constitution. It would be anomalous, in my view, for this Court to declare that a legal

norm is inconsistent with a constitutional norm in circumstances where, notwithstanding the inconsistency, the former legal norm remains valid and in full force. In the absence of clear constitutional authority to act in a purely advisory capacity, it seems to me that judicial power is restricted to determining legal and constitutional issues, and does not extend to advising State institutions on matters which have no practical impact on their powers or on people's rights and obligations.

5. My third comment relates to the argument that, if the Constitutional Court had held the application to be admissible, it should have held that the arrangements set out in Article V of the Constitution and in Article 8.1 paragraphs 1 and 2 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05 and 52/05) were discriminatory and therefore unconstitutional. Although it is not necessary to the present decision to express any concluded view about this, I would not want it to be thought that any difference between the treatment of members of the various constituent peoples and Others inevitably amounts to discrimination on ethnic or national grounds contrary to Article 14 of, or Protocol No. 12 to the European Convention. The jurisprudence of the European Court of Human Rights and of the Constitutional Court clearly establishes that a difference of treatment violates the right to non-discrimination only if there is no objective and rational justification for the difference. A difference of treatment has an objective and rational justification if it is intended to advance a legitimate aim and is rationally related to that aim, and the extent of the disadvantage to those adversely affected is not disproportionate to the importance of the legitimate aim.

6. Does the difference in treatment advance a legitimate aim? Special protection for the ability of members of the three constituent peoples to participate actively in government was one of the fundamental features of the General Framework Agreement for Peace. Article V of the Constitution of Bosnia and Herzegovina accordingly restricts people's rights to stand for election to the Presidency and to vote for candidates for election to the Presidency in order to bolster the positions of the three constituent peoples by ensuring that the Presidency shall consist of one member of each of the constituent peoples. This way of securing the collective representativeness of the institution is not a classic form of electoral democracy. As many of the responsibilities of the Presidency are concerned with the representation of the whole of Bosnia and Herzegovina, not merely the Entities or the constituent peoples, it might be argued that democracy would normally require that the members of the Presidency should all be elected by all the people of the country, including Others, and that all the people should be eligible to be candidates for election, on a state-wide rather than an Entity and ethnicity basis.

7. Nevertheless, the arrangements agreed in the General Framework Agreement for Peace and reflected in Article V of the Constitution can be seen as a special form of representative democracy (sometimes called 'consociation') modified to suit the special needs of the country. In my view, putting in place a model of democracy suitable for the special and pressing needs of the country is a legitimate aim, and there is a rational connection between the aim and the means adopted to pursue it.

8. I therefore move to the question whether the challenged provisions of the Law on Elections interfere disproportionately with the right to be free of discrimination. The deviation from the normal system of elections applies only to the Presidency, not to a law-making body. In relation to the Parliamentary Assembly, the normal principles of electoral democracy apply, with some relatively minor modifications. It is therefore not at all clear to me that the challenged provisions would have been held to be inconsistent with Protocol No. 12 to the European Convention, even if the Court had considered the application to be admissible.

SEPARATE DISSENTING OPINION OF JUDGE GREWE

I do not agree with the opinion of the majority of the Court since I consider the request of Mr. Sulejman Tihić, Chair of the Presidency of Bosnia and Herzegovina, not only admissible but also partially justified.

I Admissibility

The request is admissible as it does not challenge a constitutional provision (see U 5/04) but the Law on Election of the Presidency. It alleges that these provisions are not in conformity with Art. 1 of Protocol No. 12 to the European Convention as well as with Articles 2(1)(c) and 5(1)(c) of the International Convention on Elimination of All Forms of Racial Discrimination. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court is competent to decide whether any provision of an Entity's constitution or law is consistent with this Constitution.

„This Constitution" as well as the role of the Constitutional Court to uphold the Constitution, has to be taken in a wide sense. Indeed, the Peace Agreement represents as a whole the *„Constitutional Charter"* of Bosnia and Herzegovina while Annex 4 and the 15 international agreements on human rights from Annex 1 of the Constitution of BiH which are directly applied in Bosnia and Herzegovina, without need for legal transformation, represent formal *„constitutional law*" of that state. In consequence, the Constitution of Bosnia and Herzegovina must be viewed as a unity whose parts are closely connected and some provisions cannot be interpreted separately without taking into consideration the complementary meaning of other provisions. For example, Article I.(2) determines that Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and free elections. This provision implies the obligation of creating a state structure that can endure the test arising out of the obligation to establish the highest principles – the principles of a democratic state, the rule of law and free elections in the specific sense which these terms mean in the developed democratic countries with long lasting practice in establishing those principles.

In this Constitutional Charter the European Convention (published in the *Official Gazette of BiH* no. 6/99) and its protocols deserve special attention. It is not only directly applicable, such as the agreements from the annexes to the Constitution of BiH, but on the basis of Article II/2 of the Constitution of BiH, it also has priority *„over any other law"*. The term „over any other law", when it comes to the law of Bosnia and Herzegovina, implies that the European Convention is a part of the unity of the state law (legal system). This

is supported by the fact that, for example, in Article 3, paragraph 3.b of the Constitution of BiH, the following is stated: „the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities".

Additional argument is also the text of Article X of the Constitution of Bosnia and Herzegovina which determines the procedure of amending the Constitution of Bosnia and Herzegovina. This provision requires that no amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present provision. Thus, Article II of the Constitution of Bosnia and Herzegovina has become the only article of the Constitution of Bosnia and Herzegovina, by which the human rights it protects, are not to be changed or reduced in any way.

So it is clear that when considering Article VI(3)(a) of the Constitution of Bosnia and Herzegovina which stipulates that the standard of control is only *„in accordance with this Constitution",* it follows that this standard of control includes also the European Convention and its protocols.

The jurisdiction of the Constitutional Court with regard to its role („*the Constitutional Court shall uphold this Constitution")* and the whole Article VI(3) of the Constitution of Bosnia and Herzegovina should be viewed in the light of internationalization of the whole domestic law and the role of the Constitutional Court. Internationalization of the domestic law, as a general principle, follows from the Constitution of Bosnia and Herzegovina, the position of the European Convention and the other international agreements. In this respect, the internationalization of the domestic law is in the function of its total harmonization with the international standards so that the Constitutional Court „*by upholding the Constitution*", has to consider its jurisdiction in context of all basic principles, so as the democratic principle or the maintain of the highest level of protection of human rights and freedoms.

It follows from the aforesaid that the Constitutional Court should have recognized its competence in this case and declare the request admissible.

II Merits

As the applicant pointed it out in his statements, he considers that the aforementioned legal provisions are in contradiction with the rights guaranteed by the European Convention, namely, right to non-discrimination and right to free elections from Article 3, Protocol No. 1 to the European Convention. The right to free elections is not applicable in this case since the Presidency is not a legislative body; insofar the request is ill founded.

As to the right to non-discrimination, the challenged provision of Article 8.1 paragraphs 1 and 2 of the Election Law reads: „The members of the Presidency of Bosnia and Herzegovina directly elected from the territory of the Federation of Bosnia and Herzegovina – one Bosniac and one Croat shall be elected by voters registered to vote for the Federation of Bosnia and Herzegovina. A voter registered to vote in the Federation may vote for either Bosniac or Croat Member of the Presidency, but not for both. The Bosniac and Croat member that gets the highest number of votes among candidates from the same constituent people shall be elected. The member of the Presidency of Bosnia and Herzegovina that shall be directly elected from the territory of RS - one Serb shall be elected by voters registered to vote in the Republika Srpska. Candidate who gets the highest number of votes shall be elected".

It can be concluded from the quoted provision that a citizen, in order to be elected as a member of the Presidency, has to belong to one of the constituent peoples and that the choice of the voters is limited to Bosniac and Croat candidates in the Federation and Serb candidates in the RS as well as Bosniacs and Croats can be elected only from the territory of the Federation and not from the RS just like Serbs can be elected only from the RS and not from the Federation.

In principle, in a multi-ethnic State such as Bosnia and Herzegovina it appears legitimate to ensure that a State organ reflects the multi-ethnic character of society. The problem is however the way in which the territorial and the ethnic principle are combined. The Constitutional Court of BiH referred to this problem in the following terms in its decision concerning constituent peoples in the Entity constitutions (Decision of the Constitutional Court no. *U 5/98*, *Official Gazette of BiH* no. 36/00):

> *A strict identification of territory and certain ethnically defined members of common institutions in order to represent certain constituent peoples is not even true for the rules on the Presidency composition as laid down in Article V, first paragraph: „The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of Republika Srpska." One must not forget that the Serb member of the Presidency, for instance, is not only elected by voters of Serb ethnic origin, but by all citizens of Republika Srpska with or without a specific ethnic affiliation. He thus represents neither Republika Srpska as an entity nor the Serb people only, but all the citizens of the electoral unit Republika Srpska. And the same is true for the Bosniac and Croat Members to be elected from the Federation.*

If the members of the Presidency elected from an Entity represent all citizens residing in this Entity and not a specific people, it is difficult to justify that they must identify themselves

as belonging to a specific people. Such rule seems to assume that only members of a particular ethnical group can be regarded as fully loyal citizens of the Entity capable of defending its interests. The members of the Presidency have a veto right whenever there is a violation of vital interests of the Entity from which they were elected. It cannot be maintained that only Serbs are able and willing to defend the interests of the RS and only Croats and Bosniacs the interests of the Federation. The identity of interests in this ethnically-dominated manner impedes the development of a wider sense of national affiliation.

Furthermore, members of the three constituent peoples can be elected to the Presidency but they may be prevented from standing as candidates in the Entity in which they reside if they live as Serbs in the Federation or as Bosniacs or Croats in the RS. Moreover, the Election Law clearly excludes Others, i.e. citizens of BiH who identify themselves as neither Bosniac nor Croat nor Serb, from the right to be elected to the Presidency. This seems clearly incompatible with the equal right to vote and to stand for election under Article 25 of the ICCPR or with the principle to non-discrimination. Article 14 of the European Convention which grants this right, can however only be applied if the discrimination concerns a right guaranteed by the Convention which precisely does not guarantee the right to elect a President or be elected President. Article 3 of the Protocol no. 1 to the European Convention guarantees only the right to elect the legislature.

A wider sense of non-discrimination is complied by Article 1 of Protocol No. 12 to the European Convention. The aforementioned Article of the European Convention is refered by the applicant and can be applied to the subject request. It has to be taken into account that Bosnia and Herzegovina ratified Protocol No. 12 of the European Convention on 29 July 2003, which guarantees the enjoyment of all rights set forth by laws, without discrimination. This protocol entered into force on 1 April 2005 and the right to non-discrimination is thereby extended to cover the right to elect a President or stand for election as President.

The question is whether under the specific, fairly exceptional, conditions of BiH such solution can be considered discriminating and if so, whether such discrimination can be justified. The European Court of Human Rights in its decisions *Mathieu-Mohin and Clerfayt vs. Belgium* of 2 March 1987 and *Melnychenko vs. Ukraine* of 19 October 2004 seemed willing to leave to States a particularly wide margin of appreciation in the sensitive area of election law. Equality of voting rights and non-discrimination are among the most important values of a constitutional system. However, illicit discrimination can only be assumed if there is no reasonable and objective justification for a difference in treatment.

In the present case, the distribution of posts in the State organs between the constituent peoples was a central element of the Dayton Agreement making the peace in BiH possible.

In such a context, it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and to avoid further loss of human lives. The inclusion of such rules in the Election Law and in the text of the Constitution at that time therefore does not deserve criticism, even though they are contradictory with the general character of the Constitution of BiH aiming at preventing discrimination.

This justification has to be considered, however, in the light of developments in Bosnia and Herzegovina since the Constitution of BiH entered into force. Bosnia and Herzegovina has become a member of the Council of Europe and the country has therefore to be assessed according to the yardstick of common European standards. It has now ratified the European Convention and its Protocol No. 12. However, it is obvious that there remain circumstances requiring a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups, as a transitional arrangement until the realization of the principles of the civil state.

This can, however, be achieved without entering into conflict with international standards. It is not the system of consensual democracy as such which raises problems but the mixing of territorial and ethnic criteria and the apparent exclusion from certain political rights, regardless whether they refer to the constituent peoples or group of *„Others"*.

Taking into consideration all the aforementioned, the Constitutional Court should have considered the current electoral arrangements in respect to the election of the members of the Presidency of Bosnia and Herzegovina inconsistent with Article 1 of the Protocol 12 to the European Convention even if they were formulated in conformity with Art. V.1 of the Constitution of Bosnia and Herzegovina. Constitutional interpretation has to take account of the whole Constitution and has to consider it as a unity. Interpretation cannot neglect the legal, international and political context and has to consider the law as a living instrument. In this perspective, Article V(1) of the Constitution has to be read complimentarily with Article II(2) which states a direct application of rights and freedoms set forth in the European Convention and which requires consequently the respect of Protocol No. 12 to the European Convention.

STATEMENT OF JUDGE PALAVRIĆ ON JOINING SEPARATE DISSENTING OPINION OF JUDGE GREWE

I hereby join the Separate Dissenting Opinion of Judge Constance Grewe in case U 13/05 in its entirety.

Case no. U 6/08

DECISION ON ADMISSIBILITY

Request of Mr. Sulejman Tihić, the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, for a review of constitutionality of the Resolution on Non-Recognition of Unilateral Declaration of Independence of Kosovo and Metohija and position of Republika Srpska issued by the National Assembly of the Republika Srpska

Decision of 30 January 2009

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 17(1) and Article 59(2)(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05), in the Plenary and composed of the following judges: Ms. Seada Palavrić, the President, Mr. David Feldman, Mr. Miodrag Simović and Ms. Valerija Galić, as Vice-Presidents and Mr. Tudor Pantiru, Mr. Mato Tadić, Ms. Constance Grewe, Mr. Krstan Simić and Mr. Mirsad Ćeman, as Judges, having deliberated on the request of **Mr. Sulejman Tihić, the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina** in case **no. U 6/08**, at its session held on 30 January 2009 adopted the following

DECISION ON ADMISSIBILITY

The request of Mr. Sulejman Tihić, the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, for Review of Constitutionality of the Resolution on Non-Recognition of Unilateral Declaration of Independence of Kosovo and Metohija and position of the Republika Srpska issued by the National Assembly of the Republika Srpska, is hereby rejected as inadmissible as the Constitutional Court of Bosnia and Herzegovina is not competent to take a decision.

This Decision shall be published in *Official Gazette of Bosnia and Herzegovina*, *Official Gazette of the Federation of Bosnia and Herzegovina*, *Official Gazette of the Republika Srpska* and *Official Gazette of the Brčko Disctrict of Bosnia and Herzegovina*.

Reasoning

1. On 11 March 2008, Mr. Sulejman Tihić, the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the applicant") lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of constitutionality of the Resolution on Non-Recognition of Unilateral Declaration of Independence of Kosovo and Metohija and position of Republika Srpska issued by the National Assembly of the Republika Srpska („the Resolution").

a) Allegations stated in the Request

2. The applicant contested the Resolution in its entirety stating, firstly, that it is inconsistent with Article III(1)(a) of the Constitution of Bosnia and Herzegovina because „the recognition or non-recognition of another State is in the domain of the foreign policy and the foreign policy falls within the exclusive responsibility of the State of Bosnia and Herzegovina and institutions of Bosnia and Herzegovina". In this regard, the applicant also stated that the Republika Srpska, as an Entity within Bosnia and Herzegovina, under the Constitution of Bosnia and Herzegovina, and also under the Constitution of the Republika Srpska, has no responsibility in the area of foreign policy, with the exception of conclusion of agreement on the establishment of special relations with neighbouring states in accordance with sovereignty and territorial integrity of Bosnia and Herzegovina or conclusion of agreements with states and international organizations with the consent of the Parliamentary Assembly of Bosnia and Herzegovina.

3. In the applicant's opinion, as expressed in his request, paragraphs 6 and 7 of the Resolution are inconsistent with Article I(1) and (3) of the Constitution of Bosnia and Herzegovina. He also pointed out that Article I(1) of the Constitution of Bosnia and Herzegovina establishes the continuity of Bosnia and Herzegovina under which the Republic of Bosnia and Herzegovina shall continue its legal existence under international law as a state and Article I(3) determines that Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. Expressing the position under which „the National Assembly considers that it has the right to determine its position on its state-legal status on the direct expression of the opinion of citizens in referendum" is inconsistent with the above referenced provisions, in the applicant's opinion, as the Constitution of Bosnia and Herzegovina determines the status of the Republika Srpska as an entity within Bosnia and Herzegovina, which is an internationally recognized State. The applicant finally alleged that the Resolution represents basis for some future activities leading to the decomposition of the State and infringement of its constitutional order and, therefore, it represents the serious threat to the constitutional order of Bosnia and Herzegovina. The applicant requested the Constitutional Court to establish that the Resolution is inconsistent with Article III(1)(a) of the Constitution of Bosnia and Herzegovina and that paragraphs 6 and 7 of the Resolution are inconsistent with Article I(1) and (3) of the Constitution of Bosnia and Herzegovina.

b) Reply to the request

4. In its reply to the request, the National Assembly contested the admissibility of the request alleging that it has not been submitted in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina which explicitly stipulates that the jurisdiction of the Constitutional Court of Bosnia and Herzegovina is to review the constitutionality of legal acts, i.e. Constitutions and laws of Entities, and that the jurisdiction of the Constitutional Court is to establish, precisely and not abstractly, whether some provisions of the Constitution or a law of any of the Entities are consistent with the Constitution of Bosnia and Herzegovina. It is further stated that the subject of disputing is the Resolution (in its entirety) in relation to Article III(1) and its paragraphs 6 and 7 with regard to Article I(1) and (3) of the Constitution of Bosnia and Herzegovina. According to the statement of the National Assembly „every resolution is primarily a political act, the act adopted at the end of discussion on the political issues based on which the representative body takes certain position (*Legal Encyclopaedia*, II volume, Belgrade, year 1985, pg. 1426)". Moreover, it is stated in the reply that under Article 185 of the Rules of Procedure of the National Assembly, the resolution indicates the situation and problems in certain area of social life; determines the policy to be applied in that area and gives instructions or provides for measures of its implementation. The National Assembly suggested that the Constitutional Court, bearing in mind the clear constitutional provision and the character of the resolution in general, reject the request at issue for formal deficiencies and lack of jurisdiction on the part of the Constitutional Court of Bosnia and Herzegovina.

5. In examining the admissibility of the request, the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1)(1) of the Rules of the Constitutional Court.

Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads as follows:

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether an Entity's decision to establish a special parallel relationship with a neighbouring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

Article 17(1) (1) of the Rules of the Constitutional Court reads as follows:

A request shall be inadmissible in any of the following cases

1. *The Constitutional Court is not competent to take a decision;*

6. The request was filed by the Chair of the House of the Peoples of the Parliamentary Assembly of Bosnia and Herzegovina and thus filed by authorized person under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

7. After having established that the request in question was filed by an authorized person, the Constitutional Court shall establish whether the issue raised by the request falls under the jurisdiction of the Constitutional Court as provided for by Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. In that regard, the Constitutional Court establishes that for the applicant the jurisdiction of the Constitutional Court is undisputable or more precisely the admissibility of the request in question, considering that the applicant limited its arguments exclusively to the merits of the request. However, the National Assembly finds that the Constitutional Court lacks jurisdiction to review the constitutionality of the Resolution considering the request disputes the act which is political and not legal in its nature and which „determines policy to be implemented and gives instructions or provides for the measures of its implementation". In the subsequent paragraphs the Constitutional Court shall explain its position concerning the jurisdiction over the request in question.

8. The Constitutional Court reiterates that it has established in its case-law a certain degree of extensive interpretation of the part of provisions of Article VI(3)(a) of the Constitution which reads *including but not limited to*, guiding itself by the position that the „the framer of the Constitution could not predict the scope of all the functions of the Constitutional Court at the time when the Constitution of Bosnia and Herzegovina was being adopted. This failure is often associated with the issue of jurisdiction of the Constitutional Court". The Constitutional Court further emphasized that „if the framer of the Constitution was to prescribe in detail the requirements for adoption of decisions by the Constitutional Court, the question as to whether this would impose restrictions on the actions of the Constitutional Court would arise". Hence, the wording *including but not limited to [...]* under Article VI(3)(a) of the Constitution. Arguing its position

further, the Constitutional Court stated the following: „Constitutional Court is one of the most responsible institutions of the system, which represents an additional protection mechanism and ensures a consistent compliance with the human rights pursuant to the international conventions and other international agreements. The Constitutional Court must be a just and reliable guardian of the Constitution of Bosnia and Herzegovina, its values and human rights. There are many issues under the Constitution of Bosnia and Herzegovina that need to be clarified and, in this respect, the Constitutional Court is the only body competent and qualified to provide interpretations". (*See* Decision of the Constitutional Court on Admissibility and Merits, *U 4/05* of 22 April 2005, paragraphs 14-16, published in the *Official Gazette of Bosnia and Herzegovina* no. 32/05).

9. The Constitutional Court has concluded that, within its extensive interpretation of the relevant provisions on its jurisdiction, it has jurisdiction and thus it reviewed the constitutionality of constituting the City Council of the City of Sarajevo on the basis of decisions passed by the Municipal Councils giving general reasons for its opinion about the jurisdiction of the Constitutional Court, which also apply to its jurisdictions under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. In that regard, the Constitutional Court referred to its jurisprudence in which the Court concluded that it had jurisdiction to decide although no explicit constitutional provision stipulating such jurisdiction existed. *Inter alia*, the Constitutional Court referred, as relevant for this decision, to the decision where it declared itself competent to review the constitutionality of the law imposed by the High Representative in substituting the national authorities (see Decision of the Constitutional Court, *U 9/00* of 3 November 2000, published in the *Official Gazette of BiH* no. 1/01) and the decision where it found itself competent to review the constitutionality of decisions adopted by the Constitutional Courts of Entities (see Decision of the Constitutional Court, *U 5/99* of 3 December 1999, published in the *Official Gazette of BiH* no. 3/00). In its present case-law, as evident from referenced decisions, the Constitutional Court has extensively interpreted its jurisdiction in reviewing constitutionality of certain acts, without having involved the review of constitutionality of entities' decisions on special relations with neighbouring states or some of the provisions of one of the entities' constitutions or laws. It is undisputed, however, that the Constitutional Court has extensively interpreted only the provisions on its jurisdiction which concern the general acts having legally binding character.

10. Taking the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina as a starting point, it is undisputed for the Constitutional Court that this request raises an issue of dispute between Bosnia and Herzegovina and the Entities since it was in the Resolution where the National Assembly determined its position concerning

the foreign policy issues that fall within the jurisdiction of the state, as implied by the request and the issues concerning the territorial integrity and sovereignty of Bosnia and Herzegovina. However, the issue arises whether the form in which the positions of the National Assembly are expressed or, more precisely, whether the act which is the subject of dispute can become the subject of review of the constitutionally by the Constitutional Court. Even the National Assembly stated that this issue involves a political act that expresses certain political views. It does not involve a legal act. The Resolution was adopted pursuant to Article 185 of the Rules of Procedure of the National Assembly defining that „the resolution indicates the situation and problems in certain area of social life; determines policy to be implemented in that area and gives instructions or provides for measures of its implementation". Thus, it is undisputed that this issue involves an act which represents a type of political proclamation that is not legally binding. Regardless of the extensive interpretation of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina in certain cases of review of constitutionality and bearing in mind an indisputably non-binding character of the act that is the subject of disputing by the request, the Constitutional Court finds that it is not competent to review the constitutionality of the Resolution in question.

11. Taking into account the provisions of Article 17(1)(1) of the Rules of Constitutional Court, pursuant to which the request shall be rejected as inadmissible if it is established that the Constitutional Court is not competent to take a decision, the Constitutional Court decided as stated in the enacting clause of this decision.

12. In accordance with 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

Case no. U 12/08

DECISION
ON ADMISSIBILITY

Request of 68 delegates of the National Assembly of the Republika Srpska for resolving a dispute between the Republika Srpska and the Federation of Bosnia and Herzegovina in relation to the proceedings of enforcement of the judgment of the European Court of Human Rights in the case of *Karanović vs. Bosnia and Herzegovina*, Application no. 39462/03 of 20 December 2007

Decision of 30 January 2009

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 17(1)(1) and Article 59(2)(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05 and 64/08), in Plenary composed of the following judges: Ms. Seada Palavrić, President, Mr. Miodrag Simović, Mr. David Feldman and Ms. Valerija Galić, Vice-Presidents, Mr. Tudor Pantiru, Mr. Mato Tadić, Ms. Constance Grewe, Mr. Krstan Simić and Mr. Mirsad Ćeman having deliberated on the request of **68 delegates of the National Assembly of the Republika Srpska,** in case no. **U 12/08**, at its session held on 28 March 2009, adopted the following

DECISION ON ADMISSIBILITY

The request lodged by 68 delegates of the National Assembly of the Republika Srpska for resolving a conflict of jurisdiction between the Republika Srpska and the Federation of Bosnia and Herzegovina in relation to the enforcement of the judgment of the European Court of Human Rights in the case of *Karanović vs. Bosnia and Herzegovina*, Application no. 39462/03 of 20 December 2007, is rejected as inadmissible because the Constitutional Court of Bosnia and Herzegovina is not competent to take a decision.

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

1. On 16 June 2008, 68 delegates of the National Assembly of the Republika Srpska („the applicants"), lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for resolving a dispute between the Republika Srpska and the Federation of Bosnia and Herzegovina in relation to the proceedings of enforcement of the judgment of the European Court of Human Rights in the case of *Karanović vs. Bosnia and Herzegovina*, Application no. 39462/03 of 20 December 2007. The applicants request

from the Constitutional Court to „eliminate discrimination from the legislation regulating pension insurance", by ordering the Federation of BiH to enforce the judgment of the European Court of Human Rights in Strasbourg in the case no. 39462/03 (*Karanović vs. Bosnia and Herzegovina*) and „allow transfer of the holder of the right to the Federation of Bosnia and Herzegovina Pension Fund."

The facts of the case, as they appear from the appellants' assertions and the documents attached to the request

2. On 20 December 2007, the European Court of Human Rights issued the judgment in the case of *Karanović vs. Bosnia and Herzegovina*. By referring to the relevant parts of the judgment (paragraph 24 *et seq*.), the appellants underline that on the basis of the said judgment, Bosnia and Herzegovina is ordered to secure the enforcement of the Decision on Admissibility and Merits of the Human Rights Chamber for Bosnia and Herzegovina no. CH/02/8923 *et al*. (*Klicković et al. vs. Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska*). The enforcement entails that the Federation of Bosnia and Herzegovina should secure the transfer of applicant Karanović from the Republika Srpska Pension Fund to the Federation of Bosnia and Herzegovina Pension Fund by changing the relevant legislation concerning the pension insurance area in order to eliminate discrimination by those decisions. In addition, the applicants underline that the three months time limit for its enforcement has expired since the judgment became legally binding on 20 February 2008 and the Federation of Bosnia and Herzegovina has failed to meet its obligation. Thus, according to the applicants, discrimination prohibited under Article II(4) of the Constitution of Bosnia and Herzegovina and international conventions for the protection of human rights and fundamental freedoms under Annex I to the Constitution of Bosnia and Herzegovina is still present. According to the appellants' assertions, the Federation of Bosnia and Herzegovina is responsible for discrimination, as stated above, since the Entities, pursuant to Article III(3) of the Constitution of Bosnia and Herzegovina are responsible for the regulation of pension and other social benefits. Furthermore, the applicants state that the case of *Karanović* is just one of 35,000 identical cases. The applicants point out that, according to the case-law of the Human Rights Chamber for Bosnia and Herzegovina and the European Court of Human Rights, all those citizens are entitled to receive their pension from the Federation of Bosnia and Herzegovina Pension Fund. However, given that the Federation of Bosnia and Herzegovina has not amended its pension insurance legislation, these persons are not able to exercise their right. Consequently, the Republika Srpska suffers huge material damage since it has to make pension payments out of its budget and the Entity responsible for pension payments „unfoundedly amass riches". In the applicants' view, this issue may be resolved only by

the Constitutional Court, which should order the Federation of Bosnia and Herzegovina to enforce the said judgment of the European Court of Human Rights.

3. In its reply to the request, the Ministry of Human Rights and Refugees of Bosnia and Herzegovina, Office of the Agent of the Council of Ministers for Representation before the European Court of Human Rights states that the Constitutional Court is not competent to take a decision related to enforcement of decisions of the European Court of Human Rights. In this regard, they give details related to the monitoring of the implementation of judgments through the Council of Europe. In addition, they state that there is no „dispute" as to the implementation of the decision since it is the obligation of authorities at all levels in Bosnia and Herzegovina and of the state organs, while the Agent of the Council of Ministers is obliged to observe the enforcement of the European Court of Human Rights' judgment in Bosnia and Herzegovina and inform the Council of Ministers and the Committee of Ministers of the Council of Europe about it. In addition, it is underlined that the allegations that the decision at issue has not been implemented are incorrect. The implementation of the general measures, which are within the discretion of the State itself, is an extensive and demanding process. In the enforcement proceedings carried out to date, *inter alia*, an expert group within the Ministry of Civil Affairs of Bosnia and Herzegovina has been established to find an appropriate solution to this issue. The Office states that only the Federation of Bosnia and Herzegovina has submitted an action plan with regard to the implementation of general measures. The relevant bodies of the Council of Europe are to give their observations as to the actions proposed and completed in the relevant case.

4. In examining the admissibility of the request, the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1)(1) of the Rules of the Constitutional Court.

5. Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads as follows:

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether an Entity's decision to establish a special parallel relationship with a neighbouring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

Article 17(1)(1) of the Rules of the Constitutional Court reads as follows:

A request shall be inadmissible in any of the following cases

1. *The Constitutional Court is not competent to take a decision;*

6. Article VI(3)(a) of the Constitution of Bosnia and Herzegovina stipulates that a request may be lodged, *inter alia*, by one-fourth of either chamber of a legislature of an Entity. The relevant request has been submitted by 68 delegates of the National Assembly of the Republika Srpska. Given that the National Assembly of the Republika Srpska is composed of 83 delegates, the former figure satisfies the criteria under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, which means that the request has been filed by an authorized person.

7. The Constitutional Court has also to examine other admissibility criteria in the case at hand. Namely, it is demanded in the request that the Constitutional Court resolve the dispute between the two Entities, the Republika Srpska and the Federation of Bosnia and Herzegovina in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. Taking into account the linguistic meaning of the first sentence of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, it clearly follows that the existence of a „dispute" is an admissibility requirement for such proceedings (see, Constitutional Court, Decision on Admissibility no. *U 17/07* of 4 October 2008, available on the website of the Constitutional Court www.ccbh.ba, paragraph 12 *et seq*.) Such a „dispute" cannot arise from ordinary and positive legal regulations but it must relate to certain issues regulated by the Constitution of BiH itself (see, Constitutional Court, Decision on Admissibility no. *U 66/02* of 30 January 2004, *Official Gazette of BiH* no. 11/04, paragraph 6).

8. In the present case, the subject matter of the dispute is the enforcement of the international judgment. Applicants request that the Constitutional Court orders by its decision the enforcement of „the judgment of the European Court of Human Rights in Strasbourg in the case no. 39462/03 „[…] and „allow transfer of the holder of the right to the Federation of Bosnia and Herzegovina Pension Fund." The Constitutional Court emphasizes that such request does not fall under the jurisdiction of the Constitutional Court. The enforcement of the judgments of the European Court for Human Rights

represents an international legal obligation of Bosnia and Herzegovina. Pursuant to Article 46 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, „the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties" while pursuant to paragraph 2 of the same Article „the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution". Details in reference to the supervision proceedings of the enforcement of the judgment of the European Court for Human Rights are established by the *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*), adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies).

9. Consequently, the Constitutional Court asserts that the enforcement of the judgment of *Karanović vs. Bosnia and Herzegovina* (Application no. 39462/03 of 20 December 2007) is international legal obligation of Bosnia and Herzegovina. System of the supervision of enforcement of judgments of the European Court for Human Rights, also including possible adoption of the measures in the event of failure to enforce those judgments is under full discretion of the Council of Europe. For that reason, the Constitutional Court has no jurisdiction to establish whether the judgment was enforced or order certain public legal subject in Bosnia and Herzegovina to enforce obligations referred to in this judgment.

10. Considering the nature of the request and bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1)(1) of the Rules of the Constitutional Court according to which a request shall be rejected as inadmissible if it is established that the Constitutional Court is not competent to take a decision, the Constitutional Court has decided as stated in the enacting clause of the present decision.

11. 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

Case no. U 5/05

DECISION
ON MERITS

Request of Mr. Borislav Paravac, the Chairman of the Presidency of Bosnia and Herzegovina, for a review of conformity of the laws passed by the Parliament of the Federation of Bosnia and Herzegovina

Decision of 30 January 2009

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) 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 n*o. 60/05), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Hatidža Hadžiosmanović, Vice-President

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Ms. Constance Grewe,

Ms. Seada Palavrić,

Having deliberated on the request of **Mr. Borislav Paravac, the Chair of the Presidency of Bosnia and Herzegovina, at the time of filing the request**, in case no. **U 5/05**, at its session held on 27 January 2006, adopted the following

DECISION ON MERITS

It is hereby established that the following Laws: Law on the Federal Prosecutor's Office of the Federation of Bosnia and Herzegovina, the Law on Amendments to the Law on Procedure for Registration of the Legal Persons in the Court Register, the Law on Interior Affairs of the Federation of Bosnia and Herzegovina, the Law on Immunity of the Federation of Bosnia and Herzegovina, the Law on Modifications and Amendments to the Law on Banks of the Federation of Bosnia and Herzegovina, the Law on Modifications and Amendments to the Law on the Banking Agency of the Federation of Bosnia and Herzegovina, the Law on Treasury in the Federation of Bosnia and Herzegovina, the Law on Modifications and Amendments to the Law on the Government of the Federation of Bosnia

and Herzegovina, the Law on the Federal Ministries and Other Bodies of the Federal Administration, the Law on Land Registries of the Federation of Bosnia and Herzegovina, the Law on Cessation of Validity of the Law on Deposit Insurance in the Federation of Bosnia and Herzegovina, the Law on Protection from Defamation of the Federation of Bosnia and Herzegovina, the Law on Modifications and Amendments to the Penal/Criminal Law of the Federation of Bosnia and Herzegovina (all published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 19/03), the Law on Enforcement of the Budget of the Federation of Bosnia and Herzegovina for 2003, the Law on Amendments to the Law on the Center for Education of Judges and Prosecutors in the Federation of Bosnia and Herzegovina (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 21/03), the Law on Modifications and Amendments to the Law on Banks, the Law on Modifications and Amendments to the Law on Salary Transactions, the Law on Modifications to the Law on Defense of the Federation of Bosnia and Herzegovina, the Law on Modifications and Amendments to the Law on Tourist-Industry Associations and Promotion of Tourism in the Federation of Bosnia and Herzegovina, the Law on Modifications and Amendments to the Law on Tourism-Catering Industry, the Law on Modifications and Amendments to the Law on Libraries, the Law on Modifications and Amendments to the Law on Bill of Exchange (all published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 28/03), the Law on Bankruptcy Procedure, the Law on Modifications of the Law on Obligations, the Law on Amendments to the Law on Property Relations, the Law on Modifications and Amendments to the Law on Bar Exam, the Law on Modifications and Amendments to the Law on Handicrafts and Trades, the Law on Modifications and Amendments to the Labor Law, the Law on Modifications and Amendments to the Law on Forests, the Law on Modifications and Amendments to the Law on Cessation of Application of the Law on Abandoned Apartments, the Law on Modifications and Amendments to the Law on Legal Profession of Federation of Bosnia and Herzegovina, the Law on Liquidation Procedure, the Law on Civil Service in the Federation of Bosnia and Herzegovina, the Law on Modifications and Amendments to the Law on Procedure for Registration of the Legal Entities in the Court Register, the Law on Modifications and Amendments to the Law on Business Companies (all published in the *Official Gazette of the*

***Federation of Bosnia and Herzegovina* no. 29/03), the Law on Enforcement Procedure (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 32/03), the Law on Waste Management, the Law on Air Protection, the Law on Water Protection, the Law on Environmental Protection, the Law on Protection of Nature, the Law on Fund for the Environmental Protection of the Federation of Bosnia and Herzegovina, (all published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 33/03), the Law on Ministerial, Governmental and Other Appointments of the Federation of Bosnia and Herzegovina, the Law on Modifications and Amendments to the Law on Chambers of Commerce in the Federation of Bosnia and Herzegovina (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 34/03), the Law on Criminal Proceedings of the Federation of Bosnia and Herzegovina (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 35/03), the Criminal Code of the Federation of Bosnia and Herzegovina, the Law on Protection of the Witnesses under Threat and Vulnerable Witnesses (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 36/03), the Law on Amendment to the Law on Registered Pledges on Movables and Membership Stakes, the Law on Modifications and Amendments to the Law on Proceedings before the Constitutional Court of the Federation of Bosnia and Herzegovina, the Law on Modifications and Amendments to the Law on Sale Taxes Applicable to Products and Services, the Law on Modifications and Amendments to the Law on Special Tax Applicable to Oil Derivatives, the Law on Modifications and Amendments to the Law on Special Tax Applicable to Coffee, the Law on Modifications and Amendments to the Law on Entitlement to the Public Revenue, the Law on Modifications and Amendments to the Law on Special Tax Applicable to Beer, the Law on Modifications and Amendments to the Law on Special Tax Applicable to Non-Alcoholic Beverages, the Law on Modifications and Amendments to the Law on Special Tax Applicable to Alcohol (all published in the Official Gazette of the Federation of Bosnia and Herzegovina no. 37/03), the Law on Protection and Rescuing People and Material Goods from Natural and Other Disasters (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 39/03), the Law on Modifications and Amendments to the Law on Procedure for Registration of the Legal Entities in the Court Register, the Law on Modifications and Amendments to the Law on Foreign Investments,**

the Law on Modifications and Amendments to the Law on Companies for Management of Funds and on Investment Funds (all published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 50/03), the Law on Contentious Proceedings (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 53/03), the Law on Funding the Rails Infrastructure and Co-Funding Passenger and Combined Transportation, the Law on Modifications and Amendments to the Law on Establishing and Implementing the Citizens' Claims in the Privatization Procedure (all published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 57/03), the Law on Statistics in the Federation of Bosnia and Herzegovina, the Law on Modifications and Amendments to the Law on Judicial and Prosecutorial Functions (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 63/03), the Law on Modifications and Amendments to the Payroll Tax Law, the Law on Modifications and Amendments to the Law on Enforcement of decisions made by the Commission for Protection of National Monuments, established pursuant to Annex 8 of the General Peace Agreement for Bosnia and Herzegovina, the Law on Transfer and Settlement of Property Claims related to the Apartments with occupancy right or related to the owned real-estates, submitted to the Commission for Property Claims of Displaced Persons and Refugees (all published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 6/04), the Law on Temporary Deferral of Enforcement of Claims Arising from Enforceable Decisions Payable by the Budget of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 9/04), the Law on Modifications and Amendments to the Law on Sales Tax Applicable to Products and Services, the Law on Modifications and Amendments to the Law on Designation of Populated Settlements and on Modifications in Names of the Populated Settlements in some Municipalities (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 14/04), the Law on Enforcement of the 2004 Budget of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 17/04), the Law on Direct Election of Municipal Mayors in the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 20/04), the Law on Standard Classification of Professions (Occupations) (*Official Gazette of the Federation of Bosnia and Herzegovina*

no. 22/04), the Law on Cash Support in Primary Monetary Production, the Law on Modifications and Amendments to the Law on Enterprise Privatization, the Law on Modifications and Amendments to the Law on Pardon, the Law on Modifications and Amendments to the Law on Tax Administration of the Federation of Bosnia and Herzegovina (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 28/04), the Law on Modifications and Amendments to the Law on Temporary Deferral of Enforcement of Claims pursuant to the Enforceable Decisions Payable by the Budget of the Federation of Bosnia and Herzegovina (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 30/04), the Law on Modifications and Amendments to the Law on Bankruptcy Procedure (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 32/04), the Law on Modifications and Amendments to the Law on Register of Securities, the Law on Modifications and Amendments to the Law on Commission for Securities (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 33/04), the Law on Rights of the Veterans and Their Families, the Law on Defense of the Federation of Bosnia and Herzegovina, the Law on Service in the Army of the Federation of Bosnia and Herzegovina (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 34/04), the Law on Modifications and Amendments to the Law on Free Zones, the Law on Modifications and Amendments to the Law on Judicial Police, the Law on Modification of the Law on Forests (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 37/04), the Law on Council of Employees (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 38/04), the Law on Modifications of the Law on Sales Tax Applicable to Products and Service, the Law on Modifications and Amendments to the Law on Special Tax Applicable to Non-Alcoholic Beverages, the Law on Modification of the Law on Non-Contentious Proceedings, the Law on Modification of the Law on Civil Service in the Federation of Bosnia and Herzegovina (all published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 39/04), the Law on Master Data File on Insurers and Beneficiaries of the Pension and Disability Insurance Rights, the Law on Modifications and Amendments to the Law on Tobacco, the Law on Displaced Persons – Refugees and Returnees in the Federation of Bosnia and Herzegovina, the Law on Types and Percentages (Extents) of Physical

Disability (all published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 42/04), the Law on Modifications and Amendments to the Law on Enterprises Privatization, the Law on Modifications and Amendments to the Law on Establishing and Exercising Citizens' Claims in the Privatization Process (all published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 44/04), the Law on Modifications and Amendments to the Law on Sale of the Apartments with Occupancy Right, the Law on Modifications and Amendments to the Law on Welfare, Protection of the Victims of the Civil War and of the Families with Children, the Law on Modifications and Amendments to the Law on Land Registries of the Federation of Bosnia and Herzegovina, the Law on Modifications and Amendments to the Law on Civil Service in the Federation of Bosnia and Herzegovina, the Law on modifications and Amendments to the Law on Protection of Waters (all published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 54/04), the Law on Modifications of the Law on Registered Pledges on Movables and Membership Stakes, the Law on Amount of the Default Interest Applicable to Unsettled Debts (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 56/04), the Law on Trade, the Law on Freshwater Fishing (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 64/04), the Law on Manner for Defining and Payment of the Internal Liabilities of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 66/04), the Law on Cessation of Validity of the Law on Money-Laundry Prevention in the Federation of Bosnia and Herzegovina, the Law on Modifications of the Law on Companies for Managing the Funds and Investment Funds (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 70/04), the Law on Control of Articles made of Precious Metals, the Law on Postal Service of the Federation of Bosnia and Herzegovina (published in the *Official Gazette of the Federation of Bosnia and Herzegovina* no. 76/04), the Law on Public Funds Investing (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 77/04), the Law on Enforcement of the 2005 Budget of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 78/04) have been adopted in accordance with Article II(1) in conjunction with Article II(2) and Article II(4) of the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 31 March 2005, Mr. Borislav Paravac, the Chair of the Presidency of Bosnia and Herzegovina („the applicant") at the time of filing the request, filed a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for a review of conformity of the Laws listed in the enacting clause of the present decision („the contested laws) with the Constitution of Bosnia and Herzegovina.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22 (1) of the Rules of the Constitutional Court, on 7 December 2005 both Houses of the Parliament of the Federation of Bosnia and Herzegovina were requested to submit their replies to the request.

3. No replies to the appeal were communicated within the given time limit of 15 days which ended on 27 December 2005.

III. Request

a) Statements from the request

The applicant filed a request for review of conformity of the contested laws, passed by the Parliament of the Federation of BiH in the current composition, with the Constitution of Bosnia and Herzegovina. In the reasoning part of the request it is stated that, though more than two years have elapsed since the general elections, the House of Peoples of the Parliament of the Federation of BiH („the House of Peoples") has not been established in accordance with the Constitution of the Federation of Bosnia and Herzegovina. Actually, out of 17 delegates representing the Serb people according to the Constitution of the Federation of Bosnia and Herzegovina, only 9 delegates have been appointed. Therefore, there has not been a 2/3rd majority of the Serb Caucus and the provisions of the Constitution of the Federation of BiH on the protection of vital

national interest can be neither realized nor implemented with regard to the delegates representing the Serb people. Thus, the way of functioning of the House of Peoples has made it impossible for Serb delegates to meet formal requirements relating to the issue of vital national interest of the people they represent, as provided for by the Constitution of the Federation of BiH. The applicant deems that such functioning of the House of Peoples embodies a violation of the internationally recognized rights, as established by Article II of the Constitution of Bosnia and Herzegovina, as well as a violation of the fundamental rights and freedoms guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, which are directly applicable in Bosnia and Herzegovina, and which have priority over all other laws. In addition, Article II(4) of the BiH Constitution provides for the enjoyment of the rights and freedoms for all persons in Bosnia and Herzegovina without discrimination on any ground. Furthermore, the applicant underlines that the Constitution of the Federation of Bosnia and Herzegovina defines a vital national interest of the peoples, which, *inter alia*, implies the realization of the constituent right to be equally represented within legislative, executive and judicial authorities, as well as the peoples' constituent right to decision-making. Considering the aforementioned, the applicant deems that representatives of the Serb people have been prevented to make use of this right. For the stated reasons, the contested laws are „unconstitutional within both procedural and substantive meaning". The contested laws have been inconsistent with the Constitution of Bosnia and Herzegovina, *i.e.* with its provisions relating to the human rights, international standards and the obligation of non-discrimination. Finally, the applicant suggests that the Constitutional Court pass the decision establishing that the contested laws have been enacted contrary to Article II(1) in conjunction with Article II(2) and Article II(4) of the Constitution of Bosnia and Herzegovina and as such cease to be valid as of the date of publishing the decision."

IV. Relevant Law

4. Constitution of Bosnia and Herzegovina

Article II(1)

Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms.

Article II(2)

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(4)

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.

5. **Amendments to the Constitution of the Federation of Bosnia and Herzegovina (***Official Gazette of the Federation of Bosnia and Herzegovina* no. 16/02 of 28 April 2002), in relevant part, read:

Amendment XXXIII
Composition of the House of Peoples and Selection of Members

(1) The House of Peoples of the Federation Parliament shall be composed on a parity basis so that each constituent people shall have the same number of representatives.

(2) The House of Peoples shall be composed of 58 delegates; 17 delegates from among each of the constituent peoples and 7 delegates from among the Others.

(3) Others have the right to participate equally in the majority voting procedure.

Amendment XXXIV

(1) Delegates to the House of Peoples shall be elected by the Cantonal Assemblies from among their representatives in proportion to the ethnic structure of the population.

(2) The number of delegates to the House of Peoples to be elected in each Canton shall be proportional to the population of the Canton, given that the number, structure and manner of election of delegates shall be regulated by law.

(3) In the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body.

(4) Bosniac delegates, Croat delegates and Serb delegates from each Canton shall be elected by their respective representatives, in accordance with the election results in the legislative body of the Canton, and the election of delegates from among the Others shall be regulated by law.

(5) No delegate of the House of Representatives or councilor of the Municipal Council may serve as a member of the House of Peoples.

Amendment XXXVII
Definition of vital national interests

Vital national interests of constituent peoples are defined as follows:

- exercise of the rights of constituent peoples to be adequately represented in legislative, executive and judicial authorities;

- identity of one constituent people;

- constitutional amendments;

- organisation of public authorities;

- equal rights of constituent peoples in the process of decision-making;

- education, religion, language, promotion of culture, tradition and cultural heritage;

- territorial organisation;

- public information system,

and other issues treated as of vital national interest if so claimed by 2/3rd of one of the caucuses of the constituent peoples in the House of Peoples.

Amendment XXXVIII
Parliamentary procedure for the protection of vital national interests

(1) Laws or other regulations or acts introduced into the House of Representatives of the Federation of Bosnia and Herzegovina shall also be adopted in the House of Peoples of the Federation of Bosnia and Herzegovina.

[...].

Amendment XXXIX
Procedure for Laws related to a vital national interest
as defined in the list of Amendment XXXVII

(1) If more than one Chairman or Vice-Chairman of the House of Peoples claims that a law comes within the list of vital national interest as defined in Amendment XXXVII of the Constitution of the Federation of BiH, the law shall be put on the agenda of the HoP as a vital national interest issue.

(2) If only one Chairman or Vice-Chairman claims that the law falls within this list, of, a two thirds of the respective caucus of the House of Peoples may declare the issue concerned to be of a vital national interest. In this case the procedure followed is the one outlined under Amendment XL.

(3) The Chairman and Vice-Chairmen of the House of Peoples have one week within which to decide.

(4) If a majority of each caucus represented in the House of Peoples vote in favour of such laws or other regulations or acts these are deemed to be adopted.

(5) If the House of Peoples agrees on amendments, the law, regulation or act is resubmitted to the House of Representatives for approval.

(6) If no agreement can be reached in the House of Peoples or if approval is not given to proposed amendments, a Joint Commission composed of representatives of the House of Representatives and the House of Peoples shall be established. The Joint Commission shall be composed on a parity basis and shall decide by consensus. The Joint Commission shall seek to achieve the harmonisation of the terms of the law. If the terms are harmonised, the law shall be deemed to be adopted.

(7) If no such harmonisation can be effected the law shall fail and the document shall be returned to the proponent for a new procedure. In that event the proponent may not resubmit the original law, regulation or act.

Amendment XL
Procedure for Laws related to a vital national interest if so decided by 2/3rd of one of the caucuses of the Constituent peoples in the House of Peoples

(1) In the event that two thirds of one of the caucuses of the constituent peoples in the House of Peoples decides that a law, regulation or act affects a vital national interest the law shall be considered by the House of Peoples.

(2) If a majority of each caucus represented in the House of Peoples vote in favour of such laws or other regulations or acts these are deemed to be adopted.

(3) If the House of Peoples agrees on amendments, the law, regulation or act is resubmitted to the House of Representatives for approval.

(4) If no harmonisation can be established by the Joint Commission referred to in Amendment XXXIX, the Constitutional Court of the Federation of Bosnia and Herzegovina shall be addressed to decide finally whether the law in question relates to a vital national interest of a constituent people.

[…].

6. **The Constitution of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 1/1994) in relevant part, reads:

Article 17

Unless provided otherwise in the Constitution, decisions of the legislature require the approval of each House of the legislature, except for rules pertaining only to one House and declarations made by it.

Article 19

Other Decisions shall be taken by a simple majority in the House except as otherwise provided in the rules of that House or in this Constitution.

7. **International Convention on the Elimination of All Forms of Racial Discrimination**

Article 2 paragraph 1 subparagraph (c)

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

Article 5 paragraph 1 subparagraph (c)

1. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.

8. The Rules of Procedure of the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 27/03),

Article 110, in relevant part, reads:

[...]

(2) Decisions shall be taken by a majority vote of the total number of representatives in the House of Peoples, unless otherwise regulated by the Constitution, or by law, or by these Rules of Procedure.

(3) The total number of representatives shall represent delegates whose mandate is still valid in the current composition.

V. Admissibility

9. The Constitutional Court notes that the applicant was a Chair of the Presidency of Bosnia and Herzegovina at the time of the submission of the request. The request for review of conformity relates to a decision determining whether the provisions of the contested laws have been passed in accordance with the Constitution of Bosnia and Herzegovina; therefore, it implies the jurisdiction of the Constitutional Court under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. Lastly, the request contains the essential facts and allegations on which is it is based.

10. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of the Constitutional Court, the Constitutional Court has established that the present request is admissible because it was filed by an authorized person. Therefore, there is no formal reason under Article 17(1) of the Rules of the Constitutional Court that would render the request inadmissible.

VI. Merits

11. The applicant challenges the enactment of the contested laws considering it inconsistent with Article II(1) in connection with Article II(2) and II(4) of the Constitution of Bosnia and Herzegovina. Namely, the House of Peoples has not been established in accordance with the Constitution of the Federation of Bosnia and Herzegovina. Actually, out of 17 delegates representing the Serb people according to the Constitution of the Federation of Bosnia and Herzegovina, 9 delegates have been appointed to the House of Peoples. Thus, Serb delegates are unable to comply with formal preconditions stipulated by the Constitution relating to the issue of vital national interest of the people they represent. Actually, the current number of the Serb delegates in the House of Peoples does not make the 2/3rd majority of the Serb delegates' caucus, as required for initiating the mentioned procedure. The applicant considers that the aforementioned amounts to

a disrespect of the „internationally recognized human rights and fundamental freedoms as established by Article II of the Constitution of Bosnia and Herzegovina as well as the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, which apply directly in Bosnia and Herzegovina, and which have priority over all other law. In addition, Article II(4) of the Constitution of Bosnia and Herzegovina prohibits discrimination on any ground in relation to the enjoyment of the rights and freedoms throughout Bosnia and Herzegovina". The applicant also alleges that the contested laws „are inconsistent with the Constitution of BiH, *i.e.* with its provisions relating to the human rights, international standards, and prohibition of all forms of discrimination".

12. Therefore, in one part of his request, the applicant challenges the constitutionality of the manner in which the contested laws have been enacted. He mentions in general „internationally recognized human rights and fundamental freedoms as established by Article II of the Constitution of Bosnia and Herzegovina…", *i.e.* the inconsistency with „the provisions relating to the human rights, international standards, and prohibition of all forms of discrimination", without dealing with the concrete rights inasmuch as Article II of the Constitution of Bosnia and Herzegovina does not contain a list of the rights. The Constitutional Court recalls that, within the meaning of Article 32 of the Constitutional Court's Rules, during the decision-making procedure, the Constitutional Court shall examine only those violations that are stated in the request. Further, the applicant alleges that the manner in which the contested laws have been enacted is inconsistent with Article II(1) in conjunction with Article II(2) and II(4) of the Constitution of Bosnia and Herzegovina. In accordance with Article II(1) of the Constitution of Bosnia and Herzegovina, both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. Article II(2) of the Constitution of Bosnia and Herzegovina establishes that the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") shall apply directly in Bosnia and Herzegovina, and Article II(4) guarantees that 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. Annex I to the Constitution of Bosnia and Herzegovina, *inter alia*, comprises the International Convention on the Elimination of All Forms of Racial Discrimination.

13. In accordance with the aforementioned, and although the applicant has not explicitly stated it in his request, it follows that he raises one concrete issue only with regard to the non- discrimination under Article 5 paragraph 1 sub-paragraph c) of the International

Convention on the Elimination of All Forms of Racial Discrimination, which relates to *political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.*

14. Therefore, the Constitutional Court shall examine whether the constitutional principle prohibiting discriminations has been violated by the manner in which the contested laws have been enacted, as previously stated.

15. The Constitutional Court recalls that according to the case-law of the European Court on Human Right („the European Court"), an act or regulation is to be deemed discriminatory if it makes distinction between individuals or groups who are in a similar situation, and if this distinction lacks reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized. Actually, the Constitutional Court's case-law relies on the European Court's jurisprudence and it has used the European Court's established criteria on non-discrimination. According to Article 14 of the European Convention it follows that its provision does not prohibit discrimination within the general meaning and that the right to non-discrimination has no independent existence, but it protects non-discrimination in relation to the enjoyment of the rights and freedoms safeguarded by the European Convention (see, European Court, *Gaygusuz vs. Austria*, judgment of 16 September 1996, Decisions and Reports 1996-IV, p. 1141, paragraph 36).

16. Unlike Article 14 of the European Convention, the provision of Article II(4) of the Constitution of Bosnia and Herzegovina, referred to by the applicant, *i.e.* the provision of Article II(3) of the Constitution of Bosnia and Herzegovina, prohibit discrimination in relation to both the enjoyment of the rights and freedoms safeguarded by the European Convention and the rights of international agreements listed in Annex I to the Constitution of Bosnia and Herzegovina. Such interpretation of Article II(4) of the Constitution of Bosnia and Herzegovina is confirmed by the long-term case law of the Constitutional Court. It follows from the aforementioned Constitutional Court's case-law that Article II(4) of the Constitution of Bosnia and Herzegovina offers a wider protection from discrimination than Article 14 of the European Convention (see, Constitutional Court, Decision no. *U 44/01* published in *Official Gazette of Bosnia and Herzegovina* no. 18/04).

17. In its efforts to clarify and to give a final answer to the mentioned questions, the Constitutional Court first refers to its Third Partial Decision in case no. *U 5/98* in which it is

emphasized that the recognition of the constituent peoples and the constitutional principle behind it – the principle of collective equality, impose an obligation on the Entities not to discriminate in particular against these constituent peoples which are, in actual fact, in a minority position in the respective Entity. Hence, as stated in the aforementioned decision, there is not only a clear constitutional obligation not to violate individual rights in a discriminatory manner which obviously follows from Article II(3) and II(4) of the Constitution of BiH, but also a constitutional obligation of non-discrimination in terms of a group right if, for instance, one or two of the constituent peoples are given special preferential treatment through the legal system of the Entities. Moreover, in the aforementioned decision, the Constitutional Court underlined that the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures, or any ethnic homogenization through segregation based on territorial separation (see, Constitutional Court, Third Partial Decision no. *U 5/98* of 1 July 2000, Bulletin of the Constitutional Court of Bosnia and Herzegovina, Sarajevo, 2001, paragraph 60). The Constitutional Court recalls that, by the mentioned decision, *inter alia*, parts of the contested provisions of the Constitution of the Federation of Bosnia and Herzegovina relating to only Bosniacs and Croats as constituent peoples on the territory of the Federation of Bosnia and Herzegovina have been declared unconstitutional.

18. With the aim of enforcement of the Constitutional Court's Decision on Constituent Peoples, amendments to the Constitution of the Federation of Bosnia and Herzegovina have been passed with the purpose of its harmonization with the Constitution of Bosnia and Herzegovina, so that the provision of paragraph 2 of Amendment XXXIII provides for that the House of Peoples shall be composed of 58 delegates; 17 delegates from amongst each of the constituent peoples and 7 delegates from amongst the Others. Furthermore, Amendment XXXIV stipulates the principles and election procedure for delegates to the House of Peoples. Firstly, this Amendment stipulates that delegates to the House of Peoples shall be elected „in proportion to the ethnic structure of the population". Secondly, it provides for that the number of delegates to the House of Peoples to be elected in each Canton shall be „proportional to the population of the Canton", and, finally, it provides for that these delegates shall be elected by their respective representatives „in accordance with the election results in the legislative body of the Canton". Thus, *de iure*, based on the mentioned Decision on Constituent Peoples, the principle of collective equality of all three peoples throughout the territory of the Federation of Bosnia and Herzegovina has been established, and, consequently, within the authorities of this Entity as well as within the House of Peoples of its Parliament.

19. In its case-law, the Constitutional Court has already passed decisions establishing that the constitutional principle of constituent peoples throughout the territory of Bosnia and Herzegovina was infringed in case when one constituent people was not guaranteed participation in the representative body while it was guaranteed to the two other peoples (see, Constitutional Court, Decision no. *U 4/05* of 22 April 2005 published in *Official Gazette of Bosnia and Herzegovina* no. 58/05).

20. However, in the present case, relevant Constitutional Amendments guarantee to the Serb delegates, as representatives of the constituent people, to have an equal number of delegates to the House of Peoples, thus establishing the principle of collective equality of constituent peoples in the House of Peoples. Consequently, the Constitutional Court finds that in accordance with the constitutional provisions, which provide for the composition of the House of Peoples, there is no distinction made between the Serb delegates and the two other constituent peoples' delegates in exercising their rights to *political rights, in particular the right to participate in elections to vote and to stand for election on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.*

21. On the other hand, there is no doubt that, following the last parliamentary elections for cantonal assemblies and indirect elections in cantonal assemblies for the elections of delegates to the House of Peoples conducted pursuant with the rules of the Election Law and Amendment XXXIV to the Constitution of the Federation of Bosnia and Herzegovina, that number of representatives from among Serb delegates that is provided for by Amendment XXXIII to the Constitution of the Federation of Bosnia and Herzegovina was not elected to the House of the Peoples. The current situation is mainly a result of present political situation in Bosnia and Herzegovina. To that end, the Constitutional Court points out once more that the political parties and their candidates have the obligation to abide by the principles of the Decision on Constituent Peoples no. *U 5/98* that are primarily based on the 1991 census on all levels of authority they are running for. Having regard to the provision of Article I(2) of the Constitution of Bosnia and Herzegovina, which provides that Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections, the political parties are clearly obliged to abide by the principles of the Decision on Constituent Peoples in view of the fact that the representatives of political parties exercise power after free and democratic elections. Otherwise, the political parties that fail to abide by the said principles shall be in a position where the election results would not correspond to the number of mandates to which a certain political party is entitled to in a legislative body (see, Constitutional Court, Decision no. *U 4/05*).

22. The fact is that there are neither constitutional nor legal mechanisms in the Federation of BiH which would ensure filling of seats by the required number of delegates in the House of Peoples from among each constituent people or from the Others, as required under the Constitution of the Federation of BiH. This may possibly result in the situation in which required number of delegates from among any of the constituent peoples nor from Others is not elected. However, none of the constituent peoples are put into a privileged position, *i.e.* there is no *system of government which reserves all public offices only to members of certain ethnic group* and no one has been deprived of equality in the enjoyment of political rights. Yet, this does not exempt the relevant authorities from an obligation to find mechanisms that would ensure constituting the House of Peoples in its full composition.

23. The Constitutional Court recalls that the provision of Article 17 of the Constitution of the Federation of Bosnia and Herzegovina provides that the decisions passed by the Parliament of the Federation of Bosnia and Herzegovina require the approval of both Houses, except for Rules and declarations that are passed independently by the Houses. It therefore may be concluded that the decisions by the Parliament of the Federation of Bosnia and Herzegovina as well as the contested laws become valid only when adopted in identical form by the House of Peoples as well. Nevertheless, Article 110 paragraph 2 of the House of Peoples' Rules of Procedure provides for that the House of Peoples' decisions shall be taken by a majority vote of the total number of representatives in the House of Peoples, unless otherwise regulated by the Constitution, or by law, or by these Rules of Procedure. The total number of representatives shall represent delegates whose mandate is still valid in the current composition. The Constitutional Court notes that these Rules of Procedure do not stipulate, as a precondition for validity of an adopted decision, that a decision must be at the same time upheld by the certain number of delegates of each national caucus in the House of Peoples. The Constitutional Court concludes that there have been no obstacles in the Constitution, Law or Rules of Procedure that prevented the contested laws to be adopted by the House of Peoples. However, the applicant claims that there has been discrimination because the delegates from among the Serb people could not raise the vital national interest issue as out of 17 delegates 9 of them have been appointed, the number which does not represent two thirds of the national caucus in the House of Peoples.

24. Amendment XXXIX to the Constitution of the Federation of Bosnia and Herzegovina provides for the procedure for laws and other regulations and acts dealing with the vital national interest. According to the aforesaid procedure, a law, regulation or act may be declared to be the issue of a vital national interest in two cases: 1. If more than one Chair or Deputy Chair of the House of Peoples claims it, and 2. If only one Chair or two thirds

of the respective national caucus claim it. A possibility to raise the issue of vital national interest, *in abstracto*, aims towards making possible for representatives of all constituent peoples to effective participation in the authorities so as to possibly prevent adoption of a law which might have an adverse effect to vital national interest at issue. The substance and *ratio* of the „vital national interest" mechanism is comprised only in the fact that certain issues, declared as being the issues of vital national interest, are considered and adopted under more strict procedural conditions.

25. Apart from the conclusion which the applicant himself drew by interpreting the current situation in the House of Peoples in the light of the relevant constitutional provisions relating to the impossibility of protecting the vital national interest of the Serb people in the House of Peoples, the applicant failed to provide any argument in support of the allegation according to which the current number of Serb delegates, in any case or in any proceedings, are deprived of the right to establish the national caucus and to enjoy the rights deriving from, including the right to raise the vital national interest issue. Moreover, the applicant failed to allege whether the Deputy Chair of the House of Peoples from Serb people initiated the procedure under Amendment XXXIX to the Constitution of the Federation of BiH. Therefore, the applicant failed to substantiate his allegations as to the impossibility of protecting vital national interest of the Serb people in the House of Peoples, *i.e.* discrimination in this respect.

26. The applicant alleges that the contested laws are „unconstitutional both in terms of procedural and substantive law." However, it is clear that the request raises only the issue of constitutionality of the enactment of the contested laws. The applicant himself has not submitted any argument in support of the allegations that the provisions of the contested laws are unconstitutional. The Constitutional Court has already recalled in this Decision that it shall decide on the constitutionality of enactment of the contested laws within the scope of the violations alleged by the applicant. Therefore, this Decision does not prejudice the question of constitutionality of the provisions of the contested laws. Moreover, the Constitutional Court has already adopted decisions on the constitutionality of certain provisions of the contested laws (see Decision of the Constitutional Court no. *U 14/05* of 2 December 2005).

27. Taking into account the aforesaid, the Constitutional Court concludes that the applicant's request is ill-founded and that the contested laws have been enacted in accordance with Article II(1) in conjunction with Article II(2) and II (4) of the Constitution of Bosnia and Herzegovina.

VII. Conclusion

28. The contested laws have been enacted in accordance with the Constitution of Bosnia and Herzegovina. According to the provisions of the Constitution of the Federation of Bosnia and Herzegovina, which provide for the composition of the House of Peoples, there is no differentiation made between the delegates from among Serb people and delegates from among two other constituent peoples in the enjoyment of their right to *political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.* None of the constituent peoples was granted a privileged position, *i.e.* there is no *system of government which reserves all public offices only to members of certain ethnic groups*, and hence the equality in enjoyment of political rights has not been prevented. The Constitutional Court concludes that there have been no obstacles in the Constitution, Law or Rules of Procedure that prevented the contested laws to be adopted by the House of Peoples. Apart from the conclusion which the applicant himself drew by interpreting the current situation in the House of Peoples in the light of the relevant constitutional provisions relating to the impossibility of protecting the vital national interest of the Serb people in the House of Peoples, the applicant failed to provide any argument in support of the allegation according to which the current number of Serb delegates, in any case or in any proceedings, are deprived of the right to establish the national caucus and to enjoy the rights deriving from, including the right to raise the vital national interest issue.

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

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case no. U 4/04

Request of Mr. Sulejman Tihić, Chairman of the Presidency of Bosnia and Herzegovina at the time of filing this request, for the review of constitutionality of Articles 1 and 2 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina, Articles 1, 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska, Articles 2 and 3 of the Law on the Use of Flag, Coat of Arms and Anthem of the Republika Srpska and Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska

Partial Decision of 31 March 2006
Partial Decision of 18 November 2006
Ruling of 27 January 2007

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2), Article 62 and Article 63(2), (3) and (4) 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:

Mr. Mato Tadić, President,

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Hatidža Hadžiosmanović, Vice-President

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Ms. Constance Grewe,

Having deliberated on the request of **Mr. Sulejman Tihić, the Chair of the Presidency of Bosnia and Herzegovina at the time of filing this request**, in case **no. U 4/04**, at its session held on 31 March 2006 adopted the following

PARTIAL DECISION ON MERITS

The request of Mr. Sulejman Tihić, the Chair of the Presidency of Bosnia and Herzegovina at the time of filing this request, is hereby partly granted.

It is hereby established that Articles 1 and 2 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina (*Official Gazette of Federation of BiH* nos. 21/96 and 26/96), and Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 19/92) are not in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina, in conjunction with Articles 1.1 and Article 2(a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination referred to in Annex I to the Constitution of Bosnia and Herzegovina.

It is further established that Article 2 of the Law on Use of the Flag, Coat of Arms and the Anthem (*Official Gazette of Republika Srpska* no. 4/93) in the part in which it is provided that the flag, coat of arms and anthem of the Republika Srpska „represent statehood of the Republika Srpska" is not in conformity with Article I.1 and I.2 of the Constitution of Bosnia and Herzegovina, and that Article 3 of the Law on the Use of Flag, Coat of Arms and Anthem (*Official Gazette of the Republika Srpska* no. 4/93) in the part that provides that the symbols of the Republika Srpska are used „in accordance with moral norms of the Serb people" are not in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina, in conjunction with Article 1.1 and Article 2(a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination referred to in Annex I to the Constitution of Bosnia and Herzegovina.

Pursuant to Article 63(2) of the Rules of the Constitutional Court, Article 2 of the Law on Use of the Flag, Coat of Arms and the Anthem (*Official Gazette of Republika Srpska* no. 4/93) in the part providing that the flag, coat of arms and anthem of the Republika Srpska „represent statehood of the Republika Srpska" and Article 3 of the Law on the Use of Flag, Coat of Arms and Anthem (*Official Gazette of the Republika Srpska* no. 4/93) in the part providing that the symbols of the Republika Srpska are used „in accordance with moral norms of the Serb people" are hereby annulled.

Pursuant to Article 63(3) of the Rules of the Constitutional Court, the annulled provisions shall be rendered ineffective on the first day following the date of the publication of the present decision in the *Official Gazette of Bosnia and Herzegovina*.

Pursuant to Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina is ordered to bring Articles 1 and 2 of the Law on Coat of Arms and Flags of the Federation of Bosnia and Herzegovina into line with the Constitution of Bosnia and Herzegovina within six months as from the date of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina*.

Pursuant to Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the National Assembly of Republika Srpska is ordered to bring Articles 2 and 3 of the Constitutional Law on the Flag,

Coat of Arms and Anthem of the Republika Srpska into line with the Constitution of Bosnia and Herzegovina within six months as from the date of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina*.

Pursuant to Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina and the National Assembly of Republika Srpska are ordered to inform the Constitutional Court of Bosnia and Herzegovina about the measures taken to enforce this Decision within the time-limit referred to in the preceding paragraph.

The 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*.

Reasons

I. Introduction

1. On 12 April 2004, Sulejman Tihić, the Chair of the Presidency of Bosnia and Herzegovina at the time of filing this request („the applicant") lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for the review of constitutionality of Articles 1 and 2 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina (*Official Gazette of Federation of BiH* no. 21/96 and 26/96), Articles 1, 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 19/92), Articles 2 and 3 of the Law on the Use of Flag, Coat of Arms and Anthem (*Official Gazette of the Republika Srpska* no. 4/93) and Articles 1 and 2 of the Law on the Family Patron-Saint's Days and Church Holidays of the Republika Srpska *(Official Gazette of Republika Srpska* no. 19/92). On 2 December 2004 the applicant submitted a supplement to the request.

II. Proceedings before the Constitutional Court

2. Pursuant to then applicable Article 21(1) of the Rules of Procedure of the Constitutional Court, on 11 May 2004, the National Assembly of Republika Srpska („the National Assembly") and Parliament of the Federation of BiH („the Parliament of the Federation") were requested to submit their replies to the request within 30 days from the

receipt of the request from the Constitutional Court. On 8 December 2004, they were also requested to submit their replies to the supplement of the request within 30 days.

3. On 8 June 2004, the National Assembly requested the time limit for giving a reply to be extended to 45 days and, on 29 July 2004, an additional extension until 15 October 2004 was requested. On 3 August 2004, the Constitutional Court, in accordance with Article 24 of the then applicable Rules of Procedure of the Constitutional Court, approved the National Assembly the extension of the time limit for reply until 1 October 2004, as requested.

4. The National Assembly submitted its reply to the request on 30 September 2004 in which it proposed a public hearing to be held in this case.

5. On 6 August 2004, the Croat Caucus and the Bosniac Caucus to the Council of Peoples of the Republika Srpska submitted their replies to the request.

6. On 20 December 2004, the House of Representative of the Parliament of the Federation of BiH („the House of Representatives") submitted its reply to the request and to the supplement to the request. The House of Peoples of the Parliament of the Federation of BiH („the House of Peoples") failed to submit its reply to the request and supplement to the request.

7. On 28 December 2004, the National Assembly requested an extension of time until 16 February 2005 for submission of its reply on the allegations stated in the supplement to the request.

8. Acting in accordance with Article 24 of the then applicable Rules of Procedure of the Constitutional Court and taking into account the statements from the request and supplement thereof as well as the fact that National Assembly already submitted its reply to the request, and that the time limit for submission of the reply was already extended as requested and the 30 days time limit for submitting the reply to the supplement was given, the Constitutional Court did not find reasons to extend the time limit for submitting the reply to the allegations made in the supplement to the request.

9. Having regard to Article 25(2) of the then applicable Rules of Procedure of the Constitutional Court, the replies of the National Assembly and the House of Representatives were submitted to the applicant on 26 October and 24 December 2004 respectively.

10. Having regard to Article 46 of the then applicable Rules of Procedure of the Constitutional Court, the Constitutional Court decided, at its plenary session of 28 January 2005, to hold a public hearing in which the parties to the proceedings would take part. At

the same session, the Constitutional Court decided to invite, as prospective *amici curiae*, the OSCE Office in BiH, the UN High Commissioner for Human Rights, the Venice Commission and the OSCE High Commissioner for National Minorities, to present their preliminary observations.

11. On 24 February 2005, the High Commissioner for National Minorities informed the Constitutional Court that he could not take part as *amicus curiae* in the present case for his current responsibility did not include the territory of Bosnia and Herzegovina. On 14 March 2005, the OSCE Office in BiH, the UN High Commissioner for Human Rights and the Venice Commission, in their capacity as *amici curiae* before the Constitutional Court, presented their joint opinion.

12. On 28 January 2006, pursuant to Article 46(1) of the Constitutional Court's Rules, the Constitutional Court held a public hearing to which it invited the applicant's representatives and the representatives of the House of Representatives and the House of Peoples, and the representatives of the National Assembly of RS, and *amici curiae*. At the public hearing, Academic Muhamed Filipović and Ms. Alma Čolo represented the applicant, Mr. Irfan Ajanović represented the House of Representatives, Professor Dr Hans Peter Schneider, Prof. Dr. Rajko Kuzmanović, Mr. Krstan Simić, Prof. Dr. Dragomir Acović, Ms. Nevenka Trifković and Mr. Borislav Bojić represented the National Assembly. In addition, Ms. Madeline Reese, Head of Office of the High Commissioner for Human Rights in Bosnia and Herzegovina and Ms. Jasminka Džumhur, a lawyer in the Office of the High Commissioner for Human Rights in BiH, acted as *amici curiae* in the case. No representative of the House of Peoples took part at the public hearing.

13. On 6 February 2006, the applicant submitted to the Constitutional Court his written statement as given at the public hearing as well as his supplement statement relating to the public hearing. On 13 February 2006, the Constitutional Court submitted the above mentioned observations to the House of Representatives and the House of Peoples of the F BiH Parliament as well as to the RS National Assembly.

14. On 6 and 20 February 2006, the RS National Assembly submitted to the Constitutional Court its written statement as given at the public hearing and a video recording of the statement by Mr. Ivan Tomljenović, the Vice-President of RS, relating to the challenged symbols of the Republika Srpska. On 12 and 13 February 2006, the Constitutional Court submitted to the applicant the written observations and a transcript of interview given by Mr. Ivan Tomljenović.

15. On 9 February 2006, *amicus curiae* submitted additional observations relating to the public hearing. On 23 February 2006, the Constitutional Court forwarded the *amicus*

curiae's additional observations to the RS National Assembly as well as to the House of Representatives and House of Peoples of the F BiH Parliament.

16. Pursuant to Article 93(1)(2) and paragraph (3) of its Rules, the Constitutional Court decided on 27 January 2006 to exempt Judge Seada Palavrić from further deliberation and decision-making in the present case in view of the fact that she had taken part in the enactment of the challenged law of the Federation of BiH.

17. At its session of 31 March 2006, the Constitutional Court decided on the basis of Article 62 of the Rules of the Constitutional Court to adopt this partial decision. As to the part of the request relating to the conformity with the Constitution of challenged provisions of Articles 1 and 2 of the Law on the Family Patron-Saint's Days and Church Holidays of the Republika Srpska and Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska, the Constitutional Court decided to postpone its decision.

III. Request

a) Statements from the request

18. The applicant states that the challenged provisions of the laws in question are not in conformity with the Constitution of Bosnia and Herzegovina for the following reasons:

Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina

19. Applicant states that Article 1 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina prescribes the appearance of the coat of arms of the Federation of Bosnia and Herzegovina, which is in the shape of a shield and consisting of three fields: one field contains a shield with gold lilies on the green background, the second field contains a historical Croat coat of arms with 25 quarters of red and white colours, while the third field, which occupies one half of the coat of arms, contains ten white six-point stars arranged in a circle. Article 2 of the said Law prescribes the appearance of the flag of the Federation of Bosnia and Herzegovina with fields of red, white and green colours with the described coat of arms in the middle.

20. Stating the genesis of the coat of arms and flag of the Federation of BiH, the applicant has concluded that the symbol of gold lilies on the coat of arms or flag of the Federation of BiH, although it cannot be solely identified with the Bosniac people, symbolizes only the Bosniacs considering that the political representatives of the Croat and Serb people did not accept the gold lily as their symbol. He further states that the historical Croat coat

of arms, square fields of red and white colour, throughout its history, has symbolized Croats, and „as of 1990 it has been the coat of arms of the Republic of Croatia". The third quarter in the flag and the coat of arms contains ten white six-point stars denoting ten cantons of the Federation of Bosnia and Herzegovina. With such appearance of the coat of arms and the flag of the Federation of Bosnia and Herzegovina the Serb people and other citizens in the Federation of BiH have been discriminated against on national/ethnic grounds. Actually, in view of the appearance of the coat of arms and the flag, they have been on an unequal footing with the Bosniac people and the Croat people in the Federation without any objective and reasonable explanation. This is contrary to the fundamental constitutional principle that guarantees equality of the Bosniac people, the Croat people and the Serb people and other citizens of Bosnia and Herzegovina throughout its territory. The applicant finds that in the instant case, the issue of discrimination arises in relation to respect of the right to return as guaranteed under Article II(5) of the Constitution of Bosnia and Herzegovina, the right to non- discrimination based on national origin and provision of equal treatment with regard to the right to liberty of movement within the state boundaries. The applicant concludes that stipulating a coat of arms and a flag that would refer only to the Bosniac people and the Croat people creates an air of distrust with the Serb people and other citizens of Bosnia and Herzegovina and prevents their return to their pre-war homes on the territory of the Federation of BiH which in turn does not contribute to the realization of the aim sought to be realized by Article II(5) of the Constitution of Bosnia and Herzegovina.

21. In regard to the above, the applicant finds that Articles 1 and 2 of the Law on Coat of Arms and Flag of the Federation of Bosnia and Herzegovina are not in compliance with Article II(4) in conjunction with Article II(3) and II(5) of the Constitution of Bosnia and Herzegovina.

Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska

22. The applicant states that Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska provides that the flag of the Republika Srpska shall consist of three colours: red, white and blue. The colours shall be placed horizontally in the following order: red, blue and white. Each colour shall occupy one-third of the flag. The flag of the Republika Srpska contains all features of the flags of the Principality of Serbia of 1878 and the Kingdom of Serbia of 1882 respectively. Article 2 of the mentioned Law stipulates the appearance of the coat of arms of the Republika Srpska, which is basically the coat of arms of Nemanjići represented by a double white eagle with a crown over its head. The applicant further states that it can be seen from the Collection of the coats of arms of the Fojnica Monastery (published by *Oslobođenje* in 1972), a book

written by Pavle Andjelić, Ph.D that the double eagle is the symbol of the coat of arms of Nemanjići, which was literally stated in Article 2 of the challenged Constitutional Law of RS. This means that this was the symbol taken from the history of the Serb people. Article 3 of the mentioned Law stipulates that the anthem of the Republika Srpska shall be „Bože Pravde". The text of the anthem Bože Pravde, which was established under the Constitution as the anthem of the Republika Srpska, originated in 1872. The text of the anthem exalts the Serb people and asks the Lord „to unite the Serb brothers, save the Serb king and the Serb lineage."

23. The applicant alleges that the said provisions of the Constitutional Law on the Flag, the Coat of Arms and the Anthem of the Republika Srpska discriminate against the Bosniac people and the Croat people as constituent peoples in the entire territory of Bosnia and Herzegovina and thus in Republika Srpska as well. The said provisions also discriminate against other citizens of Bosnia and Herzegovina.

24. Furthermore, the applicant pointed out that a possible reason for lack of features of either Bosniac people or Croat people in the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska was related to the fact that the Bosniac and the Croat people, according to the Constitution of the Republika Srpska, had no status of constituent peoples in the Republika Srpska at the time of enactment of the relevant law. This status was recognized by the Constitution of the Republika Srpska only following the adoption of the Decision of the Constitutional Court of Bosnia and Herzegovina on the constituent peoples no. *U 5/98* at which time the amendments to the Constitution of the Republika Srpska were adopted.

25. The applicant alleges that it clearly follows from the aforesaid that the prescribed appearance of the flag, the coat of arms and the text of the anthem of the Entity of Republika Srpska represent the symbols and emblems of the Serb people. However, they cannot be official symbols and emblems of the entity since the Entity Republika Srpska is a community of not only the Serb people but also of the Bosniac, Croat and other peoples and citizens who are equal in all respects. By prescribing the said provisions, the Bosniac people, the Croat people and other citizens of Bosnia and Herzegovina have been directly discriminated against on national grounds, resulting in creation of an air of fear and distrust in the authorities of the Republika Srpska, thereby impeding the return of non-Serbs to their homes of origin in the Republika Srpska. According to the applicant, the present case raises an issue of discrimination with regard to respect of the right to return as guaranteed under Article II(5) of the Constitution of Bosnia and Herzegovina, prohibition of discrimination on a national origin and provision of equal treatment with regard to the right to liberty of movement within the state boundaries.

Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska

26. The applicant alleges that Article 2 of the Law on the Use of the Flag, the Coat of Arms and the Anthem is not in conformity with Articles I(1) and I(3) of the Constitution of Bosnia and Herzegovina, whereas Article 3 of the said Law is not in conformity with Article II(4) in conjunction with Articles II(3) and II(5) of the Constitution of Bosnia and Herzegovina.

27. The applicant alleges that Article 2 of the Law provides that the flag, the coat of arms and the anthem of the Republika Srpska shall represent the statehood of the Republika Srpska. The said provisions imply the statehood of the Republika Srpska, which it does not have under the Constitution of Bosnia and Herzegovina. Actually, this is inconsistent with Article I(1) of the Constitution of Bosnia and Herzegovina, that provides that *Bosnia and Herzegovina shall be a democratic state, which shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders.* Moreover, Article 2 of the said Law stands in opposition to Article I(3) of the Constitution of Bosnia and Herzegovina, which provides that *Bosnia and Herzegovina shall consist of the two Entities - the Federation of Bosnia and Herzegovina and the Republika Srpska.*

28. The applicant states that this means that, according to the constitutional provisions, only Bosnia and Herzegovina represents a state pursuant to the principles of international law while the Republika Srpska is only an Entity in its composition. Consequently, one cannot speak of **„representation of statehood of the Republika Srpska"** since Republika Srpska does not have that statehood. After all, the provisions of the Constitution of the Republika Srpska, which read that *the Republika Srpska shall be a State of the Serb people*, were amended in the procedure of implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina on constituent peoples throughout the entire territory of Bosnia and Herzegovina.

29. The applicant deems that Article 3 of the said Law is not in conformity with Articles II(3) and II(5) of the Constitution of Bosnia and Herzegovina for it provides that the flag, the coat of arms and the anthem of the Republika Srpska shall, *inter alia*, **„be used with the moral norms of the Serb people"**. Such provision, claims the applicant, gives preferential treatment to the Serb people and it associates the use of the symbols of the Republika Srpska with only one of the three constituent peoples in Bosnia and Herzegovina, thereby discriminating against the Bosniac people, the Croat people and other citizens of Bosnia and Herzegovina on national grounds without any objective and reasonable justification.

Law on the Family Patron-Saint's Days and Church Holidays

30. The applicant alleges that Articles 1 and 2 of the Law on the Family Patron-Saint's Days and Church Holidays are not in conformity with Article II(4) in conjunction with Articles II(3) and II(5) of the Constitution of Bosnia and Herzegovina.

31. In Articles 1 and 2 of the said Law, the following family patron-saint's days and church holidays are designated as the holidays of the Republika Srpska: Christmas, Day of Republic, New Year, Twelfth-day, St. Sava, First Serb Uprising, Easter, Whitsuntide, May Day – Labour Day and St. Vitus' Day. The applicant states that these obviously include holidays of only one people, the Serb people (save the Labour Day), and that those holidays are solely orthodox religious holidays and holidays associated with the history of the Serb people and Orthodox faith, *e.g.* First Serb Uprising, Twelfth-day, Orthodox Christmas, Easter, etc. On the other hand, the applicant states, the working days are holidays of other peoples and religious denominations such as Eid (*Bajram*), Catholic Christmas, Easter, etc.

32. The above referenced holidays are celebrated by legislative, executive and administrative bodies of the Republika Srpska, army, police, judicial authorities, etc. The applicant further states that according to this Law, those are the days when the said institutions do not work as well as the officials elected from the Republika Srpska to the institutions of Bosnia and Herzegovina. Moreover, according to the applicant's allegations, all citizens of the Republika Srpska who are not of the Serb origin are forced to celebrate those holidays although they do not regard them as their own holidays. Furthermore, all but the Serbs in the Republika Srpska are prohibited to have their own holidays which would be the official holidays in the Entity they live in, the holidays that would not be offensive to the constituent peoples in Bosnia and Herzegovina. Hence, according to the applicant, the enactment of such holidays that are part of the Serbs' history only create an air of distrust among other peoples and citizens and maintains a sense of fear of ethnic cleansing that was experienced during the aggression on Bosnia and Herzegovina between 1992 and 1995 when they were forced to leave their homes of origin.

b) Statements from the supplement to the request

33. The applicant stated in its supplement to the request that the central goal of the General Framework Agreement for Peace in Bosnia and Herzegovina and the Constitution of Bosnia and Herzegovina is non-discrimination. This is supported by the fact that the provision of Article II(4) has been given additional importance by associating the application of fifteen human rights protection instruments under Annex I to the Constitution

of Bosnia and Herzegovina. Hence, the application of rights and freedoms under Annex I to the Constitution of Bosnia and Herzegovina, as laid down in Article II(4), is secured to all persons without discrimination. In the present case, the applicant believes that the said constitutional provisions have priority over the laws of, respectively, the State and the Entities, which includes all laws and the Entity Constitutions. In view of the fact that the state is solely responsible for obligations arising out of each individual instrument under Annex I to the Constitution of Bosnia and Herzegovina and in view of the specific constitutional and territorial organization of Bosnia and Herzegovina, it follows that the territorial units of Bosnia and Herzegovina are very often the subjects obliged to apply the said instruments in practice. Notwithstanding, the Federation of Bosnia and Herzegovina and the Republika Srpska preserved and established, respectively, the symbols and other features; the Republika Srpska additionally enacted the Law on the Use of the Flag, Coat of Arms and Anthem of the Republika Srpska and the Law on Family Patron Saint's Days and Church Holidays of the Republika Srpska – this indubitably shows that the Serbs in the Federation of Bosnia and Herzegovina and the Bosniac people and the Croat people in the Republika Srpska have been treated differently with regard to the Bosniac people and the Croat people in the Federation of Bosnia and Herzegovina and the Serb people in the Republika Srpska, which has been contrary to Articles 1(1) and 2 (a), (b), (c), (d) and (e) of the International Convention on the Elimination of All Forms of Racial Discrimination. The said articles, particularly Article 2(d) and (e), provide for that effective measures of *national and local policy* must be undertaken in order to repeal or quash any law or regulation aimed at an unequal and discriminatory treatment and that the authorities are obliged to support integrationist organizations and movements in order to repeal discriminatory measures.

34. The applicant states in his supplement to the request that he bases his allegations on the violation of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1 and Article 2 (a), (b), (c), (d) and (e) of the International Convention on the Elimination of All Forms of Racial Discrimination on the same reasons as those set out in his request for he considers that any prescription of features of an Entity that symbolize only one people, or two of the three constituent peoples in Bosnia and Herzegovina, represent measures that aim at distinction, exclusion, restriction or preferential treatment based on a national or ethnic origin. Their goal is to infringe or discredit the recognition, enjoyment or exercise of the human rights and fundamental freedoms in all domain of life on equal terms.

35. Finally, the applicant states that notwithstanding the positive obligations arising out of Articles II(1) and II(6) of the Constitution of Bosnia and Herzegovina, the competent

authorities of the Federation of BiH and the Republika Srpska failed to take appropriate measures to fulfil the obligations assumed under Articles II(1) and II(6) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 (a), (b), (c), (d) and (e) of the International Convention on the Elimination of All Forms of Racial Discrimination listed in Annex I to the Constitution of Bosnia and Herzegovina.

36. The supplement to the request contains the signature of the applicant verified with the appropriate seal.

c) Reply to the request and supplement to the request

Reply of the National Assembly of the Republika Srpska

37. The National Assembly at its session held on 28 July 2004 ascertained the reply to the statements from the request.

38. As to the admissibility of the request, the National Assembly states that in the request the applicant failed to state precisely what violation under Article II(3) was committed and which incorporates 12 rights. The National Assembly therefore finds that hence, *prima facie,* the requirement under Article 18(1) of the Rules of Procedure of the Constitutional Court was not met; namely, „the provisions of the Constitution which are deemed to have been violated" were not stated. In addition, in the request one may observe that it consists of a simple listing of the provisions of the Constitution of Bosnia and Herzegovina deemed to have been violated without a single fact and, particularly, without evidence on which it is based. Therefore, the request does not meet another requirement under Rules of Procedure of the Constitutional Court. At the same time, the National Assembly finds that the request does not meet the requirement under the last subparagraph; namely, it was not „verified by the seal of the applicant". Hence, Mr. Tihić lodged the request concerned in his capacity as a citizen of Bosnia and Herzegovina and not as Member of the Presidency of Bosnia and Herzegovina, which is inconsistent with Article 16(2)(5) of the Rules of Procedure of the Constitutional Court. In fact, the said person has no right of action. In accordance with the above, the National Assembly proposes that the request is rejected within the meaning of Article 60 of the Rules of Procedure of the Constitutional Court.

39. With respect to the position on the merits, the National Assembly claims that it is beyond dispute that the challenged laws were adopted in the period between 1992 and 1993. The National Assembly recalls that the continuity of the Constitution of the Republika Srpska was confirmed in the Basic Principles agreed on in Geneva on 8 September 1995. Subparagraph 2 sub-item 2 of the Constitution of Bosnia and Herzegovina reads

that *each entity will continue to exist under its present Constitution, however, amended to accommodate these basic principles*. Pursuant to Article XII(2) of the Constitution of Bosnia and Herzegovina, the Entities harmonized their respective Constitutions with the Constitution of Bosnia and Herzegovina under the international supervision during 1996. The National Assembly further states that the highest authority of the Council of Europe – the European Commission for Democracy through Law (the so-called Venice Commission) – presented its opinion regarding the compatibility of the Entity Constitutions, the Constitution of the Republika Srpska included, in the document CDL (96) and (48). The opinion of the said Commission is binding. The Constitution of the Republika Srpska was last revised by the High Representative of Bosnia and Herzegovina in 2002.

40. In the reply to the request it is further stated that Annex II item 2 of the Constitution of Bosnia and Herzegovina provides that *all laws… shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina*. Hence, the National Assembly finds that the Constitution of BiH itself ratified through the said norm all legislation that was enacted prior to the entry into force of the Constitution.

41. The National Assembly claims that the challenged laws have their *iustus titulus* in Article 8 of the Constitution of the Republika Srpska. This Article provides that *the Republika Srpska shall have the flag, the coat-of-arms and the anthem. The flag, the coat-of-arms and the wording of the anthem shall be determined by constitutional law.* As already stated, the last amendments to the Constitution of the Republika Srpska introduced by the High Representative did not challenge the existence of symbols in the Entities since they do not infringe the constitutionality of peoples and the constitutional rights and freedoms of citizens of any nationality. The conclusion to be inferred is that all amendments to the Constitution of the Republika Srpska verified the provision of Article 8 thereof.

42. The National Assembly believes that the constituent status of peoples was implemented in the Republika Srpska through the constitutional amendments of 2002. In particular, Amendment LXXVI provides that all relevant duties and institutions of power shall be proportionally assumed by each constituent people. Out of six highest duties (Prime Minister, President of the People's Assembly, Chair of the Council of Peoples, President of the Supreme Court, President of the Constitutional Court and Public Prosecutor), four were assigned to the representatives of the Bosniac people and Croat people. In addition to the highest duties in the Entity, proportional representation in public services has been established and it is being implemented in public services.

43. In the reply to the request it is stated that statement of the applicant that the flag of the Republika Srpska is the flags the Principality and the Kingdom of Serbia is ill-founded as red, blue and white are the so-called „pan-Slavist colors" and they can be found, in a different arrangement, on the flags of Croatia, Slovenia, Slovakia and Russia and, with specific modification, Bulgaria. In view of the fact that all constituent peoples in Bosnia and Herzegovina are of Slovene origin, it is claimed in the reply that the colours themselves cannot be the subject matter of dispute. Red and white are heraldic colours of the Croat and the Serb people and they cannot be disputable as such, whereas red colour was on the flag of the Socialist Republic of Bosnia and Herzegovina from 1946 until the dissolution of Yugoslavia. Accordingly, none of the colours from the flag can be disputable as such. Assuming that the applicant does not mind colours but their arrangement, this is related to a feeling for beauty and not discrimination and feeling for beauty is not a constitutional category. It is further stated in the reply that „the fact that the flag of Serbia has the same arrangement of colours does not have to imply anything since Serbia and Bosnia and Herzegovina were one country for long period of time in history, including the period of King Tvrtko I". One of the assumptions is that Mr. Tihić does not mind either the colours or their arrangement but he would just like to see a specific symbol on the flag as is the case with the flag of the Federation of Bosnia and Herzegovina. As the flag of the Republika Srpska contains no symbols and the flag of the Republika Srpska should not be compared to the ranking and commanding flags and standards, an absence of something cannot be regarded as evidence for the claim of discrimination if the latter does not represent either of two constituent peoples. Hence, the Bosniac people, in the spirit of the initiative of Mr. Tihić, are free to identify themselves with one of the colours on the present flag of the Republika Srpska.

44. With respect to the coat of arms of the Republika Srpska, the National Assembly states that Article 2 of the Constitutional Law states in explicit terms that the coat of arms of the Republika Srpska is the coat of arms of Nemanjići and it is heraldically blazoned to be interpreted as the symbol and designation of the Serb people. It is true that the double eagle is part of history of the Serb people. In its present form, the coat of the Republika Srpska originates from the Medieval Serbian Empire and, in a larger historical sense, from the emblems of the Byzantine Empire. However, blazoned in the Constitutional Law of the Republika Srpska in heraldic terms, it was never (nor it is now) the coat of arms of Serbia. The emblems are not mere illustrations rather they are the expression of the awareness of the identity and existence through centuries. Further it is stated that every town and municipalities in Bosnia and Herzegovina have their respective coat of arms, which reflects tradition and specific qualities and it is only logical that an entity should have its symbols. The applicant's allegation that Article 3 of this Law gives preferential

treatment to the Serb people whereby the Bosniac people and the Croat people have been discriminated against on national grounds is ill-founded and it lacks arguments to support it. The National Assembly states that practice refutes the applicant's claim that other peoples are not allowed to express their respective flags and coats of arms. It is stated in the reply to the request that all religious buildings – mosques in the Republika Srpska have a green flag with a crescent. In addition, every political party shows their respective flags and coat of arms in prominent places. It is stated by the National Assembly that the arguments in support of the coat of arms and the flag can also be applied to the anthem, which is one of the symbols that also reflects cultural and historical heritage.

45. Furthermore, in its reply the National Assembly states that the challenged provisions of the Law on Family Patron-Saint's Days and Church Holidays does not violate the constitutional right of the Bosniac people, the Croat people and of Others in any aspect nor do they endanger national equality and vital interests of constituent peoples and Others in Bosnia and Herzegovina. The National Assembly believes that the applicant overlooked the fact of existence of a norm in Article 2 paragraph 2 of the Law on Family Patron-saint's Days and Church Holidays that *the citizens of the Republika Srpska shall have the right and choice to celebrate their religious holidays three days in a year* without discrimination on any grounds or status. Moreover, it is stated that this Law provides in its Article 4 that *the statute of a municipality may determine that one day shall be celebrated as a holiday in that particular municipality.*

46. The National Assembly finds that the request consists of two parts: legal and political and that the legal part does not contain a single fact let alone a piece of evidence. What is more, evidence (return of refugees) refutes the applicant's allegations. The National Assembly recalls that the Constitutional Court of Bosnia and Herzegovina, in case no. *U 12/02*, defined its position on discrimination (paragraphs 32 through 38). The National Assembly of the Republika Srpska agrees with the position expressed therein in its entirety. Therefore, the National Assembly believes that in fact the applicant discriminates by stating that only other constituent peoples have not been allowed to return to their homes due to fear and mistrust in the authorities of the Republika Srpska thus preferring only the constituent peoples. At the same time, National Assembly shares the view expressed by Judge Mirko Zovko in his dissenting opinion in case no. *U 5/98*: *I am not in favour of the glorification of the rights of a citizen who is constituent versus a citizen who is not constituent since the right of each citizen […] is protected in an identical way.* The identical position has been taken in Article 10 of the Constitution of the Republika Srpska, which provides that *the citizens of the Republika Srpska shall be equal in their freedoms, rights and duties […]without any discrimination.*

47. The applicant's allegations that the return of the citizens to their homes of origin was prevented as a result of alleged fear, the National Assembly finds to be in opposition to well-known facts that, as such, do not need to be proved. The implementation of the property legislation on the territory of the Republika Srpska, it is claimed in the reply, was achieved in 99.5% of the cases. Currently, thirty-six (36) municipalities in the Republika Srpska fully implemented property legislation and, to that end, received certificates issued by the international community. It is further stated that in the Republika Srpska the priority was given to return of refugees in the reconstruction and rehabilitation of their homes.

48. Finally, the National Assembly is of the opinion that it is necessary for the significance of the adoption of the decision to directly examine the request in question, and request that the public hearing is held, and after that adopt the decision dismissing the request.

Reply of National Assembly to the supplement to the request

49. The National Assembly in its reply to the supplement to the request repeated its arguments from the reply to the request and added some additional arguments. In the opinion of the National Assembly there is no discriminatory intent, nor is such effect produced by the symbols. Otherwise, if the meaning of the symbols is not separated from its appearance elements, argumentation with the clause on the prohibition of discrimination arising under Article II(4) of the Constitution of BiH would be meaningless. In that manner someone could always find that some of the elements on the coat of arms of the Republika Srpska are discriminatory, for example, religious elements such as cross which could insult atheists, composition with the arms could insult pacifists etc. It is further stated in the reply that nobody can dispute that two entities in the state of Bosnia and Herzegovina are distinguished in terms of the authorities and citizens. The symbols that are identical and which neglect these differences are quite useless because the main purpose of the symbols is to make the difference between different public authorities and organizations on the same territory.

50. As to Article 3 of the Law on the Use of the Flag, Coat of Arms and Anthem in which the term „**moral norms of the Serb people**" are used, the National Assembly states that this term is used in the close relation with the title of the entity „Republika Srpska" and that it is the part of the same sentence which forbids violation of the „reputation and dignity". Therefore, if the legal document is interpreted in the good faith „in accordance with usual meanings within sense of Article 31 of the Vienna Convention on the Law on Peaceful Agreements" the words „Serb people" must be understood as „Serb citizens" which implies all citizens of Republika Srpska. Similarly, the description of the flag, coat of arms and anthem as „state emblems" in Article 2 of the same Law must be understood

within meaning of „entity emblems" following the established principles of interpretation, under which all legal regulations must be interpreted in accordance with the Constitution of Bosnia and Herzegovina as long as it is possible (Decision of the Constitutional Court no. *U 5/98-IV* of 19 August 2000). In the opinion of the National Assembly, there are no discriminatory elements in any of the challenged laws, and the issues as to the extent to which the citizens of the entity may or wish to identify with these symbols depends on their personal feeling which is an individual and not a constitutional issue.

51. In the reply it is further stated that if the statements of the applicant on the existence of the different treatment are confirmed, there is objective and rational explanation for it. Such treatment is justified by the fact that symbols which allegedly characterize the Serb element only express their connection with the title „Republika Srpska". All sub-national entities in the world make the same thing: give names to and design their symbols in accordance with the official denomination for example: Flemings and Walloons in Belgium, Catalans and Basque in Spain, etc. Why then would it be considered unconstitutional the sub-national entity Republika Srpska uses „Serb" symbols?

52. As to Articles 1 and 2 of the challenged Law on the Family Patron-Saint's Days and Church Holidays, the National Assembly has stated that it is necessary, firstly, to clarify that the acceptance of the Greece Orthodox Calendar in the Republika Srpska does neither offend nor discriminate anyone since it is absolutely necessary to use only one calendar as well as reasonable to use the traditional calendar of the vast majority of citizens. In this respect, it is objectively impossible that all three peoples are equally treated by entitling them to use different calendars. Therefore, in their opinion, the celebration of two New Years is undisputed. The ten religious holidays are based on Christian faith and therefore the Orthodox Serbs and Croat Catholics may celebrate them. Only Bosniacs, as Muslims, are affected by these days. At the same time, they are entitled to celebrate the three additional days of their own choice every year on the days of their religious holidays. Consequently, the Bosniacs are not discriminated against but privileged as they are entitled not to sixteen but to nineteen non-working days. This is an illustration that an unequal treatment does not necessarily represent discrimination. Hence, if the differential effect of the relevant law to the constituent peoples is to be found, the grounds of differential treatment are both reasonable and justified. Finally, it is stated in the conclusion that „not to mention in this context that Republika Srpska remains in any event – whether one likes it or not – symbolically, a mother Entity for the Serbs".

53. In the opinion of the National Assembly such symbols in the Republika Srpska are necessary for creation of one united, peaceful and tolerant entity, as „collage" symbols which would occur by mixing of the symbols of the three constituent peoples represent more

division or fragmentation of the citizens rather than union. Such symbols are necessary in order for Republika Srpska to distinguish itself from Bosnia and Herzegovina, and such differences, reflected in the clear and distinct symbols, cannot be challenged as Republika Srpska has its constitutional right to establish special parallel relations with neighbouring countries based on international law.

54. The National Assembly states in connection with Article 3 of the Constitutional Law on the Flag, Coat of Arms and the Anthem of the Republika Srpska, particularly in connection to the anthem, that if the text of the anthem itself is examined, it must be admitted that it seems that it has racist and discriminatory character. However that text, in their opinion, can be seen as correct only as historical and obsolete document, as the inheritance of the past. Today there is neither „Serb crown" nor „Serb lineage". This text should not be understood as political proclamation for the glorification of only the people of Serb original excluding all other constituent peoples but rather as transcendental imagination distant from the real contents.

55. As to the statements from the supplement to the request regarding International Convention on Elimination of All Forms of Racial Discrimination, the National Assembly replies that this Convention is not directly applicable to the Republika Srpska. Article II(4) of the Constitution of Bosnia and Herzegovina invokes this Convention as an international agreement listed in Annex I to the Constitution of Bosnia and Herzegovina. The wording of this Convention, however, is quite clear: it binds and obliges only „state parties" like Bosnia and Herzegovina and not other kinds of political communities. In contrast to that, the Republika Srpska is just an entity and not a state. It would be contradictory to argue that the Republika Srpska is an Entity as far as the rights, privileges and competencies are concerned. Moreover Article 1.1 of the stated Convention guarantees on equal footing only the recognition, enjoyment or exercise of „human rights and fundamental freedoms" in the political, economic, social cultural or any other field of public life. But the disputed Laws do not grant or regulate human rights or fundamental freedoms. There is no basic or guaranteed right by the Constitution of BiH, to claim specific symbols for any constituent people. Thus, the disputed laws by their mere content and substance cannot be in conflict with the International Convention on the Elimination of All Forms of Racial Discrimination. Also Articles 2 a, b, c d and e of this Convention does not have any broader meaning than Article II(4) of the Constitution of Bosnia and Herzegovina. It only repeats normative devices, commands and orders and obligations imposed on public authorities which can also be derived directly from an appropriate interpretation of Article II (4) itself.

56. Finally, in the opinion of the National Assembly the annulment of the existing symbols and imposition of the identical or almost identical symbols would lead to the situation in which the entities would lose their identity and feature and such situation would lead to the development of new tensions and hostilities between constituent peoples rather than integration and peaceful development. It is finally stated that the citizens cannot be deprived of their official symbols without destroying their identity.

Reply of the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina

57. The House of Representatives in their reply to the request and supplement to the request states that the Constitutional Commission of that House, at the session held on 22 November 2004, examined the request in question. On that occasion, it is stated in the reply, this commission took position that the request was fully justified and proposed the House of Representatives, in accordance with he decision of the Constitutional Court on the constitutionality of the Peoples and Others in Bosnia and Herzegovina, to change the entity emblems, coat of arms and flags of the Federation of BIH.

Reply to the request by the Croat Caucus and the Bosniac Caucus within the Council of Peoples of the Republika Srpska

58. Both the Croat Caucus and the Bosniac Caucus within the Council of Peoples of the Republika Srpska maintain that the applicant's initiative is both legal and legitimate and that the challenged laws should be brought promptly into line with the Decision on Constituent Peoples in Bosnia and Herzegovina.

d) *Amicus curiae* submission

59. In its submission, *amicus curiae* initially reasoned from the constitutional and legislative framework in which the challenged laws were adopted, pointing out that the challenged laws were adopted before the decision of the Constitutional Court on „constituent peoples" and the decision on the names of towns and municipalities in the Republika Srpska no. *U 44/01*, *i.e.* at the time when neither the Serbs in the Federation of BiH nor the Bosniacs or the Croats in the Republika Srpska had the opportunity to express their position regarding the symbols, and taking the same view regarding the holidays of the entity as „they were not represented in the meaningful sense in the legislative process".

60. Furthermore, in its analysis *amicus curiae* points out that the use of symbols or integral parts thereof is an important issue considering its origin stemming from the conflict and aiming at the domination of one ethnic group within a certain geographic area. *Amicus*

curiae therefore points to a necessity to ascertain, with regard to the non-discrimination principle, whether there is a legitimate aim in a democratic society and whether the use of legitimate means is proportionate to the prevention of the rights violation taking into account that the symbols are used at the places where all persons should have access to the rights guaranteed under the European Convention and the Constitution of Bosnia and Herzegovina such as schools, public buildings, courts, public areas, hospitals, etc.

61. *Amicus curiae* referred to the Constitutional Court's decision no. *U 44/01* in which the Constitutional Court declared unconstitutional the names „srpski" within the names of towns in the Republika Srpska and concluded that the use of symbols which were *prima facie* exclusive was analogous to the use of names which were demonstrative of the predominance of one ethnic group. It was also stated that the groups to be compared were the same as in the previous decision and that it was incumbent on the authorities to demonstrate that the difference in treatment was objective and justifiable within the meaning of Article II(4) of the Constitution of Bosnia and Herzegovina. *Amicus curiae* concluded that in the present case it was extremely difficult to argue that there could be a legitimate aim in restricting the enjoyment of a right which was related to return, that even if this could be argued, then to do so would lead to discrimination on grounds of ethnicity and that any objective justification raised must be adjudicated in the light of a very narrow margin of appreciation that must be applied.

62. In the conclusion, *amicus curiae* submitted that the challenged laws led to the adoption of symbols which were not representative of all the constituent peoples. In such circumstances and in the context in which they were adopted, it was inevitable that there would be an impact on those who were not included in the enactment of the challenged laws. In addition, it is concluded that the adoption of symbols which were representative of one ethnic group has inhibited the right to return, and that the reasons for the inhibition of that right embody potential and real violations of substantive rights within the European Convention while the reason for the violation lies in discrimination on the grounds of ethnicity.

63. Finally, *amicus curiae* presents its view that there is a violation of the right to return caused by discrimination on the grounds of ethnicity and also a violation of Article II(4) of the Constitution of Bosnia and Herzegovina.

IV. Public Hearing

Applicant's position presented at the public hearing

64. The applicant has maintained his position stated in the request that „choosing" the symbols which are deeply rooted in the historical past of only one people or which are

identical to the features and symbols of another state, where that people are dominant, has represented discrimination against all other peoples and citizens who live in the territory of the relevant entity, and such circumstance is without reasonable and objective justification. The applicant has underlined that Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina obligates the parties to create in their territories the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group. In the opinion of the applicant, the enactment of the mentioned symbols does not contribute to the voluntary return and harmonised reintegration of refugees and displaced persons in the Entities. The applicant substantiates his allegations by the presentation of official statistics of the BiH Ministry for Human Rights and Refugees, which indicate a minor return of the Bosniacs to the Republika Srpska (Bileća 3.65%, Gacko 9.95%, etc.) as well as a minor return of the Serbs to the Federation of BiH (Tomislavgrad 0.17%, Usora 5.26%, etc.). In addition, the applicant emphasizes that the challenged laws are inconsistent with the Constitution of Bosnia and Herzegovina taking into account that the principle of constituent status of all peoples of Bosnia and Herzegovina throughout its territory is incorporated in the Constitution of Bosnia and Herzegovina, and this right has been infringed by the challenged laws as well as by the practice provided for by these laws. Hence, the Entities should have amended the challenged laws but have failed to do so.

65. The applicant deems unconstitutional any legal activity imposing one sided elements of symbolic identification on other nations, with the intention that symbols of one nation only are imposed and become obligatory for all citizens of a state *i.e*. that respect for these symbols is being imposed on members of other nations. In addition, it is emphasized that in countries such as Bosnia and Herzegovina, only the symbols of universal consensus or those that are neutral as to the tradition, beliefs, and ritual practice of each present and constituent peoples, or those symbols which contain the traditional elements of symbolic expression of each of these peoples, can function as the symbols of the state. In that context, according to the applicant, any symbol used in the existence of the state or in public should reflect its ethnic, national, religious and traditional structure. This is valid to even greater extent in the entities; its symbols should contain the elements of common tradition and symbols of all peoples living in these territories. It is also stated that the Republika Srpska cannot introduce such symbols which reflect a specific approach to experiencing the state, national and cultural tradition inherent to the Serbs only so that other peoples cannot take part thereof in an equal way without discrimination. This is applicable for the symbols of the Federation of BiH as well.

66. The applicant has also underlined that the previous war resulted in genocide, war crimes and crimes against humanity which are constitutionally punishable as well as

under international law in such way that the soldiers – war crimes perpetrators, under the heraldic signs and insignias (coats of arms and flags), were wearing the symbols or were being consecrated or were carrying flags with these heraldic symbols at the head of these criminal armies. According to the applicant, „it would therefore be very good to clarify the previous violations of human rights and international humanitarian law, within a longer historical span, by 'the same perpetrators' towards 'the same victims', thereby, historically seen, a certain significant continuity of effect would be demonstrated".

67. As for the argument of the RS National Assembly that the disputed symbols of the Republika Srpska do not jeopardize any of the rights of others and in particular the right to return, it has been stated that such a position is untenable because there is no sustainable return at all and if there is some return it is rather formally achieved through the restoration of ownership rights under the pressure of international community and very little or almost nothing through the reintegration of those people into the society being developed in the Republika Srpska, which includes the disputed symbols as well. It has been stated that the most important reasons for lack of return of people are related to psychological, emotional and cultural-religious sphere originating from the absolute domination of the Serb national feelings, Serb symbols, and the „provident" Orthodox practice, being imposed on the entire society in the Republika Srpska. Furthermore, it has been stated that the Bosniacs and Croats refuse to send their children to the schools that celebrate their individual Patron-Saint's Days and which operate under the auspices of the Orthodox saints. They also do not want to look at two headed eagles on public institutions or sing or listen to old Serb anthem called „Bože Pravde" or to stand under the sign of tinder-box steels (the cross with four Ss imprinted in Cyrillic letter „C" which, when read or interpreted, always mean „only unity may save the Serb") as this is not only a part of their tradition, but the reason for their refusal is that those, who had those signs and were wearing those symbols, are the executors of the most serious crimes against the Bosniacs and Croats who are now to integrate into the society of the Republika Srpska.

68. With reference to the presentation on the heraldry by the representative of the RS National Assembly, the applicant referred to the allegation that „due to the general Slavic origin, the signs in the existing symbols of the Republika Srpska do not offend the historical, cultural, spiritual or religious integrity of Bosniacs and Croats" and stated that this allegation does not only represents fabrications and scientifically verified inaccuracies but also a calculated lie. The applicant stated that there are no eagles and birds in the heraldry of Croats and Bosniacs, and there is almost no reference to tinderbox steels or other signs that are a distinguishing feature of the Serb and Orthodox state, religious and national tradition. The applicant supported his claim by saying that general Slavic symbols do not exist as such, because, by having a look at the heraldic history of Slavic

peoples (Russians, Ukrainians, Byelorussians, Slovenians, Croats, Serbs, Bosniacs, etc.), one can see that the heraldic signs were created among these peoples and their states by the emergence of states and aristocracy. The Slavic states, as it is stated, emerged at some later period of the Middle Ages (in VIII through IX century), at the time when heraldic tradition was already formed and when those peoples, i.e. the states, started recognizing the signs of that particular state under which power they were developing or which religion and culture they had already accepted.

69. With reference to the Law on the Family Patron-Saint's Days and Church Holidays of the Republika Srpska, which ceased to be in force by entry into force of the Law on Public Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, no 103/05), the applicant stated that the procedure was initiated before the Constitutional Court of the Republika Srpska for the review of constitutionality of the Law on Public Holidays of the Republika Srpska and the procedure of its enactment given the fact that the law was proclaimed by the decree of the President of the Republika Srpska and that the procedure was not followed with regards to the raised issue of „vital national interest". The applicant suggested that the Constitutional Court review the compatibility of the challenged Law on Family Patron-Saint's Days and Church Holidays, which is still in application. At the end of the hearing the applicant suggested that the Constitutional Court postpone the discussion on this law pending the decision of the Constitutional Court of the Republika Srpska.

70. After being asked by the Court whether there were any specific data or evidence to prove that refugees do not want to return to the Republika Srpska because of the symbols, the applicant replied that the specific names of persons refusing to return for those reasons cannot not be offered, but it was undisputable that the symbols represent one of the reasons for refugees' refusal to return to the Republika Srpska.

Position of the House of Representatives of the F BiH Parliament

71. The representatives of the House of Representatives of the F BiH Parliament reiterated their standpoint supporting the request of the applicant. It was also stated that the House of Representatives and its working bodies, primarily the Constitutional Commission, in the period between 2002 and 2004, were issuing conclusions whereby they pointed to the necessity for harmonizing the said symbols with the Constitution of Bosnia of Herzegovina, European Convention and International Conventions on Elimination of all Forms of Racial Discrimination. However, the House of Peoples of the F BiH Parliament failed to react to the said initiatives, which stopped them according to the Constitution of the Federation of BiH. Thus, except for the raised initiative no further progress was made.

72. The House of Representatives delivered a written submission supporting the statements given at the public hearing, wherein they stated that the design of the coat of arms and the flag of the Federation of Bosnia and Herzegovina point to only to two constituent peoples: Bosniacs and Croats, and in no way contains any insignia of Serb people or Others in Bosnia and Herzegovina. It was also stated that they disagree with the allegations from the request relating to the part where the meaning of golden lilies is explained, stating that the use of two terms in the request is evident: the term „golden lily" (in singular) and the term „golden lilies" (in plural), and therefore it is not clear what this refers to. The term „golden lily" is determined to be used in the coat of arms and the flag of the Federation of BiH, while the term „golden lilies" was the part of the coat of arms and the flag of the Republic of Bosnia and Herzegovina during the war period (1992-1995) and used only by the Army of Bosnia and Herzegovina, which was an armed force in the war. Finally, they said that they agree with the view that any prescribing of Entity insignia that symbolizes only one or two out of three constituent peoples in Bosnia and Herzegovina would be inconsistent with the decision of the Constitutional Court on constituent status of peoples.

Position of the RS National Assembly

73. The representatives of the RS National Assembly objected to the participation of *amicus curiae* in the present proceedings before the Constitutional Court as they held that their taking part has no grounds under either the Constitution of BiH or the Rules of the Constitutional Court.

74. The Constitutional Court rejected this objection by the RS National Assembly in view of its previous practice to invite *amicus curiae* to take part in a public hearing before the Constitutional Court as well as Article 47(2) and (3) of the Rules of the Constitutional Court which provides for that the Constitutional Court shall also invite persons who may submit expert opinions and statements relevant for taking of a decision.

75. The RS National Assembly reiterated its standpoints from the reply to the request and the supplement to the request and presented some additional views. The RS National Assembly reiterated that the applicant had failed to present any evidence supporting the allegations that the challenged laws have been discriminatory, *i.e.* that they have discriminatory effects. It was also stressed that no person has been put in a situation of being unable to return to the Republika Srpska because of the symbols, and the best example is the applicant who was the Deputy Chair of the National Assembly and who accepted those symbols at the time of his term of office. Furthermore, it was stated that the challenged symbols of the Republika Srpska, either all or parts of them, always belonged

to all the peoples – Serbs, Croats and Bosniacs. It was also pointed out that the symbols are not *prima facie* exclusionary, as the flag of the Republika Srpska is in Pan-Slavic colours. They pointed out that these symbols, not the existing ones, but rather some of their elements, such as cross, lily, colour of flag etc., are deeply rooted in the history of all three peoples of Bosnia and Herzegovina.

76. In the heraldry-related part of the presentation, the representatives of the RS National Assembly stated that what refers to the coat of arms is also relevant to the flag of the Republika Srpska and, to some extent, to its anthem. It was particularly emphasized that the coat of arms and its owner (the one represented by the coat of arms) make a single entity and are of the same identity which concerns both the past and future and that the coat of arms is like a signature, which may contain all the letters of the owner's name or it may focus on few draws that represent a unity. The symbols, because of such nature, cannot be annulled by a decision of the court or executive authority without interfering with the issue of identity, because, as it is stated, a person who uses a coat of arms that does not represent his identity is brought in the position of imposed identity. The coat of arms and the flag of Bosnia and Herzegovina are mentioned as an example in this regard. In the opinion of the representatives of the RS National Assembly, the aforesaid signs represent no one because they are neutral.

77. It was also stated that if there are any arguments as to the standpoints of the applicant that the symbols make an impediment for the return to the Republika Srpska, then it should be first said that the name „Republika Srpska" is disputable as such, not the symbols. If it is accepted that the symbols were derived from the name of the Republika Srpska, which was established by the „Dayton Constitution" and which as such cannot be changed, then the symbols cannot be changed either. The RS National Assembly is of the opinion that the symbols represent the results of compromise achieved in Dayton and the question was posed what would happen if the symbols were annulled since the Constitutional Court cannot invent new symbols.

78. The proposal was made to defer the proceedings in the part of the request where the Law on the Family Patron-Saint's Days and Church Holidays was challenged since the new Law on Public Holidays had been passed according to which all constituent peoples are entitled to celebrate their religious holidays.

79. After being asked by the applicant to elaborate on the arguments that the symbols of the Republika Srpska represent all the constituent peoples, *i.e.* that they do not offend the feelings of Bosniacs and Croats, the National Assembly replied that there is no opinion or an agreed position on the symbols of Serbs, Croats or Bosniacs, and that therefore, those

are not only the symbols of Serb people, but also of the entire Bosnia and Herzegovina and as such they cannot irritate anyone.

80. Furthermore, as for the question of the applicant whether the challenged laws were enacted in compliance with the Constitution of the Republika Srpska where it was stipulated that the Republika Srpska is the entity of Serb people, the National Assembly stated there is no disputing that. However, at the same time this does not imply that if the Republika Srpska was the entity of the Serb people (prior to the amendments to the Constitution of the Republika Srpska), the symbols are Serb symbols.

81. As for a question of the Constitutional Court relating to the anthem of the Republika Srpska to offer an explanation on the neutrality in terms of the constitutional principle of non-discrimination of all citizens of Bosnia and Herzegovina, the National Assembly confirmed that the text of the anthem of the Republika Srpska is disputable, which may be resolved by keeping the current melody of anthem and selecting another text. They also acknowledged that some wordings of anthem may raise certain doubts in terms of neutrality, but the coat of arms and the flag do not discriminate anyone for which, as they emphasized, plenty of arguments were offered.

82. As for the request of the Constitutional Court to elaborate on the meaning of four Ss („C") on the coat of arms of the Republika Srpska, i.e. to explain whether those letters mean that „only the unity may save the Serb" as said among ordinary people, the National Assembly stated that it is not the letters on the coat of arms that are being disputed, but the tinder-box steels, the device used to kindle the fire. They acknowledged the existence of some generally accepted opinions among ordinary people when it comes to the meaning of tinder-box steels on the coat of arms of the Republika Srpska, but those are just tinder-box steels, and therefore they do not represent anything else.

83. After being requested by the Constitutional Court to elaborate on the fact that general understanding of those symbols differs, because, when it comes to the discriminatory effect, the point that matters the most is a generally accepted opinion and not the opinion of experts, the National Assembly replied that nobody can confront someone's opinion about the symbols since the symbols require some time to be understood or a research study. Furthermore, they replied that since the applicant presented the thesis that the challenged symbols are not the symbols of Bosniacs and Croats, then it was somehow expected that he will say what their symbols are. Only then the public and the representatives of the Republika Srpska would be able to reply that the proposal is unacceptable to them and that such requests could have been offered for discussion at the time of enactment of laws. It was also replied that the argument of applicant is unacceptable in which he alleged that

he was not able to initiate the issue of challenged laws in the Assembly procedure. It was also stated that it is true that the perception of symbols may be different, but majority of people do not understand the symbols nor do they know the text of the anthem. Thus, in essence, the symbols are always the instrument of politicians and serve them to carry out their ideas and initiatives.

84. At the request of the Constitutional Court to explain the difference between the coat of arms of the Republika Srpska and the Kingdom of Serbia, the National Assembly replied that the coat of arms of the Kingdom of Serbia is identical to the coat of arms of today's Republic of Serbia and the difference between those coat of arms and the coat of arm of the Republic of Srpska is that in addition to two-headed eagle there are also two lilies on the coat of arms of the Kingdom of Serbia. There is the crown on the head of eagle on the coat of arms of the Republika Srpska, which is missing on the coat of arms of the Kingdom of Serbia. Moreover, it was emphasized that all contained inside the shield of the coat of arms represents its indispensable part.

85. After being asked by the Constitutional Court whether there is a difference in colours and their arrangement in the flags of the Republic of Serbia and Republika Srpska, the explanation was given that the colours and their arrangement are the same, but that the flag of Republic of Serbia also contains the coat of arms of the Republic of Serbia.

86. After being asked by the Constitutional Court whether the representatives of all three constituent peoples took part in the enactment of the challenged laws of the Republika Srpska, it was replied that nobody knows that for sure, but it is presumed to be so. It was also replied that the standpoints presented at the hearing on behalf of the National Assembly would not be supported by Bosniacs, but the Croats would support those standpoints because the issue of constitutionality of the challenged laws has never been raised by them.

87. To contribute to their standpoints presented at the public hearing, the National Assembly submitted the statement of Mr. Ivan Tomljenović, Vice-President of the Republika Srpska which he gave on 29 January 2006 during his appearance at the Weekly News program broadcasted by the local TV station in the Republika Srpska. Mr. Tomljenović stated that he does not consider the challenged symbols of the Republika Srpska offensive, but he admitted that they are not satisfactory since all three peoples are equal and constituent in the Republika Srpska. He also said that the challenged symbols of the Republika Srpska do not contain anything that would even partially be satisfactory to Croats and Bosniacs. He stated that the challenged symbols represent only one people. Mr. Tomljenović also said that he had expected the current arrangements concerning

symbols would change when the situation becomes more stable and that there would be no problems, but it is evident that the situation is not like that since the problem reached the Constitutional Court. Furthermore, in his reply to the question whether the symbols jeopardize the return to the Republika Srpska or the reasons are of economic nature, Mr. Tomljenović stated that the issue is of subjective nature, but that there are people who refuse to return to the Republika Srpska because of the symbols, in particular because of the anthem that defends the salvation of the Serb people, Serb King and Serb lineage. Mr. Tomljenović said that the anthem is about the salvation of Serbs and since it is the anthem of the Republika Srpska it would be a good thing if Croats and Bosniacs also consider Republika Srpska their homeland. As a final point Mr. Tomljenović said that he attends the manifestations at which the anthem „Bože Pravde" is played and where the symbols of the Republika Srpska are displayed, but that he had expected from the beginning that those symbols would change over time.

Position of *Amicus curiae*

88. As for the question of the Constitutional Court whether *amicus curiae* is in the possession of any concrete facts or evidence relating to the allegations that the refugees do not want to return to the their pre-war homes, *amicus curiae* stated that she was in possession of such facts, i.e. the evidence. Such facts, according to *amicus curiae*, appeared in the data obtained by the Office of the High Commissioner for Human Rights through the program of making an assessment of the situation in the municipalities in Bosnia and Herzegovina with regards to the respect of human rights. The objective of the program was identification of the problem in the field of human rights in the municipalities of Bosnia and Herzegovina and work on finding methods how to solve these problems in cooperation with the municipalities and local communities. There are many municipalities, such as Zvornik, Derventa, Prijedor, Stolac, etc., for which the prospective returnees clearly said they did not want to return to because of the feeling of insecurity they had on entering the public buildings, hospitals, schools, municipal buildings and because the first thing they saw was the flag, which was flying at the place where the ethnic cleansing had been conducted. *Amicus curiae* states that those reports were available and that they could be made available to the Constitutional Court, if the need arose.

89. At the request of the National Assembly to elaborate on the presented standpoints concerning the discrimination from which the conclusion could be drawn that any exclusion leads to discrimination, *amicus curiae* stated that she disagreed with such a conclusion because, in principle, one is allowed to take affirmative steps in order to promote the minority rights and to achieve equality. *Amicus curiae* also referred to the statement of Venice Commission presented in its opinion on the Constitution of

Bosnia and Herzegovina that the affirmative steps must in no way be taken to promote majority rights. It was furthermore stated that the Constitutional Court and European Court of Human Rights had elaborated on the test of discrimination many times, that discrimination may be either direct or indirect, and that there was no need to prove an intention to discriminate, but that it was only necessary to prove the effect and potential effect of an act or measure. In reference to this, *amicus curiae* referred to part of its written submission relating to evidence of discrimination. *Amicus curiae* pointed also to the part of its written submission where it was stated that the Constitutional Court had already taken decisions on discrimination, notably in the Decision on constituent status of peoples and Decision on use of prefix „Serb", despite the evidence not having been collected in these cases. Therefore, *amicus curiae* argued that the Constitutional Court could rely on those decisions in order to find discrimination in this case, though it was also pointed out that the applicant himself had presented some evidence of discriminatory effect in this case. *Amicus curiae* said that the key fact was that the symbols represented one group exclusively, and therefore the burden of disproving discrimination should be placed on the enactor of the challenged laws.

90. After being asked by the National Assembly whether there were data on the basis of which one could draw the conclusion that the challenged symbols did not represent all constituent peoples, *amicus curiae* replied that the legal argument that all the challenged laws were enacted without full participation of all constituent peoples was a sufficient legal argument.

91. At the request of the Constitutional Court to elaborate on the conclusion of discrimination, *amicus curiae* replied that the European Convention obliges the states to create an environment in which everyone will be entitled to the enjoyment of human rights including the right to return and all the rights must be viewed in connection with Article 14 of the European Convention.

92. At the request of the Constitutional Court to elaborate on the conclusion referring to the importance of the context of time in which the challenged laws were enacted, *amicus curiae* replied that the time context was essential since the challenged laws had been enacted at the time when all constituent peoples were not entitled to constituent status under Entity Constitutions, and therefore they were not equally participating in the enactment of laws either in the Republika Srpska or in the Federation of BiH. The decision of the Constitutional Court on the constituent status of peoples confirmed the principle of peoples' constituency and ordered the amendments to the Entity Constitutions. Therefore, the laws that were enacted prior to the interpretation of the Constitutional Court must be amended.

V. Relevant Law

93. **Constitution of Bosnia and Herzegovina**

Article I(1)

The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be „Bosnia and Herzegovina", shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations.

Article 1(2)

Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.

Article I(3)

Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska.

Article II(3)

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:

a. The right to life.
b. The right not to be subjected to torture or to inhuman or degrading treatment or punishment.
c. The right not to be held in slavery or servitude or to perform forced or compulsory labour.
d. The rights to liberty and security of person.
e. The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.
f. The right to private and family life, home, and correspondence.
g. Freedom of thought, conscience, and religion.
h. Freedom of expression.
i. Freedom of peaceful assembly and freedom of association with others.
j. The right to marry and to found a family.
k. The right to property.
l. The right to education.
m. The right to liberty of movement and residence.

Article II(4)

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

Article II(5)

All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.

Article II(6)

Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above.

Article III(3)(b)

The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.

Article XII(2)

Within three months from the entry into force of this Constitution, the Entities shall amend their respective constitutions to ensure their conformity with this Constitution in accordance with Article III.3 (b).

94. **Decision Enacting Amendments to the Constitution of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH* no. 16/02)

The Constitution of the Federation of Bosnia and Herzegovina is hereby amended as follows:

Amendment XXVII

Bosniacs, Croats, and Serbs, as constituent peoples, along with Others, and the citizens of the Federation of Bosnia and Herzegovina, which is a constitutive part of the sovereign state of Bosnia and Herzegovina, being determined to ensure full national representation, democratic relations and the highest level of internationally recognized rights and freedoms, hereby pass the Constitution of the Federation of Bosnia and Herzegovina.

This amendment changes the last sub-paragraph of the Preamble of the Constitution of the Federation of Bosnia and Herzegovina, which was changed by Amendment II to the Constitution of the Federation of Bosnia and Herzegovina.

Amendment XXVII

Vital national interests of the constituent peoples shall be defined, as follows:

- *(...)*
- *identity of a constituent people*
- *(...)*
- *education, religion, language, promotion of culture, tradition and cultural heritage*
- *(...)*

95. **Amendments LXVI-XCI to the Constitution of the Republika Srpska** (*Official Gazette of the Republika Srpska* no. 21/02)

Amendments LXVII, paragraph 1

1. The Republika Srpska shall be a unique and inseparable constitutional-legal entity

The Republika Srpska shall perform its constitutional, legislative, executive and judiciary duties independently.

The Republika Srpska shall be one of two equal Entities in Bosnia and Herzegovina.

Serbs, Bosniacs and Croats, as constituent peoples, Others and citizens shall participate in the exercises of power in the Republika Srpska equally and without discrimination.

96. **International Convention on the Elimination of All Forms of Racial Discrimination,** in its relevant part, reads as follows:

Article 1.1.

In this Convention, the term „racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic

origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 2

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division

97. **The Law on the Coat of Arms and the Flag of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH* nos. 21/96 and 26/96)

Article 1

The Coat of Arms is in the shape of a shield and consisting of three fields: the left upper field, which occupies one quarter of the Coat of Arms, contains a shield with gold lilies on the green background mounted in gold band; the right upper field, which occupies one quarter of the Coat of Arms, contains a historical Croat coat of arms with 25 quarters of red and white colour mounted in red band; the lower field, which occupies one half of the coat of arms, contains ten white six-point stars arranged in circle; the shield with gold lilies and historical Croat coat of arms are placed in the white field; the coat of and the blue filed are fitted in gold band.

Article 2

The flag of the Federation of Bosnia and Herzegovina is rectangular with fields of red, white and green colour and the coat of arms of the Federation of Bosnia and Herzegovina referred to in Article 1 of this Law. The white filed is three times larger than the red field and green field. The proportion between the width and the length is 3:5.

98. **The Constitutional Law on the Flag, Coat of Arms and Anthem of Republika Srpska** (*Official Gazette of the Republika Srpska* no. 19/92).

Article 2

The coat of arms of the Republika Srpska is the coat of arms of Nemanjici represented by a double white eagle with a crown over its head. A red shield with a cross and four white tinder-box steels between the arms of the cross is on the eagle's chest.

Article 3

The anthem of the Republika Srpska shall be „Bože Pravde".

99. **The Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska** (*Official Gazette of the Republika* Srpska no. 4/93)

Article 2

The flag, the coat of arms and the anthem of the Republika Srpska shall represent the statehood of the Republika Srpska.

Article 3

The flag, coat of arms and anthem of the Republika Srpska shall be used in accordance with this law, public order, moral norms of the Serb people and in the manner which shall not disturb respect and dignity of the Republika Srpska.

VI. Admissibility

100. Taking into account the conclusion on adoption of a partial decision pursuant to Article 62 of the Rules of the Constitutional Court, the Constitutional Court shall not examine the admissibility in respect of Article 1 of the Constitutional Law on Flag, Coat of Arms and Anthem of Republika Srpska nor shall it examine the admissibility in respect of the Law on Family Patron-Saint's Days and Church Holidays in Republika Srpska

101. According to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to whether any provision of the Entity's Constitution or law is consistent with this Constitution. Such disputes may be referred *inter alia* by a member of the Presidency of Bosnia and Herzegovina.

102. The applicant requested the Constitutional Court to review the conformity with Constitution of Articles 1 and 2 of the Law on the Coat of Arms and the Flag of the Federation of Bosnia and Herzegovina, Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska, Articles 2 and 3 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska.

103. At the time when the request was submitted the applicant acted in his capacity as the Chair of the Presidency of Bosnia and Herzegovina and therefore was authorized to submit the request according to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

104. The National Assembly challenges the admissibility of the request as, *inter alia*, the applicant did not specify an allegedly violated right laid down in Article II(3) of the Constitution of Bosnia and Herzegovina as the aforementioned Article encompasses 12 rights. However, the Constitutional Court has established that the applicant alleged that the challenged provisions of the aforementioned laws primarily violated the right laid down in Article II (4) in conjunction with Articles II(3) and II(5) of the Constitution of Bosnia and Herzegovina. Moreover, in his supplement dated 2 December 2004 the applicant requested the establishment of the violation of Article II (4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1 and 2. a), b), c), d) and e) of the International Convention on Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina. The fact that the applicant did not specify a right provided for in the list consisting of 12 rights under Article II(3) of the Constitution of Bosnia and Herzegovina, and that he alleges the violations of other Articles of the Constitution of Bosnia and Herzegovina and International Agreement under Annex I to the Constitution of Bosnia and Herzegovina, does not mean *a priori* that the request is lacking in necessary elements provided for in Article 18(1) of the Rules of Procedure of the Constitutional Court. Therefore, the Constitutional Court must dismiss the aforementioned allegations of the National Assembly as ill-founded.

105. As to the National Assembly's allegations with respect to the admissibility of the request, according to which the request does not contain the facts and evidence on which the request is based, the Constitutional Court holds that such allegations are arbitrary and lacking in specification. Without wishing to go into the merits of the case in this part dealing with admissibility, the Constitutional Court concludes that the request contains relevant facts and evidence without going into their fundamental nature in this part of the proceedings. The Constitutional Court therefore must dismiss the aforementioned allegation of the National Assembly as ill-founded.

106. The National Assembly alleges that the applicant's request was not certified by the seal of the applicant and that the request was therefore submitted by an unauthorized person, i.e. Mr. Sulejman Tihić as a citizen of Bosnia and Herzegovina and not as a Chair of the Presidency of Bosnia and Herzegovina. The National Assembly holds that this is in violation of Article 16(2)(5) of the then applicable Rules of Procedure of the Constitutional Court and that the request should be rejected in the sense of Article 18(1) of the then applicable Rules of Procedure of the Constitutional Court. The Constitutional Court recalls that according to Article 18(1) of the then applicable Rules of Procedure of the Constitutional Court the certification of the signature by a seal of the applicant was one of the necessary requirements under Article 18(1) of the Rules of Procedure of the Constitutional Court. On 2 December 2004 the applicant submitted to the Constitutional Court a supplement to the request signed and certified by the seal of a member of the Presidency of Bosnia and Herzegovina. The Constitutional Court therefore concluded that the applicant certified subsequently the allegations set forth in the request submitted on 12 April 2004, which was not in violation of then applicable Rules of Procedure of the Constitutional Court. Accordingly, the Constitutional Court must dismiss the aforementioned allegations of the National Assembly as unfounded. Moreover, according to Article 19(1) of the Rules of the Constitutional Court, which entered into force in the meantime, a request for institution of proceedings arising under Article VI(3)(a) of the Constitution, shall contain the signature of an authorized person or applicant but not a certification by the seal.

107. In view of the provisions of Article VI(3) (a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of the Constitutional Court, the Constitutional Court has established that the request is admissible and that there is no formal reason under Article 17(1) of the Rules of the Constitutional Court that would render the request inadmissible.

VII. Merits

108. The Constitutional Court shall review whether Articles 1 and 2 of the Law on the Coat of Arms and the Flag of the Federation of Bosnia and Herzegovina, Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska, Article 3 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska are in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1. and 2 a) and c) of the International Convention on Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina. The Constitutional Court shall also examine whether Articles 2

and 3 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska are in conformity with Article I(1) and I(3) of the Constitution of Bosnia and Herzegovina.

109. According to the case-law of the European Court of Human Rights an act or a regulation is discriminatory if it differentiates between individuals or groups in similar situations without objective and reasonable justification, i.e. if there was no legitimate aim and a reasonable proportionality between the means used and the aim sought to be achieved.

110. As to the criteria for non-discrimination, the Constitutional Court has used those established by the European Court of Human Rights, which includes the constitutional rights, the rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") and the rights set forth in the international human rights instruments under Annex I to the Constitution of Bosnia and Herzegovina. According to the aforementioned case-law of the Constitutional Court, Article II(4) of the Constitution of Bosnia and Herzegovina offers a larger protection against discrimination than offered by Article 14 of the European Convention (see Decision of the Constitutional Court of Bosnia and Herzegovina no. *U 44/01* published in *Official Gazette of Bosnia and Herzegovina* no. 18/04).

111. Article II(4) of the Constitution of Bosnia and Herzegovina provides for the right to non-discrimination either in relation to the rights laid down in the European Convention or in relation to the rights and freedoms set forth in the international instruments under the Annex I to the Constitution of Bosnia and Herzegovina. In that way the scope of protection of the rights and freedoms of the citizens of Bosnia and Herzegovina is expanded and the State of Bosnia and Herzegovina and its both Entities are even more firmly obliged to ensure the highest level of internationally recognized human rights as provided for in Article II(1) of the Constitution of Bosnia and Herzegovina, without discrimination on any ground. According to the case-law of the European Court of Human Rights, Article 14 is clarified as follows:

„Discrimination exists if it results in a different treatment of individuals in similar situations and if that treatment has no objective and reasonable justification. In order to be justified, the treatment must pursue a legitimate aim and there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realized". (European Court for Human Rights, *Marckx vs. Belgium*, op. cit, page 16, paragraph 33)".

In the instant case, the applicant did not exclusively refer to Article 14 but primarily to Article II(4) of the Constitution of Bosnia and Herzegovina. Taking this into account, the

question of existence of discrimination must be viewed in the context of the provisions of the Constitution of Bosnia and Herzegovina. On the other hand, the principle of protection of certain scope of issues that are being viewed as collective rights of the constituent peoples, i.e. the rights treated as vital national interests of the constituent peoples, is absolute. The Constitutional Court emphasizes that the Constitutional Court's task is clearly prescribed by Article VI providing that the Constitutional Court „shall uphold this Constitution".

Taking into account the aforementioned, the principle of non-discrimination under Article II(4) has a considerably different meaning, i.e. offers a wider scope of protection than that offered by Article 14 of the European Convention and Protocol No. 12 to the European Convention. According to the established practice, Article II(4) of the Constitution of Bosnia and Herzegovina offers a basis for the Constitutional Court to apply 15 international instruments for the protection of human rights, including the **International Convention on the Elimination of All Forms of Racial Discrimination.**

Article 1.1 of the International Convention on the Elimination of All Forms of Racial Discrimination reads as follows:

Article 1.1

In this Convention, the term „racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The Constitutional Court emphases that the term „racial discrimination" means also different treatment based on national and ethnic origin. Moreover, this Article involves the respect of freedoms in the political, economic, social, and cultural or any other field of public life.

In view of such constitutional definition, the term „discrimination" must be interpreted in a wider manner than the term „discrimination" provided for in the European Convention, which relates to member States which are, as a rule, mono-national nation-states, and not institutionally multiethnic ones such as Bosnia and Herzegovina with the constitutional principle of protection of collective rights and the notion of constituent peoples. The concept of discrimination should be viewed in this context; in other words the issue is raised with regards to existence of right in relation to which the constituent peoples are discriminated. The provisions on non-discrimination between the constituent peoples,

i.e. the principle of protection of certain scope of collective rights, are incorporated in the Constitutions of the Entities so that it is not an exclusive principle provided for in the Constitution of Bosnia and Herzegovina. The Constitutional Court has expressed its position on this issue in a number of its decisions in which it dealt with the issue of vital national interest provided for in Article IV(3)(f) of the Constitution of Bosnia and Herzegovina and has always stressed the right to political representation of the constituent peoples as a fundamental right of the constituent peoples.

112. Notwithstanding the fact that the obligations set forth in international agreements listed in Annex I to the Constitution of Bosnia and Herzegovina relate to the Member States, it is indisputable that those obligations also relate to the Entities in Bosnia and Herzegovina as, within the meaning of Article II(1) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. Also, Article II(6) of the Constitution of Bosnia and Herzegovina provides, in part dealing with the implementation of the constitutional provisions guaranteeing the protection of human rights and fundamental freedoms, that in addition to Bosnia and Herzegovina both Entities shall apply and conform to the human rights and fundamental freedoms. Moreover, the Constitutions of the Entities provide that both Entities are competent to decide on the symbols of the Entities. It follows that the Entities, in exercising that competence, have the obligation to ensure the respect of human rights and fundamental freedoms as stated above. The Constitutional Court outlines that the aforementioned constitutional provisions impose a clear positive obligation on the Entities to amend or put out of force the laws and regulations which are incompatible with the provisions of the Constitution of Bosnia and Herzegovina, Constitutions of the Entities and general rules of international law, which form an integral part of the Constitution of Bosnia and Herzegovina.

113. The Constitutional Court concludes that the challenged laws regulate the issue of symbols and that, in principle, the symbols are closely related to the fostering and preservation of tradition, culture, distinctive characteristics of every people and that they have an influence on bringing them together and joining in one idea and one belief. It is beyond any doubt that the symbols convey certain emotions and meaning which are experienced in a specific way by those who recognize their history, tradition and culture in those symbols. The symbols are not pure images and decorations but each of them carries certain deeper and hidden meaning. The fact that heraldry is the science which studies coats of arms and symbolic meaning of the elements designed on the coats of arms should be noted in support of the aforementioned. Heraldry has its own interpretation for each single element designed on a coat of arms, for example the way in which the colors are used

on the coats of arms but also all other elements. Moreover, a flag represents the symbol which sublimates achievements, hope and ideals of all citizens of a country. As such the flag must have respect for all citizens, that is, in the instant case, the citizens of the Entity as a unit of the territorially single and internationally recognized country. In order to make it possible for the citizens of Bosnia and Herzegovina to see it and feel it in that way, the flags of the Entities must be the symbol of all their citizens. Moreover, the anthem of the Republika Srpska must produce the same feeling in the citizens of the Republika Srpska, its words and music must represent all citizens of the Republika Srpska. The question which the Constitutional Court must answer in the further elaboration of its decision is whether the symbols of the Federation of Bosnia and Herzegovina and Republika Srpska as determined by the challenged laws represent all citizens of the Entities, that is whether all citizens of Bosnia and Herzegovina can identify with the challenged symbols.

114. The Constitutional Court reiterates that all challenged laws were passed in a political and temporal context preceding the Decision on the „constituent status of the peoples" adopted by the Constitutional Court, no. *U 5/98*, and before the amendments to the Entity Constitutions were passed on the basis of that Decision, which established the mechanisms for equal participation in decision-making procedures in the field of legislation of all three constituent peoples in both Entities as well as the mechanisms for the protection of their vital national interests.

115. The Constitutional Court also stresses the fact that the challenged laws of the Republika Srpska were passed during the hostilities in Bosnia and Herzegovina when the Republika Srpska was „the State of the Serb people and of all its citizens" according to then applicable Article 1 of the Constitution of the Republika Srpska, which is a significant point for the analysis of the challenged symbols in connection with the question of the identification of its citizens with the challenged symbols.

116. Regardless of the fact that in the instant case the Constitutional Court shall be focused on the question whether the challenged symbols discriminate against because of their appearance and temporal and legal context under which the laws determining the symbols and their use were passed, the Constitutional Court considers it necessary to emphasize the facts which the *amicus curiae* presented in her observations during the public hearing. Namely, she stated that a number of refugees and displaced persons did not want to return to their homes of origin because of the symbols which reminded them of the war and because they considered them provocative and offensive. In this respect, the Constitutional Court points to the indisputable fact that the challenged symbols of the Federation of Bosnia and Herzegovina and Republika Srpska, in their present forms or their basic elements, were used during the war in Bosnia and Herzegovina. The Constitutional Court points to this

fact particularly in the context of the question to know whether all citizens of Bosnia and Herzegovina may identify with the challenged symbols taking into account the fact that Serbs in the Federation of BiH and Bosniacs and Croats in Republika Srpska were not given the opportunity, during the procedure of passing the challenged laws, to raise those issues and to take position as to whether they could identify with such symbols.

117. According to the jurisprudence of the Constitutional Court, the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures or any ethnic homogenization through segregation based on territorial separation (see Decision of the Constitutional Court, Case no. *U 5/98 III* of 1 July 2000, item 60).

118. The Constitutional Court, in its decision in Case no. *U 5/98* on the recognition of the rights of the constituent peoples on the whole territory of Bosnia and Herzegovina, established that the recognition of constituent peoples and its underlying constitutional principle of collective equality imposes an obligation on the Entities not to discriminate in particular against these constituent peoples which are, in actual fact, in a minority position in the respective Entity. Hence, there is not only a clear constitutional obligation not to violate individual rights in a discriminatory manner, but also a constitutional obligation of non-discrimination in terms of a group right. The territorial delimitation of the Entities cannot confer constitutional legitimacy on ethnic domination, or national homogenization or a right to uphold the effects of ethnic cleansing (see Decision of the Constitutional Court, in Case no. *U 5/98 III* of 1 July 2000, item 61).

119. The Constitutional Court points to the General Recommendation of the United Nations Committee on the Elimination of Racial Discrimination: *In order to respect fully the rights of all peoples within a State, Governments are again called upon to adhere to and implement fully the international human rights instruments and in particular the International Convention on the Elimination of All Forms of Racial Discrimination. Concern for the protection of individual rights without discrimination on racial, ethnic, tribal, religious or other grounds must guide the policies of the Governments. In accordance with Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination and other relevant international documents, Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their rights to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens* (General Recommendation of the United Nations Committee on the Elimination of Racial Discrimination, 48th session (1996).

120. The Constitutional Court shall first review the conformity of the challenged provisions with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1 and Article 2(a) and (c) of the International Convention on Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina.

Articles 1 and 2 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina

121. The Constitutional Court holds that the reply of the House of Representatives to the allegations set forth in the request, which *de facto* admits the request as well-founded, does not make obstacles to the Constitutional Court to review the conformity of the challenged Laws with the Constitution of Bosnia and Herzegovina.

122. The applicant holds that although the „gold lilies" cannot be solely identified with the Bosniac people, the political representatives of the Croat people and Serb people did not accept the gold lily as their own symbol. In this way, the gold lilies in the coat of arms and the flag of the Federation of Bosnia and Herzegovina symbolize the Bosniac people only. As the coat of arms and the flag of the Federation of Bosnia and Herzegovina contains solely the historical symbol of the Croat people with 25 quarters of red and white colors without containing the symbols of the Serb people and other citizens of Bosnia and Herzegovina, the applicant is of the opinion that the challenged Articles of the law in question are not in conformity with the Constitution of Bosnia and Herzegovina.

123. The Constitutional Court points out that it is indisputable that Bosniacs identify with the „gold lily" portrayed on the present coat of arms of the Federation of Bosnia and Herzegovina and that Croats identify with the „chessboard". Moreover, the Constitutional Court observes that the Croats and Bosniacs in the Federation of Bosnia and Herzegovina have the legitimate right to preserve its tradition, culture and identity through legislative mechanisms, but an equal right must be given to Serbs as a constituent people and other citizens of Bosnia and Herzegovina, all the more so as the Constitution of the Federation of Bosnia and Herzegovina defines the identity of the constituent peoples such as education, religion, language, fostering culture, tradition and cultural heritage as vital interests of the constituent peoples. Such right, in dealing with the symbols of the Federation of BiH, was not given to the Serb people as the status of constituent people was not acknowledged by the Constitution of the Federation of BiH at the time of passing the challenged laws. The House of Representatives confirmed this in its reply to the request, which was reiterated during the public hearing before the Constitutional Court.

124. Taking into account the significance of the aforementioned symbols, the Constitutional Court holds that in the instant case these symbols represent *distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

125. Bearing in mind the principles mentioned above and the principles in the Decision in Case no. *U 5/98* on the constituent status of the peoples, as well as the political and temporal context in which the legislator adopted the challenged law, the Constitutional Court holds that Articles 1 and 2 of the Law on the Coat of Arms and the Flag of the Federation of Bosnia and Herzegovina have a discriminatory character and are not in conformity with the constitutional principle of equality of the constituent peoples, citizens and others, and that the obligation under the International Convention on the Elimination of All Forms of Racial Discrimination according to which *each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation* has not been respected in the instant case.

126. Taking into account the aforesaid, the Constitutional Court holds that the existing coat of arms and flag of the Federation of Bosnia and Herzegovina do not symbolize all constituent peoples, citizens and „Others" in the Federation of Bosnia and Herzegovina.

127. The Constitutional Court concludes that Articles 1 and 2 of the Law on the Coat of Arms and the Flag of the Federation of Bosnia and Herzegovina are not in conformity with Article II (4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 a) and c) of the International Convention on Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina.

Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska

128. The National Assembly, challenging the applicant's allegations in respect of the coat of arms of the Republika Srpska, pointed to the similarities and differences between the coat of arms of the Republika Srpska and the coat of arms of the former Kingdom of Serbia which is identical to the coat of arms of Serbia. The National Assembly alleges that the present coat of arms of Serbia has a shield with two gold lilies which are not present on the shield of the coat of arms of the Republika Srpska. Moreover, there is a crown on the head of the eagle on the shield of the Republika Srpska, whereas there is no such crown

on the shield of the coat of arms of Serbia. The National Assembly holds that, even if one accepts that the coat of arms of the Republika Srpska and Serbia, that is the Kingdom of Serbia are the same ones, this should not be a disputable point as the identification takes place at the Entity level, not the State level. As to the anthem of the Republika Srpska, the National Assembly is of the opinion that the existing text of the anthem is a historical and out-dated document and the various pleas to „God" or „Lord" have a character of a prayer rather than a folk song directed against those who are not Serbs. The National Assembly confirmed at the public hearing that the anthem of the Republika Srpska is disputable in terms of its „neutrality" and that therefore the words could be changed, whereas the melody could remain the same.

129. The challenged Article 2 of the Constitutional Law of the Republika Srpska provides that the coat of arms of the Republika Srpska is the coat of arms of Nemanjići represented by a two-headed white eagle with a crown over its head. The Constitutional Court holds that it is an indisputable historical fact that the aforementioned coat of arms symbolized the royal family Nemanjići which reigned from 12th century to year 1371. The difference between the coat of arms of the Kingdom of Serbia and the existing Serbia on the one hand and the coat of arms of the Republika Srpska on the other hand is that the shield of coat of arms of the Republika Srpska does not have two gold lilies portrayed on the shield of the coat of arms of Serbia; moreover, the crown over the two-headed eagle is portrayed on the shield of the coat of arms of the Republika Srpska, whereas that crown is placed outside the shield of the coat of arms of Serbia. Although what makes a coat of arms authentic is its design on its shield according to the heraldic interpretation, it is indisputable that in the instant case the coats of arms have more elements that make them similar than those that make them different. Therefore, they point to the cultural and historical identity of the Serb people only. According to the heraldic interpretation, the coat of arms and its owner (the one it represents) are unity, they have the same identity in terms of the past and the future. It is therefore indisputable that the existing coat of arms of the Republika Srpska represents only the identity of the Serb people in Bosnia and Herzegovina.

130. The Constitutional Court does not consider that the National Assembly's arguments presented in the reply to the request and during the public hearing, according to which all citizens of the Republika Srpska identify with the coat of arms and flag of the Republika Srpska, are sufficiently credible. The Constitutional Court holds that these allegations of the National Assembly are even in contradiction to a certain extent with the National Assembly's allegation that the symbols may not be annulled by a decision of a court or executive authority without going into the issue of identity, that the existing symbols derive from the name „Republika Srpska" itself and that the symbols may not be changed

as the name „Republika Srpska" may not be changed. Such allegation is contradictory to the allegation that the symbols of the Republika Srpska express only a link of the Serb people with the name „Republika Srpska". The aforementioned allegation of the National Assembly was expressed in the context of the explanation according to which all „sub-national entities worldwide give the names to their symbols and design their symbols according to the official denomination"; in that respect, the National Assembly offered the example of Walloons and Flemings in Belgium and Basques in Spain. The National Assembly implies in that way that those are the „Serb" symbols.

131. As to the symbols of the Republika Srpska, the Constitutional Court points to the fact that the symbols in question are the official symbols of a territorial unit which has the status of „Entity", that they constitute a constitutional category and as such must represent all citizens of the Republika Srpska, who have equal rights according to the Constitution of the Republika Srpska. These symbols appear on all features of the public institutions of the Republika Srpska, that is the National Assembly of the Republika Srpska, public institutions etc. They are not the local symbols of one people, which are to reflect the traditional and historical heritage of that people but the official symbols of the multinational Entity. As such they must reflect the character of the Entity. Taking into account the aforesaid, the Constitutional Court holds that the arguments of the National Assembly, according to which other constituent peoples in Republika Srpska are not denied the right to use their own symbols, i.e. they freely may display their symbols on religious institutions, cannot be accepted.

132. The Constitutional Court reiterates that it does not deny the right of the Serb people in Republika Srpska to preserve its tradition, culture and identity through the symbols of the Republika Srpska, but an equal right must be given to Croats and Bosniacs as constituent peoples and all other citizens of the Republika Srpska bearing in mind that in the Constitution of the Republika Srpska the vital national interests of the constituent peoples are *inter alia* defined as identity of the constituent peoples, education, religion, language, promotion of culture, tradition and cultural heritage.

133. The text of the present anthem of the Republika Srpska was written at the time of knez (prince) Milan Obrenović in 1872. It became the official national anthem at the time of his crowning when the original words „God, save the Knjaz-Milan" were changed reading as follows „God, save the King Milan". That anthem was in use until the proclamation of the Kingdom of Yugoslavia, which is also an indisputable fact. The anthem has the words which exalt the Serb King: *God, our Master! Guide and prosper the Serbian crown and Serbian race;* appeal for the harmony of the Serb people: *Bind in closest links our kindred,*

Teach the love that will not fail, May the loathed fiend of discord Never in our ranks prevail. Let the golden fruits of union, Our young tree of freedom grace; and talks about the Serb Kingdom: *Through five hundred years of durance, we have knelt before Thy face.* This points to the fact that the anthem of the Republika Srpska symbolizes solely the Serb people in Republika Srpska, as confirmed by the National Assembly as undisputed.

134. Taking into account the significance of the aforementioned symbols, the Constitutional Court holds that in the instant case they mean *distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

135. Bearing in mind the principles mentioned above and the principles in Decision in Case no. *U 5/98* on the constituent peoples, as well as the political and temporal context in which the legislator adopted the challenged law, the Constitutional Court holds that Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska have a discriminatory character and are not in conformity with the constitutional principle of equality of the constituent peoples, citizens and others, and that the obligation according to which *each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation* has not been respected in the instant case.

136. The Constitutional Court concludes that Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska are not in conformity with Article II (4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2. a) and c) of the International Convention for Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina.

Article 2 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska

137. The challenged provision of Article 2 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska provides that the flag, the coat of arms and the anthem of the Republika Srpska „**represent the statehood of the Republika Srpska**".

138. As to the aforementioned Article, the National Assembly alleges that the description of the flag, coat of arms and anthem as „State symbols" must be understood as „Entity

symbols" following the established principles of interpretation according to which the legal regulations must be interpreted in accordance with the Constitution of Bosnia and Herzegovina as far as it is possible (Decision of the Constitutional Court no. *U 5/98-IV* of 19 August 2000).

139. The Constitutional Court holds that it is indisputable that the aforementioned provisions stress the statehood of the Republika Srpska. The Constitutional Court recalls that Article 1 of the Constitution of the Republika Srpska, which read as follows: *Republika Srpska shall be the State of Serb people and of all its citizen*s, was changed by the amendments to the Constitution of the Republika Srpska, which were passed in order to fully implement the principle of constituent peoples set forth in Decision in Case no. *U 5/98* so that Article 1, in its relevant part, reads as follows: *The Republika Srpska shall be unique and indivisible constitutional and legal entity*. The Constitutional Court is not competent to review conformity of the laws with the Constitutions of the Entities but it considers it necessary, in the context of this reasoning, to point to what appears to it to be a flagrant incompatibility of the challenged Aticle 2 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska with the Constitution of the Republika Srpska.

140. Moreover it is also undisputed that, according to Article I(1) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina shall continue „its legal existence under international law as a state, with its internal structure modifies herein." According to Article I(3) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina shall consist of two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. According to Article III(2) of the Constitution of Bosnia and Herzegovina, the „Entities shall have right to establish parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina"; „(…) each Entity may also enter into agreement (…) with the consent of the Parliamentary Assembly". Unlike the constituent units of federal states which are by themselves called states, according to the Constitution of Bosnia and Herzegovina, the Republika Srpska and the Federation of BiH are not the „States" but the „Entities". Articles I(1) and I(3) of the Constitution of BiH guarantee the sovereignty, territorial integrity, political independence and international personality of the State of Bosnia and Herzegovina.

141. In view of the aforesaid, the Constitutional Court concludes that Article 2 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska, in the part providing that the flag, coat of arms and anthem of the Republika Srpska **represent the statehood of the Republika Srpska**, is not in conformity with Article I(1) and I(3) of the Constitution of Bosnia and Herzegovina.

Article 3 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska

142. Article 3 of that Law provides *inter alia* that the symbols of the Republika Srpska are used „**in accordance with the moral norms of the Serb people**".

143. The National Assembly alleges that the term the „**moral norms of the Serb people**" is used in close relation with the name of the Entity „Republika Srpska" and that it is the part of the same sentence which forbids violation of the „reputation and dignity". Therefore, it argues that the words „Serb people" must be understood as „Serb citizens" in the spirit of the interpretation in good faith in accordance with the usual meaning given to the expressions used in documents, in their context and in the light of their aim and purpose laid down in Article 31 of Vienna Convention on the Law of Treaties.

144. The Constitutional Court cannot accept the National Assembly's argument that the words „Serb people" must be understood as „Serb citizens" by applying the manner in which the provisions of treaties are interpreted as provided for by Article 31 of the Vienna Convention on the Law of Treaties. The present case does not concern any treaty but the Constitution of the Republika Srpska, whose text must not have any ambiguities in terms of identification of any people, i.e. it must not provide for any provision which would be subject to different interpretations, which is the case here. The Constitutional Court holds that the interpretation of the term „Serb people" is unacceptable for the same reasons for which the Court declared Article 1 of the Constitution of the Republika Srpska (which provided that *Republika Srpska shall be the state of Serb people*) unconstitutional in Decision in Case no. *U 5/98* providing that *the regulations of Article 1 of the Constitution of the Republika Srpska, particularly in conjunction with other provisions such as the rules on the official language under Article 7 of the Constitution of the Republika Srpska and Article 28 paragraph 3 which declares the Serb Orthodox Church to be the Church of the Serb people – thereby creating a constitutional formula of identification of the Serb 'state', people and Church and putting the Serb people into privileged position since it is neither at the level of the Republika Srpska nor at the level of Bosnia and Herzegovina in the factual position of an endangered minority which must preserve its existence. The privileged position of the Serb people under Article 1, therefore, violates the explicit designation of constituent peoples under the Constitution of Bosnia and Herzegovina as already outlined above in para 52.*

145. Having regard to the significance of these symbols, the Constitutional Court holds that in the present case the statement that these symbols are to be used „**in accordance with the moral norms of the Serb people"** without mentioning other constituent peoples,

citizens and others, represents *distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

146. Bearing in mind the principles mentioned above and the principles in Decision no. *U 5/98* on the constitutionality of the peoples as well as the political and temporal context in which the legislator adopted the challenged law, the Constitutional Court holds that Article 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska has a discriminatory character and is not in conformity with the constitutional principle of equality of the constituent peoples, citizens and others, and that the obligation according to which *each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation* has not been complied with in the instant case.

147. The Constitutional Court concludes that Article 3 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska in the part providing that the symbols shall be used „in accordance with the moral norms of the Serb people" is not in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1 and 2 (a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina.

Other allegations

148. In view of the conclusion of the Constitutional Court with respect to the violation of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 (a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina, the Constitutional Court holds that it is not necessary to examine other allegations set forth in the request.

VIII. Conclusion

149. Bearing in mind the principles mentioned above and the principles expressed in Decision no. *U 5/98* on the constituent status of the peoples as well as the political and temporal context in which the legislator adopted the challenged laws in the Federation of BiH and Republika Srpska, the Constitutional Court holds that challenged provisions

have discriminating character and are not in conformity with the constitutional principle of equality of the constituent peoples, citizens and Others and that the obligation under the International Convention on the Elimination of All Forms of Racial Discrimination according to which *each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation* has not been complied with in the instant case.

150. The Constitutional Court concludes that it is the legitimate right of the Bosniac and Croat people in the Federation of BiH and the Serb people in the Republika Srpska to preserve their tradition, culture and identity through legislative mechanisms, but an equal right must be given to the Serb people in the Federation of BiH and Bosniac and Croat peoples in Republika Srpska and other citizens of Bosnia and Herzegovina. The Constitutional Court further holds that it cannot consider as reasonable and justified the fact that any of the constituent peoples has a privileged position in preservation of tradition, culture and identity as all three constituent peoples and other citizens of Bosnia and Herzegovina enjoy the rights and fulfill obligations in the same manner as provided for in the Constitution of Bosnia and Herzegovina and Constitutions of the Entities. Moreover, it is of a particular importance the fact that the identity of the constituent peoples, education, and religion, language, fostering culture, tradition and cultural heritage are defined in the Constitution of the Federation of BiH and Constitution of the Republika Srpska, as the vital national interests of the constituent peoples.

151. Having regard to Article 61(1) and (2), Article 62 and Article 63(2), (3) and (4) of the Constitutional Court's Rules, the Constitutional Court decided as set out in the enacting clause.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI 3(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1), (2) and (3), Article 62 and Article 63(4) 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 Hadžiosmanović, President

Mr. David Feldman, Vice-President,

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Mr. Jovo Rosić,

Ms. Constance Grewe,

Ms. Seada Palavrić

Having deliberated on the request of **Mr. Sulejman Tihić, Chairman of the Presidency of Bosnia and Herzegovina at the time of filing this request**, in case **no. U 4/04**, at its session held on 18 November 2006 adopted the following

SECOND PARTIAL DECISION ON ADMISSIBILITY AND MERITS

The request of Mr. Sulejman Tihić, Chairman of the Presidency of Bosnia and Herzegovina at the time of filing this request, for the review of constitutionality of Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska (*Official Gazette of Republika Srpska* no. 19/92) is hereby granted.

It is established that Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska (*Official Gazette of Republika Srpska* no. 19/92) are not in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina, in conjunction with Articles 1.1

and 2.a) and c) of the International Convention on the Elimination of All Forms of Racial Discrimination referred to in Annex I to the Constitution of Bosnia and Herzegovina.

Pursuant to Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the National Assembly of Republika Srpska is ordered to bring in line Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska (*Official Gazette of Republika Srpska* no. 19/92) with the Constitution of Bosnia and Herzegovina within six months as from the date of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina*.

The National Assembly of Republika Srpska is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within the above specified time-limit, about the measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The request of Mr. Sulejman Tihić, Chairman of the Presidency of Bosnia and Herzegovina at the time of filing this request, for the review of constitutionality of Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of Republika Srpska (*Official Gazette of Republika Srpska* no. 19/92) is hereby dismissed.

It is established that Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of Republika Srpska (*Official Gazette of Republika Srpska* no. 19/92) is in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina, in conjunction with Articles 1.1 and 2.a) and c) of the International Convention on the Elimination of All Forms of Racial Discrimination referred to in Annex I to the Constitution of Bosnia and Herzegovina.

The 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*.

Reasons

I. Introduction

1. On 12 April 2004, Mr. Sulejman Tihić, Chairman of the Presidency of Bosnia and Herzegovina at the time of filing this request, („the applicant"), filed a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for the review of constitutionality of Articles 1 and 2 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina (*Official Gazette of Federation of BiH* no. 21/96 and 26/96), Articles 1, 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 19/92), Articles 2 and 3 of the Law on the Use of Flag, Coat of Arms and Anthem (*Official Gazette of the Republika Srpska* no. 4/93) and Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska *(Official Gazette of Republika Srpska* no. 19/92). On 2 December 2004, the applicant submitted a supplement to the request.

II. Proceedings before the Constitutional Court

2. Pursuant to then applicable Article 21(1) of the Rules of Procedure of the Constitutional Court, on 11 May 2004, the National Assembly of Republika Srpska („the National Assembly) was requested to submit its reply to the request within 30 days from the receipt of the request from the Constitutional Court. On 8 December 2004, it was also requested to submit its reply to the supplement of the request, also within 30 days.

3. On 8 June 2004, the National Assembly requested the time limit for submitting a reply to be extended to 45 days and, on 29 July 2004, an additional extension until 15 October 2004 was requested. On 3 August 2004, the Constitutional Court, in accordance with Article 24 of the then applicable Rules of Procedure of the Constitutional Court, approved the National Assembly the extension of the time limit for reply until 1 October 2004, as requested.

4. The National Assembly submitted its reply to the request on 30 September 2004 in which it proposed a public hearing to be held in this case.

5. On 6 August 2004, the Croat Caucus and the Bosniac Caucus within the Council of Peoples of the Republika Srpska submitted their replies to the request.

6. On 28 December 2004, the National Assembly requested an extension of time until 16 February 2005 for submission of its reply on the allegations stated in the supplement to the request.

7. Acting in accordance with Article 24 of the then applicable Rules of Procedure of the Constitutional Court, and taking into account the statements from the request and supplement thereof as well as the fact that National Assembly already submitted its reply to the request, and that the time limit for submission of the reply was already extended as requested and the 30 days time limit for submitting the reply to the supplement was given, the Constitutional Court did not find reasons to extend the time limit for submitting the reply to the allegations made in the supplement to the request.

8. Having regard to Article 25(2) of the then applicable Rules of Procedure of the Constitutional Court, the reply of the National Assembly was submitted to the applicant on 26 October 2004.

9. Having regard to Article 46 of the then applicable Rules of Procedure of the Constitutional Court, the Constitutional Court decided at its plenary session of 28 January 2005 to hold a public hearing in which the parties to the proceedings would take part. At the same session, the Constitutional Court decided to invite, as prospective *amici curiae*, the OSCE Office in BiH, the UN High Commissioner for Human Rights, the Venice Commission and the OSCE High Commissioner for National Minorities, to present their preliminary observations.

10. On 24 February 2005, the High Commissioner for National Minorities informed the Constitutional Court that he could not take part as *amicus curiae* in the present case for his current responsibility did not include the territory of Bosnia and Herzegovina. On 14 March 2005, the OSCE Office in BiH, the UN High Commissioner for Human Rights, and the Venice Commission, in their capacity as *amici curiae* before the Constitutional Court, presented their joint opinion.

11. On 28 January 2006, pursuant to Article 46(1) of the Constitutional Court's Rules, the Constitutional Court held a public hearing to which it invited the applicant's representatives and the representatives of the House of Representatives and the House of Peoples, and the representatives of the National Assembly of RS, and *amici curiae*. At the public hearing, Academician Muhamed Filipović and Ms. Alma Čolo represented the applicant, Mr. Irfan Ajanović represented the House of Representatives, and Professor Dr Hans Peter Schneider, Prof. Dr. Rajko Kuzmanović, Krstan Simić, Prof. Dr. Dragomir Acović, Nevenka Trifković and Borislav Bojić represented the National Assembly. In addition, Ms. Madeline Reese, Head of Office of the High Commissioner for Human Rights in Bosnia and Herzegovina and Ms. Jasminka Džumhur, a lawyer in the Office of the High Commissioner for Human Rights in BiH, acted as *amici curiae* in the case. No representative of the House of Peoples took part at the public hearing.

12. On 6 February 2006, the applicant submitted to the Constitutional Court his written statement as given at the public hearing, as well as his supplement statement relating to the public hearing. On 13 February 2006, the Constitutional Court submitted the above mentioned observations to the RS National Assembly.

13. On 6 and 20 February 2006, the RS National Assembly submitted to the Constitutional Court its written statement as given at the public hearing and a video recording of the statement by Mr. Ivan Tomljenović, the Vice-President of RS, relating to the challenged symbols of the Republika Srpska. On 13 and 23 February 2006, the Constitutional Court submitted to the applicant the written observations and a transcript of interview given by Mr. Ivan Tomljenović.

14. On 9 February 2006, *amici curiae* submitted additional observations relating to the public hearing. On 23 February 2006, the Constitutional Court forwarded the *amici curiae's* additional observations to the applicant and RS National Assembly.

15. At its plenary session of 31 March 2006 the Constitutional Court adopted a partial decision („the Partial Decision I") on the basis of Article 62 of the Rules of the Constitutional Court, whereby it was established that Articles 1 and 2 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina (*Official Gazette of Federation of BiH* no. 21/96 and 26/96), Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 19/92), in certain parts, are not in conformity with Articles I (1) and I(2) of the Constitution of Bosnia and Herzegovina, i.e. with Article II(4) of the Constitution of Bosnia and Herzegovina, in conjunction with Articles 1.1 and 2.a) and c) of the International Convention on the Elimination of All Forms of Racial Discrimination referred to in Annex I to the Constitution of Bosnia and Herzegovina. On that occasion the Constitutional Court deferred the adoption of a decision on the part of the request relating to establishing the inconsistency of Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska and Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska with the Constitution of BiH. The Partial Decision I was published in the *Official Gazette of Bosnia and Herzegovina* no. 47/06 on 20 June 2006.

III. Request

a) Statements from the request and supplement to the request

Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska

16. The applicant stated that Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska provides that the flag of the Republika Srpska shall consist of three colours: red, white and blue. The colours shall be placed horizontally in the following order: red, blue and white. Each colour shall occupy one-third of the flag. The flag of the Republika Srpska contains all features of the flags of the Principality of Serbia of 1878 and the Kingdom of Serbia of 1882 respectively. Thus, it contains symbols that are deeply rooted in the historical past of the Serb people. The applicant alleges that the said provisions of the Constitutional Law on the Flag, the Coat of Arms and the Anthem of the Republika Srpska discriminate against the Bosniac people and the Croat people as constituent peoples in the entire territory of Bosnia and Herzegovina and thus in the Republika Srpska as well. The said provisions also discriminate against other citizens of Bosnia and Herzegovina.

17. Furthermore, the applicant pointed out that a possible reason for failing to incorporate the symbols of either the Bosniac or the Croat people into the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska is the fact that at the time of enactment of the relevant law the Bosniac and the Croat people, according to the Constitution of the Republika Srpska, had no status as constituent peoples in the Republika Srpska. This status was recognized by the Constitution of the Republika Srpska only following the adoption of the Decision of the Constitutional Court of Bosnia and Herzegovina on the constituent peoples no. *U 5/98,* at which time the amendments to the Constitution of the Republika Srpska were adopted.

18. The applicant alleges that it clearly follows from the aforesaid that the prescribed appearance of the flag, the coat of arms and the text of the anthem of the Entity of Republika Srpska represent the symbols and emblems of the Serb people. However, they cannot be official symbols and emblems of the entity since the Entity of Republika Srpska is a community of not only the Serb people but also of the Bosniac, Croat and other peoples and citizens who are equal in all respects. By prescribing the said provisions, the Bosniac people, the Croat people and other citizens of Bosnia and Herzegovina have been directly discriminated against on national grounds, which is causing an atmosphere of fear among them and distrust in the authorities of the Republika Srpska, thereby impeding the return

of non-Serbs to their homes of origin in the Republika Srpska. According to the applicant, the present case raises an issue of discrimination with regards to respect of the right to return as guaranteed under Article II(5) of the Constitution of Bosnia and Herzegovina, prohibition of discrimination on national origin and provision of equal treatment with regard to the right of freedom of movement within the state boundaries.

Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of Republika Srpska

19. The applicant alleges that Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays are not in conformity with Article II (4) in conjunction with Articles II(3) and II(5) of the Constitution of Bosnia and Herzegovina.

20. In Articles 1 and 2 of the said Law, the following family Patron-Saints' days and church holidays are designated as the holidays of the Republika Srpska: Christmas, Day of Republic, New Year, Twelfth-day, St. Sava, First Serb Uprising, Easter, Whitsuntide, May Day – Labour Day and St. Vitus's Day. The applicant states that these obviously include holidays of only one people, the Serb people (save the Labour Day), and that those holidays are solely orthodox religious holidays and holidays associated with the history of the Serb people and Orthodox faith, *e.g.* First Serb Uprising, Twelfth-day, Orthodox Christmas, Easter, etc. On the other hand, the applicant states, the working days are the holidays of other peoples and religious denominations such as Eid (*Bajram*), Catholic Christmas, Easter, etc.

21. The above mentioned holidays are celebrated by legislative, executive and administrative bodies of the Republika Srpska, army, police, judicial authorities, etc. The applicant further states that according to this Law, those are the days when the said institutions do not work, as well as the officials from the Republika Srpska elected to the institutions of Bosnia and Herzegovina. Moreover, according to the applicant's allegations, all citizens of the Republika Srpska who are not of Serb origin are forced to celebrate those holidays although they do not regard them as their own holidays. Furthermore, all but the Serbs in the Republika Srpska are prohibited to have their own holidays as official holidays in the Entity they live in, which holidays would avoid giving offence to the constituent peoples in Bosnia and Herzegovina. Hence, according to the applicant, the enactment of official holidays that are the part of the Serbs' history alone creates an air of distrust among other peoples and citizens and maintains a sense of fear of the ethnic cleansing that they experienced during the aggression in Bosnia and Herzegovina between 1992 and 1995 when they were forced to leave their homes of origin.

b) Statements from the supplement to the request

22. The applicant stated in its supplement to the request that the central goal of the General Framework Agreement for Peace in Bosnia and Herzegovina and the Constitution of Bosnia and Herzegovina is non-discrimination. This is supported by the fact that the provision of Article II(4) has been given additional importance by associating the application of fifteen human rights protection instruments under Annex I to the Constitution of Bosnia and Herzegovina with this Article. Hence, the application of rights and freedoms under Annex I to the Constitution of Bosnia and Herzegovina, as laid down in Article II(4), is secured to all persons without discrimination. The applicant considers that the said constitutional provisions have priority over the laws of, respectively, the State and the Entities, which includes all laws and the Entity Constitutions. Although the state is solely responsible in international law for obligations arising out of each individual instrument listed in Annex I to the Constitution of Bosnia and Herzegovina, the specific constitutional and territorial organization of Bosnia and Herzegovina means that the territorial units of Bosnia and Herzegovina are very often the agents obliged to apply the said instruments in practice. Notwithstanding this, the Republika Srpska preserved and established the symbols and other features and enacted the Law on Family Patron Saints' Days and Church Holidays of the Republika Srpska – this indubitably shows that the Bosniac people and the Croat people in the Republika Srpska are treated differently when compared to the Serb people in the Republika Srpska, which is contrary to Articles 1(1) and 2 (a), (b), (c), (d) and (e) of the International Convention on the Elimination of All Forms of Racial Discrimination. The said articles, in particular Article 2 (c) and (d), provide for effective measures of *national and local policy* to be undertaken in order to repeal or quash any law or regulation aimed at unequal and discriminatory treatment, and oblige the authorities to support integrationist organizations and movements in order to repeal discriminatory measures.

23. The applicant states in his supplement to the request that he bases his allegations of a violation of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1 and Article 2 (a), (b), (c), (d) and (e) of the International Convention on the Elimination of All Forms of Racial Discrimination on the same reasons as those set out in his request for he considers that any prescription of symbols of an Entity that symbolize only one people, or two of the three constituent peoples in Bosnia and Herzegovina, represent measures aimed at distinction, exclusion, restriction or preferential treatment based on a national or ethnic origin. Their goal is to infringe or discredit the recognition, enjoyment or exercise of human rights and fundamental freedoms in all spheres of life on equal terms.

24. Finally, the applicant states that notwithstanding the positive obligations arising out of Articles II(1) and II(6) of the Constitution of Bosnia and Herzegovina, the competent authorities of the Republika Srpska failed to take appropriate measures to fulfill the obligations assumed under Articles II(1), II(4) and II(6) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 (a), (b), (c), (d) and (e) of the International Convention on the Elimination of All Forms of Racial Discrimination listed in Annex I to the Constitution of Bosnia and Herzegovina

b) Reply to the request

25. With reference to the allegations from the request relating the flag of the Republika Srpska as it is stipulated by Article 1 of the Constitutional Law on the Coat of Arms, Flag and Anthem of Republika Srpska, it is pointed in the reply that the allegation that the flag of Republika Srpska is the flag of the Principality and the Kingdom of Serbia is ill-founded as red, blue and white are the so-called „pan-Slavic colours" and they can be found, in different arrangements, on the flags of Croatia, Slovenia, Slovakia and Russia and, with specific modification, on the flag of Bulgaria. In view of the fact that all constituent peoples in Bosnia and Herzegovina are of Slavic origin, it is claimed in the reply that the colours themselves cannot be the subject matter of dispute. Red and white are heraldic colours of the Croat and the Serb people and they cannot be disputable as such, whereas the colour red was on the flag of the Socialist Republic of Bosnia and Herzegovina from 1946 until the dissolution of Yugoslavia. The National Assembly has drawn a conclusion from the aforesaid that none of the colours from the flag can be disputable as such and that the arrangement of colours cannot be associated with discrimination, but rather with aesthetic feelings, aesthetic feeling is not a constitutional category. It is furthermore stated that „the fact that the flag of Serbia has the same arrangement of colours does not have to imply anything since Serbia and Bosnia and Herzegovina were one country for long period of time in history, including the period of King Tvrtko I". One of the assumptions is that the applicant does not mind either the colours or their arrangement but he would just like to see a specific symbol on the flag as is the case with the flag of the Federation of Bosnia and Herzegovina. As the flag of the Republika Srpska contains no symbols and the flag of the Republika Srpska should not be compared to the ranking and commanding flags and standards, an absence of anything representing two constituent peoples cannot be regarded as evidence for the claim of discrimination. Hence, the Bosniac people, in the spirit of the applicant's initiative, are free to identify themselves with one of the colours on the present flag of the Republika Srpska.

26. Furthermore, the National Assembly in its reply states that the challenged provisions of the Law on Family Patron-Saints' Days and Church Holidays do not violate the

constitutional right of the Bosniac people, of the Croat people and of Others in any aspect, nor do they endanger national equality and vital interests of constituent peoples and Others in Bosnia and Herzegovina. The National Assembly believes that the applicant overlooked the provision in Article 2 paragraph 2 of the Law on Family Patron-Saints' Days and Church Holidays that *the citizens of the Republika Srpska shall have the right and choice to celebrate their religious holidays three days in a year* without discrimination on any ground or status. Moreover, it is stated that this Law provides in its Article 4 that *the statute of a municipality may determine that one day shall be celebrated as a holiday in that particular municipality.*

27. As to Articles 1 and 2 of the challenged Law on the Family Patron-Saints' Days and Church Holidays, the National Assembly has stated that it is necessary, first, to clarify that the acceptance of the Greek Orthodox Calendar in the Republika Srpska neither offends nor discriminates against anyone since it is absolutely necessary to use only one calendar and it is also reasonable to use the traditional calendar of the great majority of citizens. In this respect, it is objectively impossible to treat all three peoples equally by entitling them to use different calendars. Therefore, in their opinion, the celebration of two New Years is unchallengeable. „The ten religious holidays are based on Christian faith and therefore the Orthodox Serbs and Croat Catholics may celebrate them. Only Bosniacs, as Muslims, are affected by these days. At the same time, they are entitled to celebrate the three additional days of their own choice every year on the days of their religious holidays". Consequently, the Bosniacs are not discriminated against but privileged as they are entitled not to sixteen but to nineteen non-working days. This is an illustration that an unequal treatment does not necessarily represent discrimination. Hence, if the differential effect of the relevant law to the constituent peoples is to be found, the grounds of differential treatment are both reasonable and justified. Finally, it is stated in the conclusion that „Republika Srpska remains in any event – whether one likes it or not – symbolically, a mother Entity for the Serbs".

28. As to the statements from the supplement to the request regarding the International Convention on Elimination of All Forms of Racial Discrimination, the National Assembly replies that this Convention is not directly applicable to the Republika Srpska. Article II(4) of the Constitution of Bosnia and Herzegovina invokes this Convention as an international agreement listed in Annex I to the Constitution of Bosnia and Herzegovina. The wording of this Convention, however, is quite clear: it binds and obliges only „state parties" like Bosnia and Herzegovina and not other kinds of political communities. In contrast to that, the Republika Srpska is just an entity and not a State. Also Article 2 (a), (b), (c), (d) and (e) of this Convention does not have any broader meaning than Article II(4) of the

Constitution of Bosnia and Herzegovina and it only repeats normative devices, orders and obligations imposed on public authorities, which can also be derived directly by an appropriate interpretation of Article II(4) of the Constitution of Bosnia and Herzegovina.

c) Submission *of Amici curiae*

29. Amici curiae elaborated on the constitutional and legislative framework in which the challenged laws were adopted, pointing out that the challenged laws were adopted at the time when neither the Serbs in the Federation of BiH nor the Bosniacs and the Croats in the Republika Srpska had the opportunity to express their position regarding the symbols and the holidays as „they were not represented in the meaningful sense in the legislative process". In their submission *amici curiae* pointed out that the context of use of symbols is also of special importance considering the use of symbols in the conflict in Bosnia and Herzegovina by way of emphasizing the dominance of one ethnic group within a certain geographic area. The rest of the submission elaborated on the issue of existence of discrimination in connection with the right to return and a concluded that there was a violation of the right to return which was caused by the existence of discrimination on the grounds of ethnicity, in other words that there was a violation of Article II(4) of the Constitution of Bosnia and Herzegovina and European Convention.

IV. Public Hearing

30. In its Partial Decision I (paragraphs 64 through 93) the Constitutional Court has presented in detail the additional submissions that were presented at the public hearing. The submissions from the public hearing that are important for this decision will be presented in paragraphs to follow.

Applicant's positions

31. At the public hearing the applicant emphasized his position that any symbol used in the existence of the state or in public should reflect its ethnic, national, religious and traditional structure and that the Republika Srpska cannot introduce symbols which reflect a specific approach to experiencing the state, national and cultural tradition inherent to the Serbs only so that other peoples cannot be symbolically represented in an equal way without discrimination.

32. It was said that the Bosniacs and Croats do not want to send their children to the schools that celebrate their own Patron-Saints' Days and which operate under the auspices of the Orthodox saints or to stand under symbols that were carried by those who committed crimes against Bosniacs and Croats.

33. With reference to the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska, which ceased to be in force by entry into force of the Law on Public Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, no 103/05), the applicant stated that a procedure had been initiated before the Constitutional Court of the Republika Srpska for review of the constitutionality of the Law on Public Holidays of the Republika Srpska and the procedure of its enactment, in view of the fact that the Law was promulgated by Decree of the President of the Republika Srpska and that the procedure laid down in the Constitution of the Republika Srpska for dealing with a claim during the legislative process that the proposed Law was destructive of a „vital national interest" of the Serb people had not been followed. The applicant suggested that the Constitutional Court could therefore still properly review the compatibility of the challenged Law on Family Patron-Saints' Days and Church Holidays, which was still in operation, with the Constitution of Bosnia and Herzegovina. At the end of the hearing the applicant suggested that the Constitutional Court might postpone its decision on this law pending the adoption of the decision of the Constitutional Court of the Republika Srpska.

Positions of the National Assembly

34. The RS National Assembly reiterated its standpoints from its reply to the request and the supplement to the request and presented some additional views. The RS National Assembly reiterated that the applicant had failed to present any evidence supporting the allegations that the challenged laws had been discriminatory, *i.e.* that they had discriminatory effects. It was also stressed that no person had been put in the position of being unable to return to the Republika Srpska because of the symbols, and the best example was the applicant who had been the Deputy Chairman of the National Assembly of the Republika Srpska and who had accepted those symbols at the time of his term of office. Furthermore, it was stated that the challenged symbols of the Republika Srpska, either wholly or in part, had always belonged to all the peoples – Serbs, Croats and Bosniacs. It was also emphasized that the symbols are not *prima facie* exclusive, as the flag of the Republika Srpska is in Pan-Slavic colours. They pointed out that some of the symbolic elements such as the cross, lily, the colour of the flag, etc., are deeply rooted in the history of all three peoples of Bosnia and Herzegovina.

35. When asked by the Constitutional Court whether there is a difference in respect of the colours and their arrangement as between the flags of the Republic of Serbia and of the Republika Srpska, the explanation was given that the colours and their arrangement are the same, but that the flag of Republic of Serbia also contains the coat of arms of the Republic of Serbia.

36. The proposal was made to terminate the proceedings relating to the part of the request challenging the Law on the Family Patron-Saints' Days and Church Holidays since the new Law on Public Holidays had been enacted according to which all constituent peoples are entitled to observe their respective religious holidays.

37. When asked by the Constitutional Court whether the representatives of all three constituent peoples took part in the enactment of the challenged laws of the Republika Srpska, the representatives of the National Assembly replied that they had no reliable information about that but they presumed it to be so. It was also said that the standpoints presented at the hearing on behalf of the National Assembly would not be supported by Bosniacs; however, the Croats would support them since they had never raised an issue relating to the constitutionality of the challenged laws.

Positions of *amici curiae*

38. Most of the presentation by *amici curiae* during the public hearing repeated the submissions in their written opinion, already set out in this decision, and emphasized the importance of taking into consideration the temporal context in which the challenged laws were enacted. *Amici curiae* said that for them a key fact is the issue of identification with symbols representing one group exclusively, and therefore the burden of proving the legitimacy of measures, within the assessment of a justification of discrimination in the challenged laws, should be placed on the enactor of the challenged laws.

V. Relevant Law

39. The **Constitution of Bosnia and Herzegovina**

Article I(1)

The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be „Bosnia and Herzegovina", shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations.

Article 1(2)

Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.

Article I(3)

Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska.

Article II(1)
Human Rights

Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.

Article II(3)

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:

- *a. The right to life.*
- *b. The right not to be subjected to torture or to inhuman or degrading treatment or punishment.*
- *c. The right not to be held in slavery or servitude or to perform forced or compulsory labour.*
- *d. The rights to liberty and security of person.*
- *e. The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.*
- *f. The right to private and family life, home, and correspondence.*
- *g. Freedom of thought, conscience, and religion.*
- *h. Freedom of expression.*
- *i. Freedom of peaceful assembly and freedom of association with others.*
- *j. The right to marry and to found a family.*
- *k. The right to property.*
- *l. The right to education.*
- *m. The right to liberty of movement and residence.*

Article II(4)

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

Article II(5)

All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.

Article II(6)

Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above.

Article III(3)(b)

The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.

Article XII(2)

Within three months from the entry into force of this Constitution, the Entities shall amend their respective constitutions to ensure their conformity with this Constitution in accordance with Article III.3 (b).

40. **Amendments LXVI-XCI to the Constitution of the Republika Srpska** (*Official Gazette of the Republika Srpska* no. 21/02)

Amendments LXVII, paragraph 1

1. The Republika Srpska shall be a unique and inseparable constitutional-legal entity

The Republika Srpska shall perform its constitutional, legislative, executive and judiciary duties independently.

The Republika Srpska shall be one of two equal Entities in Bosnia and Herzegovina.

Serbs, Bosniacs and Croats, as constituent peoples, Others and citizens shall participate in the exercises of power in the Republika Srpska equally and without discrimination.

41. The **International Convention on the Elimination of All Forms of Racial Discrimination,** in its relevant part, reads as follows:

Article 1.1.

In this Convention, the term „racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 2

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

42. The **Constitutional Law on the Use of Flag, Coat of Arms and Anthem of the Republika Srpska** (*Official Gazette of the Republika Srpska* no. 19/92)

Article 1

The flag of the Republika Srpska shall consist of three colours: red, white and blue. The colours shall be placed horizontally in the following order: red, blue and white. Each colour shall occupy one-third of the flag", the proportion of width and length of the flag shall be 1:2.

43. The **Law on Family Patron-Saints' Days and Church Holidays of the Republika Srpska** (*Official Gazette of the Republika Srpska* no. 19/92).

Article 1

The following family Patron-Saints' days and church holidays are designated as the holidays of the Republika Srpska in Articles 1 and 2 of the said Law: Christmas, Day of Republic, New Year, Twelfth-day, St. Sava, First Serb Uprising, Easter, Whitsuntide, May Day – Labour Day and St. Vitus' Day.

Article 2

The holidays referred to in Article 1 of this Law shall be: Christmas – 6, 7 and 8 January, Day of Republic – 9 January, New Year – 14 and 15 January, Epiphany, St. Sava – 27 January, First Serb Uprising – 14 February, Easter Holidays: Good Friday – one day and Easter – two days, May Day – Labour Day – one day, Whitsuntide – two days, St. Vitus's Day - 28 June.

The citizens of the Republika Srpska are entitled to take three days to observe their holidays on the days of their religious holidays.

44. The **Law on Holidays in Republika Srpska** (*Official Gazette of the Republika Srpska* no. 103/05), in its relevant part, reads as follows:

Article 13

The Law on Family Patron-Saints' Days and Church Holidays (Official Gazette of the Republika Srpska no. 19/92) shall cease to be in force on the date of entry into force of this Law.

45. The **Decision of the Constitutional Court of the Republika Srpska no. U 60/05** (*Official Gazette of the Republika Srps*ka no. 14/06), in its relevant part, reads as follows:

It is hereby established that the procedure of passing and publishing the Law on Holidays of the Republika Srpska and Law Amending the Law on Territorial Organization both published in Official Gazette of the Republika Srpska no. 103/05 of 21 November 2005 is not compatible with the Constitution of the Republika Srpska.

46. The **Constitution of the Republika Srpska** (*Official Gazette of the Republika Srpska,* Amended Text no. 21/92).

Article 120 paragraph 5

If the Constitutional Court finds that a law is not compatible with the Constitution or if other regulation or general act is not compatible with the Constitution or law, the law, regulation or general act shall cease to be in force on the date of publishing of the decision of the Constitutional Court.

VI. Admissibility

47. According to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to whether any provision of the Entity's Constitution or law is consistent with this Constitution. Such disputes may be referred *inter alia* by a member of the Presidency of Bosnia and Herzegovina.

48. Taking into account that a part of the applicant's request was resolved by Partial Decision I, the Constitutional Court, in this Decision, shall deal with the review of conformity of Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska and Articles 1 and 2 of the Law on Family Patron-Saints' Days and Church Holidays in Republika Srpska with the Constitution of Bosnia and Herzegovina.

49. The applicant was a member of the Presidency of Bosnia and Herzegovina at the time of filing this request, and therefore he is authorized to file a request in question based on Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

50. In its Partial Decision I, the Constitutional Court did not deliberate on the admissibility of request in relation to the challenged provisions that are the subject of review in this decision. However, in a part of its Partial Decision I dealing with the admissibility of the case, the Constitutional Court dismissed as ill-founded the objections of the National Assembly by which the admissibility of the request in question was challenged. Given that all the objections were relating to the request as a whole and not only to the provisions whose constitutionality the Constitutional Court was reviewing in its Partial Decision I, the Constitutional Court, in this part relating to the objections of the National Assembly on the admissibility of the request, makes a reference to paragraphs 104, 105 and 106 of its Partial Decision I.

51. As for the proposal of the National Assembly to terminate the proceedings for review of constitutionality of Articles 1 and 2 of the Law on Family Patron-Saints' Days and Church Holidays of Republika Srpska, the Constitutional Court established that on 28 November 2005 the Law on Holidays of Republika Srpska entered into force, which, in its Article 13, provides that the *Law on Family Patron-Saints' Days and Church Holidays (Official Gazette of the Republika Srpska no. 19/92) shall cease to be in force on the date of entry into force of this Law.* However, the Constitutional Court of Republika Srpska, in its decision no. *U 60/05* of 31 January 2006, established that the procedure under which the said law had been adopted and published was not in accordance with the Constitution

of Republika Srpska. That decision was published in the *Official Gazette of Republika Srpska* no. 14/06 of 20 February 2006. Article 120 paragraph 5 of the Constitution of Republika Srpska provides that *when the Constitutional Court assesses that a law is not in accordance with the Constitution, or that another regulation or general enactment is not in accordance with the Constitution or law, such law, regulation or general enactment shall cease to be effective on the day of the publication of the Constitutional Court's decision*. Therefore, the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 103/05) ceased to be in effect on 20 February 2006. Accordingly, the provision stipulating that *the Law on Family Patron-Saints' Days and Church Holidays shall cease to be in force by the entry into force of the Law on Holidays of Republika Srpska* ceased to be in force. The Constitutional Court therefore concludes that the Law on Family Patron-Saints' Days and Church Holidays (*Official Gazette of the Republika Srpska* no. 19/92), which is the subject of this part of the request, is still in force and applicable in Republika Srpska. Taking into account the aforesaid, the Constitutional Court dismissed the request of the National Assembly to terminate the proceedings for review of the Law on Family Patron-Saints' Days and Church Holidays since the requirements for termination of the proceedings under Article 65 of the Rules of the Constitutional Court have not been met.

52. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of the Constitutional Court, the Constitutional Court has established that the request is admissible and that there is no formal reason under Article 17(1) of the Rules of the Constitutional Court that would render the request inadmissible.

VIII. Merits

53. The Constitutional Court shall review whether Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska and Articles 1 and 2 of the Law on Family Patron-Saints' Days and Church Holidays of Republika Srpska are in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 a) and c) of the International Convention on Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina.

54. In its Partial Decision I the Constitutional Court elaborated in detail the term „discrimination" with a special reference to the issue of discrimination within the ambit of Article II(4) of the Constitution of Bosnia and Herzegovina and International Convention on Elimination of All Forms of Racial Discrimination. It also emphasized that under Article II(1) and II(6) the Entities have a clear positive obligation to amend or put out of force

the laws and regulations which are incompatible with the provisions of the Constitution of Bosnia and Herzegovina, Constitutions of the Entities and general rules of international law, which form an integral part of the Constitution of Bosnia and Herzegovina. Taking into account the fact that the above argumentation is relevant to this Decision as well, the Constitutional Court makes reference to paragraphs 109-113 of Partial Decision I.

55. In this decision, as in its Partial Decision I (paragraph 113) the Constitutional Court, points to the importance of symbols in fostering and preservation of tradition, culture and distinctive characteristics of every people. Given that the symbols represent the achievements, hopes and ideals of a state, they have to be respected by all its citizens, in this specific case by the citizens of Entities. In order to be seen in that way by all the citizens of Entities in Bosnia and Herzegovina, the flag of the Republika Srpska must be the symbol of all of its citizens and the holidays celebrated in the Republika Srpska must be regulated in such a way that none of the constituent peoples is treated in a preferential manner. The question which the Constitutional Court must answer in the further elaboration of its decision is whether the flag of Republika Srpska represents all the citizens of Entities and whether the manner in which the holidays in the Republika Srpska are defined by law is preferential with respect to any of the constituent peoples when compared with two other peoples.

56. The Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska and the Law on Family Patron-Saints' Days and Church Holidays were passed in a political and chronological context preceding the Decision on the „constituent peoples" adopted by the Constitutional Court in case no. *U 5/98*, and before the amendments to the Entity Constitutions were passed on the basis of that Decision, which established the mechanisms for equal participation in decision-making procedures in the field of legislation of all three constituent peoples in both Entities as well as the mechanisms for the protection of their vital national interests. The Constitutional Court placed emphasis on that argument in its Partial Decision I.

57. As to the issue of possible identification of all citizens of Republika Srpska with the challenged symbols, the Constitutional Court reiterates that the challenged laws of the Republika Srpska were passed at the time of war in Bosnia and Herzegovina, when Republika Srpska, according to the then applicable Article 1 of the Constitution of the Republika Srpska, was the „State of Serb people and of all its citizens".

58. In its Partial Decision I, whereby it was found that the coat of arms and flag of the Federation of Bosnia and Herzegovina and the coat of arms and anthem of the Republika Srpska were unconstitutional, the Constitutional Court took into account the fact that

the challenged symbols had been used during the war in Bosnia and Herzegovina thus it was questionable whether all citizens of Bosnia and Herzegovina could identify with such symbols, all the more so since Serbs in the Federation of Bosnia and Herzegovina and Bosniacs and Croats in Republika Srpska were not given the opportunity, during the procedure of passing the challenged laws, to raise those issues and to take position as to whether they could identify with such symbols. Taking into account that the flag of the Republika Srpska is defined by the Law whose Articles 2 and 3 were declared unconstitutional by the Constitutional Court, it is indisputable that the aforementioned argument is applicable to this Decision as well. The same argument may apply to the Law on Family Patron-Saints' Days and Church Holidays given the time when it was adopted.

59. The Constitutional Court found it necessary to point, in this decision as well, to the General Recommendation of the United Nations Committee on the Elimination of Racial Discrimination: „In order to respect fully the rights of all peoples within a State, Governments are again called upon to adhere to and implement fully the international human rights instruments and in particular the International Convention on the Elimination of All Forms of Racial Discrimination. Concern for the protection of individual rights without discrimination on racial, ethnic, tribal, religious or other grounds must guide the policies of the Governments. In accordance with Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination and other relevant international documents, Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their rights to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens" (General Recommendation of the United Nations Committee on the Elimination of Racial Discrimination, 48th session (1996)).

As to Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska

60. The applicant alleges that the flag of the Republika Srpska has all features of the flags of, respectively, the Principality of Serbia of 1878 and the Kingdom of Serbia of 1882 and that therefore it is about a symbol which is deeply-rooted in the historical past of the Serb people.

61. The National Assembly challenged the view according to which the flag as a symbol of the Republika Srpska is rooted exclusively in the past of the Serb people. The National Assembly argued that such a view was not well founded. It substantiated its argument by alleging that the three colours, i.e. red, blue and white, portrayed on the flag of the Republika Srpska are so-called Pan-Slavic colours and that those colours are also displayed

on the Croatian flag albeit in a different arrangement. Red and white are heraldic colours of the Croat and the Serb people and they cannot be challengeable as such, whereas the colour red was on the flag of the Socialist Republic of Bosnia and Herzegovina from 1946 until the dissolution of Yugoslavia. The National Assembly has drawn a conclusion from the aforesaid that none of the colours from the flag can be challengeable as such and that the arrangement of colours cannot be associated with discrimination, but rather with aesthetic feelings, and aesthetic feeling is not a constitutional category. Taking into account that all constituent peoples in Bosnia and Herzegovina are of Slavic origin, the National Assembly argued that the colours themselves could not be the subject of a constitutional dispute and that their arrangement represents an aesthetic category rather than a constitutional matter. One of the assumptions is that „the applicant does not mind either the colours or their arrangement but he would just like to see a specific symbol on the flag as is the case with the flag of the Federation of Bosnia and Herzegovina. As the flag of the Republika Srpska contains no symbols and the flag of the Republika Srpska should not be compared to the ranking and commanding flags and standards, an absence of something cannot be regarded as evidence for the claim of discrimination if the latter does not represent either of two constituent peoples. Hence, the Bosniac people, in the spirit of the applicant's initiative, are free to identify themselves with one of the colours on the present flag of the Republika Srpska".

62. The Constitutional Court finds that it can accept as well founded the National Assembly's arguments that the flag of the Republika Srpska, as defined in Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska, does not represent only the Serb people in the Republika Srpska as the colours displayed on that flag are Pan-Slavic colours which are related to the history of all the Slavic peoples, including the constituent peoples of Bosnia and Herzegovina. The Constitutional Court recalls that the flag of the Republika Srpska and the flag of Serbia are not identical as the flag of Serbia, unlike the flag of Republika Srpska, also contains a coat of arms. Moreover, the fact, which was stated in the applicant's request, that the flag was used during the war and that war was waged under that symbol, does not mean *per se* that the colors on the flag and their arrangement are unconstitutional. The Constitutional Court therefore concludes that Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska is in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1. and Article 2. a), b), c), d) and e) of the International Convention on the Elimination of All Forms of Racial Discrimination under in Annex I to the Constitution of Bosnia and Herzegovina. Taking into account the aforesaid, the Constitutional Court cannot accept the applicant's allegations that the

Republika Srpska failed to fulfill its positive obligations under Article II(1) and II(6) of the Constitution of Bosnia and Herzegovina by failing to change the above Article. Taking into account the above conclusion, the Constitutional Court find it must dismiss the applicant's allegations that other constituent peoples, when compared to the Serb people, are discriminated against in enjoyment of their right to return under Article II(5) of the Constitution of Bosnia and Herzegovina, as ill-founded.

As to Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska

63. The National Assembly, challenging the allegations of the applicant, alleges *inter alia* that Article 2 para 2 of the aforementioned Law grants all citizens of the Republika Srpska a right on their own choice to celebrate three days per year on the date of their religious holidays without discrimination on any grounds. The National Assembly holds that if one would gather from this Law different effects for constituent peoples, this differential treatment has reasonable and justifiable grounds, „not to mention in this context that Republika Srpska remains in any event – whether one likes it or not – symbolically, a mother Entity for the Serbs".

64. It is indisputable that the challenged provisions of Article 2 paragraph 2 of the Law in question give a possibility to the citizens of the Republika Srpska to have three days off on the days of their religious holidays without discrimination on any ground. However, the holidays in question, as established by the challenged provisions of the above stated Law, are almost exclusively orthodox religious holidays and holidays related to the historical past of the Serb people alone. These days in are days off work in the Republika Srpska and as such are celebrated throughout the Entity and in all public institutions and were imposed, from the position of the authorities, on all citizens of the Republika Srpska that do not belong to Serb people and Orthodox religion. Therefore, these holidays have the character of Entity holidays and not religious holidays, while at the same time, religious and national holidays of the Bosniac and Croat people and other citizens of the Republika Srpska on the territory of the Entity are working days and do not have the same Entity holiday status as the holidays of the Serb people of the Orthodox religion.

65. The principle of the collective equality of the constituent peoples, as already stated in this decision, arises from the designation of the Bosniac, Croats and Serbs as constituent peoples and prohibits any special privileges for one or two of those peoples, any domination in the authority and any ethnic homogenization through segregation based on territorial separation.

66. The Constitutional Court recalls that Article 2.c) of the International Convention on the Elimination of All Forms of Racial Discrimination, provides the obligation of the Member States that *each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.*

67. The National Assembly stated that holidays represent a legitimate means of preserving the tradition and identity of the Serb people. The Constitutional Court finds that the Serb people in the Republika Srpska has the legitimate right to preserve its tradition and identity through legislative mechanisms but equal rights must be given to the other constituent peoples in the Republika Srpska and other citizens of the Republika Srpska. The Constitutional Court further holds that it cannot consider as reasonable and justified a privileged position for the Serbs in Republika Srpska in the preservation of their tradition and identity on account of their belief that the Entity in a symbolic way is the mother of the Serbs. The Serbs are but one of three constituent peoples of that Entity, and enjoy rights and fulfill obligations under the same conditions and in the same manner as the two other constituent peoples and other citizens in Republika Srpska as provided for in the Constitution of Bosnia and Herzegovina and Constitution of the Republika Srpska. Therefore, the National Assembly's allegation that depriving citizens of the existing symbols would lead to the destruction of their identity is unfounded as the Constitutional Court has concluded that the existing symbols in the Republika Srpska do not represent all citizens of the Republika Srpska but the Serb people only.

68. The Constitutional Court holds that the holidays provided for in the challenged provisions of the law in question only exalt the history, tradition, customs and religious and national identity of the Serbs and that at the same time such values are imposed on the members of other constituent peoples, other citizens and Others on the territory of the Republika Srpska. These means of preserving the tradition and identity of the Serb people are not proportional to the aim sought to be achieved. Taking into account that Republika Srpska has the obligation to *revoke, i.e. annul every law and every regulation with the aim of introducing racial discrimination or making it permanent where it exists*, the Constitutional Court concludes that Articles 1 and 2 of the Law on Family Patron-Saints' Days and Church Holidays of the Republika Srpska are not in conformity with the constitutional principle of equality of the constituent peoples, citizens and Others in Bosnia and Herzegovina, are discriminating and therefore are in inconformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1 and Article 2. a) and c) of the International Convention for Elimination of all Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina.

Other allegations

69. In view of the conclusion of the Constitutional Court with respect to the alleged violation of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 (a) and (c) of the International Convention for Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina, the Constitutional Court holds that it is not necessary to examine other allegations set forth in the request.

VIII. Conclusion

70. The Constitutional Court concludes that Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 19/92) are not in conformity with the constitutional principle of equality of the constituent peoples, citizens and Others, have discriminating character and are not in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 (a) and (c) of the International Convention for Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina. The challenged provisions of the Law on the Family Patron-Saints' Days and Church Holidays include the holidays which only reflect and exalt the Serb history, tradition, customs and religious and national identity, while the same values are imposed on the members of other constituent peoples, other citizens and Others on the territory of the Republika Srpska. The Constitutional Court emphasizes that the Serb people in Republika Srpska has the legitimate right to preserve its tradition and identity through legislative mechanisms, but an equal right must be given to other constituent peoples of the Republika Srpska and to other citizens of the Republika Srpska.

71. The Constitutional Court holds that Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 19/92) is in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 (a) and (c) of the International Convention for Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina. The Constitutional Court cannot accept the applicant's allegations that Republika Srpska failed to meet its positive obligations under Article II(1) and II(6) of the Constitution of Bosnia and Herzegovina by failing to change the challenged Article. Taking into account the above conclusion, the Constitutional Court considers that the applicant's allegations that other constituent peoples, when compared to the Serb people, are discriminated against in enjoyment of their right to return under

Article II(5) of the Constitution of Bosnia and Herzegovina are to be dismissed as ill-founded. The Constitutional Court finds it can accept the National Assembly's argument that the flag of the Republika Srpska, as defined in Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska, does not represent only the Serb people in the Republika Srpska as the colours displayed on that flag are Pan-Slavic colours which are specific for the history of the Slavic peoples, including the constituent peoples of Bosnia and Herzegovina. The Constitutional Court recalls that the flag of the Republika Srpska and flag of Serbia are not identical as the flag of Serbia, unlike the flag of Republika Srpska, contains a coat of arms. Moreover, the fact, which was stated in the applicant's request, that the flag was used during the war and that war was waged under that symbol, does not mean per se that the colors on the flag and their arrangement are unconstitutional.

72. Pursuant to Article 61(1), (2) and (3) and Articles 62 and 63(4) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause. Serparate Dissenting Opinion of Judges Feldman and Grewe shall make annex to this Decision.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

SEPARATE DISSENTING OPINION OF JUDGES FELDMAN AND GREWE

1. We write this separate opinion to record our reservations in relation to the decision of the Constitutional Court in the Second Partial Decision in Case no. U 4/04. In this decision, the Constitutional Court holds that Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska (*Official Gazette of Republika Srpska* no. 19/92), hereafter 'Law on the Flag', is in conformity with the prohibition on discrimination in Article II.4 of the Constitution of Bosnia and Herzegovina and Articles 1.1 and 2.a) and c) of the International Convention on the Elimination of All Forms of Discrimination referred to in Annex I to the Constitution of Bosnia and Herzegovina. The Constitutional Court also holds that Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska, (*Official Gazette of Republika Srpska* no. 19/92), hereafter 'Law on Family Patron-Saints' Days'), is not in conformity with the same provisions of the Constitution of Bosnia and Herzegovina and the International Convention.

2. We have no disagreement with the decision of the Constitutional Court in relation to the Law on Family Patron-Saints' Days. Our reservation relates to the part of the decision concerning the Law on the Flag.

3. In its decision in this case, the Constitutional Court holds that the design of the flag prescribed by Article 1 of the Law on the Flag is not discriminatory because the colours are pan-Slavic colours, so all constituent peoples in the Republika Srpska, being of Slavic origin, can identify with it. The design of the flag is not identical with that of Serbia. Most significantly, the Court concludes that the fact that the war of 1992-1995 was waged under the symbol does not *per se* make it unconstitutional, and the positive obligations of the Republika Srpska to prevent discrimination did not require the National Assembly of the Republika Srpska to change the Law on the Flag so as to adopt a new design.

4. We have found this an immensely difficult case, and after much heart-searching and after carefully considering the arguments we have the misfortune to have reached a different conclusion from that of the majority.

5. There is no doubt that the colours of the flag—red, blue and white—are pan-Slavic colours, as other flags in the region demonstrate. It does not discriminate directly between the constituent peoples. However, it does not seem to us to follow that the effect of the flag is entirely non-discriminatory. A legal rule, such as that prescribing the appearance of

a flag, may appear to treat different peoples equally, yet have a discriminatory effect if in the prevailing circumstances it has a different impact on different peoples. The differential effect of an apparently neutral rule by reason of the circumstances of the people to whom it applies is sometimes called ‘indirect discrimination’.

6. Is the flag’s design prescribed in Article 1 of the Law on the Flag of this kind? After considerable hesitation, and after giving great weight to the views of those judges who have formed a different view, we have concluded that it does give rise to indirect discrimination. The design has different meanings for people and affects people and peoples differently, depending on their different experiences during the war of 1992-1995. The symbolic and psychological effects of the design cannot be separated from people’s memories of the circumstances in which the flag was used at that time.

7. We are particularly influenced by two factors which seem to us to make it inevitable that the flag of the Republika Srpska will have a different impact on different peoples, and a seriously detrimental effect on some of them.

8. First, the Law on the Flag, and the design for the flag prescribed by it, were put in place by the National Assembly of the Republika Srpska in 1992 after the Republika Srpska was established to enable Serbs in the territory of the former Republic of Bosnia-Herzegovina to separate themselves from the claims of the Bosniac and Croat leaders of the Republic to establish Bosnia and Herzegovina as a sovereign State independent of the Socialist Federative Republic of Yugoslavia. The flag of the Republika Srpska can therefore be seen from the perspective of Bosniacs and Croats as a symbol of the separation of the Serb people from the Bosniac and Croat peoples in Bosnia and Herzegovina. It is also, of course, a symbol of the opposition of the Serb people’s leaders to the establishment of an independent sovereign State of Bosnia and Herzegovina. This in itself would be likely to lead the constituent peoples to view the significance of the design of the flag differently. One can understand that the Serb people would see it as a symbol of solidarity of Slav peoples, while the Bosniac and Croat peoples would see it as a symbol of opposition to the existence of the State of Bosnia and Herzegovina.

9. Secondly, as is now widely acknowledged, atrocities were committed during the war of 1992-1995. They were committed by all parties. In our view, however, it is significant for the purposes of this case that many Bosniacs and Croats suffered greatly at the hands of Serb military personnel who operated under the flag of the Republika Srpska, and wore uniforms which incorporated the design and colours of the flag, typically on the caps and sleeves. For the Bosniac and Croat peoples, therefore, it would be surprising if the flag were to be regarded as one with which they could comfortably identify.

10. The meaning of the design of the flag cannot be divorced from the emotions, perceptions and memories of those who see it in use on a day-to-day basis. The different constituent peoples understandably bring different emotions, perceptions and memories to the task of interpreting the meaning of the flag. When the emotions, perceptions and memories of the Bosniac and Croat peoples are as strong and as traumatic as those likely to be associated with this particular flag, it seems to us that one can sensibly speak of the flag and the Law having an indirectly discriminatory effect.

11. A further question then arises. Can the differential impact of the flag on the different constituent peoples be justified? Any such justification would have to show that there was an objective and rational justification for the differential effect, and that it was proportionate to a legitimate aim, in the sense that the differential effect was no greater than necessary to achieve the legitimate aim.

12. The National Assembly of the Republika Srpska advanced few arguments to the Constitutional Court in relation to the issue of justification, since it put at the forefront of its submissions the argument that the flag does not discriminate at all. Nevertheless, we would be prepared to accept that it is a legitimate aim for a flag to reflect the historical political ideals of the Serb people. But we are not persuaded that the use of the design is proportionate to that end, bearing in mind the emotional reaction which the flag is likely to produce among non-Serbs and the fact that it would have been easy to design a different flag after the coming into force of the Constitution of Bosnia and Herzegovina. For example, the order of colours could have been changed, or the shape of the flag varied, or other colours or symbols added to reflect the fact that the Bosniacs and Croats are also constituent peoples.

13. We conclude that the National Assembly of the Republika Srpska had a positive obligation under Article II(4) of the Constitution of Bosnia and Herzegovina to take reasonable steps within a reasonable time to make such changes to Article 1 of the Law on the Flag as would have been sufficient to diminish the detrimental impact of the design on the emotions and psychology of members of the Bosniac and Croat peoples. The National Assembly did not violate its positive obligation by failing to take action immediately after the Constitution of Bosnia and Herzegovina came into force in December 1995. However, once the Constitutional Court had established, in the *Constituent Peoples* Case No *U 5/98*, that the Bosniac, Croat and Serb peoples are constituent peoples throughout the territory of Bosnia and Herzegovina and are entitled to benefit from a principle of collective equality throughout the territory, the institutions of both Entities should have taken steps to remove symbols, as well as names, having a discriminatory effect on one

or more of the constituent peoples. More than six years after that decision was published, the flag remains unchanged.

14. For these reasons we found ourselves unable to share the view of the majority on this point. While being very conscious of our temerity in differing on a matter on which local feelings are closely engaged from Judges who are far more familiar than we are with the ethos and feelings of citizens of the country, we feel driven to record our dissent, with the greatest respect to those who hold another view.

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(3), Article 63(5) and (6) and Article 74(6) 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 Hadžiosmanović, 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,

In case **U 4/04,** adopted at its session held on 27 January 2007 the following

RULING

It is hereby established that the Parliament of the Federation of Bosnia and Herzegovina and National Assembly of Republika Srpska failed to enforce the Partial Decision of the Constitutional Court of Bosnia and Herzegovina no. U 4/04 of 31 March 2006, within a given time limit of six months from the date it was published in *Official Gazette of Bosnia and Herzegovina*.

It is hereby established that Articles 1 and 2 of the Law on Coat of Arms and the Flag of the Federation of Bosnia and Herzegovina (*Official Gazette of Federation of Bosnia and Herzegovina* nos. 21/96 and 26/96) and Articles 2 and 3 of the Constitutional Law on Flag, Coat of Arms and Anthem of the Republika Srpska (*Official Gazette of Republika Srpska* no. 19/92), shall be rendered ineffective.

These provisions shall be rendered ineffective as of the date following the publishing date of this Ruling in *Official Gazette of Bosnia and Herzegovina*.

Pursuant to Article 74(6) of the Rules of the Constitutional Court of Bosnia and Herzegovina, this Ruling shall be remitted to the Prosecutor's Office of Bosnia and Herzegovina.

This Ruling 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

1. By its Partial Decision no. *U 4/04* of 31 March 2006, the Constitutional Court of Bosnia and Herzegovina (hereinafter: Constitutional Court) established, *inter alia*, that Articles 1 and 2 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina (*Official Gazette of Federation of BiH* nos. 21/96 and 26/96) and Articles 2 and 3 of the Constitutional Law on Flag, Coat of Arms and Anthem of Republika Srpska (*Official Gazette of RS* no. 19/92) are not in compliance with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and Article 2(a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination referred to in Annex I to the Constitution of Bosnia and Herzegovina.

2. Pursuant to Article 63(4) of the Rules of the Constitutional Court, the Parliament of the Federation of Bosnia and Herzegovina and the National Assembly of Republika Srpska were ordered to bring Articles 1 and 2 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina and Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska into line with the Constitution of Bosnia and Herzegovina within six months as from the publishing date of this Decision in the *Official Gazette of Bosnia and Herzegovina*. The Constitutional Court submitted this Decision to the Parliament of the Federation of Bosnia and Herzegovina and National Assembly of the Republika Srpska for enforcement and ordered them to inform the Constitutional Court on the measures taken to enforce this Decision within the time-limit referred to in the preceding paragraph.

3. This Decision was published in *Official Gazette of Bosnia and Herzegovina* no. 47/06 of 20 June 2006. The time limit of six months for bringing these provisions into line with the Constitution of Bosnia and Herzegovina started running as from that date.

4. The Constitutional Court concludes that the time limit for enforcement of Decision no. *U 4/04* of 31 March 2006 has run out on 20 December 2006.

5. The Parliament of the Federation of Bosnia and Herzegovina and National Assembly of Republika Srpska in their letters no. 01-02-413/04 of 8 January 2007 and no. 01-52/07 of 12 January 2007 respectively, informed the Constitutional Court that they failed to act pursuant to its order to bring these provisions into line with the Constitution of Bosnia and Herzegovina.

6. Pursuant to Article 63(2) to (4) of the Rules of the Constitutional Court, in a decision establishing inconformity of the provisions with the Constitution of Bosnia and Herzegovina, the Constitutional Court may grant a time-limit for harmonization, which shall not exceed six months and if the inconformity is not removed within a given time limit, it shall establish with its decision those provisions as no longer in force as of the date of publishing that decision in *Official Gazette of Bosnia and Herzegovina.*

7. In its decision no. *U 4/04* of 31 March 2006, the Constitutional Court ordered the manner and time limit for enforcement of the decision. Pursuant to Article VI(4) of the Constitution of Bosnia and Herzegovina, decisions of the Constitutional Court shall be binding and final. Also, pursuant to Article 74(1) of the Rules of the Constitutional Court, final and binding decisions shall be respected by every physical and legal person. In addition, paragraph 2 of same Article stipulates that all bodies shall be obligated to enforce the decisions of the Constitutional Court within their competences established by the Constitution and law.

8. Having regard to the above and pursuant to Article 74(6) of its Rules, the Constitutional Court established that the Parliament of the Federation of Bosnia and Herzegovina and National Assembly of Republika Srpska failed to enforce final and binding decision of the Constitutional Court no. *U 4/04* of 31 March 2006.

9. Constitutional Court also reminds of its obligation to „uphold this Constitution" and finds that considering the optional character of symbols of the Entities and an option to use the symbols of the state of Bosnia and Herzegovina instead, the fact that challenged provisions of these laws shall be rendered ineffective, will not result in a legal gap or interfere with functioning of the entities and state of Bosnia and Herzegovina. Thus, the Constitutional Court finds that, while not undertaking the legislator's role, it is not necessary by way of a separate decision to provisionally replace the Entities' symbols which in accordance with this decision shall be rendered ineffective.

10. Pursuant to Article 74(6) of the Rules of the Constitutional Court, this Ruling shall be remitted to the Prosecutor's Office of Bosnia and Herzegovina.

11. Pursuant to Article 74(6) of its Rules the Constitutional Court decided as set out in the enacting clause of this Decision.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. U 17/05

DECISION
ON MERITS

Request of Mr. Borislav Paravac, Member of the Presidency of Bosnia and Herzegovina, for a review of consistency of the provisions of Article 5(2) and (6), Article 7(2), Article 46(3) and Article 51(2), (4) and (5) of the Law Establishing the Company for the Transmission of Electric Power in BiH with the provisions of Article III(5)(b) and II(3)(e) and (k) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Fundamental Rights and Freedoms and Article 1 of Protocol No. 1 to the European Convention

Decision of 26 May 2006

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (3) 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:

Mr. Mato Tadić, President,

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Hatidža Hadžiosmanović, Vice-President

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Ms. Constance Grewe,

Ms. Seada Palavrić,

Having deliberated on the request of **Mr. Borislav Paravac**, **Member of the Presidency of Bosnia and Herzegovina**, in case no. **U 17/05**, at its session held on 26 May 2006, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request of Mr. Borislav Paravac, Member of the Presidency of Bosnia and Herzegovina, is dismissed as ill-founded.

It is established that the provisions of Article 5(2) and (6), Article 7(2), Article 46(3) and Article 51(2), (4) and (5) of the Law Establishing the Company for the Transmission of Electric Power in BiH (*Official Gazette of BiH* no. 35/04) are in conformity with the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 9 November 2005, Mr. Borislav Paravac, Member of the Presidency of Bosnia and Herzegovina („the applicant"), filed a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of consistency of the provisions of Article 5(2) and (6), Article 7(2), Article 46(3) and Article 51(2), (4) and (5) of the Law Establishing the Company for the Transmission of Electric Power in BiH (*Official Gazette of BiH* no. 35/04 - „the relevant Law") with the provisions of Article III(5)(b) and II(3)(e) and (k) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Fundamental Rights and Freedoms („the European Convention") and Article 1 of Protocol No. 1 to the European Convention. The applicant requested that the Constitutional Court issue an interim measure and „defer, pending the adoption of a final decision, the application of the contested provisions in order to prevent any new damaging consequences".

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the House of Peoples and the House of Representatives of the Parliamentary Assembly were requested on 26 January 2006 to submit their replies to the request.

3. No replies to the request have been submitted.

4. The Constitutional Court adopted decision *U 17/05* on 22 November 2005, whereby it dismissed the request for adoption of interim measure as ill-founded.

5. Pursuant to Article 93 of the Rules of the Constitutional Court, Judge Seada Palavrić shall not take part in the work and the decision-making process relating to this case.

III. Request

a) Statements from the request

6. In his request for review of the constitutionality, the applicant states the following:

„On 2 June 2003, the Prime Minister of the RS Government and of the FBiH Government concluded on the basis of a Decision on the Status of State-Owned Capital in Buildings, Facilities and Devices for Power Transmission of the RS Government (*RS Official Gazette* no. 80/02), an Agreement on a Transmission Company and an

Independent System Operator (ISO). Item 2 of the Agreement provides that the Entities will own the Transmission Company proportionally to the relative value of the overall property, whereas item 4 thereof provides that the Entities' Prime Ministers will make nominations proportionally to the owned shares in the Transmission Company and the Council of Ministers will accept or reject nominations to the Management Boards of the Transmission Company and of the ISO. The Management Boards shall be responsible for appointing the Transmission Company's Directors and of the ISO. Item 7 of the Agreement provides that „if the Management Boards of the Transmission Company or of the ISO are not established in due time or if they do not act in accordance with the time-limits set in the transitional provisions of the Law on the Transmission Company and the Law establishing the ISO, the Independent Members of the Transmission Company and of the ISO shall have full power to act on behalf of the Management Board, pursuant to the provisions of the law. On 29 July 2004, the aforementioned Law was enacted and it entered into force on 6 August 2004. The contested provisions of the Law are inconsistent with the Agreement on Transmission Company and the Independent System Operator concluded between the FBiH Prime Minister and the RS Prime Minister on 2 June 2003, whereby the RS Government gave its approval for the establishment of a company for transmission of electric power in BiH. The contested provisions are also inconsistent with Articles III(3) and III(5)(b) of the Constitution of Bosnia and Herzegovina, which provide that the Entities shall, within six months following the entry into force of this Constitution, begin negotiations with a view to include in the responsibilities of the institutions of BiH other matters, including utilization of energy resources and cooperative economic projects. Namely, the authority and status of the Independent Member of the Management Board of the Company for transmission of electric power in BiH vested by the articles of the Law are in contravention with the approval given in the Agreement; in other words, they have been extended considerably so that the RS representatives in the management bodies would not be in a position to decide on management of their property. As the Republika Srpska's share in the Company is the ownership of the RS citizens pursuant to the Agreement and the mentioned Decision of the RS Government, the said provisions of the law violated the provisions of Articles II(1), II(2) and II(3)(k) of the BiH Constitution (right to property) and Article 1 of Protocol No. 1 to the European Convention. Namely, item 7 of the aforesaid Agreement vested in the independent member of the Transmission Company authority of the Management Board, in pursuance of the provisions of the Law that needed to be observed by the Agreement. However, Article 5 item 2 and Article 51 items 2 and 4 of the Law vested in the Independent Member of the Company's Management Board authority of the General Meeting of the Shareholders and of the shareholders. In addition, Article 51 item 5 of the Law grants absolute immunity to the said Independent Member, which is contrary to the principles of legal system and positive legislation of Bosnia and

Herzegovina. Furthermore, Article 5 item 6, Article 7 item 2 and Article 46 item 3 of the Law are in contravention with Article 6 of the European Convention and Article II(3)(e) of the BiH Constitution. Namely, the said articles endanger the right to a fair trial because decisions of the independent member of the Company's Management Board are not subject to judicial review. As the present case concerns the right to property under Article II(3)(k) of the BiH Constitution and Article 1 of Protocol No. 1 to the European Convention, and in connection with Article 6 of the European Convention, there is an obligation to stipulate a possibility of access to a court".

IV. Relevant Law

7. The Law Establishing the Company for the Transmission of the Electric Power in Bosnia and Herzegovina *(Official Gazette of Bosnia and Herzegovina n*o. 34/04), the relevant contested provisions read:

Article 5(2) and (6)

(2) This automatic conveyance shall include all assets, liabilities, and ownership rights over the property, including moveable, immovable, tangible and intangible property, financial assets, as well as any other right, title, or interest in or to property, that have been approved by the Management Boards of the three above-named Elektroprivrede with approval from the Entity Governments for transfer. In accordance with provisions of this Law, Elektroprivrede in BiH shall form commissions which will complete a proposal for division and separation of EP assets owned or operated by the three Elektroprivrede and ZDP of the RS and submit that proposal to the Management Boards of the three Elektroprivrede. The Elektroprivrede Management Boards shall complete the entire asset allocation process within sixty (60) days of the effective date of this Law. In the event that the entire asset allocation approval process has not been completed within the sixty (60) day timeframe then the Independent Member shall assume exclusive jurisdiction for the asset allocation decision making process and shall complete said process within thirty (30) days after his or her appointment under Article 51 (Extraordinary Formation Powers of Independent Member), or after the expiration of sixty (60) day period. Following transfer, the transferring Elektroprivrede, and their successors, shall remain jointly and severally liable with the Company for any liabilities arising from any loans or credits made by an international financial institution to such Elektroprivrede, directly or indirectly through the State or Entities, unless otherwise agreed to with each relevant international financial institution. Only for purposes of this transfer of the subject property, title shall be deemed good and merchantable.

(6) The Independent Member may, in his discretion, authorize limited exceptions to the distribution, generation and ISO property and asset exclusions of this Article in order to assure maximum efficiency of the transmission power system. The Independent Member's decision shall be final until the end of the Transition Period as defined in Article 50 (Duration of Transition Period). If any dispute arises out of the Independent Member's decision concerning allocation of property and assets under this Article, then the arbitration procedure set forth in Article 49 (Company Registration and Initial Operations) may be followed.

Article 7(2)

Except as otherwise noted in this paragraph, the SERC, in accordance with its jurisdiction as defined in the Act on Transmission, shall have authority to resolve any disputes arising out of or concerning the implementation of this Law upon petition by any of the following: the State; an Entity; the ISO; the Company Management Board, an independent power producer, a power trader; a supplier, or any other person who is directly connected to or relies upon the transmission system. The SERC decision is subject to judicial review pursuant to Article 14 of the Law on the Court of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina no. 29/00.) The Public Parent State Enterprise Elektroprivreda Republike Srpske, the Public Enterprise Elektroprivreda Bosne i Hercegovine, and the Elektroprivreda Hrvatske zajednice Herceg-Bosne Mostar, as well as their generation or distribution successors, may also petition the SERC under this provision. The SERC shall not have authority to resolve any dispute concerning the exercise of authorities granted in Article 5 (Forming of the Company) and Article 51 (Extraordinary Formation Powers of Independent Member) of this Law by the Independent Member.

Article 46(3)

If all three Elektroprivrede do not pay their proportional share of the Invoice for Costs presented by the Company Management Board within thirty (30) days of submittal, the dispute shall be referred promptly to the expedited arbitration procedure described in this Article. This arbitration procedure shall be the exclusive remedy for any dispute concerning formation costs under this Article

Article 49(3)

If any dispute arises out of the Independent Member's decision concerning allocation of property and assets under Article 5 (Forming of the Company), the dispute shall be addressed by filing an application for arbitration under this Article after the Transition Period. This arbitration procedure shall be the exclusive, final, and binding remedy for any disputes arising out of the Independent Member's decision concerning allocation of

assets under this Article, and there shall be no right of judicial appeal from the arbitration decision.

Article 51(2), (4) and (5)

(2) Throughout the remainder of the transition period under Article 50 (Duration of Transition Period), the Independent Member shall exercise all Management Board authorities and powers for Company formation and operations. During this period, the Management Board Members shall continue to use their best efforts to assist the Independent Member in completion of the remaining tasks required for Company formation. The Independent Member shall use his best efforts to regularly convene and consult with the Management Board Members who have been appointed in order to develop consensus concerning Company formation implementation decisions.

(4) If the Independent Member assumes exclusive jurisdiction for the formation of the Company under this Article, then the Independent Member shall have all of the powers of the Management Board under this Law, as well as the following extraordinary power:

(a) To the extent necessary to assure formation, the Independent Member shall exercise all authorities of the shareholders and the General Meeting of the Shareholders under Articles 22 (Decision-making of the General Meeting of Shareholders), 24 (Shareholder Rights) and 27 (Authority of the Management Board) of this Law until termination of the transition period. This exercise of shareholder authority by the Independent Member shall be exclusive, and shall pre-empt any exercise of authority by the shareholder, but the Independent Member shall provide reasonable information to the shareholders concerning actions taken pursuant to the powers of this Article.

(5) During the transition period, the Independent Member shall not be held criminally or civilly liable for any act carried out within the scope of his/her duties pursuant to this Law.

8. Other relevant provisions of the aforementioned Law which are not contested by the request, read as follows:

Article 1(1) and (2)

(1) This Law establishes a joint stock company for the transmission of electric energy, „Elektroprenos Bosne i Hercegovine" („the Company"), and defines its functions, powers, governance, and ownership. The Company shall perform its activities on the entire territory of Bosnia and Herzegovina.

(2) The objective of the Law is to establish a single transmission company and to ensure a continuous supply of electricity at defined quality standards for the enjoyment

of the citizens of Bosnia and Herzegovina. The Law is intended to facilitate the creation of an electric energy market in Bosnia and Herzegovina and its integration into regional energy markets and regional energy development activities. The Law is based on existing international practices and applicable Directives of the European Union (and their implementation in European Union Member States.)

Article 2(1)

(1) The Company shall perform activities related to the operation of the electric power transmission system in accordance with the provisions of this Law. Its activities shall include the transmission of electric power and transmission related activities as specified in Article 7 (Transmission Company Regulation and Interface) of this Law. Upon the establishment of the Company, no other electric or other company shall have authority to engage in such transmission of electric power or transmission related activities.

Article 3(12), (13) and (16)

(12) „Independent Member" shall be as defined in Articles 29 (Management Board Appointment), Article 49 (Company Registration and Initial Operations), 51 (Extraordinary Formation Powers of Independent Member) of this Law.

(13) „ISO" shall mean the Independent System Operator as described in the Act on Transmission of Electric Power, Regulator, and System Operator of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina nos. 7/02 and 13/03) („Act on Transmission").

(16) „SERC" shall mean the State Electricity Regulatory Commission as described the Act on Transmission.

Article 10

The initial Owners of the Company are:

1. The Federation of Bosnia and Herzegovina; and

2. The Republika Srpska.

Article 34 (3)

The Members of the Management Board cannot be sued by reason of official acts done in good faith in the exercise of their functions. The Company shall indemnify, in accordance with the Statute and Books of Rules, a Member of the Management Board or qualifying director for any legal action arising out of such person's services executed in good faith as a Member or qualifying director, in accordance with the Statute and Books of Rules.

Article 49 (4)

An aggrieved party shall file an application for arbitration within 120 days following the end of the Transition Period with the Minister of Energy, Industry and Mines of the Federation of Bosnia and Herzegovina and the Minister of Industry, Energy, and Development of the Republika Srpska. The two Ministers shall select a third mutually agreeable arbitrator within a period of 30 days from the filing of the first application for arbitration following the end of the Transition Period. If the two Ministers have not selected the third arbitrator in a timely manner, then the Council of Ministers of Bosnia and Herzegovina will have an additional 30 days to choose the third arbitrator. In the event that the Council of Ministers does not choose the third arbitrator in a timely manner, then the High Representative may decide to appoint the third arbitrator. The Company and the Elektroprivrede shall cooperate fully with the arbitration proceedings. The arbitration decision shall be based upon a majority vote of the three arbitrators.

Article 50

The transition period shall commence on the effective date of this Act and shall end when: (i) all transfers of assets, liabilities and employees necessary for the Company to operate contemplated by Articles 5 (Forming of the Company) and Article 43 (Transition of Employment) of this Law have been completed; (ii) the Company has been registered under Article 8 (Company Registration) of this Law; and (iii) five Management Board Members, in addition to the Independent Member, have been appointed pursuant to Article 29 (Management Board Appointment) of this Law. After that termination date, the Independent Member shall serve on the Management Board consistent with the authorities outlined in Articles 28 (Decision-making of the Management Board) and 29 (Management Board Appointment) of this Law.

Article 51 paragraph 1 items a) – d)

In the event that any of the following actions are not completed within the timeframes stipulated below, the Independent Member shall assume exclusive jurisdiction for the formation of the Company under this Article, pre-empting any exercise of authority for the formation of the Company by the Management Board Members

(a) within a period of one hundred sixty (160) days after the entry into force of this Law: all appointments to the Management Board (Article 29); initial meeting of the Management Board (Article 44); appointment of General Director (Article 45); submission of invoice for Company formation costs and filing of application for the SERC approval (Article 46);

(b) within the time period specified in Article 47: adoption of the Statute;

(c) within the time period specified in Article 48: approval of the Books of Rules and Code of Ethics; or

(d) within the time period specified in Article 49: application for registration of the Company

Article 52(1)

Notwithstanding the provisions of Article 29 (Management Board Appointment), during the transition period referenced in Article 50 (Duration of the Transition Period) the Independent Member shall be appointed in accordance with the applicable Law on Ministerial and other Government Appointments (Official Gazette of Bosnia and Herzegovina no. 7/03) but in any event he shall be appointed no later than sixty (60) days after entry into force of this Law. The Independent Member shall be nominated by the Entity Prime Ministers and appointed by the Council of Ministers of Bosnia and Herzegovina only for the term of the transition period. In the event that the Independent Member is not appointed in a timely manner under this Article, the High Representative may decide to appoint the Independent Member. In transition period the Independent Member may be a citizen of a country other than Bosnia and Herzegovina.

9. **Agreement between the Prime Ministers of the Federation of Bosnia and Herzegovina and Republika Srpska on the Transmission Company and Independent System Operator signed on 2 June 2003**

1

There shall be a State Law for the formation of the Transmission Company and a State Law for the formation of the Independent System Operator (ISO).

2

The Entities shall own the Transmission Company, in proportion to the relative value of the net assets contributed.

3

The Transmission Company shall be a Joint Stock Company. There shall be no distribution of dividend of assets of profits of the Transmission Company for ten years.. In addition, the Entities shall not net sell, convey, assign, mortgage, pledge, lease, securitize, exchange, transfer or otherwise encumber or dispose of their respective ownership shares or any party before the expiration of the ten year period.

4

The Prime Ministers of the Entities shall nominate, based on the proportional Transmission Company ownership shares held and the Council of Ministers shall than approve or reject the nominees to the respective Management Boards of the Transmission Company and the ISO. The Management Boards will be responsible for appointing the directors of the Transmission Company and the ISO.

5

The Initial Management Boards of the Transmission Company and the ISO shall each be appointed with four (4) Members nominated by the Federation and three (3) nominated by the Republika Srpska. When the asset valuation is final, than the Management Boards' composition shall be adjusted, if necessary.

6

The Transmission Company shall own all assets and liabilities necessary for transmission and transmission related activities. The assets interface points of the Transmission Company with distribution and generation will be defined in the Transmission Company Law.

7

If the Management Board of either Transmission Company or ISO are not formed in a timely manner or fail to act in accordance within the time period set forth in the Transition Provisions of the Transmission Company Law and ISO Law, than the respective Independent Members shall be fully empowered to act in the Management Board's place in accordance with the provisions of the respective laws.

V. Admissibility

10. In the present case, the request was submitted by an authorized person, since it was signed and certified with the seal bearing the name of Borislav Paravac, the member of the Presidency of Bosnia and Herzegovina who is, according to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, a person authorized to file a request, and the relevant request refers to a review of conformity of the provisions of Article 5(2) and (6), Article 7(2), Article 46(3) and Article 51(2), (4) and (5) of the relevant Law with the provisions of Article III(5)(b) and II(3)(e) and (k) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, and Article 1 of Protocol No. 1

to the European Convention. The Constitutional Court is competent to decide on the issue pursuant to Article VI(3)(a)(2) of the Constitution of Bosnia and Herzegovina.

11. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Constitutional Court's Rules, the Constitutional Court has established that the present request is admissible because it was filed by an authorized person. Therefore, there is no formal reason under Article 17(1) of the Rules of the Constitutional Court that would render the request inadmissible.

VI. Merits

12. The applicant states that the provisions of Article 5(2) and (6), Article 7(2), Article 46(3) and Article 51(2), (4) and (5) of the relevant Law are inconsistent with the provisions of Article III(5)(b) and II(3)(e) and (k) of the Constitution of Bosnia and Herzegovina, Article 6 of the European Convention and Article 1 of Protocol No. 1 to the European Convention.

13. **Constitution of Bosnia and Herzegovina**

Article III(5)(b)

Within six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects.

Article II paragraphs 2 and 3 item (e) and (k)

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.

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.

k) The right to property

14. **European Convention**

a) The right to a fair trial

Article 6(1) of the European Convention in the first sentence provides:

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.

b) Right to property

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

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.

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.

15. In the opinion of the Constitutional Court, the applicant's assertions can be summarized up as follows: a) the applicant maintains that the contested provisions of the relevant Law are in contravention with Article III(5)(b) of the BiH Constitution, because they disregarded the Agreement on Transmission Company and the Independent System Operator concluded between the FBiH Prime Minister and the RS Prime Minister on 2 June 2003 („the Agreement") considering the fact that the authorizations and the status of the Independent Member of the Management Board have been extended considerably so that the RS representatives are not in a position to decide on management of their property ; (b) Considering the extended authorizations and status of the Independent Member of the Management Board in relation to the signed Agreement, the RS representatives in the management bodies would not be in a position to decide in the Management Bodies of the Company for the Transmission of Electric Power in BiH. Since the share of the Republika Srpska in the Company is the ownership of the RS citizens, the said provisions of the law violated the provisions of Articles II(3)(k) of the BiH Constitution and Article 1 of Protocol No. 1 to the European Convention; c) the core of extended authorizations and status of the Independent Member of the Management Board, which had been given to the Independent Member of the Management Board contrary to the signed Agreement, lies in the fact that the Agreement stipulates that the Independent Member shall be given authorizations of

Management Board, while the contested provisions vested in the Independent Member of the Company's Management Board authority of the General Meeting of the Shareholders and of the shareholders; d) the contested provisions of the Law granted absolute immunity to the said Independent Member, which is contrary to the principles of legal system and positive legislation of Bosnia and Herzegovina, and e) decisions of the independent member of the Company's Management Board are not subject to regular judicial review which constitutes a violation of Article 6 of the European Convention.

16. The Constitutional Court shall first examine the assertions under item a). In that context, the Constitutional Court notes that the applicant has found the grounds to challenge the conformity of the provisions of the relevant Law with Article III(5)(b) of the Constitution, in the fact that the contested provisions are inconsistent with the Agreement, whereby the Entities transferred the aforementioned responsibilities to Bosnia and Herzegovina. Therefore, the applicant indirectly requests the Constitutional Court to examine the contested provisions of the relevant Law in relation to the Agreement. Having regard to the aforementioned, the Constitutional Court notes that it is authorized to examine the constitutionality and legality of the contested provisions only in relation to the provisions of the Constitution of Bosnia and Herzegovina and not in relation to the provisions of the Agreement, which are not part of the Constitution of Bosnia and Herzegovina, therefore, its constitutionality can not be examined. Hence, the Constitutional Court can examine the constitutionality of the contested provisions of the relevant Law only in relation to Article III(5)(b) of the Constitution of Bosnia and Herzegovina.

17. Having regard to the aforementioned, the Constitutional Court notes that the provisions of Article III(5)(b) of the Constitution of Bosnia and Herzegovina provide that the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects. The Constitutional Court holds that the provisions of Article III(5)(b) of the Constitution of Bosnia and Herzegovina had been respected when the relevant Law was adopted, considering the fact that the Entities commenced negotiations in accordance with the aforementioned constitutional provision, in the present case „on utilization of energy resources", which were finalized by signing of the Agreement, whereby the State Bosnia and Herzegovina was vested with the competence to form the Company for Transfer of Electric Power and adopt corresponding laws. Therefore, it is indisputable that the provision of Article III(5)(b) of the Constitution of Bosnia and Herzegovina was respected when the relevant Law was adopted, considering the fact that the relevant Law was adopted on the basis of the Agreement signed on 2 June 2003 by Prime Ministers from both Entities.

18. Furthermore, the Constitutional Court shall examine assertions under items b) and c). According to these assertions from the request, the Republika Srpska, due to the extended authorizations and status of the Management Board's Independent Member, and since the share of the Republika Srpska in the Company is the ownership of the RS citizens, there was a violation of the constitutional right to property. In connection to this, the Constitutional Court, once again notes that it shall not examine authorizations of the Independent Member in relation to the signed Agreement, since that is not a constitutional issue and the Constitutional Court is not authorized to examine the constitutionality of the contested provisions of the relevant Law in relation to the Agreement signed by the Entities' Prime Ministers.

19. As to the constitutional right to property, the Constitutional Court notes, that the guarantees arising under Article II(3)(k) of the Constitution of Bosnia and Herzegovina, correspond to the guarantees arising under Article 1 Protocol No. 1 to the European Convention. The Constitutional Court reminds that Article 1 of Protocol No. 1 to the European Convention comprises „three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. However, the three rules are not „distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, European Court of Human Rights, *Sporrong and Lönnroth vs. Sweden*, Judgment of 23 September 1982, Series A no. 52, para. 61). The violation of the right to property exists if the reply to any of the following questions is negative: whether the interference with the right, *i.e.* the control of the use of property has its grounds in the law, whether there is proportionality between the means employed and the aim sought to be achieved, *i.e.* between the request for the protection of fundamental rights.

20. The present law, including its contested provisions, represents an instrument of „control of the use of property". This Law was published in an Official Gazette. The provisions of the Law, including the contested ones, were drawn up with sufficient clarity and precision, therefore all those to which they refer can understand the consequence of its actions. As stated in Article 1 and 2 of the present Law, „the objective of the Law is to establish a single transmission company and to ensure a continuous supply of electricity at defined quality standards for the enjoyment of the citizens of Bosnia and Herzegovina.

The Law is intended to facilitate the creation of an electric energy market in Bosnia and Herzegovina and its integration into regional energy markets and regional energy development activities. The Law is based on existing international practices and applicable Directives of the European Union (and their implementation in European Union Member States.) It clearly follows from the aforementioned that the Law was adopted in the public and general interest. Moreover, the Constitutional Court finds that the contested provisions of the relevant Law in itself represent disproportionality between the „means employed and the objective sought to be achieved". In accordance with the aforementioned, the Constitutional Court concludes that the contested provisions of the relevant Law do not violate the constitutional right to property arising under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

21. Finally, the Constitutional Court shall examine the applicant's assertions under items d) and e), of the request, according to which granting the Independent Member of the Company immunity is in contradiction of the principles of legal system and positive legislation of Bosnia and Herzegovina, as well as that there was violation of the right of access to the court within the right to a fair trial under Article 6 of the European Convention, as the decisions of the independent member of the Company's Management Board are not subject to judicial review. In connection with the above, the Constitutional Court notes that there is a margin of appreciation as to who is going to be granted the immunity during certain term of office, and concludes that the use of this right by the legislator in the present case cannot represent a violation of the constitutional right to a fair trial under Article II(3) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention.

22. As to applicant's allegations of a violation of the right of access to court within the scope of the right to a fair trial under Article 6 of the European Convention, the Constitutional Court notes that this right guarantees the right of access to court only in cases when an individual's civil rights and obligations are being determined. In the present case, the contested provisions of the relevant Law stipulate that the decisions of the Company's Independent Member shall be subject of judicial control in the following cases: a) in the case when the Independent Member takes the decision concerning the allocation of property and assets (Article 49 paragraph 3), and b) in the case when the Independent Member takes over exclusive authorizations of the Management Board and Company's Shareholder's Assembly (Article 7(2) and Article 51). Therefore, in the present case there are decisions which concern the management rights in the Company and they do not determine any civil rights and obligations within the meaning of Article 6 of the European Convention; therefore, there is no obligation to ensure the effective legal remedy against the latter. In addition, arbitration proceedings are stipulated against

the Independent Member's decisions (Article 49(3) and (4) of the relevant Law). The applicant failed to provide any assertions with regard to the arbitration proceedings as ineffective legal remedy and the term „tribunal" under Article 6 of the European Court does not necessarily mean „court" in a restricted sense of the word.

23. Having regard to the aforementioned, the Constitutional Court concludes that the present request for review of the constitutionality is ill-founded, and the contested provisions of the relevant Law are not contrary to the provisions of Article III(5)(b), II(3)(e) and (k) of the Constitution of Bosnia and Herzegovina, Article 6 of the European Convention, and Article 1 of Protocol No. 1 to the European Convention.

VII. Conclusion

24. The present request for review of the constitutionality is ill-founded, considering the fact that it starts from the position that the contested provisions of the Law Establishing the Company for the Transmission of Electric Power in BiH are not in conformity with the Agreement, whereby the Entities, *i.e.* the Government of the Federation of Bosnia and Herzegovina and the Republika Srpska, transferred the aforementioned responsibilities to Bosnia and Herzegovina, since the Agreement cannot represent grounds for an examination of the constitutionality of the law. It is also indisputable that the very Law Establishing the Company for the Transmission of Electric Power in BiH was adopted upon the agreement reached within the meaning of Article III(5)(b) of the Constitution of Bosnia and Herzegovina. Moreover, the contested provisions of the challenged law, *per se*, do not violate the constitutional rights to property and to a fair trial and, therefore, they are not inconsistent with Article II(3)(e) and (k) of the Constitution of Bosnia and Herzegovina, Article 6 of the European Convention, and Article 1 of Protocol No. 1 to the European Convention.

25. Pursuant to Article 61(1), (2) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case no. U 19/06

DECISION
ON ADMISSIBILITY
AND MERITS

Request of Mr. Muhamed Ibrahimović, Chairman of the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina at the time of filing the request and 36 Members of the House of Representatives of the Federation of Bosnia and Herzegovina, for a review of constitutionality of the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina and Law on Privatization of State Capital in Enterprises with the Constitution of Bosnia and Herzegovina

Decision of 30 March 2007

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (3) 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 Hadžiosmanović, 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 request of **Mr. Muhamed Ibrahimović, the Chair of the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina at the time of filing the request and 36 Members of the House of Representatives of the Federation of Bosnia and Herzegovina** in case no. **U 19/06,** at its session held on 30 March 2007 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request of Mr. Muhamed Ibrahimović, Chair of the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina at the time of filing the request and 36 Members of the House of Representatives of the Federation of Bosnia and Herzegovina is dismissed as ill-founded.

It is established that paragraph 3 of the Preamble, Article 2 paragraph 1 and Article 3 paragraph 2 of the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 14/98 and 12/99) are consistent with Article

II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 2 of Annex II to the Constitution of Bosnia and Herzegovina and that Articles 7 and 8 of the Law on Privatization of State Capital in Enterprises (*Official Gazette of Republika Srpska* no. 51/06) are consistent with Article II(4) and II(3)(k) of the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 20 October 2006, Mr. Muhamed Ibrahimović, Chair of the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina at the time of filing the request and 36 Members of the House of Representatives of the Federation of Bosnia and Herzegovina („the applicants") filed a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of constitutionality of the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 14/98) and Law on Privatization of State Capital in Enterprises (*Official Gazette of the Republika Srpska* no. 51/06) with the Constitution of Bosnia and Herzegovina, in conjunction with the Decision on issuing a special privatization program for the company „TELEKOM SRPSKE" AD Banja Luka (*Official Gazette of the Republika Srpska* no. 74/06) taken pursuant to the above laws. The applicants requested the Constitutional Court to order an interim measure whereby it would ban the enforcement of the Decision on issuing a special privatization program for the company „TELEKOM SRPSKE" AD Banja Luka pending the adoption of a decision on the request.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, both Houses of the Parliamentary Assembly of Bosnia and Herzegovina, House of Representatives and House of Peoples, National Assembly of the Republika Srpska, Council of Peoples and Government of the Republika Srpska were requested on 27 October 2006 to submit their replies to the appeal.

3. By Decision no. *U 19/06* of 17 November 2006, the Constitutional Court dismissed the request for interim measure as ill-founded.

4. On 30 November 2006 the National Assembly of the Republika Srpska and Government of the Republika Srpska submitted their replies to the request, while other parties failed to submit their replies to the request.

5. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were forwarded to the applicants on 21 February 2007.

III. Request

a) Statements from the request

6. The applicants allege that the provisions of paragraph 3 of the Preamble, Article 2 paragraph 1 and Article 3 paragraph 2 of the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina, which stipulate that the right of the Entities is expressly recognized to privatize non-privately owned enterprises and banks located on their territories and to receive the proceeds therefrom according to legislation adopted by their respective Parliaments, are inconsistent with the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") and Article 1 of Protocol No. 1 to the European Convention which, according to Article II(2) of the Constitution of Bosnia and Herzegovina, are applied in Bosnia and Herzegovina. They allege that according to Article 1 of Protocol No. 1 to the European Convention, Bosnia and Herzegovina is entitled to the peaceful enjoyment of its possessions and that 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. Furthermore, they claim that pursuant to Article I(2) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina is not a group of „joint institutions" but a democratic state, which shall operate under the rule of law, and that the Republika Srpska is one of the State's two entities. Therefore, the challenged Law disregards the fact that the state of Bosnia and Herzegovina is a legal person, which is entitled to the peaceful enjoyment of its property.

7. The applicants allege that the challenged Law is also inconsistent with the provisions of Annex II(2) to the Constitution of Bosnia and Herzegovina as all provisions relating to the state as the beneficiary of its property remain in effect unless the state has been deprived of its property in the public interest and subject to the conditions provided for by law and by the general principles of international law. They point out that by the

challenged Law no attempt has been made to connect the state property and its possible privatization with Annex IX of the Dayton Peace Agreement and that nothing has been done to resolve the issue of PTT and Communication Services in line with Article 3 of Annex 9 of the Dayton Peace Agreement. They claim that by division of the state property according to the territorial principle into the two Entities, the challenged Law sets up a basis for the Entities factually to become the holders of the state property and to be considered as separate states. They allege that it follows from the Decision on issuing a special privatization program for the company „Telekom Srpske" A.D. Banja Luka, which repeatedly refers to the state capital managed by the Republika Srpska.

8. The applicants complain about the inconsistency of Articles 7 and 8 of the Law on Privatization of State Capital in Enterprises which stipulate terms and conditions, and subject-matter of sale, and Article 14 of the European Convention, i.e. the non-discrimination on territorial ground staking into account the number of inhabitants in both Entities according to the 1991 census.

9. The applicants hold that in order to review the constitutionality of the Decision on issuing a special privatization program for the company „TELEKOM SRPSKE" AD Banja Luka, it is necessary to review the constitutionality of the laws which led to the adoption of the above Decision.

b) Reply to the request

10. In its response to the request, the National Assembly alleges that the request is inadmissible since it does not fall within the scope of issues provided for by Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. In this respect, the National Assembly alleges that the part of the request whereby the applicants request the Constitutional Court to establish that the provisions of Articles 7 and 8 of the Law on Privatization of State Capital in Enterprises are inconsistent with Article 1 of Protocol 1 to the European Convention and Article 14 does not fall within the scope of the Constitutional Court's jurisdiction as it does not decide on the compatibility of laws or general acts with the European Convention. As to the part of the request whereby the applicants claim that the challenged laws and decision deprived the State of its property, the National Assembly responds that Article 34 of the European Convention provides that any person, non-governmental organization or group of individuals may claim to be the „victim" of a violation; the State has no *locus standi* and, by its reference to Article 33 of the Convention, the state may refer to the Court complaining about breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party. The National Assembly is therefore of the opinion that the Court is not competent *ratione materie* to consider that part of the request. The

National Assembly further alleges that the challenged Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 14/98), which was „octroyed" by the High Representative for BiH, is not in force any longer and that on 19 July 1999 the Parliamentary Assembly of BiH adopted the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 12/99). The National Assembly is of the opinion that the Constitutional Court cannot decide on the constitutionality of individual acts such as the Decision on issuing a special privatization program for the company „TELEKOM SRPSKE" A.D. Banja Luka.

11. The National Assembly alleges that Article 68 of the Constitution of the Republika Srpska contains the constitutional basis for adopting the Law on Privatization of State Capital in Enterprises.

12. As to the applicants' allegations relating to Article 1 of Protocol No. 1 to the European Convention, the National Assembly alleges that these provisions shall not 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. As to the applicants' allegations relating to Article 14 of the European Convention, the National Assembly alleges that based on the allegations stated in the request, it is not possible to determine as to what group in an analogous or relevantly similar situation has been subjected to differential in treatment with regard to the challenged acts.

13. In response to the request, the Government of the Republika Srpska basically alleges the same reasons as those stated by the National Assembly insofar as the admissibility of the request is concerned. As to the alleged discrimination, the Government of the Republika Srpska alleges that the fact that there is no discrimination in the instant case has been established by the Council of Peoples on 29 May 2006 which confirmed that the national vital interested was not jeopardized by the Entity Law.

IV. Relevant Law

14. The **Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* nos. 14/98 and 12/99), so far as relevant, reads as follows:

Preamble

The General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter called the GFAP) and particularly its Annex 4 determines the respective functions and

responsibilities of the Institutions of Bosnia and Herzegovina and of the Entities as well as the financial obligations of the Entities towards those Institutions, but contains no specific provision regarding the ownership of public assets.

The purpose of this law is to establish a secure legal environment for the privatization process of enterprises and banks and to permit that such process takes place as transparently and rapidly as possible for the benefit of the citizens of Bosnia and Herzegovina (BH), including displaced persons and refugees.

Therefore, the Parliamentary Assembly of Bosnia and Herzegovina passes this Law expressly recognizing the right of the Entities to privatize non privately owned enterprises and banks located on their territories and to receive the proceeds there from according to legislation adopted by their respective Parliaments.

Article 2

1. In accordance with the GFAP, this Law expressly recognizes the right of the Entities to privatize non-privately owned enterprises and banks located on their territories.

The determination whether or not an enterprise or bank is non-privately owned shall be made on the basis of entity legislation. Such legislation shall provide for a transparent review of any changes in capital structure or ownership transformation of non-privately owned property that has occurred after 31 December 1991, where such changes are in dispute.

2. The exercise of the right of the Entities to privatize those public facilities falling within the scope of Annex 9 to the GFAP shall be consistent with whatever reorganization might be necessary to fit the new internal structure of the country, as is determined pursuant to the GFAP and in particular its Annex 9.

3. In any process of restitution, privatization of enterprises and banks will not prejudice restitution claims that may be brought in accordance with applicable restitution laws.

Article 3

1. The entity parliaments shall adopt legislation, which in non-discriminatory, ensures maximum transparency and public accountability in the privatization process and is in conformity with GFAP.

2. The laws of the privatizing Entity will cover only those assets and related liabilities located on its territory.

3. The laws of the Entities shall regulate on a non-discriminatory basis, which BH or foreign natural and legal persons have the right to acquire shares and property in the privatization process in accordance with Article 3.1 of this Law.

15. The **Law on Privatization of State Capital in Enterprises** (*Official Gazette of the Republika Srpska* no. 51/06) so far as relevant reads as follows:

Article 7

(1) According to a special privatization program, certain criteria may be envisaged to be fulfilled by the purchasers of state capital within the given time limit and these include the following:

a) program to keep the present employees and to create conditions for new jobs
b) maintaining the existing activities or developing new ones
c) increase of registered capital
d) placing of shares of the privatized enterprise on the official stock exchange market

(2) Special conditions that must be fulfilled by potential purchasers may also be envisaged by a special privatization program for the enterprises mentioned under Article 6 of this Law.

Article 8

(1) Natural resources, goods of general use, resources of cultural and historical importance used by an enterprise cannot be subject to privatization.

(2) The status of building land and agricultural land shall be determined by special laws.

V. Admissibility

16. Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, so far as relevant, reads as follows:

a) The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

17. As to the part of the request whereby the applicants request the review of constitutionality of the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 14/98), the Constitutional Court observes that the aforementioned Law was passed by the High Representative for Bosnia and Herzegovina on a temporary basis pending the adoption by the Parliamentary Assembly of Bosnia and Herzegovina in the appropriate form, without amendments or additional conditions. At the session of the House of Representatives held on 14 July 1998 and the session of the House of Peoples held on 19 July 1999, the Parliamentary Assembly adopted the same text of the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 12/99) as that of the Law passed by the High Representative for Bosnia and Herzegovina on the temporary basis. That Law entered into force on 10 August 1999. It follows that the aforementioned Law is in force.

18. Despite the fact that the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina does not explicitly provide that the Constitutional Court is competent to review the constitutionality of laws or provisions of laws of Bosnia and Herzegovina, in essence the authorizations provided for in the Constitution of Bosnia and Herzegovina enshrine *titulus* granted to Constitutional Court for such jurisdiction, particularly the role of the Constitutional Court as an authority upholding the Constitution of Bosnia and Herzegovina. The position taken by the Constitutional Court in such cases, points to the fact that the Constitutional Court is competent to review the constitutionality of laws and provisions of laws of Bosnia and Herzegovina (see Constitutional Court, Decision no. *U 1/99* of 14 August 1999, *Official Gazette of Bosnia and Herzegovina* no. 16/99).

19. As to the part of the request whereby the applicants request the review of constitutionality of the Law on Privatization of State Capital in Enterprises (*Official Gazette of the Republika Srpska* no. 51/06), the Constitutional Court holds that the request concerns the issue falling within the scope of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina as the applicants challenged the compatibility of the Entity law with the Constitution of Bosnia and Herzegovina.

20. The Constitutional Court has established that the applicants, Chair of the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina at the time of filing the request and 36 Members of the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina are authorized persons according to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

21. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17 of the Rules of the Constitutional Court, the Constitutional

Court concludes that the request is admissible as it has been filed by an authorized person and there are no other formal reasons laid down in Article 17 of the Rules of the Constitutional Court which would render the request inadmissible.

VI. Merits

22. The applicants complain of the inconsistency of paragraph 3 of Preamble, Article 2 paragraph 1 and Article 3 paragraph 2 of the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina with Article 1 of Protocol No.1 to the European Convention. They allege that the provisions of Articles 7 and 8 of the Law on Privatization of State Capital in Enterprises are inconsistent with Article 1 of Protocol No. 1 to the European Convention and Article 14 of the European Convention. The applicants hold that it is necessary to review the constitutionality of the provisions of all laws that led to the adoption of the Decision on issuing a special privatization program for the company „TELEKOM SRPSKE" AD Banja Luka to allow a review of constitutionality of the aforementioned Decision.

23. 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:

(...)

k) The right to property.

24. The above provision corresponds to Article 1 of Protocol No. 1 to the European Convention.

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

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.

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.

25. The applicants hold that the challenged laws deprive the State of its property and that therefore Article 1 of Protocol No.1 to the European Convention has been violated.

26. As already stated, Article 1 of Protocol No.1 to the European Convention corresponds to Article II(3)(k) of the Constitution of Bosnia and Herzegovina. In this respect, the Constitutional Court outlines that the concept of the right to property includes the obligation and responsibility of the State to take preventive measure and mechanisms protecting the right of individual to the peaceful enjoyment of his possessions. The State has positive obligation to protect individuals against interference with and deprivation of their property regardless of whether the interference or deprivation comes from officials of the State authorities or private persons. Therefore, the State protects individual against interference with and deprivation of his property by another individual (the principle of *Drittwirkung* effect). However, it is necessary to outline that the State enjoys a wide margin of appreciation either in respect of the means used to implement certain measures or in respect of establishment whether the consequences of such measures can be justified by the general interest of the goal of law. The State offers an initial assessment and identification of problems of general interest requiring introduction of property deprivation and corrective measures to be taken. Therefore, the State is granted a wide margin of appreciation in taking certain measures whose consequences are the interference with the right to property of individual.

27. According to the aforementioned concept of the right to property, which is identical in both the European Convention and Constitution of Bosnia and Herzegovina, it is obvious that a situation in which the State (including the Entities) would violate its own right to property by adopting a law is not possible. It follows that the part of the applicants' request is unfounded in which they claim that the challenged laws are inconsistent with the Constitution of Bosnia and Herzegovina as they have violated the right of the State to its property under Article 1 of Protocol No. 1 to the European Convention.

28. The applicants allege that the challenged Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina is inconsistent with the provisions of Annex II(2) of the Constitution of Bosnia and Herzegovina as those provisions stipulate that all provisions according to which the State is a beneficiary of its property shall remain in force unless it is deprived of its property in the public interest and subject to the conditions provided for by law and by the general principles of international law.

29. The Constitutional Court reminds that Article 2 of Annex II to the Constitution of Bosnia and Herzegovina provides that „all laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina". It follows that any law adopted by the State after the entry into force of the Constitution

of Bosnia and Herzegovina, regardless of the contents of the law, cannot violate in any way the above constitutional provision as it relates to the continuation of legal regulations adopted prior to the entry into force of the Constitution of Bosnia and Herzegovina.

30. Although the applicants do not request the review of compatibility of the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina and Law on Privatization of State Capital in Enterprises with Article 3 of Annex IX of the General Framework Agreement for Peace in Bosnia and Herzegovina, the Constitutional Court reminds that the above provisions provide that the „Parties" may decide, upon recommendation of the commission, to use establishment of the transportation corporation as a model for the establishment of other joint public corporations, such as for the operation of utility, energy, postal and communication facilities. The aforementioned Annex therefore provides for a possibility, not obligation, for the „Parties" to organize public corporations.

Discrimination

31. Article II(4) of the Constitution of Bosnia and Herzegovina, reads as follows:

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.

32. Article 14 of the European Convention reads as follows:

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.

33. The applicants allege that Articles 7 and 8 of the Law on Privatization of State Capital in Enterprises are inconsistent with Article 14 of the European Convention.

34. The Constitutional Court observes that Article II(4) of the Constitution of Bosnia and Herzegovina corresponds to Article 14 of the European Convention. Article II(4) of the Constitution of Bosnia and Herzegovina provides for the non-discrimination in respect of the enjoyment of rights and freedoms provided for in the Constitution and European Convention and the rights and freedoms provided for in the international agreements listed in Annex I to the Constitution of Bosnia and Herzegovina. The scope of protection

of the rights and freedoms of the citizens of Bosnia and Herzegovina is thus extended, and State of Bosnia and Herzegovina including both Entities are even more decisively obliged to ensure the highest level of internationally recognized human rights and fundamental freedoms as provided for in Article II(1) of the Constitution of Bosnia and Herzegovina without discrimination on any ground.

35. According to the case-law of the Constitutional Court and European Court of Human Rights, an act or a regulation is discriminating if it makes difference between individuals or groups in similar situations without objective and reasonable justification, i.e. if there was no reasonable proportionality between the means used and the aims sought to be achieved.

36. In the instant case, the applicants complain of the discrimination on territorial grounds taking into account the number of inhabitants according to the 1991 census but fail to specify anything that would indicate that Articles 7 and 8 of the Law on Privatization of State Capital in Enterprises are discriminatory thus inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina.

37. Taking into account the aforesaid, the Constitutional Court concludes that the request is unfounded and should be dismissed. Moreover, the Constitutional Court concludes that paragraph 3 of the Preamble, Article 2 paragraph 1 and Article 3 paragraph 2 of the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 14/98 and 12/99) are compatible with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 2 of Annex II to the Constitution of Bosnia and Herzegovina and that Articles 7 and 8 of the Law on Privatization of State Capital in Enterprises *(Official Gazette of the Republika Srpska* no. 51/06) are compatible with Articles II(4) and II(3)(k) of the Constitution of Bosnia and Herzegovina. In this respect, the Constitutional Court holds that there is no need to separately examine the compatibility of the Decision on issuing a special privatization program for the company „TELEKOM SRPSKE" AD Banja Luka which was taken on the basis of the challenged laws.

VII. Conclusion

38. The State and its bodies enjoy the constitutional rights enumerated in Article II(3) of the Constitution of Bosnia and Herzegovina. However, according to the very concept of the right to property provided for by the European Convention which is identical to that provided for by the Constitution of Bosnia and Herzegovina, the situation in which the State (including the Entities) would violate its own constitutional right to property is not

possible. The State can in no way violate that constitutional provision by adopting any law after the entry into force of the Constitution of Bosnia and Herzegovina regardless of the contents of the provisions of that law as that provision relates to the continuity of legal regulations adopted prior to the entry into force of the Constitution of Bosnia and Herzegovina.

39. 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.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. U 18/06

**DECISION
ON ADMISSIBILITY
AND MERITS**

Request of Mr. Petar Kunić, Mr. Milorad Živković, Mr. Tihomir Gligorić, Mr. Nenad Mišić, Mr. Miloš Jovanović, Mr. Momčilo Novaković, Ms. Ljiljana Miličević, Mr. Mirko Blagojević, Ms. Dušanka Majkić, Ms. Jelina Đurković and Ms. Marija Perkanović, Members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time when the request was filed, for a review of the constitutionality of Article 62 para 5 of the Law on Defense of Bosnia and Herzegovina

Decision of 23 November 2007

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) 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* no. 60/05), in Plenary and composed of the following judges:

Ms. Hatidža Hadžiosmanović, 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,

Mr. Krstan Simić,

Having deliberated on the request of **Mr. Petar Kunić, Mr. Milorad Živković, Mr. Tihomir Gligorić, Mr. Nenad Mišić, Mr. Miloš Jovanović, Mr. Momčilo Novaković, Ms. Ljiljana Miličević, Mr. Mirko Blagojević, Ms. Dušanka Majkić, Ms. Jelina Đurković and Ms. Marija Perkanović**, Members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time when the request was lodged, in case no. **U 18/06,** at its session held on 23 November 2007, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request of Mr. Petar Kunić, Mr. Milorad Živković, Mr. Tihomir Gligorić, Mr. Nenad Mišić, Mr. Miloš Jovanović, Mr. Momčilo Novaković, Ms. Ljiljana Miličević, Mr. Mirko Blagojević, Ms. Dušanka Majkić, Ms. Jelina Đurković and Ms. Marija Perkanović, Members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time when the request was lodged, is dismissed as ill-founded.

It is hereby established that Article 62 paragraph 5 of the Law on Defense of Bosnia and Herzegovina (*Official Gazette of Bosnia and*

***Herzegovina* nos. 88/05 and 94/05) is compatible with the Constitution of Bosnia and Herzegovina.**

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 10 July 2006, **Mr. Petar Kunić, Mr. Milorad Živković, Mr. Tihomir Gligorić, Mr. Nenad Mišić, Mr. Miloš Jovanović, Mr. Momčilo Novaković, Ms. Ljiljana Miličević, Mr. Mirko Blagojević, Ms. Dušanka Majkić, Ms. Jelina Đurković and Ms. Marija Perkanović**, members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at that time („the applicants"), lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of Article 62 paragraph 5 of the Law on Defense of Bosnia and Herzegovina („the Law on Defense"), (*Official Gazette of Bosnia and Herzegovina* nos. 88/05 and 94/05).

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 13 February 2007 the House of Representatives and House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina were requested to submit their replies to the request.

3. The House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina submitted their reply to the request through their Constitutional and Legal Committee on 28 February 2007. The House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina failed to submit a reply to the request.

4. Pursuant to Article 33 of the Rules of the Constitutional Court, on 14 June 2007 the Ministry of Defense of Bosnia and Herzegovina („the Ministry of Defense") was requested to submit information as to whether the Ministry of Defense took a final decision on the status of civil servants and employees formerly employed with the Ministry of Defense of the Republika Srpska („the civil servants").

5. On 11 July 2007, the Ministry of Defense informed the Constitutional Court that they had not taken a final decision on the status of the civil servants thus far. Furthermore, the Ministry of Defense stated that they acted in accordance with the provisions of the Law on Defense, which were binding upon the Ministry, pending a final decision and that the Ministry, acting in accordance with its competence, had passed adequate regulations on application in compliance with the referred provisions of the Law on Defense.

6. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply to the request was communicated to the applicant on 5 June 2007.

7. In accordance with Article 93(1) of the Rules of the Constitutional Court, Judge Seada Palavrić, was exempted from taking part in the decision-making process in the present case, given the fact that, as a member of the Parliamentary Assembly of Bosnia and Herzegovina, she had participated in the adoption of the law which is the subject of disputing.

III. Request

a) Statements from the request

8. The applicants filed the request in accordance with the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. They hold that Article 62 paragraph 5 of the Law on Defense is incompatible with the Constitution of Bosnia and Herzegovina as its provisions are discriminatory. Namely, Article 62 paragraph 5 of the aforementioned Law provides that civil servants shall have the same pay (salary, remunerations etc.) they had while being employed with the Ministries of the Entities pending a final decision of the Minister of Defense in respect of their status within the Ministry of Defense after the election procedure as provided by Article 64 of the Law on Defense. Furthermore, the applicants allege that the civil servants and employees from Republika Srpska have received salaries and meal allowance that are 20% to 30% lower than those of other civil servants and that their holiday allowance has been up to three times lower since the date of their transfer (1 January 2006). They therefore hold that the quoted law provision is discriminatory and unconstitutional since it treats differently the same category of civil servants and employees. Also, they point out that it is absurd that the civil servants with the same qualifications and status employed with the same body have different pay and remunerations. Although the applicants did not specify any provision of the Constitution of Bosnia and Herzegovina they claim to have been violated, it follows from the request that they raise the issue of violation of the right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention for

the Protection of Human Rights and Fundamental Freedoms („the European Convention") in conjunction with 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, Article 7 of the International Covenant on Economic, Social and Cultural Rights and Article 1 of Protocol No. 12 to the European Convention. The applicants proposed that the Constitutional Court takes a decision whereby it would declare the provisions of Article 62 paragraph 5 of the Law on Defense incompatible with the Constitution of Bosnia and Herzegovina.

b) Reply to the request

9. In reply to the request the Constitutional and Legal Committee of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina alleges that the legislator, by passing the challenged provision of Article 62 paragraph 5 of the Law on Defense, had the intention of regulating the rights of civil servants for a fixed period of time. In particular, by the challenged provision, the legislator protects – guarantees the civil servants' acquired rights in respect of their positions, salaries and remunerations pending a final decision of the Minister of Defense in respect of their status within the Ministry of Defense after the election procedure as provided for by Article 64 of the Law on Defense, assuming that the duration of the transitional period shall be limited. The challenged provision has not stipulated anything new, but quite the contrary, the existing situation has been maintained. *Status quo* in itself cannot be the source of a discriminatory relation. If there is a differentiation between salaries and remunerations, it has not been caused by the adoption of the Law on Defense and application of Article 62 paragraph 5 but earlier. Furthermore, the Constitutional Committee alleges that the excessive length of transitional period pending a final decision on the status of civil servants may jeopardize the principles on which the civil service is based. Effective actions and adoption of a final decision on the status of all employed persons would resolve the indicated problems which, once again, show that the text of Article 62 paragraph 5 of the Law on Defense is not the cause of the problem but an inherited situation and tardiness in implementation of Article 64 regulating the election procedure and Article 65 of the Law on Defense regulating decision-making procedure in respect of the status of civil servants.

IV. Relevant Law

10. The **Law on Defense of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* nos. 88/05 and 94/05)

Article 62 paragraphs 1, 3, 4 and 5

(1) With the exception of the provisions of Article 19 paragraph 4 and Article 32 (a) of the Law on Civil Service in the Institutions of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina nos. 19/02, 35/03, 14/04, 17/04, 26/04, 37/04, 48/05), all civil servants of the former Ministries of Defense of the Entities, whose status as civil servants was established in the procedure conducted by the competent Agencies of the Entities, shall become civil servants of the Ministry of Defense on 1 January 2006, and the Law on Civil Service in the Institutions of Bosnia and Herzegovina shall apply to them.

(3) On 1 January 2006 the employees of the former Ministries of Defense of the Entities shall become employees of the Ministry of Defense and the Law on Labor in the Institutions of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina nos. 26/04 and 7/05) shall apply to them.

(4) […] the civil servants and employees referred to in paragraphs 1 and 3 of this Article shall perform the same tasks and duties insofar as they are in accordance with the present Law pending a decision of the Minister in respect of their status following the election procedure prescribed by Article 64 of the present Law.

(5) […] the civil servants and employees referred to in paragraphs 1 and 3 of this Article shall have the same positions, salaries and remunerations pending a final decision of the Ministry of Defense in respect of their status in the Ministry of Defense following the election prescribed by Article 64 of the present Law.

Article 64 paragraphs 3 and 5

(3) The Election Commission shall have the responsibility to establish whether the civil servants and employees with the Ministry of Defense fulfill the requirements for continuation of employment with the Ministry of Defense as regulated by the applicable provisions and other requirements determined by the Minister of Defense and approved by the Council of Ministers of Bosnia and Herzegovina;

(5) The Election Commission shall propose all civil servants and employees of the Ministry of Defense, that have been transferred from the former Ministries of Defense of the Entities, and shall submit a report to the Minister of Defense for his/her consideration prior to taking a decision referred to in Articles 65 and 66 of the present Law.

Article 65

After the election procedure referred to in Article 64 of the present Law, the Minister of Defense shall take a decision on the status of all civil servants and employees of the Ministry of Defense in compliance with the report referred to in Article 64 paragraph 5 of the present Law.

Article 66

(1) The Minister of Defense shall draft a new Book of Rules on Internal Organization and shall submit it to the Council of Ministers of Bosnia and Herzegovina for approval within a time limit of 30 days from the date of entry into force of the present Law.

(2) Following the adoption of the Book of Rules referred to in paragraph 1 of the present Article, the Minister of Defense shall assign selected civil servants and employees to the determined work positions.

V. Admissibility

11. Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, so far as relevant, reads as follows:

1. The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

12. The Constitutional Court holds that the present request relates to an issue under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina as it relates to the review of constitutionality of Article 62 paragraph 5 of the Law on Defense, i.e. issue falling within the scope of competence of the Constitutional Court under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

13. Furthermore, the Constitutional Court established that the applicants (11) were members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time they lodged the request and that they constituted one-fourth of the members (42) of the House of Representatives. Therefore, they are authorized persons within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

14. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of the Constitutional Court, the Constitutional

Court concludes that the present request is admissible as it has been filed by the authorized persons and that there are no other formal reasons under Article 17(1) of the Rules of the Constitutional Court which would render the request inadmissible.

VI. Merits

15. The applicants filed the request in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. They claim that Article 62 paragraph 5 of the Law on Defense is incompatible with the Constitution of Bosnia and Herzegovina as its provisions are discriminatory because the civil servants formerly employed with the Ministry of Defense of the Republika Srpska and presently employed with the Ministry of Defense receive salaries and remuneration that are lower than the salaries and remunerations of other civil servants with the Ministry of Defense. The applicants raise the issue of violation of the right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in conjunction with 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 and Article 7 of the International Covenant on Economic, Social and Cultural Rights and Article 1 of Protocol No. 12 to the European Convention.

As to the discrimination in conjunction with the right to property

16. Article II(4) of the Constitution of Bosnia and Herzegovina reads as follows:

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.

17. Article 14 of the European Convention reads as follows:

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.

18. 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:

[...]

k) The right to property.

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

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.

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.

19. In considering whether there has been a violation of the right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in conjunction with 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 Constitutional Court must first examine whether the present case gives rise to „property" protected by the guarantees related to the „right to property".

20. According to the case-law of the European Court of Human Rights, the pay for work fall within the scope of protection under Article 1 of Protocol No. 1 of the European Convention (see ECHR, *Smokovitis and Others vs. Greece*, judgment of 11 April 2002, Application no. 46356/99, paragraph 32). The Constitutional Court has already concluded that the right to pay for work can be regarded as „possessions" within the meaning of Article 1 of Protocol No. 1 to the European Convention (see Decision of the Constitutional Court n*o. U 26/00*, paragraph 22, published in the *Official Gazette of Bosnia and Herzegovina* no. 8/02). However, this does not include the right to payment of a precisely determined amount. Furthermore, justified expectations that certain conditions will be applied and legitimate claims can be regarded as possessions.

21. In considering the issue relating to the right to salaries and remunerations of civil servants in the context of the challenged provision of Article 62 paragraph 5 of the Law on Defense, the Constitutional Court observes that the challenged Article provides that the civil servants shall become the civil servants of the Ministry of Defense and shall keep their positions, salaries and remunerations pending a final decision of the Minister of Defense in respect of their status within the Ministry of Defense after the election procedure prescribed by Article 64 of the Law on Defense. According to Article 62 paragraph 4 of the same Law, *the civil servants and employees (...) shall perform the same tasks and duties (...).*

22. Taking into account the present legislation, the challenged provision of Article 62 paragraph 5 of the Law on Defense, which provides that the civil servants shall keep their positions, salaries and remunerations pending a final decision of the Minister of Defense in respect of their status within the Ministry of Defense, guarantees the civil servants' acquired right to salary and remunerations they had while being employed with the Ministry of Defense of the Entity. Moreover, with exception of the challenged provision of Article 62 paragraph 5 of the Law on Defense, no other provision of the quoted Law regulates precisely the right to salary and remunerations of the civil servants (formerly employed with the Ministry of Defense of the Republika Srpska) who are presently employed with the Ministry of Defense. Therefore, the civil servants who shall keep their positions, salaries and remunerations in accordance with Article 62 paragraph 5 of the Law on Defense pending a final decision on their status of the Minister of Defense do not have legally constituted right to higher salary and remunerations than those they received according to the Entity regulations, which payment has not been questioned by the challenged law. Furthermore, they could not have had any „legitimate expectation" that their salaries and remunerations would be increased in the transitional period pending a final decision on their status since no law provision provides for it. It follows that the differentiation in the salaries and remunerations between the civil servants of the former Ministries of Defense of the Entities, whose status within the Ministry of Defense has not been resolved yet by a final decision and the civil servants whose status has been resolved by a final decision of the Minister of Defense does not constitute „possessions" within the meaning of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

23. Furthermore, the right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention is an accessory right. This implies that it has no independent existence since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by the Constitution of Bosnia and Herzegovina and European Convention. Although the application of Article 14 does not presuppose a breach of those provisions, there can be no room for its application unless the facts at issue fall within the ambit of a guaranteed right (see ECHR, *Karlheinz Schmidt vs. Germany,* judgment of 18 July 1994, Series A no. 291-B, paragraph 22).

24. As the Constitutional Court has already concluded that in the instant case there is no „possessions" that enjoys protection under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, there has been no violation of the right to non-discrimination relating to the enjoyment of this right.

General right to non-discrimination - Article 1 of Protocol No. 12 to the European Convention

25. Article 1 of Protocol No. 12 to the European Convention implies wider scope in respect of the principle of non-discrimination. On 29 July 2003, the State of Bosnia and Herzegovina ratified Protocol No. 12 to the European Convention, which secures the enjoyment of any right set forth by law without discrimination. This Protocol entered into force on 1 April 2005.

26. Article 1 of Protocol No. 12 reads as follows:

1. The enjoyment of any right set forth by law 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.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

27. It follows that the provisions of Protocol No. 12 guarantee the enjoyment of all rights provided by law without discrimination and provides precisely that no one shall be discriminated against by public authorities on any ground. The basic principle of non-discrimination is thereby extended to national laws and thus it is not limited to the rights guaranteed by the European Convention. The Constitutional Court reiterates that the provisions of Article 62 paragraph 5 of the Law on Defense protects the acquired rights of the civil servants who shall keep their positions, salaries and remunerations pending a final decision in respect of their status of the Ministry of Defense. The mere fact that Article 64 of the Law on Defense provides that it will be confirmed whether the civil servants fulfill the requirements for continuation of employment with the Ministry of Defense, prescribed by relevant regulations as well as other requirements determined by the Minister and approved by the Council of Ministers shows that there are no strong guarantees that all civil servants of the former Ministries of Defense of the Entities will fulfill those requirements. Namely, the Law on Defense provides for a possibility to establish following the procedure, whether civil servants and employees fulfill the requirements for continuation of employment with the Ministry of Defense. As stipulated by the Law on Defense, the State is obliged to provide implementation of applicable norms in order to allow for civil servants to resolve their employment status, which certainly represents a legitimate aim in the general interest. The civil servants and employees are not denied the right to salary by the Law on Defense, but quite the contrary,

the challenged provision protects the civil servants' acquired rights as to their positions and salaries, pending a final decision on their status. The Constitutional Court observes that the status of the civil servants formerly employed with the Ministries of Defense of the Entities is specific and that they belong to a specific category whose status as to their positions and salaries remains the same pending a decision on their final status, i.e. pending a decision on whether they fulfill legal requirements to continue being employed with the Ministry of Defense.

28. The Constitutional Court holds that the aim of the legislator was to regulate the rights of the civil servants from the Ministries of Defense of the Entities for a certain period of time by the challenged provision of Article 62 paragraph 5 of the Law on Defense and to protect in that way the guaranteed acquired rights of the civil servants as to their positions, salaries and remuneration pending a final decision on their status.

29. The Constitutional Court observes that the applicants are justifiably discontent with the excessive length of the period pending a final decision on their status, which, first of all, relates to the lack of a mechanism implementing the Law on Defense. It is true that the Law on Defense does not determine duration of the transitional period during which their status should be resolved and that a more effective action in terms of taking a final decision on the status of all employed persons would resolve the problems indicated by the applicants. However, it cannot be said that the challenged provisions do not pursue the legitimate aim, that they are not justified and that they represent an excessive burden put on the applicants, since the restriction is proportionate to the aim of the community in terms of preservation of the established defense system and creation of a single defense system in order to secure sovereignty, territorial integrity and international subjectivity of Bosnia and Herzegovina.

30. In the instant case, the aim of the Law on Defense is to establish a system of defense of Bosnia and Herzegovina which armed forces will be a professional force organized and controlled by Bosnia and Herzegovina so that it would be hard to deny the legitimacy of a norm that is necessary to attain a single defense system of Bosnia and Herzegovina.

31. This being so, the Constitutional Court concludes that the provisions of the challenged Article 62 paragraph 5 of the Law on Defense do not jeopardize the acquired rights of the civil servants, but indeed guarantee the enjoyment of the acquired rights in respect of the salaries and remunerations of the civil servants pending a final decision on their status of the Minister of Defense. Consequently, the Constitutional Court holds that the challenged provisions of Article 62 paragraph 5 of the Law on Defense are not discriminatory and that Article 1 of Protocol No.12 to the European Convention has not been violated.

Discrimination as to Article 7(i) of the International Covenant on Economic, Social and Cultural Rights

32. The applicants raise the issue of non-discrimination in respect of fair wages and equal remuneration for work as ensured by Article 7(i) of the International Covenant on Economic, Social and Cultural Rights.

Article 7(i) of the International Covenant on Economic, Social and Cultural Rights reads as follows:

The states parties to the present covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(i) fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

33. The Constitutional Court recalls that the right to work and the right to the enjoyment of favourable conditions of work are not guaranteed by the Constitution of Bosnia and Herzegovina nor by the European Convention which, according to Article II(2) of the Constitution of Bosnia and Herzegovina, is directly applied in Bosnia and Herzegovina. However, Annex I item 8 of the Constitution of Bosnia and Herzegovina provides for the Additional Human Rights Agreements to be applied in Bosnia and Herzegovina, including the International Covenant on Economic, Social and Cultural Rights (1996). Article 7 (i) of the Covenant guarantees the right to fair wages and remuneration for work. The enjoyment of that right is guaranteed by Article II(4) of the Constitution of Bosnia and Herzegovina which provides that 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.

34. The Constitutional Court reiterates that the provisions of Article 62 paragraph 5 of the Law on Defense protect the acquired rights of the civil servants as to their salaries and remunerations pending a final decision in respect of their status. The mere fact that provisions of Article 64 of the Law on Defense provides that it should be examined whether the civil servants fulfill the requirements for continuation of their employment with the Ministry of Defense as well as other criteria determined by the Minister and approved by the Council of Ministers of Bosnia and Herzegovina, indicates that there are no guarantees that all persons employed with the Entities' Ministries of Defense

will fulfill those requirements. Therefore, the Law on Defense provides that the State is obligated to ensure implementation of applicable norms to make it possible for the civil servants to resolve their labor status. Furthermore, the provisions of the Law on Defense do not deprive the civil servants of the right to salary and remunerations. On the contrary, the challenged provision of Article 62 paragraph 5 of the Law on Defense protects the rights that the civil servants acquired in respect to their position including certain salaries pending a final decision on their status. Moreover, none of the provisions of the Law on Defense, except the challenged provision of Article 62 paragraph 5 of the Law on Defense, regulates the issue of the right to salary and remunerations of the civil servants (formerly employed with the Ministry of Defense of the Republika Srpska) who became the employees of the Ministry of Defense.

35. This being so, the Constitutional Court concludes that the challenged provision of Article 62 paragraph 5 of the Law on Defense is not in violation of the right of the civil servants to non- discrimination in conjunction with Article 7 (i) of the International Covenant on Economic, Social and Cultural Rights.

VII. Conclusion

36. The Constitutional Court concludes that the challenged provision of Article 62 paragraph 5 of the Law on Defense is in compliance with the Constitution of Bosnia and Herzegovina as there has been no violation of the right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in conjunction with 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 and Article 7(i) of the International Covenant on Economic, Social and Cultural Rights and Article 1 of Protocol No. 12 to the European Convention.

37. Pursuant 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.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. U 1/08

DECISION
ON ADMISSIBILITY
AND MERITS

Request of Dr Milorad Živković, the Chairman of the House of Representatives of the Parliamentary Assembly of BiH, for a review of the constitutionality of Article 11, paragraph 6 of the Law on the Financing of Institutions of Bosnia and Herzegovina with Article VIII (2) of the Constitution of Bosnia and Herzegovina

Decision of 25 January 2008

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 63(2) and (3) 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 Hadžiosmanović, President

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Ms. Constance Grewe,

Mr. Krstan Simić

Having deliberated on the request of **Dr Milorad Živković**, **the Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina** in case no. **U 1/08**, at its session held on 25 January 2008 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request of Dr Milorad Živković, the Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina is partially granted.

It is established that Article 11, paragraph 6 of the Law on the Financing of Institutions of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 61/04), in its part that reads as follows: „If the Budget is not adopted by 31 March, no expenditures shall be approved after that day for any purpose other than paying unsettled debt until the budget is properly adopted" is inconsistent with Article VIII(2) of the Constitution of Bosnia and Herzegovina

Article 11 paragraph 6 of the Law on the Financing of Institutions of Bosnia and Herzegovina is quashed in part which is declared unconstitutional, in accordance with Article 63(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The provision of Article 11 paragraph 6 of the Law on the Financing of the Institutions of Bosnia and Herzegovina, in part which is declared unconstitutional, shall be rendered ineffective on the day following the day of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina* in accordance with Article 63(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The part of the applicant's request, relating to Article 11 paragraph 6 of the Law on the Financing of the Institutions of Bosnia and Herzegovina in the part that reads: „The Budget shall be adopted no later than 31 March each year", shall be 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*.

Reasons

I. Introduction

1. On 15 January 2008, Dr Milorad Živković, the Chair of the House of Representatives of the Parliamentary Assembly of BiH („the applicant") lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of conformity of Article 11, paragraph 6 of the Law on the Financing of Institutions of Bosnia and Herzegovina (*Official Gazette of BiH* no. 61/04) („the Law on the Financing of Institutions of BiH") with Article VIII(2) of the Constitution of Bosnia and Herzegovina. The applicant requested the Constitutional Court to act urgently, in accordance with Article 24(4) of the Rules of the Constitutional Court. Also, the applicant requested that the Constitutional Court, if unable to adopt a decision on the request under an expedited procedure, adopt an interim measure, whereby Article 6 paragraph 11 of the Law on the Financing of Institutions of BiH would be suspended.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 22 (1) of the Rules of the Constitutional Court, on 16 January 2008 the House of Representatives and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the Parliamentary Assembly of BiH") were requested to submit their responses to the request.

3. On 24 January 2008, the House of Representatives of the Parliamentary Assembly of BiH submitted its opinion in relation to the request.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the response to the request was submitted to the applicant.

5. At the request of the applicant and in accordance with Article 24(4) of the Rules of the Constitutional Court, the Constitutional Court decided to deliberate on the request in an expedited procedure, considering its nature. Pursuant to Article 93(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court has also taken a decision exempting Judge Seada Palavrić from sitting in the case, as she took part in the adoption of the law which is the subject of the request for review of constitutionality.

III. Request

6. The applicant alleges that Article 11 paragraph 6 of the Law on the Financing of Institutions of BiH is inconsistent with Article VIII(2) of the Constitution of Bosnia and Herzegovina for it is stipulated by the challenged provision that if the budget of Bosnia and Herzegovina is not adopted by 31 March „the expenditures shall not be approved for any purpose other than paying unsettled debt until the budget is properly adopted, after that day." The applicant alleges that even at first glance it is perfectly clear that the restrictive measure blocking expenditure, due to failure to adopt the Budget of Bosnia and Herzegovina within a specified time limit, is inconsistent with Article VIII of the Constitution of Bosnia and Herzegovina. Furthermore, the applicant alleges that the Constitution of Bosnia and Herzegovina also provides for a restrictive measure defined under Article VIII(2) prescribing the use of the budget from the previous year, and that „the framer of the Constitution was most probably guided by the fact that use of the budget from previous year, as a narrow frame, should have a sufficiently stimulating effect on all institutions participating in the process of adoption of the Law on Budget of Institutions of Bosnia and Herzegovina and International Obligations of Bosnia and Herzegovina to make them exert maximum efforts in complying with the deadlines for its adoption."

7. The applicant further alleges that the application of the challenged provision of Article 11 paragraph 6 of the Law on the Financing of Institutions of BiH, in case that the budget of Bosnia and Herzegovina is not adopted within a specified time-limit, „may lead to a blockage in the functioning of institutions of Bosnia and Herzegovina, in turn leading to chaos and many other detrimental unimaginable consequences". The applicant has also pointed out that „the adoption of the budget should be stimulated in the same manner as the restrictive measures which should be applied as a pressure on all involved in the process

of its adoption, but not in such a manner that the budget is placed outside the Constitution of BiH, that it is more important than Bosnia and Herzegovina itself, and that the fact of failure to adopt the budget may seriously jeopardize it. What kind of consequences would occur if the institutions of BiH have their electricity supply and heating system cut off, if they were to be without telephone lines and internet network connection, and if there should be no salaries for the employees of State Investigation and Protection Agency (SIPA), Intelligence Security Agency, State Border Service, Constitutional Court or other institutions? Some of the institutions would be left without office space for they could not afford it".

8. Having regard to the aforesaid, the applicant suggests that the Constitutional Court declares unconstitutional the provision of Article 11 paragraph 6 of the Law on the Financing of Institutions of Bosnia and Herzegovina and „orders the Parliamentary Assembly of Bosnia and Herzegovina to execute the decision of the Constitutional Court of Bosnia and Herzegovina within 30 days by adopting the Law on Amendments to the Law on the Financing of Institutions of Bosnia and Herzegovina wherein the challenged provision will be removed".

b) Reply to the Request

9. The opinion submitted by the House of Representatives of the Parliamentary Assembly read that the applicant's request was considered at the session of the Constitutional and Legal Committee of the House of Representatives of the Parliamentary Assembly („the Commission") held on 24 January 2008. Following the discussion, the Committee established that the House of Peoples adopted the Law on the Financing of Institutions of BiH on 23 November, and the House of Representatives did so on 2 December 2004 respectively. The opinion further reads that the Committee „by majority vote, with three votes „in favor", one „against" and two „abstaining", upheld the mentioned request. Three members of the Committee were not in attendance at the session during the vote casting." It is further stated that the chairman of the Committee Mr. Šefik Džaferović separated his opinion holding that the request should not be upheld, as well as that a member of the Committee Mr. Halid Genjac approached subsequently asking that „his opinion be separated, because he held that the Constitutional and Legal Committee should not uphold similar requests or do otherwise but only state facts in respect of the adopted law".

IV. Relevant Law

10. In the **Law on the Financing of Institutions of BiH** (*Official Gazette of BiH* no. 61/04), the relevant provisions read as follows:

Article 10

[...]

(3) The Parliamentary Assembly of Bosnia and Herzegovina shall consider the Proposal for the Budget which is submitted by the Presidency of Bosnia and Herzegovina and, pursuant to its Rules of Procedure, shall adopt the Law on Budget by 31 December of the current year in accordance with the approved budget for that year.

Article 11

(1) If the Parliamentary Assembly of Bosnia and Herzegovina does not adopt a Budget Law before the beginning of fiscal year, the financing shall be temporary until such law comes into force.

(2) For the purpose of conducting the activities of legally defined budget users and fulfilling the international financial obligations of Bosnia and Herzegovina, temporary financing shall be provided in proportion to the funds spent during the three months average period for the last fiscal year.

[...]

(6) The Budget shall be adopted no later than 31 March each year. If the Budget is not adopted by 31 March, no expenditures shall be approved after that day for any purpose other than paying unsettled debt until the budget is properly adopted.

V. Admissibility

11. The Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina lodged the request for review of constitutionality, which means that the request was submitted by an authorized person under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. The subject of request is a review of constitutionality of the challenged provision of the Law on the Financing of Institutions of Bosnia and Herzegovina, passed by the Parliamentary Assembly of BiH. The Constitutional Court is authorized to resolve this matter in accordance with Article VI(3)(a)(2) of the Constitution of Bosnia and Herzegovina.

12. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of Constitutional Court, the Constitutional Court found that the request is admissible for it was submitted by an authorized person and that there is no a single reason under Article 17(1) of the Rules of the Constitutional Court that would render the request inadmissible.

VI. Merits

13. The applicant alleges that the challenged provision of Article 11 paragraph 6 of the Law on the Financing of Institutions of BiH is inconsistent with Article VIII of the Constitution of Bosnia and Herzegovina.

14. The **Constitution of Bosnia and Herzegovina** reads as relevant:

Article VIII
Finances

1. The Parliamentary Assembly shall each year, on the proposal of the Presidency, adopt a budget covering the expenditures required to carry out the responsibilities of institutions of Bosnia and Herzegovina and the international obligations of Bosnia and Herzegovina.

2. If no such budget is adopted in due time, the budget for the previous year shall be used on a provisional basis.

3. The Federation shall provide two-thirds, and the Republika Srpska one-third, of the revenues required by the budget, except insofar as revenues are raised as specified by the Parliamentary Assembly.

15. According to the contemporary meaning of the Constitution, it is the highest and fundamental legal act of a state, whereby political and legal system is established, and therefore all acts and actions of public authorities and citizens must be in compliance with it. The Constitution and the laws adopted on its basis must provide for the establishment of effective public authorities in the public interest, but at the same time these laws must impose limitations on public authorities so as to prevent abuses. Therefore, it is necessary to establish a balance between the conflicting demands for this kind of limited but effective authority. Every state body is limited in its legal functioning: a legislative body must comply with the constitution and executive and judicial authorities must comply with the constitution and law. The constitutional norms are interpreted and adjusted to the necessities of life at every level of their implementation, and foremost in the stage of elaboration of legislation, with due respect for the principle of constitutionality. The principle of constitutionality does not imply only a requirement for the laws to be passed by a competent legislative body in accordance with the set procedure, but it also means a requirement for the laws and other regulations to be in compliance with the provisions of the constitution in substantive terms. Only the acts that meet these requirements can satisfy the principle of constitutionality in both the formal and substantive meaning. Substantive unconstitutionality is, *inter alia*, related to inconsistency of law provisions

with the provisions of the constitution in terms of their contents, irrespective of whether it concerns immediate contradiction (*contra constitutionem*) or regulating relations contrary to the meaning of constitutional provisions (*praeter constitutionem*).

16. In the instant case, the applicant does not challenge the formal constitutionality of the Law on the Financing of Institutions of BIH, but rather points to the unconstitutionality of the challenged provision in this law in terms of its substance, stating that the challenged provision of the said law is „manifestly unconstitutional". In essence, the applicant considers that the challenged provision is unconstitutional since the legislator prescribed a time limit within which the budget must be adopted for the current fiscal year and after the expiry of that deadline no expenditures shall be approved for any purpose „other than paying unsettled debt until the budget is properly adopted". The Constitutional Court considers that in the instant case the issue is not a direct or, as alleged by the applicant, „a manifest" unconstitutionality, since the Law on the Financing of Institutions of BiH further elaborated the constitutional provision on temporary financing in case that the budget is not adopted in a timely manner. However, the Constitutional Court is of the opinion that it is necessary to examine whether the challenged law provision is inconsistent with the meaning of the constitutional provision under Article VIII(2) of the Constitution of Bosnia and Herzegovina.

17. The Constitutional Court notes that the Constitution of Bosnia and Herzegovina gave a clear responsibility to the Parliamentary Assembly to adopt the budget to cover the expenditures required for carrying out the responsibilities of the institutions of Bosnia and Herzegovina and fulfilling its international obligations. Furthermore, the Constitution also provided for an arrangement in case the state budget is not adopted in a timely manner: the budget for the previous year shall then be used on a provisional basis. The Constitutional Court considers that the rationale for this constitutional arrangement is aimed at ensuring a regular and smooth functioning of the state, i.e. of the state institutions in case that, for some reason, the budget is not adopted in due time. Moreover, the Constitutional Court observes that Article VIII(2) of the Constitution of Bosnia and Herzegovina is a constitutional principle by its nature, for it precisely defines the notion of „timely" and „on a provisional basis". This is definitely for the reason that the state legislator is given a power, in accordance with its constitutional responsibilities and obligations, to regulate these issues in more detail by a relevant law, observing the said constitutional provision.

18. Acting in accordance with its responsibilities, the Parliamentary Assembly of BiH stipulated, in Article 10 of the Law on the Financing of Institutions of BiH, that it should consider the draft budget which is to be proposed by the Presidency of BiH and that it should adopt the Law on Budget by 31 December of the current fiscal year. The

Constitutional Court considers that in this way the constitutional notion of „timeliness" has been worked out in detail by the law. As for the constitutional notion „on a provisional basis", the legislator further elaborated on this constitutional notion stipulating that, if the Law on Budget is not adopted before the beginning of a new fiscal year, the financing will be carried on a provisional basis until such law enters into force, no later than March 31st, by which date the Law on Budget must be adopted. In order to ensure the compliance with this provision, the legislator set down a rule, as a kind of a restrictive measure, that upon the expiry of the specified time-limit no expenditures will be approved for any purpose other than paying unsettled debt.

19. In considering the question as to whether this legal provision is contrary to the meaning of Article VIII of the Constitution of Bosnia and Herzegovina, the Constitutional Court first and foremost observes that the Constitution of Bosnia and Herzegovina lays down basic constitutional principles and goals for the functioning of Bosnia and Herzegovina, *inter alia*, through discharging competencies and commitments of the state institutions. A positive constitutional obligation of Bosnia and Herzegovina and its competent authorities arises therefrom, and that is to create a necessary legal framework specifying constitutional obligations. One of those obligations, without which it would be practically impossible to discharge jurisdiction of the state, i.e. of its institutions, effectively is the adoption of budget for each fiscal year. In that respect, as aforesaid, the BiH Constitution lays down only basic constitutional principles, which the legislator is obliged to elaborate.

20. In the present case, the Constitutional Court deems that the legislator did not act inconsistent with the BiH Constitution in specifying by law the general constitutional provision on temporary funding of the state institutions in the event the adoption of the budget is untimely, by defining the deadline for such temporary situation. Namely, as mentioned above, rationale of the provision of Article VIII(2) of the Constitution of Bosnia and Herzegovina is to ensure unhindered functioning of the state and its institutions, whereby temporary funding was possible for a specified period of time only, during which the competent institutions have the obligation to work more intensively and efficiently on adopting the budget. However, the Constitutional Court holds that the purpose of such provision is in no way for the temporary situation to last indefinitely. Such interpretation would bring into question effective functioning of the state and its institutions. As aforesaid, the Constitution, and laws enacted on its grounds, must facilitate the constitutional and effective functioning of public authorities.

21. Therefore, the Constitutional Court considers that the legislator may introduce time constraints in respect of the period during which temporary funding may be in place and during which the budget must be adopted, the goal of which is to discharge competencies

of the BiH institutions effectively. Therefore, the challenged provision of Article 11 paragraph 6 of the Law on the Financing of Institutions of BiH in the part reading „the budget must be adopted no later than 31 March of each year" is not inconsistent with Article VIII(2) of the Constitution of Bosnia and Herzegovina.

22. On the other hand, the Constitutional Court observes that, by the disputed provision of Article 11 paragraph 6 of the Law on the Financing of Institutions of Bosnia and Herzegovina, the legislator stipulates a sort of sanction in the event the budget is not adopted within the timeframe given subsequently. In that respect, the applicant points to actual problems and consequences that could set in if the budget is not adopted by 31 March 2008. However, in reviewing the constitutionality of some law or a provision of a certain law, the task of the Constitutional Court is to conduct that review *in abstracto* regardless of any particular case. Therefore, the Constitutional Court shall review the issue of constitutionality of the disputed legal solution in general terms.

23. Bearing in mind the aforesaid, the Constitutional Court considers that the legislator in no uncertain terms has authority and competence to envisage and prescribe the manner of conduct in the event that the budget is not adopted upon the expiry of deadline stipulated for temporary funding. However, measures stipulated by the legislator in such a case cannot be such as to completely obstruct the functioning of the state, i.e. its institutions, as that would be contrary to the goals, purpose and spirit of the Constitution of Bosnia and Herzegovina. A possibility of temporary funding specified in Article VIII(2) of the Constitution of Bosnia and Herzegovina was stipulated, particularly aiming at the effective functioning of the state and its institutions and not at completely obstructing them. Therefore, this provision may in no way be interpreted as granting authority to the legislator to hinder by law any operation of state institutions, regardless of the issue at hand. On the contrary, the purpose of such constitutional provision is to leave lots of room to the legislator to seek out the best solutions to ensure effective functioning of the state. The Constitutional Court shall not consider the issue as to which measures the legislator should choose as most efficient, as that is exclusively the task of the competent legislator. However, the Constitutional Court points out that the legislator has responsibility to take appropriate legislative measures urgently in order to solve the issue of adopting a budget and temporary funding in accordance with the Constitution of Bosnia and Herzegovina, as reasoned in this decision, and in the manner not leading to possible obstruction of the functioning of the institutions of the state of Bosnia and Herzegovina.

24. In view of the abovementioned, the Constitutional Court is of opinion that provision of Article 11 paragraph 6 of the Law on the Financing of Institutions of Bosnia and Herzegovina in the part that reads: „If the Budget is not adopted by 31 March, no

expenditures shall be approved after that day for any purpose other than paying unsettled debt until the budget is properly adopted" is not in conformity with Article VIII (2) of the Constitution of Bosnia and Herzegovina.

VII. Conclusion

25. The Constitutional Court concludes that the legislator has the authority, to specify a deadline, for the sake of efficient functioning of the state, within which a budget must be adopted, and during which temporary funding may be in place. In addition, measures stipulated by the legislator, in the event the deadline is not observed, must not entirely hinder the discharge of competencies of the state institutions, as that would prove contrary to the goal and spirit of the Constitution of Bosnia and Herzegovina. Therefore, the Constitutional Court concludes that the disputed provision of Article 11 paragraph 6 of the Law on the Financing of Institutions of BiH, in the part reading „the budget must be adopted no later than March 31st of each year" is consistent with Article VIII(2) of the Constitution of Bosnia and Herzegovina. However, in the part reading „if the Budget is not adopted by March 31st, no expenditures shall be approved after that day for any purpose other than paying unsettled debt until the budget is properly adopted", the challenged provision is not in conformity with Article VIII(2) of the Constitution of Bosnia and Herzegovina, for the reason that this measure entirely hinders the carrying out of competencies of the state institutions after the said date.

26. Given the decision on merits in this case, the Constitutional Court is of an opinion that there are no grounds to review the proposal of the applicant for an interim measure.

27. Pursuant to Article 61(1) and (2) and Article 63(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

28. In view of Article VI(4) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. U 13/06

**DECISION
ON ADMISSIBILITY
AND MERITS**

Request of Mr. Nikola Špirić, the Deputy Chairmen of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing a request, for a review of the constitutionality of Article 1, paragraphs 2 and 3, Article 4, Articles 5 through 21, Article 27 and Article 28 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings

Decision of 28 March 2008

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 17(1)(6) and Article 59(2)(2), Article 61(1) and (3) and Article 65(1)(4) 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 Hadžiosmanović, 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

Mr. Krstan Simić

Having deliberated on the request of **Mr. Nikola Špirić, the Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging a request,** in case no. **U 13/06**, at its session held on 28 March 2008 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request of Mr. Nikola Špirić, the Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging a request, for review of constitutionality of Articles 4 and 28 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings (*Official Gazette of Bosnia and Herzegovina* nos. 28/06, 76/06 and 72/07) is dismissed as ill-founded.

It is established that Article 4 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings (*Official Gazette of Bosnia and Herzegovina* nos. 28/06, 76/06 and 72/07) is consistent with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of the Protocol

no. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

It is established that Article 28 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings (*Official Gazette of Bosnia and Herzegovina* nos. 28/06, 76/06 and 72/07) is consistent with 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 proceedings initiated by the request of Mr. Nikola Špirić, the Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging a request, for review of constitutionality of Articles 5 through 21 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings (*Official Gazette of Bosnia and Herzegovina* nos. 28/06, 76/06 and 72/07) is hereby terminated on the grounds that it would serve no purpose to conduct further proceedings.

The request of Mr. Nikola Špirić, the Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing a request, for review of constitutionality of Article 1 paragraphs 2 and 3 and Article 27 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings (*Official Gazette of Bosnia and Herzegovina* nos. 28/06, 76/06 and 72/07) is rejected on the ground that the legal circumstances have changed.

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*.

Reasons

I. Introduction

1. On 31 May 2006, Nikola Špirić, the Deputy Chair of the House of Representatives of the Parliamentary Assembly of BiH at the time of lodging a request („the applicant"), lodging a request with the Constitutional Court of Bosnia and Herzegovina („the

Constitutional Court") for review of constitutionality of Article 1, paragraphs 2 and 3, Article 4, Articles 5 through 21, Article 27 and Article 28 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings (*Official Gazette of Bosnia and Herzegovina* nos. 28/06, 76/06 and 72/07), („the challenged Law").

II. Proceedings before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 13 August 2007, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina („the House of Representatives") and House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the House of Peoples) were requested to submit their replies to the request, while the Ministry of Finance and Treasury of Bosnia and Herzegovina („the Ministry of Finance") was requested on 25 February 2008 to submit its reply to the request.

3. On 6 September 2007, the House of Representatives submitted its reply to the request. The Ministry of Finance submitted its reply on 4 March 2008 while the House of Peoples failed to submit it reply.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply to the request was communicated to the applicant on 4 March 2008.

5. Given the fact that the Parliamentary Assembly, after the submission of the request in question, passed the Law on Amendments to the Law on Settlement of Debts Arising from Old Foreign Currency Savings (*Official Gazette of BiH* no. 76/06) and the Law on Amendments to the Law on Settlement of Debts Arising from Old Foreign Currency Savings (*Official Gazette of BiH* no. 72/07), on 5 February 2008, the Constitutional Court requested from the applicant to give his opinion about the changed legal circumstances. The applicant failed to give his opinion within a specified time limit of 15 days.

III. Request

a) Allegations stated in the request

6. The applicant alleges that Article 1, paragraphs 2 and 3 of the challenged Law, is inconsistent with Article III(1)(e) of the Constitution of Bosnia and Herzegovina, whereby it is stipulated that finances for the international obligations of Bosnia and Herzegovina shall be within the exclusive responsibility of Bosnia and Herzegovina. Furthermore, it is stated that Article 4 of the challenged Law is inconsistent with the Constitution of Bosnia and Herzegovina because „the interest accrued in accordance with previous agreements

falls within the scope of acquired rights of the holders of old foreign currency savings accounts and cancellation of the said interest would constitute a violation of international obligations of Bosnia and Herzegovina". The applicant deems Articles 5 through 21 of the challenged Law, which provide for the verification process, disputable considering that in that manner the property rights of holders of old foreign currency savings have been directly violated. The applicant deems disputable the providing for verification process because „everywhere in the world the foreign currency savings are to be proved either by savings book or by the statement obtained from the bank based on the holder's savings account and this system exists because the holder of the account has placed his money in the bank and not because the state has recognized his right after the conducted administrative procedure, which, in fact, is what the verification process is all about". With reference to Article 17 of the challenged Law, the applicant states that the mentioned provision leads to a conclusion that by failing to comply with the specified time-limit for verification one will lose his/her right to the savings, which also constitutes a violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina. Finally, the applicant is of the opinion that Articles 27 and 28 of the challenged Law are inconsistent with the Constitution of Bosnia and Herzegovina for he considers that by stipulating that the enforceable court judgments would become invalid and the court proceedings terminated also constitutes a direct violation of the 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 („European Convention") and the right to an effective legal remedy.

b) Reply to the Request

7. The House of Representatives stated that it remains supportive of the challenged law and advised the Constitutional Court that the Draft Law on Amendments to the Law on Settlement of Debts Arising from Old Foreign Currency Savings was adopted on 31 July 2007 and that the Draft will be considered by the House of Peoples.

8. The Ministry of Finance, as a party proposing the Law, stated that Article 1 of the challenged Law was amended, so it is regulated that Bosnia and Herzegovina shall take part in the provision of funds from the resources placed at its disposal after the succession of the former SFRY, as well as from other available resources in accordance with the decision of the Council of Ministers of Bosnia and Herzegovina. Further, as to Article 4 of the challenged Law, the Ministry of Finance presented an opinion that such kind of restriction of property rights is in accordance with the public interest, in other words that the interest write-off is justified and in this regard it was referred to the opinion of the

Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina („the Human Rights Commission”) presented in its Decision on Admissibility and Merits, CH/98/375, *Đorđe Besarović and Others*. As to the verification process, it is replied that the verification is a necessary procedure for identifying the claimants, verifying the amounts and registering all the claims arising from the old foreign currency savings, whereby the existing relations shall be verified and not redefined or terminated. It is also stated that pursuant to the stand-point of the Human Rights Commission, the authority has been vested in the Entities and Brčko District to pass enforceable legislation on verification process. It is said in the reply that by the latest amendments to the challenged law, the time limit for verification has been extended. And lastly, it is stated that Article 27 of the challenged Law was amended in the context of the judgment of the European Court of Human Rights in case AP no. 41183/02, *Ruža Jeličić* (*Official Gazette of BiH* no. 20/07).

IV. Relevant Law

9. The provisions of the challenged Law, which are the subject of review with respect to their compatibility with the Constitution of Bosnia and Herzegovina and European Convention, read as follows:

Article 1, paragraphs 2 and 3

2) Bosnia and Herzegovina shall be held responsible for settling the Debts arising from the old foreign currency savings, whereas the funds shall be provided by the Federation of Bosnia and Herzegovina, Republika Srpska (hereinafter: „the Entities”) and Brčko District of Bosnia and Herzegovina (hereinafter: „the District”).

3) The provision of funds, as referred to in paragraph (2) of this Article, shall depend on the location of each deposit in the bank, its branch offices or its lowest-level units that were operating in the territory of Entities and District in which the foreign currency savings were deposited.

Article 4

Any interest accrued after 1 January 1992 but not paid shall be cancelled. Interest for the period between 1 January 1992 and the entry into force of this Law shall be calculated afresh at an annual rate of 0.5%.

Article 5

The fulfillment of Debts arising from the old foreign-currency savings, if not verified in accordance with this Law and enforceable laws of Entities and District, can be requested only in court proceedings.

Article 6
(Verification of claims)

(1) Verification of claims is a necessary procedure for identifying the claimants, checking the amount of old foreign currency savings of each claimant, as well as for registering all the claims arising from old foreign currency savings, whereby the existing rights shall be verified and not redefined or terminated.

(2) Following the verification process, each claimant shall be provided with a certificate which identifies him or her and the amount of his or her old foreign-currency savings.

(3) The certificate referred to in paragraph 2 of this Article, which serves as a basis for settlement of claims arising from old foreign currency savings and is printed on a form prescribed by the Entitles and District, shall include, inter alia, the following:

a) each individual account and verified amount

b) owner's identity

c) claimant's statement on waving any legal action following cash payment

d) name of the bank and account number on which the cash payment shall be made including the payments made on the basis of issued bonds under Article 18 of this Law.

(4) If the claimant has several accounts, all accounts shall be individually verified and the amounts shall be summed in order to calculate the cash payment and amounts of bonds issued in accordance with this Law. Each individual claimant shall receive only one verification certificate.

(5) Verification of foreign currency deposits for each savings depositor shall be done cumulatively in regards to deposited savings with one or several banks that had their main seat in the territory of Entities and District.

Article 7
(Verification Agencies)

(1) Verification of old foreign currency savings accounts, as defined by the decisions of Entity Governments and District Assembly, shall be conducted by:

a) Agency for Intermediary, Informatics and Financial Services A.D. Banja Luka – for the District area;

b) Agency for Intermediary, Informatics and Financial Services A.D. Banja Luka – for the area of Republika Srpska;

c) Agency for Intermediary, Informatics and Financial Services A.D. Sarajevo – for the area of Federation of Bosnia and Herzegovina;

d) Agency for Intermediary, Informatics and Financial Services Mostar – for the area of Federation of Bosnia and Herzegovina (hereinafter: „the Agencies”).

(2) Within 15 days as from the day of entry into force of the Law, the Agencies shall exchange the data bases concerning all the deposits arising from old foreign currency savings to be settle in another Entity or District, as defined by the Law.

Article 8
(Debts of Banks)

(1) With reference to the process of verification of old foreign currency savings, the banks shall undertake to cooperate with the respective Entity Ministries of Finance, the District Revenue Administration, the Agencies and the commissions.

(2) In the verification process, the banks shall be obliged to check their data bases and to make them available to the Verification Agencies and they shall be also obliged to prepare two separate statements of recorded interest covering the period until 31 December 1991 and the period following 31 December 1991.

Article 9
(Public Invitation)

(1) As a part of the process of verification of old foreign currency savings, the Entity Ministries of Finance and District Revenue Administration shall publish public invitation for verification of old foreign currency savings in at least to daily newspapers covering the whole territory of Bosnia and Herzegovina, as well as on the Internet and this invitation shall be published for at least three times until the expiry of the determined time limit for submission of applications for verification.

(2) The first invitation for verification shall be published within 15 days from the day of entry into force of this Law, and then it will be published every two months until the expiry of the time limit for submission of application for verification.

(2) The Minister of Foreign Affairs of Bosnia and Herzegovina shall also forward the invitations for verification of old foreign currency savings to all embassies and consulate offices of Bosnia and Herzegovina with instructions of publishing the invitations in the relevant countries.

Article 10
(Debts of Agencies)

In the process of verification of old foreign currency savings, the Agencies shall be obliged to:

a) conduct verification of old foreign currency savings in accordance with this Law

b) issue to every claimant a certificate on the received application for verification and documents under Article 12 of this Law (hereinafter: the application);

c) establish, regularly update and maintain the Register of old foreign currency savings accounts (hereinafter: „the Register”) for each claimant, including the data on the status of verified accounts of old foreign currency savings after writing off the interest, the amount of interest that was written-off, transaction prior to completion of verification process, as well as to maintain all bank information necessary for settlement of claims in accordance with this Law;

d) draft and implement necessary security procedures for data protection and ensuring of data integrity in the Register;

e) ensure establishment of a special data base of old foreign currency savings according to branch offices and organizational units that existed in the territory of Entities and District, wherein all the claimants and amounts of claims shall be recorded.

f) establish a data base of all disputed claims;

g) issue a certificate of verification referred to in Article 6 of this Law;

h) after conducted verification in accordance with this Law, the foreign currency savings book shall be verified with a special stamp;

i) update the respective Ministries of Finance and District Revenue Administration on the conducted verification

j) establish an archive on the conducted verification of old foreign currency savings; and

k) perform other tasks in accordance with this Law and other individual agreements concluded with the Entity Ministries of Finance and Mayor of District.

CHAPTER II - PROCEDURE FOR SUBMISSION OF APPLICATIONS

Article 11
(Location of submission of application)

A claimant shall submit, in person or through his/her authorized representative, an application for verification of his/her foreign currency savings directly in any business unit of the relevant agencies located in the places of the bank branch offices or the bank lowest-level operational units in the Entities or District where the old foreign currency savings were deposited.

Article 12
(Documents to be attached to application)

(1) For the purpose of verification of old foreign currency savings, the claimant of old foreign currency savings shall, in person or through his/her authorized representative, submit the following documents to the Agencies:

a) application for verification of old foreign currency savings

b) claimant's original foreign currency savings book or other original bank documentation, contract or the bank card based on which the account of old foreign currency savings was opened;

c) a legally binding judicial decision on inheritance provided that the foreign currency savings is acquired through inheritance;

d) claimant's identity card or passport

e) birth certificate for a minor claimant;

f) letter of authorization certified by the competent body in cases where an authorized person acts on behalf of the claimant

g) identity card or passport of authorized person

h) valid gift agreement if the old foreign currency savings account is given to another person as a gift, and

i) all other documents that can assist verification process including receipts, invoices or any other documents proving the amount or ownership of old foreign currency savings.

(2) If an original foreign currency savings book was lost or destroyed or if the claimant does not posses any or several documents under paragraph (1) of this Article, the claimant shall be entitled to submit an application for verification and other documents or evidence to prove his/her right to foreign currency savings.

(3) Application for verification of old foreign currency savings shall be submitted on a form prescribed by the enforceable laws of Entities and District.

Article 13
(Identity of claimant)

The application for verification to be submitted to the Agencies shall be supplemented by the documents identifying the claimant in a satisfactory manner:

a) In case of account user's death, the claims arising from the old foreign currency savings may be inherited and proved by submission of legally binding court decision on inheritance

b) If the foreign currency savings account was given as a gift to another person, the claims shall be proved by submission of valid gift agreement; and

c) If an authorized person acts on behalf of the claimant or if he/she takes over the cash payment on behalf of the claimant, the original certified letter of attorney shall be submitted to the Agencies which will keep it.

CHAPTER III – AGENCY VERIFICATION OF CLAIMS

Article 14
(Receipt of applications)

(1) The claimant shall submit an application for verification of old foreign currency savings within a time-limit specified under Article 17 of this Law and he/she shall also summit his/her original documents and foreign currency savings book.

(2) The Agencies shall register applications and assign a single identification number to each application, then they shall certify the application for verification and the claimant shall be provided with certified copy of application for verification. The certified copy of application for verification shall constitute a proof that the application has been submitted.

(3) With the exception of foreign currency savings books and documents under Article 12 of the Law, all original documents shall be copied by the Agencies and returned to the claimant at the time of submission of application for verification. The Agencies may keep the foreign currency savings book until the completion of the verification process. The claimant shall be entitled to submit a certified copy of the entire foreign currency savings book to the Agencies and retain the original foreign currency savings book.

(4) Upon the completion of verification process, in cases where the claim has been approved, the certificate on verification under Article 6 of the Law shall be issued by the Agencies and foreign currency savings book shall be certified and returned to the claimant.

Article 15
(Verification process)

(1) Upon submission of application, the Agencies shall conduct a timely inspection of reliability of data provided in the documents submitted by the claimant in accordance with Article 12 of the Law.

(2) The Agencies shall conduct verification of each individual application by way of making the comparison, wherever it is possible, with the information obtained by the banks

in accordance with Article 8 of the Law. Should it be impossible to verify the application in the data base, the Agencies shall conduct verification on the basis of documents submitted in accordance with Article 12 of the Law.

(3) If the Agencies establish that some data are missing or that a document is missing based on which the actual balance of foreign currency savings is to be undoubtedly established, the Agencies shall request in writing that the claimant or an authorized person submit additional information or documents within 30 days, but no later than the time limit for submission of application for verification under Article 17 of the Law.

(4) If the Agencies do not receive the requested data or documents within the specified time limit or if it is not possible to establish the identity of claimant based on the received data or document or if it is not possible to conduct the verification of the amount claimed on the basis of old foreign currency savings, the Agencies shall reject the application for verification.

(5) Following the process of verification of each individual claim, the Agencies shall inform the claimant on whether his/her application was approved or rejected.

(6) The claimants shall be permitted to appeal against the Agencies' decisions and the appeals shall be filed with the Commission for verification of old foreign currency savings (hereinafter: „the Commission") as a second-instance body in charge of the verification process in the Entities and District. The decisions of the Commission shall be final and binding and no appeal shall be permitted against its decisions, but it shall be permitted to pursue an administrative dispute before the competent court against the second-instance decision.

(7) In resolving the issues arising from the process of verification of old foreign currency savings, the Agencies and the Commission shall apply the laws on administrative procedure of the Entities and District.

Article 16
(Commission for verification of old foreign currency savings)

There shall be at least one commission established in each Entity and District. The commission shall consist of five members to be appointed by the Entity Governments and District Assembly. Minimum one member of the Commission shall be from the Entity Ministry of Finance and District Revenue Administration respectively, one shall be from the Entity Ministry of Justice and District Legal Office respectively, and the remaining three members shall be appointed in accordance with the decision of Entity Governments and District Assembly. The Entity Governments and District Assembly may appoint additional commissions depending on the number of submitted applications.

Article 17
(Time limits)

(1) The time limit for submission of application for verification of old foreign currency savings shall be six months from the day of entry into force of the Law and the Agencies shall undertake to complete the verification process within nine months from the day of the Law coming into force.

(2) The verification completed until the day of the Law coming into force shall be accepted as valid verification within the meaning of this Law.

Article 18
(Cash payment)

(1) During each of 60 days designated for verification, the Entities and District shall be publishing announcements with identification number of each individual application that has been approved and ready for cash payment and the announcements shall be published in the official gazettes and two daily newspapers.

(2) If the verification of individual applications is completed and the claimant accepts the amount determined in the verification process, the claimant shall sign a verification certificate. Following the claimant's signing of statement waiving the right to appeal, a maximum of 100 KM, or the total savings up to the amount of 100 KM, shall be paid. Upon the completion of verification process the Agencies shall make the lists of all verified applications and their respective amounts.

(3) Furthermore, by the end of 2007 a maximum of 1,000 KM, or the total amount of savings up to 1,000 KM shall be paid to each individual claimant recorded in the Register upon his/her submission of verification certificate and the said amount also includes the amount paid in accordance with paragraph (2) of the Law. The remaining amount shall be reimbursed in State bonds in accordance with this Law. The payments made up to the amount of 1,000 KM shall be recorded by the Agencies in the verification certificate and that the rest of unpaid claims shall be settled in bonds. The claimant shall submit the bank particulars (bank name and bank account number) to the Agencies and the said data shall be entered in the verification certificate and Agencies' registers.

(4) The cash payments under paragraph (2) and (3) of the Article shall be made in accordance with the procedure envisaged by the enforceable laws of Entities and District.

(5) The amount of liabilities arising from the old foreign currency savings that has never been re-calculated shall be converted in KM in accordance with the official exchange rate of the Central Bank of Bosnia and Herzegovina (hereinafter: „the Central

Bank") on the day of entry into force of this Law. The date of re-calculation shall be taken as a date of conversion of already re-calculated amount of old foreign currency savings.

Article 19
(Verified claims)

(1) The Agencies shall record the amount of old foreign currency savings verified in the Register.

(2) The Agencies shall issue to each claimant the certificate on verification.

(3) Upon the completion of verification process, the amount of foreign currency savings, verified in accordance with this Law, shall be reduced by the portion of liability which is settled by the cash payment and this shall be recorded in the Register and in the verification certificate under paragraph (2) of this Article.

Article 20
(Disputed claims)

(1) The Agencies shall also undertake to maintain the register of disputed claims including the claims which have been forwarded to the commissions as disputed, as well as all cases pending before the courts of law. The list also includes the data on identification of persons claming old foreign currency savings, identification of information about the accounts on which the savings have been deposited and the amount of deposit.

(2) Upon the adoption of final judicial decision, the Commission shall deliver a copy of its decision to the Agencies. Thereafter, the procedure laid down in the provisions of Article 18 of this Law shall apply.

(3) After the decision on disputed claims becomes legally binding and enforceable, the claimant shall attach this decision to the application for verification and submit it to the Agencies within 15 days for the purpose of settlement in accordance with this Law.

(4) Should the verification process be completed before the judicial decision becomes enforceable, the claimant shall submit the final judicial decision to the relevant Entity Ministry of Finance or to the District Revenue Administration for verification and settlement in accordance with this Law.

Article 27

(1) Enforcement of judicial judgments in the possession of creditors concerning their old foreign currency savings shall also be subject to verification with the aim of registering the claims which will be proved by submission of enforceable judicial judgments.

(2) The creditors shall undertake to submit judicial decisions to the Agencies together with their applications for verification. The provisions of this Law regulating the issues of written-off interest, cash payments and issuance of bonds shall also apply.

Article 28

*As to the cases pending legally binding decisions on the day of entry into force of this Law, the competent courts shall refer them ex officio to the verification process in order to be settled in accordance with this Law***.**

10. The **Law on Amendments to the Law on Settlement of Debts Arising from Old Foreign Currency Savings** (*Official Gazette of BiH no. 76/06*) entered into force on 15 September 2006 and, as relevant, reads:

Article 1

Line c) shall be deleted in Article 6, paragraph 3 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings (Official Gazette of BiH no. 28/06).

11. The **Law on Amendments to the Law on Settlement of Debts Arising from Old Foreign Currency Savings** (*Official Gazette of BiH no. 72/07*) entered into force on 27 September 2007 and, as relevant, reads:

Article 1

In Article 1, after paragraph 2 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings (Official Gazette of BiH nos. 28/06 and 76/06), new paragraphs (3) and (4) shall be added to read as follows:

3) Provision of funds for unimpeded settlement of Debts arising from the old foreign currency savings shall not be subject to reallocation of public expenditure funds or budget rebalance.

4) For the purpose of providing additional funds for settlement of Debts arising from the old foreign currency savings, the Ministries of Finance of Entities and District shall be reviewing the budget on regular basis in order to find ways of reallocation of possible surplus budgetary funds aimed at creating more favorable conditions for repayment of old foreign currency savings.

Former paragraph (3) shall become paragraph (5)

Former paragraph (4) shall become paragraph (6) to read as follows:

(6) As to providing the funds referred to in paragraph (2) of the said Article, Bosnia and Herzegovina shall take part in the provision of funds from the resources placed at

her disposal after the succession of the former SFRY, as well as from other available resources and the Council of Ministers of Bosnia and Herzegovina, by its decision, shall determine the amount and the manner of use of the said funds.

Article 3

In Article 5, after word „which" the wording „for the justified reasons" shall be added, and after the words „may be" the wording „in accordance with this law" shall be added.

Article 8

In Article 17, paragraph (1) shall be amended to read as follows:

(1) The time limit for submission of application for verification of old foreign currency savings shall be six months from the day of commencement of verification process in accordance with enforceable legislation of Entities and District, while the Agencies shall undertaker to complete the verification process within 12 months form the day of the aforesaid commencement of verification.

New paragraph (2) shall be added after paragraph (1) to read as follows:

(2) With the exception of the provisions of paragraph (1), an additional time limit has been determined for submission of applications for verification in duration of one month to be competed no later than 30 September 2007 and the agencies shall undertake to finish the verification process no later than 15 December 2007.

Former paragraph (2) shall become paragraph (3).

Article 13

Article 27 is amended to read as follows:

The courts shall undertake to submit the enforceable court judgments to the Entity Ministry of Finance or District Finance Directorate.

V. Admissibility

12. Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads as follows:

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly; by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

Article 17(1)(6) of the Rules of the Constitutional Court reads as follows:

A request shall be inadmissible in any of the following cases:

6. the legal circumstances have changed;

Article 65(1)(4) of the Rules of the Constitutional Court reads as follows:

1. The Constitutional Court shall take a decision on terminating the proceedings when during the proceedings:

4. the prerequisites for the proceedings to be conducted no longer exist or the Constitutional Court establishes that it would be irrelevant to proceed with further procedure provided that human rights are respected.

13. It is undisputable that the applicant is an authorized person to file a request since at the time of lodging the request; he was the Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina. Furthermore, the Constitutional Court is competent to take a decision on the request in question within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina since the review of compatibility of the law of Bosnia and Herzegovina with the Constitution of Bosnia and Herzegovina and European Convention has been requested.

14. Therefore, the Constitutional Court shall examine whether the request in question meets other admissibility requirements. In particular, the Constitutional Court finds it necessary to analyze whether the legal circumstances have changed after the enactment of two relevant laws amending the challenged law so as to make the request inadmissible within the meaning of Article 17(1)(6) of the Rules of the Constitutional Court. In this regard, the Constitutional Court established that Article 1 of the challenged Law was amended by new paragraphs 3 and 4, which, in some other manner, regulate the participation of Bosnia and Herzegovina in settling the debts arising from old foreign currency savings, which was the subject of the applicant's request. Moreover, Article 27 of the challenged Law was also amended and, according to the amendments, an undisputable possibility was created for enforcement of final court judgments which concern the old foreign currency savings.

15. In view of the aforesaid, the Constitutional Court concludes that as to Article 1, paragraphs 2 and 3 and Article 27 of the challenged Law, the legal circumstances have changed in relation to the legal situation existing at the moment of lodging the request for review of constitutionality. The applicant failed to give his opinion about the changed legal circumstances. Accordingly, no conditions have been met to take a decision on merits with regards to this part of the request.

16. In view of the provisions of Article 17(1)(6) of the Rules of the Constitutional Court according to which a request shall be rejected as inadmissible if the legal circumstances have changed, the Constitutional Court decided, with regards to this part of the request, as set out in the enacting clause of this decision.

17. Furthermore, the applicant stated that the provisions of the challenged Law, whereby the verification process is regulated under Articles 5 through 21, constitute an unjustified interference with the property rights of the holders of foreign currency savings accounts. The Constitutional Court established that by the amendment of the challenged Law it is stipulated that the verification process shall be completed by 15 December 2007, which means that the process of verification of foreign currency savings has been completed. Bearing in mind the fact that the verification process has been completed, the Constitutional Court deems it purposeless to conduct further proceedings when it comes to the review of constitutionality of the mentioned provisions of the challenged Law. Moreover, the Constitutional Court concludes that the termination of proceedings is in compliance with the principle of compliance of the human rights since under Article 5 of the challenged Law it is stipulated that as for the old foreign currency savings that were not verified in accordance with the challenged Law, the related rights can be proved and realized in the court proceedings. Under Article 6 it is explicitly prescribed that in the course of verification process „the existing rights shall be verified and not redefined and terminated" which is contrary to the allegations stated in the request. Accordingly, the Constitutional Court, in accordance with Article 65(1)(4) of the Rules of the Constitutional Court, decided to terminate the proceedings with regards to this part of the request.

18. Finally, Articles 4 and 28 of the challenged Law have not been amended and there are no other circumstances to indicate that this part of the request is inadmissible. Accordingly, given the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of the Constitutional Court, the Constitutional Court finds that this part of the request is admissible for it was filed by an authorized person and there are no other formal reasons under Article 17(1) of the Rules of the Constitutional Court which would render the request inadmissible.

VI. Merits

a) Compatibility of Article 4 of the challenged Law with the Constitution of Bosnia and Herzegovina and the European Convention

19. The applicant is of the opinion that Article 4 of the challenged Law has violated the property rights of the holders of old foreign currency savings accounts, in other words that this Article is in violation of Article II(3)(k) of the Constitution of Bosnia and Herzegovina. The Constitutional Court shall also examine the said allegations in their relation to the principles of Article 1 of Protocol No. 1 to the European Convention.

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:

k) right to property

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

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.

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.

20. Article 4 of the challenged Law, which is the subject of review of constitutionality, reads as follows:

Any interest accrued after 1 January 1992 but not paid shall be cancelled. Interest for the period between 1 January 1992 and the entry into force of this Law shall be calculated afresh at an annual rate of 0, 5%.

21. The applicant stated that Article 4 of the challenged Law, which governs the cancellation of the interests that were accrued but not paid in accordance with the agreements on foreign currency savings, constitutes a violation of the property rights of the holders of foreign currency savings accounts since the said interest represents their acquired property.

22. According to the jurisprudence of the European Court of Human Rights, the term „possessions" to be protected may only apply to existing possessions (see the European

Court of Human Rights, *Van der Mussele,* judgment of 23 November 1983, Series A, no. 70, paragraph 48), or at least to the „possessions" in relation to which the appellant has „legitimate expectations" as to repossessing them *(*see the European Court of Human Rights, *Pine Valley Developments Ltd and Others*, judgment of 29 November 1995, Series A, number 332, paragraph 31). Moreover, the word „possessions" includes a wide range of proprietary interests to be protected and representing an economic value (see the judgment of the former European Human Rights Commission, *Wiggins vs. the United Kingdom,* application no. 7456/76, Decisions and Reports (DR) 13, p. 40-46 (1978)). The concept „possessions" has an autonomous meaning, and proving of the established economic interest may be sufficient if the right protected by the European Convention has been determined, whereby the question of whether the property interests have been recognized as the legal right in the national legal system is of no importance (see the European Court of Human Rights, *Tre Traktörer Aktibolag vs. Sweden*, judgment from 1984, Series A, no. 159, paragraph 53). Further, the Constitutional Court recalls its own jurisprudence whereby the term „possessions" is not to be interpreted restrictively but shall be considered to include existing monetary claims of individuals and various other rights of individuals which have an economic value (see, the Constitutional Court of Bosnia and Herzegovina, decisions nos. *U 26/00* of 21 December 2001 and *AP 1/05* of 18 May 2005). Pursuant to the case-law of the Constitutional Court, the interest that has been recognized and determined shall constitute property within the meaning of Article 1 of Protocol No. 1 to the European Convention. Therefore, the Constitutional Court shall examine whether the authorities, by applying the challenged provisions, interfered with the property rights of the holders of foreign currency savings accounts.

23. In examining the applicant's allegations stated in the request, the Constitutional Court recalls the case-law of the European Court of Human Rights according to which 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, covers deprivation of possession and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not „distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule. (see, *inter alia*, the European Court of Human Rights, *James and others vs. the United Kingdom*, judgment of 21 February 1986, series A, no. 98, pages 29-30, paragraph 37).

24. It is undisputed that according to Article 4 of the challenged Law the holders of old foreign currency savings accounts are deprived of their property since, as envisaged by this provision, the interest accrued in accordance with the previous agreement shall be cancelled, in other words it has been stipulated that the interest shall be written off. The Constitutional Court shall examine whether the deprivation was in compliance with the principles of Article 1 of Protocol No. 1 to the European Convention.

25. Any interference with the right pursuant to either the second or third rule must be provided for by law, it must pursue a legitimate aim and it must strike a fair balance between the public or general interest and individual rights. In other words, to be justified, interference must not only be imposed by a legal provision which meets the requirements of „lawfulness" and serves a legitimate aim in the public interest but must also maintain a reasonable relationship of „proportionality" between the means used and the aim pursued. In particular, the interference with the right to property must not go beyond what is necessary to achieve the legitimate aim, and the property right holders must not be subject to arbitrary treatment, or required to bear an excessive burden in pursuit of the legitimate aim (see Decision of the Constitutional Court of Bosnia and Herzegovina no. *U 83/03* of 22 September 2004, *Official Gazette of Bosnia and Herzegovina* no. 60/04, paragraph 49).

26. The Constitutional Court should give an answer to a question whether the challenged provision, which constitutes a deprivation of property rights of the holders of old foreign currency savings accounts, meets the requirement of lawfulness, serves a legitimate aim and maintains a reasonable relationship of „proportionality" between the means employed and the aim sought to be achieved. Taking into account that the principle of lawfulness primarily implies a sufficient preciseness and accessibility of legal provisions which make the basis for interference, the Constitutional Court concludes that the challenged provision satisfies the requirement of lawfulness since it is sufficiently precise and the challenged law is published in the official gazette, which means that the requirement of accessibility was also satisfied.

27. With regards to the question whether there was a public interest for adoption of the challenged provision, the Constitutional Court recalls that the notion of „public interest", within the meaning of Article 1 of Protocol No. 1, is „inevitably broad". In establishing the existence of such „public interest", the national authorities enjoy a wide margin of appreciation. As to this wide margin of appreciation, the European Court of Human Rights stated that „because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is „in the public interest". The European Court of Human Rights also concludes that „this Court will respect the legislator's position as to what is „in the public interest" unless that

judgment position manifestly lacks reasonable foundation" (see already quoted judgment of the European Court of Human Rights cited above, *James and Others*, paragraph 46).

28. In its reply to the request, the party proposing the challenged Law justifiably refers to the standpoint of the Human Rights Commission presented in its decision „*Besarović and Others"* with regards to the write-off of the interest. According to the Commission' opinion, there was a public interest for depriving the foreign currency savings' owners of their property and this interest was reflected in an effort to preserve the economic stability of the state, in other words in the need not to place an excessive burden on the state in the future in a way that its functioning becomes questionable. The Human Rights Commission particularly emphasized the following*: As the interest is concerned, the new Law wrote it off for the period as of 1 January 1992. The Commission finds such approach the sensible, objective and justified. Namely, the interest has to be understood and considered in the present cases in the spirit of this institute. The interest is a kind of compensation to the one putting the capital at disposal – it is compensation for use. Taking into account that it is not completely clear in what measure and to what extent the State disposed with the foreign currency assets (Poropad et al, loc. cit, page 25, paragraph 2), and because of the fact that the strong public interest exists and the need for the State not to be overburdened in future, the Commission considers the writing off of interest justified* (...). *Transferred to the present cases, the Commission concludes that the reason for the loss of interest is not unjustified non-reimbursement of the old foreign currency savings but events that occurred in Bosnia and Herzegovina after 1992. The competence of the Commission in such cases would be to asses whether there has been any arbitrariness on the part of the State in deprivation of this right, which could not be confirmed by the Commission in the particular cases* (...). (See, the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits no. CH/98/375, *Đorđe Besarović and others vs. Bosnia and Herzegovina and Federation of Bosnia and Herzegovina*, pages 118, 119 and 120, paragraphs 1240-1244). The Constitutional Court recalls that the above view of the Human Rights Commission is related to the provision of the then valid Entity law, which regulated the interest write off in the same manner as it is currently prescribed by Article 4 of the challenged Law. The Constitutional Court finds that the circumstances with regards to this provision have not changed and therefore the Court remains supportive of the opinion that a justified measure was applied when the holders of the old foreign currency savings accounts were deprived of their property and that this issue is to be considered within a wider context of resolving the entire issue of the old foreign currency savings. Both the Human Rights Commission and the Constitutional Court adopted a series of decisions on this issue including a decision annulling the Entity laws as unconstitutional because they regulated the above matter in an unequal manner,

(see, *inter alia,* the Constitutional Court, Decision on Merits, *U 14/05* of 2 December 2005, *Official Gazette of BiH* no. 2/06).

29. In view of the aforementioned, the Constitutional Court considers that the challenged provision, which provides for the holders of old foreign currency savings accounts to be deprived of their property, satisfies the principle of lawfulness, serves the legitimate aim and maintains a reasonable relationship of „proportionality" between the means employed and the aim sought to be achieved and therefore it is in accordance with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

b) Compatibility of Article 28 of the challenged Law with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention

30. The applicant stated that Article 28 of the challenged Law, terminating the court proceedings and referring the holders of old foreign currency saving accounts, who initiated the said proceedings, to the verification process and payment in accordance with the challenged law, is in violation of their right to a fair trial and the right to an effective legal remedy. The Constitutional Court shall examine the said allegations in connection with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and 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 paragraph 1 of the European Convention, in its relevant part, reads:

1. In the determination of his civil rights and Debts 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. [...]

31. Article 28 of the challenged Law whose review of constitutionality has been requested reads as relevant:

As to the cases pending legally binding decisions on the day of entry into force of this Law, the competent shall refer them ex officio to the verification process in order to be settled in accordance with this Law.

32. The Constitutional Court refers to the interpretation of the European Court of Human Rights, where it is said that Article 6 paragraph 1 of the European Convention embodies the „right to a court". One aspect of that right is the right to access to a court, that is, the right to institute proceedings before a court in civil matters. However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access to a court by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the European Convention's requirements rests with the Court. The Court must see for itself that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 paragraph 1, if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see the judgment in case *Stubbings and Others vs. the United Kingdom* of 22 October 1996, *Reports of Judgments and Decisions* 1996-IV, paragraph 50).

33. Although it is not clearly defined in Article 28 of the challenged Law, after interpretation of this provision, a conclusion could be drawn that the procedures in which a final decision has not been adopted on the issue of old foreign currency savings, will be terminated. The applicant also interprets the challenged Article in this manner and deems that such a restriction of the right to a fair trial is incompatible with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

34. This applicant's allegation shall be examined in the context of the right of access to court since by Article 28 of the challenged Law it was made impossible for the holders of old foreign currency savings accounts to reach justice in civil proceedings conducted before ordinary courts concerning their savings. A limitation of this kind is acceptable, as per principle presented above in this decision, but only of it serves the legitimate aim and maintains a reasonable relationship of „proportionality" between the aim and the means employed. The issue of existence of „legitimate aim" for adoption of Article 28 of the challenged Law is to be considered within the law as a whole. In that regard, the Constitutional Court deems it necessary to recall that the issue of old foreign currency savings is a long standing problem of Bosnia and Herzegovina and there were

many attempts to resolve this issue in different ways with the aim of regulating the rights of the holders of old foreign currency savings accounts in an equal manner. Acting in accordance with the judgment of European Court of Human Rights in case *Jeličić vs. Bosnia and Herzegovina* (judgment of the European Court of Human Rights in case APP. no. 41183/02, published in the *Official Gazette of BiH* no. 20/07), the legislator amended Article 27 of the challenged Law whereby only the holders of foreign currency savings accounts, who were granted the final court judgments in their favor, have been placed in a different position when compared with others. A legitimate aim under Article 28 of the challenged Law implies that all the holders of foreign currency savings accounts should be entitled to their property rights. Therefore, in observing this provision within the spirit of the challenged law as a whole, the Constitutional Court considers that the very essence of the applicants' property rights was not impaired by Article 28 wherein a restriction of the right of access to a court has been provided for. In other words, the fair balance has been struck between the legitimate aim and the property rights of the holders of foreign currency savings accounts.

35. The Constitutional Court concludes that Article 28 of the challenged Law is consistent with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

c) Compatibility of Article 28 of the challenged Law with Article 13 of the European Convention

36. The Constitutional Court considers that it is not necessary to separately examine the applicant's allegations about the incompatibility of Article 28 of the challenged Law with Article 13 of the European Convention given the conclusions pertaining to the compatibility of the mentioned provision with the right to a fair trial and the fact that Article 13 of the European Convention provides for much narrower guarantees than the ones provided for under Article 6 paragraph 1 of the European Convention in relation the right to a fair trial.

VII. Conclusion

37. The Constitutional Court concludes that the legal circumstances have changed in relation to the legal situation that had existed at the moment of lodging the request for review of constitutionality of Article 1, paragraphs 2 and 3 and Article 27 of the Law on Settlement of Debts Arising form Old Foreign Currency Savings (*Official Gazette of BiH* nos. 28/06, 76/06 and 72/07). Furthermore, as to the provisions regulating the process of verification of old foreign currency savings (Article 5 through 24), the Constitutional

Court decided to terminate the proceedings for it would not serve the purpose to conduct the proceedings given the fact that the verification process has been completed. The conclusion was made that the termination of proceeding was conducted consistent with the human rights protection principle.

38. As to the allegations about the incompatibility of Article 4 of the challenged Law with the right to property, the Constitutional Court concluded that the said provision, stipulating the write off of the interest, has satisfied the principle of lawfulness, it serves a legitimate aim and maintains a reasonable relationship of „proportionality" between the means employed and the aim sought to be achieved. Therefore, the mentioned provision is in compliance with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. Finally, the Constitutional Court found that Article 28 of the challenged Law is in compliance with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention as by restricting the right of access to a court, which is referred to in the challenged provision, the very essence of the applicants' property rights was not impaired. In other words, a fair balance has been struck between the legitimate aim and the property rights of the holders of foreign currency savings accounts.

39. Pursuant to Article 17(1) (6), Article 61(1) and (3) and Article 65(1)(4) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

40. In view of Article VI(4) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. U 6/06

DECISION
ON ADMISSIBILITY
AND MERITS

Request of Messrs. Ivo Miro Jović and Sulejman Tihić, Members of the Presidency of Bosnia and Herzegovina at the relevant time, for a review of the constitutionality of the provisions of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina and Law on Civil Service in the Institutions of Bosnia and Herzegovina.

Decision of 29 March 2008

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1), (2) and (3) and Article 63(2) and (3) 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 Hadžiosmanović, President,

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Ms. Constance Grewe,

Ms. Seada Palavrić,

Mr. Krstan Simić,

Having deliberated on the requests of **Messrs. Ivo Miro Jović and Sulejman Tihić, Members of the Presidency of Bosnia and Herzegovina at the time of lodging the request,** in case **no. U 6/06,** at its session held on 29 March 2008, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The requests of Messrs. Ivo Miro Jović and Sulejman Tihić, Members of the Presidency of Bosnia and Herzegovina at the time of lodging the requests, are hereby partially granted.

It is hereby established that the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 90/05) is inconsistent with Article VI(2)(b), VI(3) and Article I(2) read in conjunction with Article IX(2) of the Constitution of Bosnia and Herzegovina insofar as it relates to the Constitutional Court of Bosnia and Herzegovina.

The Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina insofar as

it relates to the Constitutional Court of Bosnia and Herzegovina, is hereby quashed pursuant to Article 63(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina, insofar as it relates to the Constitutional Court, shall be rendered ineffective as of the day following the date of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina* in accordance with Article 63(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

It is hereby established that Article 4 of the Law on Civil Service in the Institutions of Bosnia and Herzegovina, titled „Exceptions in Application", (*Official Gazette of Bosnia and Herzegovina* nos. 19/02, 35/03, 4/04, 17/04, 26/04 and 37/04) is consistent with the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 17 February 2006 and subsequently on 16 March 2006, Messrs. Ivo Miro Jović and Sulejman Tihić, Members of the Presidency of Bosnia and Herzegovina at the relevant time („the applicants"), lodged requests with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for a review of the constitutionality of the following provisions of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 90/05), („the Law on Salaries") and Law on Civil Service in the Institutions of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 19/02, 35/03, 4/04, 17/04, 26/04 and 37/04) („the challenged provisions of the Laws in question") with the provisions of Article I(2), IV(4)(a) and VI(2)(b) of the Constitution of Bosnia and Herzegovina: Article 2, Article 8 paragraph 5 in the part reading as follows: „(…) of the Constitutional Court of Bosnia and Herzegovina", Article 14, in the part reading

as follows: „As for the Constitutional Court of Bosnia and Herzegovina, these provisions are enacted by the Constitutional Court of Bosnia and Herzegovina in cooperation with the Ministry of Justice of Bosnia and Herzegovina"; Article 15 in the part reading as follows: „of the Constitutional Court of Bosnia and Herzegovina", Article 17 item a) in the part reading as follows: „for the Secretary General of the Constitutional Court", item b) in the part reading as follows: „For the Registrar of the Constitutional Court", items (d), (e), (f) and (g), in the parts reading as follows: „for Heads of the Department of the Constitutional Court of Bosnia and Herzegovina", „for Senior Legal Advisors of the Constitutional Court", „For Legal Advisors of the Constitutional Court of Bosnia and Herzegovina", and „For Judicial Associates of the Constitutional Court of Bosnia and Herzegovina", and Article 4 of the Law on Civil Service in the Institutions of Bosnia and Herzegovina, titled „Exceptions in Application", (*Official Gazette of Bosnia and Herzegovina* nos. 19/02, 35/03, 4/04, 17/04, 26/04 and 37/04), („the Law on Civil Service") in the part reading as follows: „Judges of the Constitutional Court of Bosnia and Herzegovina".

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the BiH Parliamentary Assembly") were requested on 10 May 2006 to submit their replies to the request. Again, on 7 December 2007 the Constitutional Court requested both Houses of the BIH Parliamentary Assembly to submit their replies to the request, since the BiH Parliamentary Assembly adopted the challenged Law on Salaries after the requests had been filed.

3. On 7 January 2008, the House of Representatives of the BiH Parliamentary Assembly submitted an opinion on the request for review of the constitutionality of the Law on Salaries. The House of Peoples submitted its respective reply to the request on 23 January 2008.

4. By letter of 23 May 2006, the High Representative for Bosnia and Herzegovina („the High Representative") informed the Constitutional Court that the High Representative, considering the established practice, was willing to assist the Constitutional Court *as amicus curiae* in this case, for which reason the Constitutional Court, on 31 May 2006, sought from the High Representative to submit its observations as *amicus curiae* within the 20-day time limit. The High Representative submitted its observations as *amicus curiae* on 26 June 2006.

III. Request

a) Statements from the request

5. In their request, the applicants requested the Constitutional Court to review the constitutionality of several provisions of the Law on Salaries and the Law on Civil Service, as well as to review the constitutionality of the Law on Salaries as a whole and declare it unconstitutional. With regards thereto, the applicants stated that the Law on Salaries was unconstitutional for several reasons:

a) First, the applicants hold that this Law is inconsistent with the principle of independence of the Constitutional Court, which is stipulated by Article I(2) read in conjunction with Article VI of the Constitution of Bosnia and Herzegovina. To that end, the applicants allege that the Constitutional Court has a normative jurisdiction to independently decide on the salaries of the judges and other employees within the Constitutional Court, emphasizing that this constitutional principle of independence itself is the source of autonomy of the Constitutional Court and that it enables it to issue fundamental and vital norms on a certain matter.

b) Moreover, the applicants hold that the issue of salaries of the judges of the Constitutional Court cannot be governed by the so-called ordinary law, since, as they allege, the Constitution of Bosnia and Herzegovina does not provide the basis for adopting laws, regulations or general acts concerning the work of the Constitutional Court and its role laid down in the Constitution. The applicants allege that Article IV(4)(a) of the Constitution of Bosnia and Herzegovina determines the responsibility of the Parliamentary Assembly for enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution. However, the applicants state that no single provision of the Constitution of Bosnia and Herzegovina provides for *expresis verbis* possibility of enacting laws governing the issues of work, role and other issues relating to the Constitutional Court.

c) The applicants hold that the issues concerning the Constitutional Court cannot be regulated by the law concerning the so-called ordinary courts, given that the Constitutional Court is the institution founded for the creation, stability and harmony of democratic existence, for which reason its status has to be separate from the status and jurisdictions of ordinary courts.

d) Finally, the applicants state that the BIH Parliamentary Assembly does not have the responsibility, under the Constitution of Bosnia and Herzegovina, to decide

on the salaries of judges by applying the so-called ordinary law, because for that to occur it would be necessary to amend the existing Constitution of Bosnia and Herzegovina in the amendment procedure whereby these issues would be provided for in the Constitution or possibly the Parliamentary Assembly would be given the responsibility for enacting constitutional organic law which would, under the Constitution, elaborate constitutional principles and closely specify organization and functioning of the Constitutional Court.

6. In view of the aforementioned, the applicants consider that the challenged legal provisions are inconsistent with Article I(2), IV(4)(a) and VI(2)(b) of the Constitution of Bosnia and Herzegovina, and propose that the Constitutional Court should take a decision finding this inconsistency, quashing the challenged provisions which shall cease to be in force the day following the publication of the decision within the meaning of Article 63(2) and (3) of the Rules of the Constitutional Court.

7. In addition, the applicants challenged constitutionality of Article 4 of the Law on Civil Service in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH* no. 19/02, 35/03, 4/04, 17/04, 17/04, 26/04 and 37/04), invoking the same provisions of the Constitution of Bosnia and Herzegovina referred to in paragraph 7 *supra* of this Decision but failed to give any reasoning as to these allegations.

b) Reply to the request

8. In reply to the request submitted to the Constitutional Court, the House of Representatives of the BIH Parliamentary Assembly allege that the Constitutional and Legal Commission of the House of Representatives considered the request for review of the constitutionality of the Law on Salaries and concluded that the Law on Salaries had been passed on a temporary basis by the High Representative on 9 December 2005, that the House of Representatives had adopted it on 15 March 2007 and the House of Peoples had adopted it on 30 March 2007. As the House of Representatives adopted the Law, the Constitutional and Legal Commission alleged that it „remains supportive of the adopted Law".

c) Opinion of *amicus curiae*

9. On 27 June 2006, the High Representative, as *amicus curiae*, submitted comments of the High Representative's Legal Department to this issue. *Amicus curiae* states that the allegations of the applicants that the Parliamentary Assembly is not entitled to adopt a law concerning the Constitutional Court are unfounded. To that end, *amicus curiae*

states that it is non disputable that the Constitutional Court is an institution of Bosnia and Herzegovina, and that the Parliamentary Assembly's power to approve budget includes the power to approve a budget for any such institution, including „those enjoying certain degree of independence like the Constitutional Court". *Amicus curiae* states that the principle of independence cannot be interpreted as preventing the Parliamentary Assembly from adopting legislation regulating the salaries of judges and other employees of the Constitutional Court. In that regard, it states that the question raised in the case at hand does not pertain to whether the Constitution of Bosnia and Herzegovina requires the principle of independence to be complied with in Bosnia and Herzegovina but to „whether this principle shall be interpreted as prohibiting the Parliamentary Assembly from adopting legislation regulating the salaries of the judiciary including those of the members of the Constitutional Court".

10. As regards the question whether the Constitutional Court may be subject to application of the „ordinary law", *amicus curiae* states that interpretation offered by the applicants would „necessarily result in the Constitutional Court functioning outside the general legal regime of Bosnia and Herzegovina", stating that it would set a precedent in a democratic regime and that it finds no grounds in the BiH Constitution. Further, *amicus curiae* states that the Constitution of BiH does not entitle the Constitutional Court to regulate or otherwise determine the salaries of its judges and/or employees, and that every interpretation of the Constitution of BiH that would entitle the Constitutional Court to adopt normative rules regulating salaries of its judges and employees would be directly incompatible with Article I(2) of the Constitution of Bosnia and Herzegovina. In fact, such an interpretation, in the opinion of *amicus curiae,* would grant the capacity to non-elected public officials to adopt normative rules having direct impact on public resources which is irreconcilable with a democratic system.

11. *Amicus curiae* further states that the entitlement of the Constitutional Court to adopt Rules of Court under Article VI(2)(b) of the Constitution cannot be interpreted as allowing the Constitutional Court to regulate the salaries of its own judges and employees. Rather this provision strictly relates to matter of procedure before the Constitutional Court. Also, *amicus curiae* holds that the term *the rules of court* must be interpreted restrictively and not broadly – as encompassing the capacity for the Constitutional Court to regulate salaries of its judges and employees.

12. *Amicus curiae* also submits that the Constitution of BiH does not foresee the possibility for the Parliamentary Assembly to adopt a constitutional law which requires a qualified majority, invoking the provisions of Article IV(3)(c) of the Constitution of BiH regulating that the Parliamentary Assembly adopts all decisions in both houses by

majority votes of those present and voting. If the Constitutional Court were to consider that a constitutional law can be adopted and that the salaries of judges and employees of the Constitutional Court can be regulated by such a law, *amicus curiae* respectfully submits that *as a final authority in theatre regarding interpretation of the Agreement on Civilian Implementation of the Peace Agreement pursuant to Article V of Annex 10 of General Framework Agreement the High Representative is entitled to adopt such law.*

13. Finally, *amicus curiae* submits that none of the provisions of the challenged Law on Salaries in this case are incompatible with the Constitution of BiH.

IV. Relevant Law

14. The **Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* no. 90/05), so far as relevant, reads:

Article 2
Basic Monthly Salary of Judges of the Constitutional Court of Bosnia and Herzegovina

The Basic Monthly Salary shall be as follows:

(a) For Judges of the Constitutional Court of Bosnia and Herzegovina: 4.200 KM.

(b) For the President of the Constitutional Court of Bosnia and Herzegovina: 4.800 KM.

Article 8(5)
Annual Paid Leave and Leave for Religious Purposes

(...)

The Annual Paid Leave for each Judge and Prosecutor shall be regulated in an Annual Leave Plan to be determined by the Court President or Chief Prosecutor on an annual basis in accordance with the internal regulations for the operation of the Constitutional Court of Bosnia and Herzegovina, ***the Court of Bosnia and Herzegovina*** *and the Prosecutor's Office of Bosnia and Herzegovina respectively.*

Article 14
Travel Costs

Regulations shall be promulgated by the High Judicial and Prosecutorial Council in cooperation with the Ministry of Justice of Bosnia and Herzegovina in respect of the

circumstances in which a Judge or Prosecutor shall be entitled to compensation for costs incurred for travel undertaken in the course of carrying out their official duties (per diem, transport and accommodation expenses) and the amount of such compensation. ***For the Constitutional Court of Bosnia and Herzegovina such regulations shall be promulgated by the Constitutional Court of Bosnia and Herzegovina in cooperation with the Ministry of Justice of Bosnia and Herzegovina****.*

Article 15
Compensation for Educational Expenses

Judges and Prosecutors are entitled to compensation for educational expenses in accordance with the internal regulations for the operation of ***the Constitutional Court of Bosnia and Herzegovina****, the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina respectively.*

Article 17
Basic Monthly Salary

1. The Basic Monthly Salary of the following professional staff shall be:

a) ***For the General Secretary of the Constitutional Court of Bosnia and Herzegovina*** *and the Director of the Secretariat of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina: 3.800 KM.*

b) ***For the Registrar of the Constitutional Court of Bosnia Herzegovina****, the Registrar of the Court of Bosnia and Herzegovina and the Deputy Director of the Secretariat of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina: 3.400 KM.*

c) For the General Secretary of the Court of Bosnia and Herzegovina and the Secretary of the Prosecutor's Office of Bosnia and Herzegovina and the Disciplinary Counsel of the Secretariat of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina: 3,000 KM.

d) ***For Heads of Departments of the Constitutional Court of Bosnia and Herzegovina****: 2.800 KM.*

e) For ***Senior Legal Advisors of the Constitutional Court of Bosnia and Herzegovina*** *and Heads of Department and Senior Advisors of the Secretariat of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina: from 2.400 to 2.600 KM.*

f) ***For Legal Advisors of the Constitutional Court of Bosnia Herzegovina****, Assistant General Secretary of the Court of Bosnia and Herzegovina, Legal Advisors of the Court of Bosnia Herzegovina and Senior Lawyers and Deputy Heads of Department of the High Judicial and Prosecutorial Council of Bosnia Herzegovina: from 1,900 to 2,400 KM.*

g) ***For Judicial Associates of the Constitutional Court of Bosnia Herzegovina****, Judicial Associates and Secretaries of Departments of the Court of Bosnia Herzegovina, Prosecutorial Associates/Assistants of the Prosecutor's Office of Bosnia Herzegovina and Junior Lawyers/Professional Staff of the Secretariat of the High Judicial and Prosecutorial Council of Bosnia Herzegovina: from 1,200 to 1,800 KM.*

Article 19
Repealing of Provisions

The provisions contained in other laws, regulations or decisions at the level of Bosnia and Herzegovina that conflict with this Law shall cease to have effect on the day of the entry into force of this Law.

15. The **Law on Civil Service in the Institutions of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* no. 19/02, 35/03, 4/04, 17/04, 26/04 and 37/04), so far as relevant, reads:

Article 4
Exceptions in Application

1. Members of the Parliamentary Assembly of Bosnia and Herzegovina (hereinafter the Parliamentary Assembly), Members of the Presidency of Bosnia and Herzegovina (hereinafter the Presidency), the Council of Ministers (hereinafter the Council of Ministers), Ministers, Deputy Ministers, Members of the Standing Committee on Military Matters, ***Judges of the Constitutional Court of Bosnia and Herzegovina*** *(hereinafter the Constitutional Court), Judges of the Court of Bosnia and Herzegovina (hereinafter the Court of Bosnia and Herzegovina), Governors and Vice-Governors of the Central Bank of Bosnia and Herzegovina (hereinafter the Central Bank), the Auditor-General and the Deputy Auditors-Generals of the Supreme Audit Institution of Bosnia and Herzegovina (hereinafter the Supreme Audit Institution) are not civil servants and their legal status shall be regulated by law.*

2. Secretaries of two Chambers of the Parliamentary Assembly of Bosnia and Herzegovina and Secretary of the Common Services of the Parliamentary Assembly of Bosnia and Herzegovina are not civil servants.

3. Individuals employed as Advisors to the Members of the Parliamentary Assembly, the Members of the Presidency, the Chair of the Council of Ministers, the Ministers and the Deputy Ministers, the Governor and Vice Governors of the Central Bank are not civil servants

16. **Article I(2) of the Constitution of Bosnia and Herzegovina:**

Democratic Principles

Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.

Article VI
Constitutional Court

1. Composition

The Constitutional Court of Bosnia and Herzegovina shall have nine members.

a. Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency.

b. Judges shall be distinguished jurists of high moral standing. Any eligible voter so qualified may serve as a judge of the Constitutional Court. The judges selected by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or of any neighboring state.

c. The term of judges initially appointed shall be five years, unless they resign or are removed for cause by consensus of the other judges. Judges initially appointed shall not be eligible for reappointment. Judges subsequently appointed shall serve until age 70, unless they resign or are removed for cause by consensus of the other judges.

d. For appointments made more than five years after the initial appointment of judges, the Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights.

2. Procedures

a. A majority of all members of the Court shall constitute a quorum.

b. The Court shall adopt its own rules of court by a majority of all members. It shall hold public proceedings and shall issue reasons for its decisions, which shall be published.

3. Jurisdiction

The Constitutional Court shall uphold this Constitution.

a. The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina

and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

b. 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.

c. The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

4. Decisions

Decisions of the Constitutional Court shall be final and binding

Article IX(2) of the Constitution of Bosnia and Herzegovina

Compensation for persons holding office in the institutions of Bosnia and Herzegovina may not be diminished during an officeholder's tenure.

V. Admissibility

17. The requests for review of constitutionality were signed by Messrs. Ivo Miro Jović and Sulejman Tihić, members of the Presidency of Bosnia and Herzegovina, which implies that the requests were lodged by authorized persons as set forth in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. In addition, the requests are related to the review of constitutionality of the challenged provisions of the laws in question, in which case the Constitutional Court is competent to take decisions, as referred to in Article VI(3)(a) line 2 of the Constitution of Bosnia and Herzegovina.

18. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of Constitutional Court, the Constitutional Court has established that the requests are admissible as they were filed by authorized persons and as there is not a single formal reason under Article 17(1) of the Rules of the Constitutional Court, which would render the requests inadmissible.

V. Merits

19. The applicants allege that the challenged provisions of the Laws in question are inconsistent with the provisions of Articles I(2), IV(4)(a) and VI(2)(b) of the Constitution of Bosnia and Herzegovina.

20. The Constitutional Court, however, notes that the applicants by stating that „the Constitution of Bosnia and Herzegovina does not provide the basis for adopting laws, regulations and general acts relating to the work of the Constitutional Court and its role laid down by that Constitution", and for it to be possible, „it is necessary to amend the existing Constitution of Bosnia and Herzegovina in the amendment procedure" are challenging the constitutionality of the Law on Salaries in its entirety.

21. The applicants allege that the challenged provisions of the Law in question are inconsistent with Articles I(2), IV(4)(a) and VI(2)(b) of the Constitution of Bosnia and Herzegovina. However, Constitutional Court notes that, although it is not explicitly alleged in the requests, the essence of the applicants' complaints relates to the reduction of salaries of the Constitutional Court's judges during their tenure. Being mindful of the general requirement of respect for the rule of law principle enunciated in Article I(2) of the Constitution of Bosnia and Herzegovina, the Constitutional Court must analyze the issues put before it in the light of Article IX(2) of the Constitution of Bosnia and Herzegovina, which, in its view, is the appropriate authority in the instant case. In so doing, the Constitutional Court stresses that it is the master of the characterization to be given in law to the facts of the case, and that it is not bound by the characterization given by the applicants (see, among other authorities, *Guerra and Others vs. Italy*, Judgment of 19 February 1998, paragraph 44). Having this in mind, the Constitutional Court finds that the applicants' allegations should be examined separately also in relation to the inconsistency of the Law on Salaries in respect to Articles I(2) and IX(2) of the Constitution of Bosnia and Herzegovina.

22. The principle of the rule of law enunciated in Article I(2) of the Constitution of Bosnia and Herzegovina implies that the State of Bosnia and Herzegovina operates in compliance with the applicable laws and, primarily, in compliance with the Constitution

of Bosnia and Herzegovina. This obligation equally relates to the legislative, executive and judicial powers of Bosnia and Herzegovina. This means that the internal organization of Bosnia and Herzegovina is based, *inter alia*, on the principle of separation of powers, which is essential for the concept of the rule of law, with an emphasis on the independence of courts before which the principle of political authority control is effectuated through law. According to the Constitution of Bosnia and Herzegovina, the BiH Parliamentary Assembly is a legislative body of Bosnia and Herzegovina and, based on its powers under Article IV(4) of the Constitution of Bosnia and Herzegovina, it determines legal framework for the activities of other state bodies, which is a traditional function of Parliament as a legislative body. Although it has a rather complex constitutional function, the Presidency of BiH is an executive branch. Though the Constitution of Bosnia and Herzegovina does not provide for judicial branch at the State level, as a third branch, it provides for the existence of the Constitutional Court as a separate and specific State institution performing its constitutional-judicial function. After a thorough reading of the constitutional powers related to the aforementioned bodies, as stipulated by the Constitution of Bosnia and Herzegovina, it clearly follows that there are the mechanisms of mutual control and balance of powers, which is the core of the principle of separation of powers, as the requirement of the rule of law.

23. In this respect, the Constitutional Court notes that the principle of independence of the Constitutional Court, though it is not explicitly enunciated in the Constitution of Bosnia and Herzegovina, represents a general principle which must be complied with even when not explicitly enunciated in the constitutional text, since, as stated above, it is inseparable from the principle of the rule of law laid down in Article I(2) of the Constitution of Bosnia and Herzegovina. However, the independence of judiciary, as its inseparable part, and, in particular, the principle of separation of powers, by no means imply that the legislator cannot regulate the issues important for functioning of the State institutions, even when relating to the Constitutional Court, though only as provided for by and in accordance with the Constitution of Bosnia and Herzegovina.

24. The Constitution of Bosnia and Herzegovina does not explicitly provide that the issues which are essential for the work of the Constitutional Court shall be regulated by a separate law. The only reference point related to the legislative solutions of the issues essential for the Constitutional Court are provided for in: (1) Article VI(1)(d) of the Constitution of BiH, which stipulates that for appointments made more than five years after the initial appointment of judges, the Parliamentary Assembly may provide by law for *a different method of selection of the three judges selected by the President of the European Court of Human Rights*; and (2) Article VI(2)(b) of the Constitution of BiH,

which stipulates that the Court shall adopt its own *rules of court* by a majority of all members. The fact that the framer of the Constitution has provided for the rules of court as a constitutional category leads to the conclusion that the allegations of *amicus curiae* that *there is nothing in the Constitution that justifies any significant difference in interpretation between rules of procedures adopted by the Court and those adopted by the Presidency and the Parliamentary Assembly.* Quite the contrary, the fact that under Article VI(2)(b) of the Constitution of Bosnia and Herzegovina the authorization for adoption of own rules of procedure has been placed within the exclusive jurisdiction of the Constitutional Court, shows the intent of the framer of the Constitution to secure the independence of the Constitutional Court by way of enabling the court to prescribe its own rules of procedure and thereby to prevent any interference with the exercise of its assigned responsibilities, which also indicates that the Constitutional Court has a special position according to the Constitution of Bosnia and Herzegovina.

25. In addition, Article IV(4)(b) of the Constitution of Bosnia and Herzegovina provides that the Parliamentary Assembly „shall decide upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina", which includes the Constitutional Court, as well. In the present case, the applicants hold that a lack of an explicit constitutional provision means barring the state legislature from defining and stipulating any important issues concerning the Constitutional Court, including the salaries and other remunerations of the judges and employees of the Constitutional Court, by law, as that infringes upon the independence and autonomy of the Constitutional Court.

26. In this respect, the Constitutional Court underlines that the principle of the rule of law and the independence of judiciary, as its inseparable part, and, in particular, the principle of the separation of powers, by no means imply that the legislator cannot regulate the issues important for functioning of the state institutions, even when relating to the Constitutional Court, by-laws and regulations, as noted by *amicus curiae*. An opposite interpretation would be contrary to the rule of law, which also entails an exclusion of wide margin of appreciation by the state authorities, and equality before the law for all citizens, and, consequently, it would be contrary to the principle of separation of powers, which entails the existence of the mechanisms of mutual control over the authorities and a balance of powers. Therefore, the issues important for the existence and functioning of the Constitutional Court must be regulated so as to be in accordance with the Constitution of Bosnia and Herzegovina and so as to preserve its independence and autonomy.

27. The Constitutional Court holds that the independence of the Constitutional Court constitutes a principle which must be secured by the legislator, taking account of the

special position and role of the Constitutional Court in the Constitution of Bosnia and Herzegovina. The Constitutional Court finds it necessary to emphasize that this implies full financial independence reflected in autonomous planning and proposal of court budget, as well as in autonomous allocation of approved budget, which amount must be subject to appropriate control of a competent authority.

28. The Constitutional Court of Bosnia and Herzegovina, beyond its specific features, is associated with the general institution of constitutional justice. In Europe, the latter was first developed in Federal States - in Germany and Austria – particularly in relation to the distribution of competencies between the central State and federal entities. This issue perceived as eminently political for a long time and as such inaccessible to the judicial settlement, acquired an increasingly legal dimension by the end of 19th and at the beginning of 20th century, justifying in this way the assignment of this particularly contentious matter to a special court. It became possible from then on to extend the notion and to assign to a Constitutional Court the competence to sanction any infringement of the Constitution and to entrust it in particular with the control of the constitutionality of laws. These federal origins and the contribution of Mr. Hans Kelsen to the concept of constitutional justice characterize constitutional courts even today. They explain the very special status of constitutional courts, based on their special functions. That status is that of an independent and autonomous body which, even though entrusted with jurisdictional functions, is placed outside the judicial mechanism and hierarchy.

29. The Constitution of Bosnia and Herzegovina has been inspired by that idea. It establishes the Presidency, the Parliament, the Council of Ministers, the Central Bank and the Constitutional Court as constitutional bodies. It confers to the latter the general task to „uphold the Constitution" (Article VI(3)) as well as wide competencies of control of constitutionality. These functions which are exercised vis-à-vis the other constitutional bodies, particularly vis-à-vis the legislator, and which are reflected in the final and binding decisions with regard to all public authorities, clearly imply solid guarantees of independence and autonomy of Constitutional Court. It is therefore that in this way the Constitution of Bosnia and Herzegovina prescribes the election of judges by Parliament and provides for the adoption by the Constitutional Court of its own rules (Article VI(2)(b)). Although it does not go further into specifying those guarantees, it is nonetheless clear that in this regard it refers to the European tradition and aims at rendering the Constitutional Court fully independent. This conclusion asserts itself very particularly in the institutional context of Bosnia and Herzegovina, marked by the predominance of the Entities and the relative weakness of the central State. The central institutions of Bosnia and Herzegovina and the integrity of its Constitution would be jeopardized without a strong and independent Constitutional Court.

30. The independence of the Constitutional Court implies that it is governed by specific rules which are also imposed on the legislator; and these rules should therefore have a constitutional value. In the absence of constitutional laws, the Constitutional Court must be able to decide independently on its internal organization and functioning. The Parliamentary Assembly has the power to establish the budget of the institutions of Bosnia and Herzegovina, but it can do this only in compliance with the Constitution of Bosnia and Herzegovina. The Constitution of Bosnia and Herzegovina obliges the legislator not to infringe upon the independence of the Constitutional Court. The fact that the challenged law was adopted as such shows the extent to which the Constitutional Court needs to be protected from pressures which may be exercised by other public authorities. As stated above, the respect for the financial independence of the Constitutional Court requires as a minimum that the Constitutional Court proposes its own budget and the manner of use of its own budget to the Parliamentary Assembly to adopt it.

31. In view of the aforesaid, the Constitutional Court holds that the challenged Law on Salaries is in violation of Article VI(2)(b) and VI(3) of the Constitution of Bosnia and Herzegovina.

32. Furthermore, Article IV(4)(a) of the Constitution of Bosnia and Herzegovina provides that the Parliamentary Assembly shall have the responsibility of „approving the budget for the institutions of Bosnia and Herzegovina." This clearly includes the right of the Parliamentary Assembly to approve the budget for the Constitutional Court of Bosnia and Herzegovina as well.

33. However, while approving the budget for the Constitutional Court, the Parliamentary Assembly, through the challenged Law on Salaries, reduced the salaries of the judges of the Constitutional Court. Therefore, in order to observe the principle of the rule of law, the Parliamentary Assembly was obliged to consider the constitutional provision set forth in Article IX(2) of the Constitution of Bosnia and Herzegovina which, in an imperative form, reads that „compensation for persons holding office in the institutions of Bosnia and Herzegovina may not be reduced during an office holder's tenure".

34. It is indisputable that the Constitutional Court is an institution at the level of Bosnia and Herzegovina and that the judges of the Constitutional Court are „persons holding office in the institutions of Bosnia and Herzegovina".

35. The Constitutional Court holds that economic situation of Bosnia and Herzegovina may indeed require a salary adjustment for all, including the salaries for the persons referred to in Article IX(2) of the Constitution of Bosnia and Herzegovina. However,

such legislative action cannot be implemented without appropriate amendments to the Constitution of Bosnia and Herzegovina, since the explicit provision of Article IX(2) of the Constitution of Bosnia and Herzegovina prevents the legislator either from reducing or from allowing the possibility of reducing the salaries for the persons holding offices within the institutions of Bosnia and Herzegovina.

36. In view of the above, the Constitutional Court infers that the Law on Salaries is inconsistent with Article I(2) read in conjunction with Article IX(2) of the Constitution of Bosnia and Herzegovina in its entirety.

Other allegations

37. In view of the findings relating to Articles VI(2)(b) and VI(3) and Article I(2) read in conjunction with Article IX(2) of the Constitution of Bosnia and Herzegovina, the Constitutional Court considers it unnecessary to examine other allegations regarding the inconsistencies of certain provisions of the Law on Salaries in relation to Articles IV(4)(a) of the Constitution of Bosnia and Herzegovina.

38. In addition, the Constitutional Court finds that a part of the request challenging constitutionality of Article 4 of the Law on Civil Service in the Institutions of Bosnia and Herzegovina is ill-founded. Indeed, the applicants completely failed to substantiate their allegations, and the Constitutional Court could not find anything that would indicate unconstitutionality of the particular legal provision which provides, *inter alia*, that judges of the Constitutional Court are not civil servants. Indeed, such provision is in no way inconsistent with the Constitution of Bosnia and Herzegovina which certainly does not provide the judges of the Constitutional Court of BiH with the status of civil servants.

VII. Conclusion

39. Pursuant to Article 61(1), (2) and (3) and Article 63(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

40. 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

Case no. U 6/07

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Milorad Živković, the First Deputy Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing a request, for a review of the constitutionality of the Public Procurement Law of Bosnia and Herzegovina

Decision of 4 October 2008

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), 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), in Plenary and composed of the following judges:

Mr. David Feldman, Vice-President,

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Ms. Constance Grewe,

Mr. Krstan Simić,

Having deliberated on the request of **Mr. Milorad Živković, the First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging a request, in Case no. U 6/07**, at its session held on 4 October 2008, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Mr. Milorad Živković, the First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging a request, for review of the constitutionality of the Public Procurement Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 49/04, 19/05, 52/05, 8/06, 24/06 and 70/06) is hereby dismissed.

It is hereby established that the Public Procurement Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 49/04, 19/05, 52/05, 8/06, 24/06 and 70/06) is consistent with Article IV(4) of the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 8 May 2007, Mr. Milorad Živković, the First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing a request („the applicant"), lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of the Public Procurement Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 49/04, 19/05, 52/05, 8/06, 24/06 and 70/06 – „the challenged law").

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina were requested on 7 February 2008 to submit their replies to the request.

3. On 4 March 2008, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina („Parliamentary Assembly) submitted its reply to the request. The House of Peoples did so on 7 April 2008.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were forwarded to the applicant on 11 July 2008.

5. Pursuant to Article 93(1) line 2 and (3) of the Rules of the Constitutional Court, the Constitutional Court has taken a decision that Seada Palavrić, the President of the Constitutional Court and Judge Mirsad Ćeman, shall not participate in the work and the decision-making process relating to the request since they participated as members of the Parliamentary Assembly in enacting the challenged law.

III. Request

a) Statements from the request

6. The applicant states that the Parliamentary Assembly enacted the challenged law and amendments thereto pursuant to Article IV(4)(a) of the Constitution of Bosnia and Herzegovina („the Constitution of BiH"), which embodies the Parliament's universal responsibility in the field of legislative power. However, according to the applicant's allegations, „the Parliamentary Assembly of Bosnia and Herzegovina did not specify the provision or constitutional basis for giving it the mandate to regulate the matter in question". In the view of the applicant, the Parliamentary Assembly has no mandate to regulate public procurement through legislation given that this matter does not fall within the scope of its responsibilities under Article III(1) of the Constitution of BiH. Furthermore, the applicant asserts that Article III(1)(d) of the Constitution of BiH stipulates the responsibilities of the Institutions of Bosnia and Herzegovina in the field of monetary policy as determined under Article VII of the Constitution of BiH and that, by applying the accepted methods of interpretation of Article VII(1) of the Constitution of BiH, the applicant cannot recognize or establish the constitutional basis for enacting the challenged law. Finally, it is mentioned that, although irrelevant to this constitutional-legal dispute, the applicant would like to point to that the challenged law has not yielded the results anticipated by its enactment. It is proposed that the challenged law be declared unconstitutional and thus rendered ineffective by the Constitutional Court.

b) Reply to the request

7. Upon the Constitutional Court's request addressed to the House of Representatives to submit its reply to the request, the Constitutional Court has received an opinion by the Constitutional and Legal Commission of the House of Representatives in which it is stated that the request in question was considered by the Constitutional and Legal Commission of the House of Representatives at its 32nd session held on 29 February 2008 and, by a vote with 5 votes „in favour" and 3 votes „against", it concluded that the challenged law had been adopted at the session of the House of Representatives held on 23 September 2004 and at the session of the House of Peoples held on 27 September 2004 as well as that the Constitutional and Legal Commission „remains in support of the position of the challenged Law."

8. Upon the Constitutional Court's request addressed to the House of Peoples to submit its reply to the request, the Constitutional Court received an opinion by the Constitutional and Legal Commission of the House of Peoples in which it is stated that the request in

question was considered by the Constitutional and Legal Commission of the House of Peoples at its 21st session held on 4 April 2008 and, by a vote with 3 votes „in favour" and 2 votes „against", it concluded that the challenged law had been adopted at the session of the House of Peoples held on 27 September 2004 and at the session of the House of Representatives held on 23 September 2004 as well as that the Constitutional and Legal Commission „remains in support of the request in question."

IV. Relevant Law

9. The **Public Procurement Law of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* nos. 49/04, 19/05, 52/05, 8/06, 24/06 and 70/06)

Article 1
Purpose and Scope of this Law

(1) The purpose of this law is to establish the public procurement system in BiH, the rights, obligations and responsibility of participants in the procurement procedures and the procedure for the control of public procurement procedures with the objectives of ensuring that

a) public funds are used in the most cost-effective manner with respect to the purpose and the object of the public procurement.

b) contracting authorities conduct their procurement and award their contracts according to the procedures set forth in this law and that

c) in doing so, they shall take all necessary steps to ensure that fair and active competition among the potential suppliers can take place, by exercising equality of treatment, nondiscrimination and transparency.

(2) Public procurement refers to procurement of goods, services and works, performed by „contracting authorities" as specified in Article 3 of this Law, and subject to the rules set forth in this Law and its Implementing Regulations adopted pursuant to the provisions of Article 53 of this Law.

10. **Constitution of Bosnia and Herzegovina,** in the relevant part, reads**:**

Article III(1)

I. Responsibilities of the Institutions of Bosnia and Herzegovina

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

a) Foreign policy.

b) Foreign trade policy.

c) Customs policy.

d) Monetary policy as provided in Article VII.

e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina.

f) Immigration, refugee, and asylum policy and regulation.

g) International and inter-Entity criminal law enforcement, including relations with Interpol.

h) Establishment and operation of common and international communications facilities.

i) Regulation of inter-Entity transportation.

j) Air traffic control.

Article III(2)(b), in the relevant part, reads:

Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honour the international obligations of Bosnia and Herzegovina […].

Article III(3)(a)

All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.

Article III(5)(a)

Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.

Article IV(4)

The Parliamentary Assembly shall have responsibility for:

a) Enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution.

b) Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.

c) Approving a budget for the institutions of Bosnia and Herzegovina.

d) Deciding whether to consent to the ratification of treaties.

e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.

V. Admissibility

11. The request for review of constitutionality was filed by the First Deputy Chair of the House of Representatives of the Parliamentary Assembly, thus it was filed by authorized person as set forth in Article VI(3)(a) of the Constitution of BiH. In addition, the request is related to the review of constitutionality of the challenged law, which was enacted by the Parliamentary Assembly, in which case the Constitutional Court is competent to take decisions, as referred to in Article VI(3)(a)(2) of the Constitution of BiH.

12. Taking into account the provisions of Article VI(3)(a) of the Constitution of BiH and Article 17(1) of the Rules of Constitutional Court, the Constitutional Court has established that the request is admissible as it was filed by authorized person and as there is not a single formal reason under Article 17(1) of the Rules of the Constitutional Court, which would render the request inadmissible.

VI. Merits

13. The applicant is of the opinion that, given that the field of public procurement does not fall within the scope of the responsibilities specified under Article III(1) of the Constitution of BiH, the Parliamentary Assembly has no mandate to regulate this field through legislation. The applicant contests the constitutional basis on which the challenged law was enacted (Article IV(4)(a) of the Constitution of BiH) in view of the restrictions related to the responsibilities under Article III(1) of the Constitution of BiH.

14. Given that the applicant contests the constitutional basis i.e. jurisdiction for enacting the challenged law, the Constitutional Court shall consider the request in a wider constitutional context without limiting itself exclusively to the provisions of the Constitution of BiH referred to in the request.

15. Article III of the Constitution of BiH governs the issue of responsibilities and relationships between the Institutions of Bosnia and Herzegovina and its Entities. The

responsibilities of Bosnia and Herzegovina are specified in paragraph 1 of this Article and those include foreign policy, foreign trade policy, customs policy, monetary policy as provided in Article VII, finances of the institutions and for the international obligations of Bosnia and Herzegovina, immigration, refugee, and asylum policy and regulation, international and inter-Entity criminal law enforcement, including relations with Interpol, establishment and operation of common and international communications facilities, regulation of inter-Entity transportation and air traffic control, which fall within the exclusive responsibilities of the Institutions of Bosnia and Herzegovina.

16. Article III(2) of the Constitution of BiH stipulates the responsibilities of the Entities and those include the right to establish special parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina as well as the right to enter into agreements with states and international organizations with the consent of the Parliamentary Assembly, unless the Parliamentary Assembly concludes that certain types of agreements do not require such consent. In addition, the said paragraph stipulates the obligations of the Entities, which shall provide all necessary assistance to the government of Bosnia and Herzegovina to enable it to honor the international obligations of Bosnia and Herzegovina and ensure a safe and secure environment for all persons under their respective jurisdictions. This paragraph does not specify any other exclusive responsibilities assigned to the Entities. However, paragraph 3 of this Article stipulates that all governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.

17. Based on further analysis of the constitutional provisions of Article III of the Constitution of BiH, the Constitutional Court notes that, although Article III(3) of the Constitution of BiH stipulates that all governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities, paragraph 5(a) confers the powers on Bosnia and Herzegovina to assume certain responsibilities of the Entities, defined in the Constitution of BiH by the notion of „additional responsibilities". The Constitutional Court construes that the aforementioned Article distinguishes three types of assuming of responsibilities: Bosnia and Herzegovina shall assume responsibility for (1) such other matters as are agreed by the Entities; (2) matters that are provided for in Annexes 5 through 8 to the General Framework Agreement; and (3) matters that are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina according to Articles III(3) and III(5) of the Constitution of Bosnia and Herzegovina (see Constitutional Court, Decision no. *U 26/01* of 28 September 2001, published in *the*

Official Gazette of BiH no. 4/02). In addition, paragraph (b) of this Article stipulates that, within six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects.

18. It would be necessary to conclude that the list of exclusive responsibilities of the Institutions of BiH under Article III(1) of the Constitution of BiH, *i.e.* the related responsibilities of the Entities under Article III(3)(a) of the Constitution of BiH, cannot be construed separately from other constitutional provisions, as already stated by the Constitutional Court in its Second Partial Decision in Case no. *U 5/98* (published in *the Official Gazette of BiH* no. 17/00), stating that „The Constitution of BiH creates powers not only within this general system of distribution of powers in Article III. In creating institutions of the State of Bosnia and Herzegovina, the Constitution also confers upon them more or less specific powers, as can be seen from Article IV(4) as regards the Parliamentary Assembly and Article V(3) as regards the Bosnia and Herzegovina Presidency, which are not necessarily repeated in the enumeration in Article III(1) of the Constitution of BiH. The Presidency of Bosnia and Herzegovina, for instance, is vested with the power of civilian command over Armed Forces in Article V(5)(a), although Article III(1) does not explicitly refer to military affairs as being within the responsibility of the institutions of Bosnia and Herzegovina. It must then be concluded that matters which are not expressly enumerated in Article III(1) are not necessarily under exclusive competence of the Entities in the same way as the Entities might have residual powers with regard to the responsibilities of the Institutions of Bosnia and Herzegovina".

19. The Constitutional Court underlines that the responsibilities within the meaning of Article III(3)(a) of the Constitution of BiH include not only the exclusive responsibilities of the Institutions of Bosnia and Herzegovina enumerated in Article III(1) of the Constitution of BiH, as construed by the applicant, but also the responsibilities and powers stipulated in the Constitution of BiH as a whole. Thus, Article IV(4) of the Constitution of BiH stipulates the responsibilities of the Parliamentary Assembly and, *inter alia*, it stipulates that the Parliamentary Assembly shall have the responsibility for enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution and for deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina. As already stated in the applicant's request, the responsibility for enacting legislation, as stipulated under Article IV(4)(a) of the Constitution of BiH, embodies the universal responsibility of the Parliament in the field of

legislative power. The Constitutional Court underlines that in addition to the said function, one of the fundamental functions of the Parliament related to the usual division of powers to legislative, judicial and executive branches is, *inter alia*, the supervision function, which implies the control exercised by the Parliament over the executive authorities. Given the authority of the Parliamentary Assembly to enact legislation as necessary to carry out its responsibilities, including the authority to decide upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina, the Constitutional Court holds that, in exercising this function, the Parliamentary Assembly is not limited only to deciding upon the sources and amounts of revenues for their operations but its function includes the control over the use of public funds, so that the public funds are used in an efficient, reliable and transparent manner. Consequently, the Constitutional Court concludes that the challenged law, which establishes the public procurement system in Bosnia and Herzegovina, has been enacted with the aim of ensuring the fulfilment of the supervision function of the Parliamentary Assembly pursuant to Article IV(4) of the Constitution of BiH.

20. Although it is not the task of the Constitutional Court to express an opinion as to whether or not the challenged law should be enacted (see Decision of the Constitutional Court, *U 26/01*, paragraph 26), it has to be noted that the challenged law was enacted through the process of harmonization of the regulations of Bosnia and Herzegovina with the EU regulations (*the acquis communautaire*), as part of the Stabilisation and Association Process. The field of public procurement is one of the fields which Bosnia and Herzegovina is obliged to bring into line with the requirements of the Agreement of the European Community and Subsidiary Laws. Bosnia and Herzegovina is responsible for meeting the international obligations and its Entities are obliged pursuant to Article III(2)(b) of the Constitution of BiH „to provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honour the international obligations of Bosnia and Herzegovina". By enacting the challenged law, Bosnia and Herzegovina has met one of the requirements envisaged within the framework of this international obligation and created a legislative framework for the authorities to perform all its activities in a transparent and conscientious manner with regard to the procedures related to the use of the public funds and, thus, Bosnia and Herzegovina has contributed to the reinforcement of the rule of law as one of the fundamental principles of a democratic State.

21. In view of the above, the Constitutional Court concludes that the challenged law is consistent with Article IV(4) of the Constitution of BiH.

VII. Conclusion

22. The Constitutional Court holds that the responsibilities under Article III(3)(a) of the Constitution of BiH include not only the exclusive responsibilities of the Institutions of Bosnia and Herzegovina enumerated in Article III(1) of the Constitution of BiH, but also the responsibilities and powers envisaged in the Constitution of BiH as a whole. Given the responsibility conferred to the Parliamentary Assembly to enact legislation as necessary to carry out its responsibilities, including the authority to decide upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina, the Constitutional Court holds that, in exercising this function, the Parliamentary Assembly is not limited only to deciding upon the sources and amounts of revenues for their operations but its function includes the control over the use of public funds, so that those are used in an efficient, reliable and transparent manner. Considering that the challenged law has been enacted with the aim of ensuring the fulfilment of the supervision function of the Parliamentary Assembly, the Constitutional Court concludes that the challenged law is consistent with Article IV(4) of the Constitution of BiH.

23. 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.

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

Seada Palavrić
President
Constitutional Court of Bosnia and Herzegovina

Case no. U 9/07

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Milorad Živković, the First Deputy Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing a request, for a review of the constitutionality of the Law on Statistics of Bosnia and Herzegovina

Decision of 4 October 2008

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2) line 2, 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), in Plenary and composed of the following judges:

Mr. David Feldman, Vice-President,

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Ms. Constance Grewe,

Mr. Krstan Simić,

Having deliberated on the request of **Mr. Milorad Živković, the First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time the request was lodged,** in Case no. **U 9/07**, at its session held on 4 October 2008, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Mr. Milorad Živković, the First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time the request was lodged, for review of the constitutionality of the Law on Statistics of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 26/04 and 42/04) is hereby dismissed.

It is hereby established that the Law on Statistics of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 26/04 and 42/04) is consistent with Article IV(4)(a) of the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*,

the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 23 May 2007, Mr. Milorad Živković, the First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time the request was filed („the applicant"), lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of the Law on Statistics of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 26/04 and 42/04 – „the challenged law").

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („Parliamentary Assembly") were requested on 7 February 2008 to submit their replies to the request.

3. On 4 March 2008, the House of Representatives submitted its reply to the request. The House of Peoples did so on 7 April 2008.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were forwarded to the applicant on 11 July 2008.

5. Pursuant to Article 93(1) lines 2 and (3) of the Rules of the Constitutional Court, the Constitutional Court has taken a decision that Ms. Seada Palavrić, the President of the Constitutional Court, and Judge Mirsad Ćeman, shall not participate in the work and the decision-making procedure relating to the request since they participated as members of the Parliamentary Assembly in the enactment of the challenged law.

III. Request

a) Statements from the request

6. The applicant states that the Parliamentary Assembly enacted the challenged law pursuant to Article IV(4)(a) of the Constitution of Bosnia and Herzegovina („the Constitution of BiH") and that, after analysing the said Article, it follows that every

Parliament has universal responsibility in the field of legislative power. In the applicant's view, an issue arises as to whether the Parliamentary Assembly, which has the mandate to enact laws, could enact the challenged law, „given the constitutional restrictions that fall under the scope of the Parliamentary Assembly." In addition, the applicant states that the High Representative of Bosnia and Herzegovina took a Decision on 22 November 2002, whereby the Law on Statistics of Bosnia and Herzegovina entered into force and whereby the High Representative promulgated that Law, after the Draft Law did not obtain approval in the parliamentary procedure, *i.e.* the Draft Law was not harmonized and did not obtain an approval by the Entities in the second round of voting. It is stated in the request that the High Representative ordered the Entities to initiate negotiations pursuant to Article III(5)(b) of the Constitution of BiH within 12 months from the date on which the Law entered into force. Nevertheless, the applicant holds that, given the limited responsibilities under Article III(1) of the Constitution of BiH, the Parliamentary Assembly had no mandate to regulate the field governed by the challenged law. Moreover, the applicant considers that in addition to the fact that it is unconstitutional to give Bosnia and Herzegovina the responsibility to decide about this field, the challenged law is not being implemented in the manner as envisaged due to a lack of relevant by-laws but also due to its inconsistency with the regulations and other laws at the level of the Entities. Finally, it is pointed out that the challenged law does not facilitate the procedures but it is rather destructive and, as such, subject to political manipulations. Consequently, it should be declared unconstitutional and thus rendered ineffective.

b) Reply to the request

7. Upon the Constitutional Court's request addressed to the House of Representatives to submit its reply to the request, the Constitutional Court has received an opinion by the Constitutional and Legal Commission of the House of Representatives in which it is stated that the request in question was considered by the Constitutional and Legal Commission of the House of Representatives at its 32nd session held on 29 February 2008 and, by a vote with 5 votes „in favour" and 3 votes „against", it concluded that the challenged law had been adopted at the session of the House of Representatives held on 23 April 2004 and at the session of the House of Peoples held on 26 April 2004 as well as that the Constitutional and Legal Commission „remains in support of the position of the challenged Law."

8. Upon the Constitutional Court's request addressed to the House of Peoples to submit its reply to the request, the Constitutional Court has received an opinion by the Constitutional and Legal Commission of the House of Peoples in which it is stated that the request in question was considered by the Constitutional and Legal Commission of the

House of Peoples at its 21st session held on 4 April 2008 and, by a vote with 3 votes „in favour" and 2 votes „against", it concluded that the challenged law had been adopted at the session of the House of Peoples held on 26 April 2004 and at the session of the House of Representatives held on 23 April 2004 as well as that the Constitutional and Legal Commission „remains in support of the request in question."

IV. Relevant Law

9. The **Decision of the High Representative in Bosnia and Herzegovina of 21 October 2002, issued with immediate effect, enacting the Law on Statistics of Bosnia and Herzegovina and directing the Entities to harmonise their laws and regulations dealing with the collection, processing and dissemination of statistics in accordance with the provisions of this Law, and further directing the Entities to enter into negotiations under Article III(5)(b) of the Constitution of Bosnia and Herzegovina as set out in this decision:**

1. The Law which follows and which forms an integral part of this Decision shall come into effect as provided for in Article 35 thereof on an interim basis, until such time as the Parliamentary Assembly of Bosnia and Herzegovina adopts this Law in due form, without amendment and with no conditions attached.

2. It is directed that the Entities shall harmonise their laws and regulations dealing with the collection, processing and dissemination of statistics with the provisions of this Law, and shall ensure that all such laws and regulations are sufficient to safeguard the Constitutional rights and freedoms of all persons.

3. It is further directed that pursuant to the provisions of Article III. 5. (b) of the Constitution of Bosnia and Herzegovina, within 12 months of this Law coming into effect, the Entities shall enter into negotiations with a view to combining the Entity Institutes with the Agency so that all aspects of collecting, processing and disseminating statistics are dealt with at the level of Bosnia and Herzegovina and form part of the responsibilities of the Institutions of Bosnia and Herzegovina.

4. This Decision shall be published without delay in the Official Gazettes of Bosnia and Herzegovina, of the Federation of Bosnia and Herzegovina, of the Republika Srpska and the Brčko District.

10. **Pursuant to Article IV(4)(a) of the Constitution of Bosnia and Herzegovina, the Parliamentary Assembly of Bosnia and Herzegovina, at the session of the House of Representatives held 23 April 2004 and at the session of the House of Peoples held on 26 April 2004, adopted the following**

Law on Statistics of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 26/04 and 42/04)

Article 1

This Law establishes the legislative framework for the organisation, production and dissemination of statistics of Bosnia and Herzegovina within the meaning of this Law.

Article 3

„Statistics of Bosnia and Herzegovina" shall mean information collected from a given field of statistical units and processed and/or disseminated to implement the Program or other statistics required for Bosnia and Herzegovina or any other statistics compiled by state bodies and endorsed by the Agency. For these purposes, Statistics of Bosnia and Herzegovina shall exclude statistics that are disseminated and/or published by the Entities of Bosnia and Herzegovina for their purposes („Entity Statistics"). Notwithstanding, the Agency may require the Entities to provide any or all data within the Entity Statistics including cells of individual Statistical Units and which the Agency deem relevant to implement the Program to be transmitted to it in accordance with the provisions of this Law.

Article 18

The Entities shall also ensure that its relevant bodies make available to the Agency (as the latter may deem necessary) such statistical data which are necessary for Bosnia and Herzegovina to carry out its responsibilities provided for in the Constitution of Bosnia and Herzegovina including those in Article III(1) and Article III(5)(a) of the Constitution of Bosnia and Herzegovina in accordance with the Program.

11. **Constitution of Bosnia and Herzegovina, in the relevant part, reads:**

Article III(1)

I. Responsibilities of the Institutions of Bosnia and Herzegovina

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

a) Foreign policy.

b) Foreign trade policy.

c) Customs policy.

d) Monetary policy as provided in Article VII.

e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina.

f) Immigration, refugee, and asylum policy and regulation.

g) International and inter-Entity criminal law enforcement, including relations with Interpol.

h) Establishment and operation of common and international communications facilities.

i) Regulation of inter-Entity transportation.

j) Air traffic control.

Article III(2)(b), in the relevant part, reads:

Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honour the international obligations of Bosnia and Herzegovina, provided that financial obligations incurred by one Entity without the consent of the other prior to the election of the Parliamentary Assembly and Presidency of Bosnia and Herzegovina shall be the responsibility of that Entity, except insofar as the obligation is necessary for continuing the membership of Bosnia and Herzegovina in an international organization.

Article III(3)(a)

All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.

Article III(5)(a)

Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.

Article IV(4)

The Parliamentary Assembly shall have responsibility for:

a) Enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution.

b) Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.

c) Approving a budget for the institutions of Bosnia and Herzegovina.

d) Deciding whether to consent to the ratification of treaties.

e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.

Article V(3), lines a, c, and d

The Presidency shall have responsibility for:

a) Conducting the foreign policy of Bosnia and Herzegovina.

c) Representing Bosnia and Herzegovina in international and European organizations and institutions and seeking membership in such organizations and institutions of which Bosnia and Herzegovina is not a member.

d) Negotiating, denouncing, and, with the consent of the Parliamentary Assembly, ratifying treaties of Bosnia and Herzegovina.

V. Admissibility

12. The request for review of constitutionality was filed by the First Deputy Chair of the House of Representatives of the Parliamentary Assembly, which means that it was filed by an authorized person as set forth in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. In addition, the request is related to the review of constitutionality of the challenged law, which was enacted by the Parliamentary Assembly of BiH, in which case the Constitutional Court is competent to take decisions, as referred to in Article VI(3)(a) line 2 of the Constitution of Bosnia and Herzegovina.

13. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of Constitutional Court, the Constitutional Court has established that the request is admissible as it was filed by the authorized person and as there is not a single formal reason under Article 17(1) of the Rules of the Constitutional Court, which would render the request inadmissible.

VI. Merits

14. According to the applicant, as the field of statistics does not fall within the scope of responsibilities specified in Article III(1) of the Constitution of BiH, the Parliamentary Assembly has no mandate to regulate this field through law. The applicant contests the constitutional basis on which the challenged law was enacted (Article IV(4)(a) of the Constitution of BiH) in view of the restrictions related to the responsibilities specified in Article III(1) of the Constitution of BiH.

15. In examining the allegations stated in the relevant request, the Constitutional Court has established that the Law on Statistics of Bosnia and Herzegovina was enacted by the High Representative's Decision of 21 October 2002, issued with immediate effect. The High Representative's Decision states that the Law on Statistics of Bosnia and Herzegovina shall enter into force on the eighth day following the date of its publication in the *Official Gazette of Bosnia and Herzegovina*, on an interim basis, until such time as the Parliamentary Assembly of Bosnia and Herzegovina adopts this Law in due form, without amendment and with no conditions attached. In addition, it is directed that the Entities shall harmonise their laws and regulations dealing with the collection, processing and dissemination of statistics with the provisions of this Law. In the preamble to his Decision, the High Representative gives the reasons for enacting the Decision stating that reliable and comprehensive countrywide statistical data are crucial for proper evaluation and decision-making in all fields in the country, and for its international obligations and relations, as well as for the future development and economic prosperity of Bosnia and Herzegovina. The High Representative took the Decision by exercising the powers vested in the High Representative by Article V of Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina („the General Framework Agreement") and referred to Article XI(2) of the Peace Implementation Council's Conclusions (the „Bonn Declaration"), authorising him to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of difficulties „by making binding decisions, as he judges necessary," on certain issues, including „measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities". In addition, by the High Representative's Decision it is further directed that pursuant to the provisions of Article III(5)(b) of the Constitution of Bosnia and Herzegovina, within 12 months of this Law coming into effect, the Entities shall enter into negotiations with a view to combining the Entity Institutes with the Agency so that all aspects of collecting, processing and disseminating statistics are dealt with at the level of Bosnia and Herzegovina and form part of the responsibilities of the Institutions of Bosnia and Herzegovina. Based on the High Representative's Decision, the Agreement on the implementation of harmonised methodologies and standards in preparing the statistical data of Bosnia and Herzegovina was signed in November 2005. By this Agreement, *inter alia*, the Entities' Ministers of Finance have undertaken to ensure that this Agreement, in an appropriate manner, improves the application of the Law on Statistics of BiH and, if necessary, to initiate the procedure for amending the present Entities' laws on statistics.

16. In answering the question as to whether the Parliamentary Assembly has the mandate to regulate the field of statistics, the Constitutional Court has invoked Article III(1)(a) of

the Constitution of BiH, which stipulates that Bosnia and Herzegovina shall have exclusive responsibility in the area of foreign policy, Article IV(4)(a) of the Constitution of BiH, which prescribes that the Parliamentary Assembly shall have responsibility for enacting legislation as necessary to implement decisions of the Presidency, and Article V(3) of the Constitution of BiH stipulating the responsibilities of the Presidency. Pursuant to Article V(3) of the Constitution of BiH, *inter alia*, the Presidency shall have responsibility for conducting the foreign policy of Bosnia and Herzegovina, representing Bosnia and Herzegovina in international and European organizations and institutions and seeking membership in such organizations and institutions of which Bosnia and Herzegovina is not a member, and negotiating, denouncing, and, with the consent of the Parliamentary Assembly, ratifying such treaties. Within the framework of its responsibilities, the Presidency creates and pursues the foreign policy of Bosnia and Herzegovina and one important aspect of its foreign policy is its membership in international organisations and integrations. In this context, the Constitutional Court recalls that, following the signing of the General Framework Agreement, *i.e.* after the entry into force of the Constitution of BiH, Bosnia and Herzegovina has continued its international legal personality and maintained membership in international organisation of which Bosnia and Herzegovina was a member and has taken all necessary steps to meet the obligations in respect of membership in these international organisations, in particular, in the United Nations. In addition to the aforementioned, the considerable efforts have been made in the context of inclusion of Bosnia and Herzegovina into the process of European integration, which resulted in its membership in the Council of Europe as of 2002. Moreover, in 2008, the European Union signed the Stabilization and Association Agreement with Bosnia and Herzegovina. European integration is a complex process which includes a number of privileges and rights of each member state as well as obligations to be fulfilled during the accession process and the post-accession period. In the view of the Constitutional Court, the issue of responsibility of the Parliamentary Assembly to enact the challenged law should be considered in the context of the obligations to be fulfilled by Bosnia and Herzegovina for its inclusion into the European integration process, as an integral part of foreign policy of Bosnia and Herzegovina, which is under the exclusive responsibility of the state institutions within the meaning of Articles III(1)(a) and V(3)(a) of the Constitution of BiH.

17. Having analysed the process related to Bosnia and Herzegovina's candidacy for membership of the Council of Europe and the obligations arising from the status of a member state, the Constitutional Court has established that the Parliamentary Assembly applied for membership of the Council of Europe in 1995. Four years later, the Committee of Ministers asked the Council of Europe Parliamentary Assembly to give an opinion

on the application of Bosnia and Herzegovina, in accordance with Statutory Resolution 51 (30A). In 2002, the Council of Europe Parliamentary Assembly gave the Opinion (see, Council of Europe Parliamentary Assembly, Opinion no. 234(2002), „Bosnia and Herzegovina's application for membership of the Council of Europe", available on www.assembly.coe.int). In the said Opinion, the Council of Europe Parliamentary Assembly recommends that the Committee of Ministers invite Bosnia and Herzegovina to become a member of the Council of Europe and allocate five seats to Bosnia and Herzegovina in the Parliamentary Assembly. Additionally, it is stated in the Opinion that the Council of Europe Parliamentary Assembly takes note of the letters from the Presidency of Bosnia and Herzegovina, the Speakers of the Parliament and the Prime Minister and notes that Bosnia and Herzegovina undertakes to honour the commitments, as quoted in the Opinion, including its obligation mentioned under the title *with regard to domestic legislation: c. to adopt, within six months after its accession, if it has not yet done so, the laws which have been temporarily imposed by the High Representative*. In the said Opinion, the Council of Europe Parliamentary Assembly states the following „the Assembly is aware that some of the above commitments are within the fields of jurisdiction of the Entities (the Federation of Bosnia and Herzegovina and the Republika Srpska), whose actions are essential to their fulfilment. Nevertheless, it considers that the state authorities of Bosnia and Herzegovina are responsible to the Council of Europe for ensuring that the Entities take the measures necessary to comply with these commitments".

18. Furthermore, as to the accession of Bosnia and Herzegovina to the European Union, *i.e.* the signing of the Stabilisation and Association Agreements with Bosnia and Herzegovina, the Constitutional Court has established that the activities of Bosnia and Herzegovina related to this process started with fulfilment of the „Road Map" requirements, which set out 18 priority steps to be undertaken by Bosnia and Herzegovina in order for the European Commission to start its work on a Feasibility Study assessing the preparedness of Bosnia and Herzegovina to take the next steps towards the European integration process within the framework of accession process. The European Commission prepared the Feasibility Study in 2003 (see, Report from the Commission to the Council on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union of 18 November 2003, available on the web-site of the Directorate for European Integration of Bosnia and Herzegovina, www.dei.gov.ba). It is stated in the Feasibility Study that Bosnia and Herzegovina has made a major progress in respect of democracy procedures enactment, the rule of law and macro-economic stabilisation development but that many fundamental reforms still need to be undertaken by Bosnia and Herzegovina. In the part of this document titled „Reliable statistics", Bosnia and Herzegovina is directed to implement the Law on Statistics [at

the time it was still the Law imposed by the High Representative] aiming at the creation of a functioning system of statistics with clear lines of responsibility and co-ordination mechanisms. This issue is included within the 16 priority reforms to be addressed in the course of 2004 by Bosnia and Herzegovina. As it related to the short-term priority areas, the European Commission published the report on the progress made in short-term priority areas (see, Stabilisation and Association Report 2004, available on www.dei.gov.ba), stating the following: *a limited progress has been made despite the November 2003 agreement among the three statistical agencies to establish a central statistical system in Bosnia and Herzegovina. The Law on Statistics (which is imposed) has not been adopted in the parliamentary procedure of the State Parliament* […]. Based on such conclusions there is no doubt that Bosnia and Herzegovina was obliged to conduct the parliamentary procedure and adopt the Law on Statistics in order to meet the requirements established in the Feasibility Study by the European Commission. The Parliamentary Assembly of Bosnia and Herzegovina adopted the challenged law in 2004 pursuant to Article IV(4)(a) of the Constitution of BiH, in the original text as temporarily imposed by the Decision of the High Representative.

19. In view of the above, the Constitutional Court holds, with no doubt, that the Parliamentary Assembly of Bosnia and Herzegovina has had the mandate to enact the challenged law based on Article IV(4)(a) in conjunction with Article V(3)(a) of the Constitution of BiH in order to enforce decisions in the area of foreign policy, which falls under the exclusive responsibility of the Presidency of Bosnia and Herzegovina, relating to the process of becoming a member of the Council of Europe and towards the signing of the Stabilisation and Association Agreement with the European Union. Although the request in question was examined within the context of the responsibility of the Parliamentary Assembly for the matters in the area of foreign policy under Article III(1)(a) of the Constitution of BiH, the Constitutional Court underlines that the Parliamentary Assembly, as an institution of BiH, has responsibilities under Article IV(4)(a) of the Constitution of BiH for all matters set out in Article III(1) of the Constitution of BiH. If the request is examined in this wider context, it is necessary to conclude that the central agency for statistics significantly facilitates functioning of all of these areas under the responsibilities of the institutions of BiH, including foreign trade policy, customs policy, immigration, refugee and asylum policy and regulation, communication facilities and regulation of inter-Entity transportation etc. Although the said obligations fall within the exclusive responsibility of the Institutions of Bosnia and Herzegovina, and the State of Bosnia and Herzegovina is responsible for the fulfilment of those obligations, the Entities have the constitutional obligation to provide all necessary assistance to the Institutions of Bosnia and Herzegovina in accordance with Article III(2)(b) of the Constitution of BiH.

20. Finally, the Constitutional Court highlights that, by enacting the challenged law, Bosnia and Herzegovina has met one of the requirements of these international obligations and, in addition, it has created a legislative framework for proper and impartial collection, processing and dissemination of statistics relevant to decision-makers in the country and international relations of Bosnia and Herzegovina as well as the right of access to information of all citizens. Thereby, Bosnia and Herzegovina has demonstrated its commitment to the reinforcement of the rule of law, which is one of the fundamental principles of any democratic society.

21. Therefore, the Constitutional Court concludes that, by enacting the challenged law, the Parliamentary Assembly has acted in accordance with its responsibilities under Article IV(4)(a) of the Constitution of BiH. Consequently, the Constitutional Court concludes that the challenged law is consistent with Article IV(4)(a) of the Constitution of BiH.

VII. Conclusion

22. The Constitutional Court concludes that the Law on Statistics of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 26/04 and 42/04) is consistent with Article IV(4)(a) of the Constitution of BiH. It is concluded that the Parliamentary Assembly of Bosnia and Herzegovina has had the mandate to enact the challenged law based on Article IV(4)(a) in conjunction with Article V(3)(a) of the Constitution of BiH in order to enforce decisions in the area of foreign policy, which falls within the exclusive responsibility of the Presidency of Bosnia and Herzegovina, relating to the process of becoming a member of the Council of Europe and towards the signing of the Stabilisation and Association Agreement with the European Union.

23. 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.

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

Seada Palavrić
President
Constitutional Court of Bosnia and Herzegovina

Case no. U 15/07

DECISION
ON ADMISSIBILITY
AND MERITS

Request of eight delegates from the Bosniak Caucus in the Council of Peoples of the Republika Srpska, for a review of the constitutionality of the provisions of Article 3 para 2, Article 15 para 2 and Articles 47, 48, 49, 50, 51 and 52 of the Expropriation Law of the Republika Srpska

Decision of 4 October 2008

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3)(a) 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* no. 60/05), in the Plenary and composed of the following judges:

Ms. Seada Palavrić, 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,

Mr. Mirsad Ćeman

Having deliberated on the request of **eight delegates from the Bosniac Caucus in the Council of Peoples of Republika Srpska** in Case no. **U 15/07**, At its session held on 4 October 2008 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request filed by eight delegates from the Bosniac Caucus in the Council of Peoples of the Republika Srpska for review of constitutionality of provisions of Article 3 paragraph 2, Article 15 paragraph 2 and Articles 47, 48, 49, 50, 51 and 52 of the Expropriation Law of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 112/06 and 37/07) is hereby dismissed.

It is hereby established that the provisions of Article 3 paragraph 2, Article 15 paragraph 2 and Articles 47, 48, 49, 50, 51 and 52 of the Expropriation Law of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 112/06 and 37/07) are consistent with the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 18 July 2007, eight delegates from the Bosniac Caucus in the Council of Peoples of the Republika Srpska („the applicants") lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of constitutionality of the provisions of Article 3 paragraph 2, Article 15 paragraph 2 and Articles 47, 48, 49, 50, 51 and 52 of the Expropriation Law of the Republika Srpska (*Official Gazette of the Republika Srpska* nos. 112/06 and 37/07 – „the Law").

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska was requested on 29 January 2008 to submit their reply to the request.

3. The National Assembly of the Republika Srpska submitted their reply to the request on 12 February 2008.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply of the National Assembly of the Republika Srpska was communicated to the applicants on 4 April 2008.

5. Pursuant to Article 93(1)(2) of the Rules of the Constitutional Court, the Constitutional Court decided that Judge Krstan Simić would not participate in the decision-making procedure, since he had participated in decision-making procedure on the challenged decision.

III. Request

a) Allegations stated in the request

6. In the request for review of constitutionality the applicants state that they initiated the present proceedings pursuant to Article VI(3)(a) of the Constitution of Bosnia and

Herzegovina, as all eight delegates of the Bosniac Caucus in the Council of Peoples of the Republika Srpska make up more than one fourth of the members of the Council of Peoples of the Republika Srpska which numbers 28 delegates in total. The applicants point out that under Article 3 paragraph 2 of the Law, exceptionally, real property may be expropriated for the purpose of residential and business construction and restructuring the land to satisfy the aforesaid needs; under Article 15 paragraph 2 a general interest for constructing residential and business facilities and restructuring land to satisfy the said needs, as referred to in Chapter VI of this Law, in the area for which a regulation planning document or town-planning project has been adopted, shall be considered established by that planning document, whereas Articles 47, 48, 49, 50, 51 and 52 of the Law prescribe conditions and procedure for expropriation for the purpose of residential and business construction and restructuring the land to satisfy the aforesaid needs. The applicants hold that „the challenged provisions of the Law are not consistent with Article II(2) and II(3) of the Constitution of Bosnia and Herzegovina concerning the rights and freedoms enumerated in the constitutional provisions, including the rights and freedoms stated in the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") and its protocols which directly apply in Bosnia and Herzegovina, and which shall have priority over all other law. Thus, this concerns the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina, which implies that all citizens of the Republika Srpska have the right to peaceful enjoyment of their property as one of their fundamental human rights, which is safeguarded by the European Convention and Article 1 of Protocol No. 1 to the European Convention, which, at present, is one of the most frequently violated rights". In view of Article 1 of Protocol No. 1 to the European Convention which stipulates that every physical or legal person is entitled to peaceful enjoyment of his/her possessions, and that no one shall be deprived of his/her possessions except in the public interest and subject to the conditions provided for by law and by the general principles of the international law, whereby the previous provisions do not affect the right of the state to apply the laws that it deems to be necessary for the purpose of regulating the use of property in accordance with general interest or for the purpose of facilitating the collection of taxes or other fees, the applicants are of an opinion „that constructing residential and business premises under current economic and social circumstances should not be categorized as general interest, as regulated by the relevant provisions of the said Law". In particular, a dispute is usually raised when general interest is considered to be established by a plan or town-planning project (Article 15, paragraph 2 of the Law). As to the disputable Article 15 paragraph 2 of the Law, the applicants are of an opinion that the issue is not about the „general interest" justifying construction of residential and business facilities, but it is rather about the „interest of a group of people" because the general interest is not to be determined by a regulation

plan for the purpose of development and visions of development of some communities, and therefore expropriation of property should be an exception in justified circumstances, and not a rule. Given the fact that according to the Law on Physical Planning (*Official Gazette of RS* no. 84/02 and 112/06), municipal and town assemblies are in charge of adopting regulation plans and town-planning projects and the said technical-regulative planning documents are not to replace the Decision of the Government on determining a general interest (Article 14 of the Law). The applicants raise a principal issue on whether construction of residential and business facilities may be a valid reason for expropriation of real properties, since in case where a beneficiary of expropriation is a unit of local self-government (municipality or a town) and the subject of expropriation are large tracts of construction land or individual plots of land, the mentioned land is to be sold at auction (as stipulated by Articles 47 through 52 of the Law at issue) to bidders who have offered the best price (the bidders may be physical or legal persons from a private sector). For the above mentioned reasons, the applicants consider Chapter VI „Expropriation of land for the purpose of residential and business construction" unconstitutional, since those provisions are inconsistent with Article II(2) (International Standards) that is with Article II(3)(k) of the Constitution of Bosnia and Herzegovina, with the European Convention and Article 1 of Protocol No. 1 to the European Convention. The applicants propose that the Constitutional Court, after conducting a procedure in accordance with the Rules of the Constitutional Court, should adopt a Decision on cessation of application of the challenged provisions of the Law due to their incompatibility with the Constitution of Bosnia and Herzegovina.

b) Reply to the request

7. In its reply to the request, the National Assembly of Republika Srpska states that Article VI(3)(a) of the Constitution of Bosnia and Herzegovina explicitly stipulates that the disputes before the Constitutional Court of Bosnia and Herzegovina, *inter alia*, may be initiated by one-fourth of the members of either chamber of a legislative authority of an Entity. According to Article 69(2) of the Constitution of the Republika Srpska „the constitutional and legislative powers shall be exercised by the National Assembly". Article 69, paragraph 2 has been supplemented by item 1 of Amendment LXXVI, reading as follows: „The legislative authority in Republika Srpska shall be performed by the National Assembly and the Council of Peoples. The laws and other regulations approved by the National Assembly concerning the vital national interest issues of any of the constituent peoples shall come into force only after their adoption by the Council of Peoples". Article 70 of the Constitution of the Republika Srpska specifies the responsibilities and scope of the National Assembly as a legislative body of the Republika Srpska stipulating, *inter*

alia, that: „the National Assembly shall: 1. decide on amending the Constitution; 2. enact laws, other regulations and general enactments". Article 70, which is supplemented by Amendment LXXXII, stipulates that the laws or other regulations or enactments, which the National Assembly has voted for, shall be forwarded to and considered by the Council of Peoples if related to the vital interest defined under Amendment LXXVII. It is evident (Article 69, paragraph 2, amended by item 1 of the Amendment LXXVI and Article 70 amended by Amendment LXXXII of the Constitution of the Republika Srpska) that the domain of consideration of law, other regulations and acts by the Council of Peoples has been exclusively limited to the segment of vital national interest of constituent peoples whose list has been defined under Article 70 of the Constitution of the Republika Srpska, which has been supplemented by Amendment LXXVII. It is also stated that the Council of Peoples does not have full legislative powers as those of the parliamentary houses and therefore it can neither be formally nor substantively considered a chamber of „a legislative authority of an Entity" as prescribed by Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. It implies that one fourth of delegates of the Council of Peoples are not authorized to act as initiator of a dispute before the Constitutional Court of Bosnia and Herzegovina and that there is *rationae personae* incompatibility with the Constitution of Bosnia and Herzegovina. The National Assembly of the Republika Srpska is the only legislative organ of the Republika Srpska that is fully authorized and entitled to all the rights and duties arising from such authorities. Only one fourth of its delegates may be considered an authorized initiator of a dispute before the Constitutional Court of Bosnia and Herzegovina within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

8. It is stressed that it is a fact that eight Bosniac delegates make up one fourth of the Council of Peoples but they do not make one-fourth of the legislative authority of the Republika Srpska. As to its powers regulated by the Constitution of the Republika Srpska, the Council of Peoples is not a legislative organ of the Republika Srpska nor is it possible to draw such conclusion in the course of legal theorizing. Its role in the legislative process has been limited exclusively to the issue of vital national interest, as well as to consideration of laws, other regulations and enactments from that aspect only. The Constitution of the Republika Srpska has clearly defined the framework that the powers of the Council of Peoples cannot be exceeded. Consequently, one fourth of the members of the Council of Peoples are not authorized to initiate a dispute before the Constitutional Court. Moreover, in its request, the Council of Peoples does not refer to the protection of vital national interest of Bosniac people and, according to the Constitution of the Republika Srpska, the Constitutional Court of the Republika Srpska is authorized to deal with that issue and

not the Constitutional Court of Bosnia and Herzegovina. It is suggested that the request is rejected as *ratione personae* inadmissible without considering the merits of the case.

9. Furthermore, the reply reads that if the Constitutional Court decides to consider the request as to its fundamental nature, it is stressed that the Law on Expropriation is aimed at meeting the requirements which, *de facto*, were created by the Law on Construction Land (*Official Gazette of Republika Srpska* no. 41/03 and 86/03) and were upheld by the new Law on Construction Land (*Official Gazette of Republika Srpska* no. 112/06) and this Law, in addition to the state-owned city construction land, has also introduced the privately-owned city construction land into a legal system. It is stated that should there be no response to a newly arisen situation in terms of amending the positive legislation it would create a situation where the existing town-planning regulations would become purposeless and unenforceable, since a private person could, at his/her discretion, render its enforcement unfeasible. The enacted law arrangements have been conditioned by economic and social requirements, that is by a specific general interest, and the legislator decided to entrust its assessment to the bodies that are believed to be capable of adopting the most appropriate decision. It is noted that this law introduced an obligation for a competent administrative body, to inform, *ex officio* and without delay, the owner of real property that a proposal for expropriation of his/her real property has been submitted (Article 26, paragraph 1 of the Law). Article 27 of the Law provides for the beneficiary of expropriation and owner of real property to sign an agreement before an administrative body, pending a ruling on the proposal for expropriation, and by this agreement the type and amount of compensation would be specified, as well as the time limit for fulfillment of obligation by the beneficiary of expropriation concerning the compensation to be paid to the owner of real property. Article 30 of the Law has specified obligatory elements of the ruling of administrative body, whereby a decision has been adopted on the proposal for expropriation and the owner of real property may pursue all legal remedies against this ruling in accordance with the Law on General Administrative Proceedings and the Law on Administrative Dispute. As last resort, an appeal may be lodged with the Constitutional Court of Bosnia and Herzegovina. The challenged provisions of the Law should be viewed in the context of the Law as a whole and the procedures prescribed by the said law. The said procedures are aimed at achieving legitimate goals thereby ensuring that the owners of the real property, which may become subject to expropriation, do not shoulder „an excessive burden" for the purpose of achieving the goals of the Law. It is stated that such regulation, in particular the above said Articles 26, 27, and 30 of the Law, provide for proportionality between the right of an individual to peacefully enjoy his/her property, within the meaning of protecting such enjoyment, and the right of the Republika Srpska to limit the right of individuals in cases where it is necessary and in the general interest.

IV. Relevant Law

10. The **Expropriation Law** (*Official Gazette of Republika Srpska* nos. 112/06 and 37/07), its relevant provisions, challenged by the request, read as follows:

Article 3, paragraph 2

(2) With the exception to paragraph 1 of this Article, real property may be expropriated for the purpose of the residential and business construction and restructuring the land to satisfy the aforesaid needs.

Article 15, paragraph 2

(2) General interest for constructing residential and business facilities and restructuring land to satisfy the said needs, as referred to in Chapter VI of this Law, in the area for which a regulation planning document or town-planning project has been adopted, shall be considered established by that planning document.

VI – EXPROPRIATION OF LAND FOR THE PURPOSE OF RESIDENTIAL AND BUSINESS CONSTRUCTION

Article 47

Large tracts of construction land and individual construction plots of land may also be expropriated for the purpose of constructing residential and business facilities and restructuring land to satisfy the mentioned needs.

Article 48

Land may be expropriated for the purpose of constructing residential and business facilities only when a regulation planning document has been adopted for that complex according to which it will be considered that the general interest for the said construction has been established.

Article 49

A large tract of construction land, as well as individual plots of land, may be expropriated for the purpose of constructing residential and business facilities to the benefit of municipality or town in which area that land is situated.

Article 50

(1) As to the expropriated land under Article 47 of the Law, an unit of local self-government unit assembly, after the bidding process, shall sell it to the most favorable bidder for the purpose of constructing residential and business facilities.

(2) In the event that the situation from the previous paragraph arises, the time limit for construction shall be specified by the agreement on the sale of land, which will also include legal consequences in the case of failure to fulfill the said obligations.

(3) The bidding process shall be conducted in a way and under the conditions prescribed by the Law on Construction Land.

Article 51

(1) If a construction plot of land, which is referred to in Article 47 of this Law, is owned by one person, that person has a priority right to construct on that land.

(2) The right from paragraph 1 has been given to the co-owner who exercises that right based on the agreement reached with other co-owners.

(3) In the event that the situation from paragraphs 1 and 2 of this Article arises, a competent body in charge of property-legal affairs, after submission of a proposal for expropriation shall invite the owner to give his/her opinion in writing about whether he/she wants to build a facility on that land. Should the owner decide to build a facility, the procedure of expropriation with regards to the owner in question shall be suspended if a facility to be built may be privately owned.

(4) The priority right in construction, which is referred to in the previous paragraphs, shall be established by a ruling of administrative body in charge of property-legal affairs.

(5) If the owner of construction land fails to start building a facility within the time limit of one year after giving the statement, in other words if he/she fails to build a facility within a period of four years, he/she shall lose that right of priority in construction, and after that the expropriation procedure shall be conducted on the land at issue.

(6) Loss of right of priority in construction, referred to in the previous paragraphs, shall be established by a ruling to be adopted by an administrative body in charge of property-legal affairs.

(7) An appeal may be lodged against the ruling referred to in paragraphs 4 and 6 of this Article and the Republic Department for Geodesy and Property-Legal Affairs shall make a decision on the said appeal.

Article 52

The provisions of this Law relating to full expropriation of real property shall be applied to the expropriation of land for the purpose of residential and business construction unless otherwise stipulated by the provisions of this Chapter.”

Other relevant provisions of the Law

Article 2

Expropriation is deprivation or restriction of the right of ownership over real property with a fair compensation, which may not be lower than the market value of real property.

Article 3 paragraphs 1 and 3

Real property may be expropriated for the purpose of carrying out works or construction of business infrastructure, such as: traffic, water, energy and telecommunications facilities, defense facilities, facilities for human environment protection and natural disasters protection, and exploiting mineral and other natural riches.

Real property may not be expropriated for the purpose of agricultural works.

Article 4

Real properties owned by physical and legal persons may be subject to expropriation.

Article 6 paragraphs 1 and 2

Expropriation may be carried out for the needs of Republika Srpska, and units of local self-government, unless the law provides for otherwise (beneficiary of expropriation).

The beneficiary shall allocate the expropriated real properties to investors for construction of buildings for which a general interest has been identified, provided that the mutual rights and obligations of the Parties to the Contract resulting from the expropriation of the real properties and construction of buildings are regulated in a Contract.

Article 7 paragraphs 1 and 2

Real property shall become ownership of expropriation beneficiary through expropriation (full expropriation).

In addition to the former owner's rights of ownership, other rights over the real property at issue shall cease to be in effect through full expropriation.

Article 10

On expropriation of real property the expropriation beneficiary shall acquire the right to use the real property for the purpose for which expropriation was carried out.

Article 12 paragraph 1

The owner of an expropriated real property shall be entitled to an equitable compensation. If the expropriation beneficiary is not able to provide such real property,

a fair compensation in cash shall be stipulated, which may not be lower than the market value of real property which is subject to expropriation.

II - Establishment of General Interest

Article 14 paragraph 1

The Government of Republika Srpska shall issue a Decision on establishing a general interest for construction of facilities or carrying out works on the basis of a proposal submitted by the beneficiary of expropriation, after having previously obtained an opinion from the unit of local self-government assembly at which territory construction or works are to take place, in accordance with appropriate planning act.

Article 15 paragraph 1

The general interest is deemed to be established if special law prescribes that construction of certain facilities or carrying out of works is in the general interest.

Article 60

Compensation for an expropriated… construction and city construction land shall be determined in cash so as to be fair and not lower than the market value of such land.

11. The **revised text of the Constitution of the Republika Srpska** (*Official Gazette of the Republika Srpska* nos. 3/92, 6/92, 8/92, 15/92 and 19/92) into which the following amendments have been incorporated: XXVI-XLIII, XLIV-LI, LII, LIII, LIV-LXV, LXVI-XCVIII, XCIX-CIII, CIV-CV, CVI-CXIII, CXIV and CXV-CXXI, relevant provision reads as follows:

Article 102

The municipality, through its bodies and in accordance with the law, shall:

1. adopt a development program, an town-planning plan, in accordance with the law;

3. regulate and provide for the use of city construction land and business premises;

4. be responsible for the construction...

5. provide for the specific needs of citizens in ... social welfare, protection of environment, and other areas"…

12. The **Law on Construction Land of the Republika Srpska** (*Official Gazette of the Republika Srpska* no. 112/06), so far as relevant, reads as follows:

Article 1

This Law regulates: the conditions and manner of identifying city construction land and other construction land in towns, cities and urban settlements and other areas intended for residential and other complex construction, the manner of use, management and disposal of state-owned construction land, as well as compensation for the use of that land.

Article 2

Construction land shall be used as per its purpose and in the manner ensuring its rational use in accordance with the law.

Article 3 paragraph 1

Under this Law, the developed and undeveloped land in cities and urban settlements, which has been intended for construction of facilities by corresponding plans, and in accordance with provisions of the Law on Physical Planning (Official Gazette of Republika Srpska no. 84/02), and which has been formerly stipulated by law and other regulations, i.e. which has been stipulated as such by a decision of a municipal assembly, or the city, shall be considered City Construction Land.

Article 4

Construction of cities and urban settlements on City Construction Land and Other Construction Land shall be carried out in accordance with the Regulation Plan or spatial-planning and town-planning–planning documentation (until adoption of a regulation plan) and shall be considered to be in the general interest.

Article 5

City Construction Land may be state or privately owned.

Article 7

The municipality, that is city („unit of local self-government") manages and disposes of the state owned City Construction Land in the manner and under conditions foreseen by the law and regulations enacted on the basis of the law.

Article 8 paragraph 2

Owners may dispose of privately owned City Construction Land subject to restrictions and under conditions prescribed by law.

Management and disposal of the state-owned City Construction Land

Article 15

The Assembly of the unit of local self-government may sell at auction or give in return state owned undeveloped Construction Land to physical and legal persons to be used for construction of permanent buildings in accordance with the Regulation Plan, or to lease it for construction of provisional facilities.

Article 16 paragraph 2

Physical persons may not be sold City Construction Land through direct agreement. Exceptionally, a physical person may be sold City Construction Land through direct agreement in the event that public sale was unsuccessful, in accordance with a by-law.

Article 17

Conditions and terms and the procedure of selling undeveloped City Construction Land by direct agreement for the purpose of construction, shall be regulated by a by-law and a decision of the unit of local self-government, in accordance with the program of residential and other construction in the unit of local self-government.

Article 18 paragraph 1

Prior to sale, that is prior to the conclusion of a contract on sale, the assembly of unit of local self-government shall, along with the draft contract, obtain an opinion from the Public Attorney of Republika Srpska on whether the proposed sale, that is the contract, is in accordance with the law.

13. The **Law on Town Planning – revised text** (*Official Gazette of the Republika Srpska* nos. 84/02, 14/03, 112/06 and 53/07), so far as relevant reads as follows:

Article 1 paragraph 1

Physical planning, within the meaning of this law, is a sum of measures and activities that are part of construction process, physical and town-planning planning, … and construction project designing and construction, with the aim to entertain the needs of population for accommodation, work and recreation in a healthy and protected environment, to create conditions and presumptions for an even and harmonious development of Republika Srpska and all its parts, thereby bringing in line general and special interests.

Article 3 paragraph 1

Republika Srpska, municipalities and other territorial units, shall stipulate and exercise in their territory physical planning policy by adopting and implementing corresponding

plans, that is by other acts and measures, in accordance with their competences laid down in the Constitution and law.

Article 33 paragraphs 1 and 3

Organization, planning and use of space and construction of settlements shall be provided for through adoption and enforcement of plans. Under this law, inter alia, regulation plans and town-planning projects shall be considered plans.

Regulation plans and town-planning projects are technical-regulatory planning documents, based on which conditions for designing and constructing facilities are elaborated on and defined, that is based on which space is directly turned into its intended purpose.

Town-planning document

Article 44 paragraph 1

Town-planning document elaborates in detail and stipulates physical options from the physical plan of a municipality, stipulates boundaries of construction land, … and the purpose of the surface for residential, work purposes…

Regulation plan

Article 46 paragraph 1

Regulation plan shall be adopted for areas of the city or urban settlements concerning which were envisaged as such by the town-planning document, that is which are to be subject to intensive development, reconstruction or repair, and for the settlements designated for such activities by a minister, i.e. the municipal assembly, in accordance with the physical plan of the municipality.

Article 48 paragraph 1

Regulation plan stipulates the scope of the plan, … the intended purpose for surfaces, the intended purpose for planned buildings, elements of regulation and construction line, number of stories, leveling plan, guidelines for design, horizontal dimensions of buildings, general town-planning-technical conditions for construction and spatial planning, as well as estimated costs of developing city land.

Article 50

The Municipal Assembly shall adopt a regulation plan and conceptual solution for a regulation plan.

Town-planning project

Article 51 paragraphs 1, 3, 4 and 5

Town-planning project shall be adopted for the core town-planning area, parts of town-planning area, which are to be built as a whole, or have already been partly built, which constitute particularly peculiar and valuable areas stipulated by town-planning document.

Regulation plan constitutes the basis for drafting the town-planning project, ...

Town-planning project offers in detail town-planning-architectural solutions for areas that the project is to cover, leveling-regulation data, environment development, conceptual solutions for utility infrastructure and conceptual projects for architectural facilities.

Town-planning project specifies detailed and special town-planning-technical conditions for the design and construction of facilities and area development.

Article 53

The Municipal Assembly shall adopt town-planning project and project-related program.

V. Admissibility

14. The request was filed with the Constitutional Court pursuant to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. It reads as follows:

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

15. In examining the admissibility of the request, the Constitutional Court considered: paragraph 2 of Article 69, which has been supplemented by Item 1 of Amendment LXXVI, reading as follows: „The legislative power in Republika Srpska shall be vested in the National Assembly and the Council of Peoples. Laws and other regulations passed by the National Assembly concerning the vital national interest of any of the constituent peoples shall enter into force only after they have been adopted by the Council of Peoples", as well as Article 71, which has been amended by Amendment LXXVIII, reading as follows: „The composition of the Council of Peoples shall be based on the principle of parity, with each constituent people having the same number of representatives. The Council of Peoples shall have eight representatives from each of the constituent peoples and four representatives from among Others. Others shall have the right to equal participation in the majority vote. The members of the Council of Peoples shall be elected by the respective caucuses in the National Assembly (…)".

16. The Constitutional Court observes that the exercise of legislative power in the first sentence of item 1 of Amendment LXXVI to the Constitution of RS has been vested in, i.e. has been in the jurisdiction of the RS National Assembly and the RS Council of Peoples.

17. Although this concerns a narrow legislative jurisdiction of the Council of Peoples of Republika Srpska, bearing in mind provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17 (1) of the Rules of the Constitutional Court, the Constitutional Court holds that one fourth of the members of the RS Council of Peoples is considered to be an authorized entity to file a request, as the Constitution of BiH places no restrictions whatsoever when it comes to the scope of legislative competence for filing a request. It is rather on the contrary, it vests such competence in one fourth of members of either chamber of a legislative authority of an Entity, and the Constitutional Court finds it undisputed that the RS Council of Peoples is a „legislative body" given its definition in the RS Constitution – „The legislative power in Republika Srpska shall be vested in the National Assembly and the Council of Peoples" (item 1 of Amendment LXXVI).

18. As there are no formal reasons under Article 17 (1) of the Rules of the Constitutional Court rendering the request inadmissible, the Constitutional Court concluded that the present request is admissible.

VI. Merits

19. The applicants state that the provisions of Article 3 paragraph 2, Article 15 paragraph 2 and Articles 47, 48, 49, 50, 51 and 52 of the Law are incompatible with Article II(2) and II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

20. **The Constitution of Bosnia and Herzegovina**

Article II paragraphs 2 and 3(k)

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.

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:

k) The right to property.

21. **The European Convention**

The right to property

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

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.

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.

22. The applicants hold that the challenged provisions of the Law are inconsistent with Article II(2) and II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention as the said provisions violate the right to property, being one of the fundamental human rights. They find the violation of the said right in the fact that „the residential and business construction under the present economic and social circumstances cannot be considered the general interest (Article 3 paragraph 2 of the Law)". The applicants are of an opinion that „it is particularly disputable when the general interest is considered as being established by an appropriate plan, if a regulation plan or town-planning project have been adopted for the area at issue (Article 15 paragraph 2 of the Law). They hold that the challenged Article 15 paragraph 2 of the Law does not concern „the general interest" for residential and business facilities construction, rather it concerns „a group interest", because the general interest cannot be identified by a regulation plan as being in the interest of development and development visions of some environments, nor can the said plans replace the Decision of the Government on establishing the general interest (Article 14 of the Law), since the seizure of property must

indeed be an exception in justified cases, and not a rule. This has been particularly pointed out by the applicants who, at the same time, posed a question as to whether residential or business construction may be a valid reason for expropriation of real property and whether all required standards have been complied with when in the present case a beneficiary of expropriation (municipality or city) has sold at auction the items subject to expropriation – large tracts of construction land or individual plots to the most favorable bidders (they may be physical or legal persons from a private sector).

23. It follows clearly from the text of Article 3 paragraph 2 and Article 15 paragraph 2 of the Law that the challenged provisions stipulate that, with *exception* of Article 3 paragraph 1 of the Law (which stipulates that „real property may be expropriated for the purpose of carrying out works or construction of business infrastructure facilities, such as: traffic, water, energy and telecommunications facilities, defense facilities, facilities for human environment protection and natural disasters protection, and exploiting mineral and other natural riches"), *real properties may be expropriated for the purpose of residential and business construction and for development of land for such purposes (Article 3 paragraph 2). General interest for constructing residential and business facilities and restructuring land to meet the said needs, in the area for which a regulation planning document or town-planning project has been adopted, shall be considered identified by that planning document (Article 15 paragraph 2).* The challenged provisions referred to in Chapter VI of the Law „Expropriation of land for the purpose of residential and business construction" (Articles 47, 48, 49, 50, 51 and 52) stipulated *that large tracts of construction land and individual construction plots of land may also be subject to expropriation for the purpose of constructing residential and business facilities and restructuring land; that the land may be expropriated for the said purposes only in case a regulation planning document has been adopted for that tract of land, according to which it will be considered that the general interest for the said construction has been established; that large tracts of construction land, as well as individual plots of land, may be expropriated for the said purposes solely to the benefit of municipality or town in which area that land is situated; after the bidding process, unit of local self-government unit assembly shall sell the expropriated land at issue (large tracts of construction land and individual construction plots) to the most favorable bidders for the purpose of constructing residential and business facilities; the time limit for construction shall be specified by the agreement on the sale of land, which will also include legal consequences in case of failure to fulfill the said obligations. The bidding process shall be conducted in a way and under the conditions prescribed by the Law on Construction Land.* Provisions of Articles 51 and 52 of the Law prescribe that*, if a construction plot has been designated for expropriation for the purpose of residential and business facilities construction, the owner, as well as co-*

owner, has the right of priority to build on that land. However, if the owner of construction land fails to build a facility within the time limit of one year, that is four years, after giving the statement, he/she shall lose that right of priority in construction. The acquiring and loss of right of priority in construction shall be established by a ruling to be adopted by an administrative body in charge of property-legal affairs. The provisions of this Law relating to full expropriation of real property shall also be applied to *the expropriation of land for the purpose of construction of residential and business facilities.*

24. The essence of challenged articles of the Law and allegations stated in the request require answers to the three questions that follow hereafter. First, may real properties, i.e. large tracts of construction land and individual construction plots be considered „property" within the meaning of Article 1 of Protocol No. 1 to the European Convention.; second, if the said real properties may be considered property, do the challenged articles of the Law interfere with the right to property so as to include the protection of Article 1 of Protocol No. 1 to the European Convention; third, if Article 1 of Protocol No. 1 to the European Convention is included, is the interference of the challenged articles of the Law justified under Article 1 of Protocol No. 1 to the European Convention?

a) Are real properties – large tracts of construction land, considered property within the meaning of Article 1 of Protocol No. 1 to the European Convention?

25. Bearing in mind that the notion of „property" implies a large scope of property interests to be protected (see judgment of the former European Commission for Human Rights, *Wiggins vs. the United Kingdom*, application no. 7456/76, published in Decisions and Reports 13, paragraphs 40-46 (1978)), which constitutes an economic value, the Constitutional Court holds that real properties – large tracts of construction land and construction plots, undoubtedly, constitute property within the meaning of Article 1 of Protocol No. 1 to the European Convention.

b) Do the challenged provisions of the Law constitute interference with the right to peaceful enjoyment of property?

26. The effect of the challenged articles of the Law pertains to the owners of real property who were subject to expropriation for the purpose of residential and business construction and planning of land for such purposes. The Constitutional Court holds that the challenged articles of the Law constitute interference with the rights, that is they deprive the owners of the said real properties to continue enjoying their property, which, in any case, includes protection of Article 1 of Protocol No. 1 to the European Convention. A question arises in this regard as to whether the mentioned deprivation is justified under Article 1 of Protocol

No. 1 to the European Convention, in terms of being provided for by law and being in the public interest.

c) Is interference justified?

27. The Constitutional Court refers to its consistent case-law and that of the European Court of Human Rights according to which 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, covers deprivation of possession and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not „distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see European Court of Human Rights, *Sporrong and Lönnorth vs. Sweden*, judgment of 23 September 1982, series A no. 52, paragraph 61; and *Scollo vs. Italy*, of 28 September 1995, series A, no. 315-C, paragraph 26 with further references). Any interference with the right under the second or the third rule must be provided for by law, must serve a legitimate goal, must strike a fair balance between the right of the holder of the right and the public and general interest. In other words, justified interference may not be imposed solely by a legal provision which meets requirements of the rule of law and serves a legitimate goal in the public interest, but it also has to uphold a reasonable proportionality between the means used and the goal sought to be achieved, in order to avoid abuse. Interference with the right must not go beyond what is necessary to achieve a legitimate goal, and the owners of real property must not be subjected to arbitrary treatment and they must not be requested to shoulder excessive burden in achieving a legitimate goal. The right to property has been violated if the answer to either of the following questions is negative: is there interference with the right, and is control of use of property pursuant to law in place; is interference for the sake of legitimate goal in the public or general interest; is there proportionality between means used and goal sought to be achieved?

c.1. Interference provided for by law

28. Interference is lawful only if the law, which is the basis for interference, is (a) accessible to citizens, (b) is precise to such extent as to allow citizens to determine their actions, (c) is in accordance with the principle of the legal state, which implies that freedom

to make decisions which has been vested by law in the executive authority must not be unrestricted, for the law must provide adequate protection for citizens against arbitrary interference (see judgment of European Court of Human Rights, *Sunday Times*, of 26 April 1979, series A, no. 30, paragraph 49; see also judgment of the European Court of Human Rights, *Malone*, of 2 August 1984, Series A no. 82, paragraphs 67 and 68).

29. The Law was published in an official gazette. Its provisions, including the challenged ones, were formulated with sufficient clarity and precision, so that any person implicated is able to understand consequences of his/her actions. The law clearly and unambiguously provides for conditions, manner and procedure of expropriation which, under the Law, implies deprivation or restriction of the right of ownership over real properties owned by physical and legal persons regarding construction of facilities of general interest, that is carrying out works of general interest, with fair compensation which may not be lower that the market value of the real property. The law provides for specific rights of the owner whose real properties are subject to expropriation and procedure for determining compensation for expropriated property and issuing a ruling following the completion of procedure on a proposal for expropriation, against which an appeal may be lodged. The Constitutional Court concludes that the Law meets the said standards within the meaning the European Convention.

c.2. Interference in public interest

30. The European Court of Human Rights expressed its position that the national authorities enjoy a wide margin of appreciation in making decisions related to depriving individuals of their property rights due to direct knowledge of society and its needs. A decision to seize property oftentimes involves consideration of political, economic and social issues, on which opinions in a democratic society may largely differ. Therefore, a judgment of national authorities shall be respected, unless it is manifestly ungrounded (see judgment of European Court of Human Rights, *James et al.,* of 21 February 1986, Series A no. 98, paragraph 46).

31. The National Assembly of the Republika Srpska, in its reply to the request, *inter alia* alleges, that the purpose of the Law is to provide replies to requests which were, *de facto*, brought about by the Law on Construction Land (*Official Gazette of RS* no. 41/03 and 86/03), and upheld by the new Law on Construction Land (*Official Gazette of RS* no. 112/06), introducing into the legal system, in addition to the state-owned city construction land, the privately-owned city construction land. Not responding to the newly arisen situation by introducing amendments in positive legislation, would bring about a situation where the existing town-planning regulations would become purposeless and impossible

to implement, given a possibility where a private person, at his/her discretion, would be in a position to thwart its realization. Furthermore, the adopted legal arrangements are conditioned by economic and social requirements, and the legislator tasked authorities, which are in a position to make the most appropriate decision, to assess the general interest.

32. The Constitutional Court observes that it follows clearly from the Law that expropriation may be carried out for the needs of Republika Srpska and *units of local self-government*. The Government of Republika Srpska may take a decision on establishing a general interest for the construction of a facility or carrying out of works following a proposal submitted by a beneficiary of expropriation (Article 14 paragraph 1 of the Law). Also, the general interest is deemed as having been established if special law prescribes that construction of certain facilities or carrying out of works is in the general interest; and that the general interest for constructing residential and business facilities and restructuring land to satisfy the said needs, as referred to in Chapter VI of this Law, in the area for which a regulation planning document or town-planning project has been adopted, shall be considered identified by that planning document (Article 15 of the Law). The Law provides for specific cases concerning which expropriation may be carried out, *inter alia*, for the purposes of residential and business construction and for restructuring land for the said purposes, and that real property may not be expropriated for agricultural purposes. Under Article 4 of the Law on Construction Land, construction of cities and urban settlements on city construction land and other construction land shall be carried out in accordance with the Regulation Plan or physical-planning and town-planning documentation (pending adoption of a regulation plan) and shall be considered as being in public interest. Under Article 1 paragraph 1 and Article 3 paragraph 1 of the Law on Physical Planning, Republika Srpska, municipalities and other territorial units, shall stipulate and exercise in their territory physical planning policy in order to entertain the needs of population for accommodation... by adopting and implementing corresponding plans, that is by other acts and measures, in accordance with their competences laid down in the Constitution and law.

33. All the said competences of the units of local self-government may be tracked down in the RS Constitution, according to which a municipality, through its bodies and in accordance with the law, shall, among other things, adopt a development program, a town-planning document, regulate and provide for the use of construction land and business premises, be responsible for the construction, and provide for the needs of citizens and social welfare. All of the provisions of the mentioned regulations clearly point out the need for interference on the part of the state with private property when it comes to general interest, and for the sake of realization of the said interest, it shall restrict the rights to

property in an appropriate manner. To that end a principle of interference for the sake of the general interest raises a question of proportionality. Proportionality presupposes striking a fair balance between the owner of real property and the public interest.

c.3. Striking a fair balance between the right of an owner of real property – construction land and the public interest (proportionality)

34. In deliberating on whether the challenged articles of the Law have stricken a fair balance or a reasonable ratio of proportionality between the right of the owner of real property and the general interest, it is necessary for the Constitutional Court to consider two questions first and foremost. First, does the interference with the right go beyond what is necessary to achieve a legitimate goal? Second, do the challenged articles of the Law impose on the owners of real property – construction plots an unfavorable treatment in comparison with others, in a sense that they are required to carry an excessive burden in achieving the ultimate goal of expropriation, a legitimate goal?

c.3.I) Necessary scope of interference with the rights

35. Considering the gravity of issues relating to the expropriation of private real property (large tracts of construction land, construction plots), economic and social problems in Bosnia and Herzegovina, as well as difficulties in resolving issues of construction of residential and business facilities for the citizens who may need them, in accordance with the Law, the Constitutional Court needs evidence to make sure that the position of a legislator has exceeded margins of appreciation in deciding on what is necessary to start solving the mentioned social issue. The Constitutional Court looked for the answer to the first question in the Law which clearly prescribes that only „*exceptionally*" can real property be expropriated for the purpose of residential and business construction and for restructuring the land for the said purposes. Provision of exceptionality has provided the scope in the event of expropriation in attaining a general interest for the purpose of residential and business construction. Therefore, the scope of the general interest has restrictions as expropriation may be carried out „*exceptionally*" for the purpose of residential and business construction and for the restructuring of the land at issue. The said scope should also be viewed based on the purpose for which expropriation is to be carried out, as the law clearly prescribes that an expropriation beneficiary, through expropriation of real property, acquires the right to use the real property for the purpose for which the expropriation has been carried out (Article 10 of the Law). Therefore, the Law allows „interference" only in exceptional circumstances and for the purpose specified. In view of the aforesaid facts, the Constitutional Court holds that there are no grounds for the

legislator to interfere with the rights to a degree exceeding the degree necessary to achieve a legitimate goal in the present case.

c.3.II) Arbitrary treatment and imposing excessive burden

36. The Law stipulated that the owner of an expropriated real property shall be entitled to an equitable compensation, such as other real property. Should an expropriation beneficiary not be able to provide such real property, a fair compensation in cash shall be determined, which may not be lower than the market value of real property subject to expropriation (Article 12 paragraph 1 of the Law). The Law elaborates in detail the elements affecting the value of compensation (Article 53 through 59 of the Law). In addition, the Law provides for the compensation for an expropriated construction land to be determined in cash, so as to be fair and „not lower than the market value of such land" (Article 60 of the Law).

37. The Constitutional Court holds, bearing in mind the said provisions of the Law, that the deprivation of the owner of real property (large tracts of land and individual construction plots) in the procedure of expropriation is proportionate to the goal of providing a necessary construction land fund, which is included in regulation plans or town-planning projects for residential and business facilities construction (which, following expropriation, the unit of local self-government goes on to sell at auction for the purpose of planned construction). Given all the circumstances relating to the general interest prescribed by the Law, the process of determining compensation for the real property expropriated, unless the owner has exercised the right of priority to build or has obtained another plot in exchange for his/her plot in the course of the procedure, i.e. the process of determining compensation in cash in accordance with Article 60 of the Law, the burden that the owner of the construction land is forced to carry is not excessive.

38. The Constitutional Court is of an opinion that the issue of determining a general interest for the area of municipality over which it exercises its function as unit of local self-government, lies exclusively within its jurisdiction when it comes to exercising its constitutional competence in the area of planning and construction. This constitutional right has been upheld also by the Law on Construction Land as well as by the Law on Physical Planning. Pursuant to the said laws and the Law on Expropriation, the municipality shall determine and enforce a general interest through regulation planning documents or town-planning projects. Therefore, the allegations of the applicants that the present case does not concern a general interest but a group interest are, in the opinion of the Constitutional Court, unfounded. However, if in some other cases, it is alleged that

the Law has been applied in the manner violating the constitutional rights, then the courts and the Constitutional Court as the court of last resort shall be in a position to provide appropriate protection.

39. In view of the aforementioned, the Constitutional Court concludes that the challenged provisions of the Law are not in violation of the constitutional right to property referred to in Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

VII. Conclusion

40. The present request for review of constitutionality is ill-founded, as the issue of determination of general interest, for the area of municipality over which it exercises its function as a unit of local self-government, lies exclusively within its jurisdiction when exercising its constitutional competences in the area of planning and construction. This constitutional right has been provided for by the Law on Construction Land and by the Law on Physical Planning. Pursuant to the said laws and the Law on Expropriation, the municipality shall determine and enforce the general interest through regulation planning documents or town-planning projects with already established general interest. The allegations of the applicants that the present case does not concern a general interest but a group interest, are, in the opinion of the Constitutional Court, ill-founded. The challenged provisions of the Law do not violate the constitutional rights to property, and therefore are not incompatible with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

41. 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.

42. In view of 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

Case no. U 3/08

DECISION
ON ADMISSIBILITY
AND MERITS

Request of Dr Haris Silajdžić, the Chairman of the Presidency of Bosnia and Herzegovina, Mr. Željko Komšić, the Member of the Presidency of Bosnia and Herzegovina, Mr. Sulejman Tihić, the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina and Nebojša Radmanović, the Member of the Presidency of Bosnia and Herzegovina, for a review of the constitutionality of the Law on Conditions and Manner of Settlement of Debts Arising from Old Foreign Currency Savings by Issuance of Bonds in the Republika Srpska, Decree on the Process of Verification of Claims and Cash Payments Arising from Old Foreign Currency Savings in the Republika Srpska and Articles 22 and 23 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings

Decision of 4 October 2008

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and (4), Article 61(1) and (3) and Article 65(1)(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05 and 68/08), as a Plenary composed of the following judges:

Ms. Seada Palavrić, 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,

Mr. Krstan Simić

Having deliberated on the requests of **Messrs. Dr Haris Silajdžić, Željko Komšić, Sulejman Tihić and Nebojša Radmanović** in case **no. U 3/08,** At its session held on 4 October 2008 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Mr. Nebojša Radmanović, a Member of the Presidency of Bosnia and Herzegovina, for review of the constitutionality of Articles 22 and 23 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings (*Official Gazette of Bosnia and Herzegovina* nos. 28/06, 76/06 and 72/07) is hereby dismissed as ill-founded.

It is hereby established that the provisions of Articles 22 and 23 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings (*Official Gazette of Bosnia and Herzegovina* nos. 28/06, 76/06 and 72/07) are consistent with the Constitution of Bosnia and Herzegovina.

The requests lodged by Dr Haris Silajdžić, the Chairman of the Presidency of Bosnia and Herzegovina, Mr. Željko Komšić, a Member of

the Presidency of Bosnia and Herzegovina and Mr. Sulejman Tihić, the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, for review of the constitutionality of Articles 8, 9, 10, 11, 12, 13, 14 and 16 of the Law on Conditions and Manner of Settlement of Debts Arising from Old Foreign Currency Savings by Issuance of Bonds in the Republika Srpska (*Official Gazette of Republika Srpska* no. 1/08) are hereby dismissed as ill-founded.

It is hereby established that Articles 8, 9, 10, 11, 12, 13, 14 and 16 of the Law on Conditions and Manner of Settlement of Debts Arising from Old Foreign Currency Savings by Issuance of Bonds in the Republika Srpska (*Official Gazette of Republika Srpska* no. 1/08) are consistent with the Constitution of Bosnia and Herzegovina.

The proceedings initiated upon a request lodged by Mr. Sulejman Tihić, the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, for review of the constitutionality of Article 19 of the Decree on Procedure for Verification of the Claims and Cash Payables Arising from the Old Foreign Currency Savings Deposits in the Republika Srpska (*Official Gazette of Republika Srpska* nos. 102/06, 124/06, 17/07, 62/07 and 107/07) are hereby suspended as it would be irrelevant to continue with further procedure.

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 Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 29 February (U 3/08 and U 4/08), and 10 March 2008 (U 5/08), the Chairman of the Presidency of Bosnia and Herzegovina, Dr Haris Silajdžić (U 3/08), the Member of the Presidency of Bosnia and Herzegovina, Mr. Željko Komšić (U 4/08), and the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, Mr. Sulejman Tihić (U 5/08), („the applicants") lodged, respectively, the requests with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review

of the constitutionality of the Law on Conditions and Manner of Settlement of Debts Arising from Old Foreign Currency Savings by Issuance of Bonds in the Republika Srpska (*Official Gazette of Republika Srpska* no. 1/08), dated 12 January 2008. In addition, the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, Mr. Sulejman Tihić, requested the review of constitutionality of the Decree on the Process of Verification of Claims and Cash Payments Arising from Old Foreign Currency Savings in the Republika Srpska (*Official Gazette of Republika Srpska* nos. 102/06, 124/06, 17/07, 62/07 and 105/07), dated 24 September 2006.

2. Furthermore, the Member of the Presidency of Bosnia and Herzegovina, Mr. Željko Komšić, (U 4/08) and the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, Mr. Sulejman Tihić (U 5/08) requested the adoption of interim measures, by which the Constitutional Court would temporarily suspend amendments to the challenged regulations, in order to prevent permanent damage with respect to the payments of old foreign currency savings.

3. On 29 May 2008, Mr. Nebojša Radmanović, the Member of the Presidency of Bosnia and Herzegovina, lodged a request for review of the constitutionality of Articles 22 and 23 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings (*Official Gazette of Bosnia and Herzegovina* nos. 28/06, 76/06 and 72/07).

II. Procedure before the Constitutional Court

4. Pursuant to Article (1) of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska and the Ministry of Finance and Treasury of Bosnia and Herzegovina, which passed the challenged general legal acts, were requested on 12 March 2008 to submit their respective replies to the requests.

5. The National Assembly of the Republika Srpska submitted its replies to the requests on 21 March 2008 (U 3/08 and U 4/08) and 26 March 2008 (U 5/08).

6. The Ministry of Finance and Treasury of Bosnia and Herzegovina submitted its reply to the requests on 26 March 2008.

7. Pursuant to Article 33 of the Rules of the Constitutional Court, on 28 March 2008, the Central Bank of Bosnia and Herzegovina was requested to submit the required documentation.

8. On 4 April 2008, the Central Bank of Bosnia and Herzegovina submitted the requested documentation.

9. Pursuant to Article 20(1) of the Rules of the Constitutional Court, on 12 May 2008, the Constitutional Court requested from the applicants, the Chairman of the Presidency of Bosnia and Herzegovina, Dr Haris Silajdžić (U 3/08) and the Member of the Presidency of Bosnia and Herzegovina, Mr. Željko Komšić (U 4/08), to supplement their requests.

10. The Member of the Presidency of Bosnia and Herzegovina, Mr. Željko Komšić (U 4/08), submitted his supplement to the request on 16 May 2008.

11. On 16 May 2008, the National Assembly of the Republika Srpska addressed a request to the Constitutional Court for a public hearing to be held in all three cases, in accordance with Article 46 of the Rules of the Constitutional Court.

12. On 23 May 2008, the Chairman of the Presidency of Bosnia and Herzegovina, Dr Haris Silajdžić (U 3/08), submitted his supplement to the request.

13. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 19 March 2008, the National Assembly of the Republika Srpska and the Ministry of Finance and Treasury of Bosnia and Herzegovina, which passed the challenged general legal acts, were requested to submit their respective replies to the supplements to the requests submitted by the Members of the Presidency of Bosnia and Herzegovina, Mr. Željko Komšić (U 4/08) and Dr Haris Silajdžić (U 3/08).

14. Pursuant to Article 26(2) of the Rules of the Constitutional Court, on 29 May 2008, the replies to the requests, submitted by the National Assembly of the Republika Srpska and the Ministry of Finance and Treasury of Bosnia and Herzegovina were communicated to applicant Mr. Sulejman Tihić (U 5/08).

15. On 5 June 2008, the National Assembly of the Republika Srpska submitted its reply to the supplements to the requests lodged by the Members of the Presidency of Bosnia and Herzegovina, Mr. Željko Komšić (U 4/08) and Dr Haris Silajdžić (U 3/08).

16. On 29 May and 5 June 2008, the Ministry of Finance and Treasury of Bosnia and Herzegovina submitted its replies to the supplements to the requests lodged by the Members of the Presidency of Bosnia and Herzegovina, Mr. Željko Komšić (U 4/08) and Dr Haris Silajdžić (U 3/08).

17. At its plenary session of 30 May 2008, the Constitutional Court dismissed the request for a public hearing, lodged by the Republika Srpska, pursuant to Article 46 of the Rules of the Constitutional Court.

18. In addition, at its plenary session of 30 May 2008, the Constitutional Court decided in accordance with Article 31 of the Rules of the Constitutional Court to merge the cases nos.

U 3/08, 4/08, 5/08 and 10/08 into one case no. U 3/08 given that the requests concerned relate to identical or similar issues.

19. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the Parliamentary Assembly of Bosnia and Herzegovina, which passed the challenged general legal acts, the Ministry of Finance and Treasury of Bosnia and Herzegovina and the Central Bank were requested on 5 June 2008 to submit their respective replies to the request lodged by Mr. Nebojša Radmanović (U 10/08).

20. On 13 and 24 June, and 9 July 2008, the Central Bank, the Ministry of Finance and Treasury of Bosnia and Herzegovina, and the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, respectively, submitted their replies to the request lodged by Mr. Nebojša Radmanović (U 10/08). On 16 July 2008 the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina submitted its reply to the request lodged by Mr. Nebojša Radmanović (U 10/08).

21. Pursuant to Article 26(2) of the Rules of the Constitutional Court, on 12 June 2008, the replies of the National Assembly of the Republika Srpska and the Ministry of Finance and Treasury of Bosnia and Herzegovina to the requests and the supplements thereto were communicated to applicants, Mr. Željko Komšić (U 4/08) and Dr Haris Silajdžić (U 3/08).

22. Pursuant to Article 26(2) of the Rules of the Constitutional Court, on 3 September 2008, the replies to the request given by the Central Bank, the Ministry of Finance and Treasury of Bosnia and Herzegovina, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina were communicated to applicant Mr. Nebojša Radmanović (U 10/08).

23. Pursuant to Article 93(1)(2) of its Rules, the Constitutional Court decided that Judge Mirsad Ćeman shall not participate in the work and the decision-making process in the present case since he participated in enactment of the challenged law.

III. Request

24. Given the relevance of the State Law on Settlement of Debts Arising from Old Foreign Currency Savings and its hierarchical position with regard to the Entities' laws regulating this field, the Constitutional Court shall first examine and establish the facts related to the mentioned Law and, next, it shall do the same with regard to the laws of the Republika Srpska.

a) Statements from the request no. U 10/08

25. It is stated in the request that the Central Bank of Bosnia and Herzegovina, based on Article VII(1) of the Constitution of Bosnia and Herzegovina, shall be the sole authority for issuing currency and for monetary policy throughout Bosnia and Herzegovina. Article VII of the Constitution of Bosnia and Herzegovina stipulates that the responsibilities of the Central Bank shall be determined by the Parliamentary Assembly, as stated in Article 2 of the Law on Central Bank of Bosnia and Herzegovina. The applicant claims that the responsibilities vested in the Central Bank pursuant to Articles 22 and 23 of the State Law on Settlement of Debts Arising from Old Foreign Currency Savings are not provided for in the Law on Central Bank of Bosnia and Herzegovina and thereby they are inconsistent with Article VII of the Constitution of Bosnia and Herzegovina.

26. In view of the above, applicant Mr. Nebojša Radmanović, the Member of the Presidency of Bosnia and Herzegovina, suggests that the Constitutional Court declares the challenged provisions of the State Law on Settlement of Debts Arising from Old Foreign Currency Savings unconstitutional.

b) Reply by the Parliamentary Assembly of Bosnia and Herzegovina to the request no. U 10/08

27. In its reply of 9 July 2008, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina corroborates the challenged Law without giving further explanation, while the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina supports the request of applicant Mr. Nebojša Radmanović, also without giving further explanation to that end.

c) Reply by the Ministry of Finance and Treasury of Bosnia and Herzegovina to the request no. U 10/08

28. The Ministry of Finance and Treasury of Bosnia and Herzegovina holds that the request lodged by applicant Mr. Nebojša Radmanović is ill-founded. It states that Articles 22 and 23 of the State Law on Settlement of Debts Arising from Old Foreign Currency Savings do not interfere with the responsibilities of the Central Bank of Bosnia and Herzegovina since the said Bank has a role of the fiscal agent for the State with regard to bonds to be issued for the purpose of settling the debts arising from „old foreign currency savings". The Central Bank has this role based on Article 52 *et seq.*, of the Law on Central Bank of Bosnia and Herzegovina, Article 17 of the Law on Debt and Guarantees of Bosnia and Herzegovina, as well as the Agreement signed between the said Ministry and the

Central Bank of Bosnia and Herzegovina. In addition, the Ministry of Finance and Treasury of Bosnia and Herzegovina is of the opinion that Article III(1)(d) of the Constitution of Bosnia and Herzegovina constitutes a constitutional basis of the challenged Law and it upholds its position by referring to the Decision of the Constitutional Court no. *U 14/05* and the Decision of the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina no. CH/98/375 *et al*.

d) Reply by the Central Bank of Bosnia and Herzegovina to the request no. U 10/08

29. In its reply to the request, the Central Bank states that Article 2 of the Law on Central Bank of Bosnia and Herzegovina determines the basic objectives and tasks of that institution but, at the same time, Article 52 of the said Law stipulates that the Central Bank shall act as the banker and the fiscal agent of Bosnia and Herzegovina, *i.e.* that it shall not act as a banker and a fiscal agent of either Entity, unless there is a joint decision by both Entities.

e) Statements from the requests U 3/08 and U 4/08

30. Given the fact that the two requests are identical, the Constitutional Court shall sum up the statements presented in both requests.

31. The Chairman of the Presidency of Bosnia and Herzegovina, Dr Haris Silajdžić and the Member of the Presidency of Bosnia and Herzegovina, Mr. Željko Komšić, hold that the Law on Conditions and Manner of Settlement of Debts Arising from Old Foreign Currency Savings by Issuance of Bonds in the Republika Srpska, in the part related to the maturity date of bonds (Articles 9 and 13) and the decision on the issuance of bonds (Article 16), is in direct conflict with the Law on Settlement of Debts Arising from Old Foreign Currency Savings (*Official Gazette of Bosnia and Herzegovina* nos. 28/06, 76/06 and 72/07), the international law and the Constitution of Bosnia and Herzegovina. In the applicants view, the said discrepancies undermine the principle of single market mentioned in Article I(4) of the Constitution of Bosnia and Herzegovina, *i.e.* the freedom of movement of capital in Bosnia and Herzegovina. To corroborate their position, the applicants refer to the Decision of the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina (CH/98/375 *et al*. paragraph 1204). In addition, such discrepancies lead to a violation of the principle of equality as regards the right to property under Article 1 of Protocol No. 1 to the European Convention in conjunction with Article II(4) of the Constitution of Bosnia and Herzegovina. Namely, the citizens of Bosnia and Herzegovina, residing in the Republika Srpska, have a privileged position based on the challenged legal solutions and the State is obliged to provide this right equally to all citizens and the State

did so by its Law. The applicants again uphold their position based on the Decision of the Constitutional Court (*U 14/05*, paragraph 47 *et seq.*) and the Decision of the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina (CH/98/375 *et al,* paragraphs 1198 and 1201).

32. In addition, the applicants allege a violation of Article III(1)(d) of the Constitution of Bosnia and Herzegovina taken in conjunction with Article VII of the Constitution of Bosnia and Herzegovina since the payment of old foreign currency savings affects the monetary policy of Bosnia and Herzegovina, which is under the sole authority of the State body – the Central Bank. The obligation and authority of the State to solve the issue of „old foreign currency savings" derives also from Article 7 of Annex C to the Agreement on Succession Issues (*Official Gazette of Bosnia and Herzegovina* no. 10/01 – International Agreements) in conjunction with Article I(1) of the Constitution of Bosnia and Herzegovina and Article II(2) of Annex 2 to the Constitution of Bosnia and Herzegovina. By this Agreement, „Bosnia and Herzegovina has clearly undertaken the obligation to negotiate the hard currency savings with regard to guarantees by the SFRY or its NBY". Therefore, according to the applicants, „the continuity of legal regulations" is infringed. In support of their position, the applicants refer to the Decision of the Constitutional Court (*U 14/05*, paragraph 38) and the Decision of the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina (CH/98/375 *et al,* paragraphs 1152, 1153 and 1197).

33. The applicants claim that the State Law is a systemic law and not a framework law. Accordingly, it should be implemented on the entire territory of Bosnia and Herzegovina, and the Entities and Brčko District are not given the authority „to pass their legislation within the framework of given solutions", but they only have the authority to pass regulations related to the verification process (Article 26 of the State Law on Settlement of Debts Arising from Old Foreign Currency Savings).

34. Finally, the applicants assert that the implementation of the State Law on Settlement of Debts Arising from Old Foreign Currency Savings is not possible without the participation of all those concerned, the State, the Entities and the Brčko District.

f) Statements from the request no. U 5/08

35. Mr. Sulejman Tihić, the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, having elaborated on the background of legislative activities of the State and the Entities as regards the settlement of obligations arising from old foreign currency savings, maintains that this issue lies within the exclusive responsibility

of Bosnia and Herzegovina. In doing so, he refers to Article III(1)(e) of the Constitution of Bosnia and Herzegovina (financing of the institutions and the payment of the international obligations of Bosnia and Herzegovina) and line 4 of the Preamble to the Constitution of Bosnia and Herzegovina (promotion of general welfare). He corroborates his stance with the reasoning stated in the Decision of the Constitutional Court no. *U 14/05* (paragraphs 38 and 56), and the Decision of the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina no. CH/98/375 *et al.* (paragraphs 1202 and 1203). Furthermore, the applicant points to the responsibilities of Bosnia and Herzegovina under the provisions of Articles III(1)(d) and VII of the Constitution of Bosnia and Herzegovina. He holds that the Entities and the Brčko District of BiH have as much jurisdictions as provided for by the State Law on Settlement of Debts Arising from Old Foreign Currency Savings. Thus, the Republika Srpska has no constitutional jurisdiction to stipulate the legal provisions deviating from the state solutions, specifically: the maturity date for bonds to five years (Article 9), taking over the guarantees for their payment (Article 10), taking over the competency to determine the depreciation plan and to issue bonds (Articles 11 and 12). Also, the applicant claims that the challenged Law is in violation of the constitutional provisions related to the protection of human rights and freedoms. To that end, he refers to the right to property mentioned in Article 1 of Protocol No. 1 to the European Convention, whereby the State is competent to offer guarantees in the present case, in accordance with equal standards, without discrimination. He corroborates his stance with the reasons stated in the Decision of the Constitutional Court no. *U 14/05* (paragraph 56), and the Decision of the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina no. CH/98/375 *et al.* (paragraphs 1202 and 1203). As to the Decree on the Process of Verification of Claims and Cash Payments Arising from Old Foreign Currency Savings in the Republika Srpska, the applicant challenges Article 19 as amended, which „modifies the structure of settlement by increasing the maximum cash payments from 1,000 to 2,000 convertible marks".

g) Reply by the National Assembly of the Republika Srpska to the requests (nos. U 3/08, U 4/08 and U 5/08)

36. The author of the challenged acts related to the cases U 3/08, U 4/08 and U 5/08, first and foremost, holds that the Constitutional Court has no jurisdiction to review „the decree", as a legal and general sub-act. Furthermore, he claims that the requests are not specific enough and do not refer to the provisions of the Constitution of Bosnia and Herzegovina. Finally, its third remark regarding admissibility is that the applicants requested the review of compatibility of the state and entities' laws as well as the review of compatibility of the entities' laws with the Decisions of the Constitutional Court and the

Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina and not the review of „constitutionality".

37. As to the merits, the National Assembly holds that Bosnia and Herzegovina has no continuity as regards the payment of old foreign currency savings, as it is conditioned with the new constitutional and legal solutions referred to in the Constitution of Bosnia and Herzegovina (Article I(3) of the Constitution of Bosnia and Herzegovina). In addition, the National Assembly asserts that it relates to the issue of international obligations of Bosnia and Herzegovina, fulfilled, also, in accordance with the division of responsibilities between the State and the Entities (Article III of the Constitution of Bosnia and Herzegovina). The National Assembly additionally corroborates the aforementioned based on the fact that Bosnia and Herzegovina has refused to fulfil the obligations set out in the Judgment of the European Court of Human Rights, the case of Ruža Jeličić (Application no. 41183/02). The National Assembly denies the applicants' position that there has been a violation of the principle of „continuity of legal regulations" or the principle of „single market" and holds that these allegations are arbitrary and unfounded.

38. According to the National Assembly, the Entities are responsible for this matter and, therefore, they have the right to decide on how to tackle this issue. The National Assembly asserts that no Articles of the Constitution of Bosnia and Herzegovina, and especially Articles III(1), III(3)(a) and VII, give the right to the State to assume the responsibilities regulated by the challenged law by the Republika Srpska. It is pointed to that the Republika Srpska took part in the drafting of the State Law, thereby „admitting that BiH has the responsibility in enacting legislative framework for solving the issues of old foreign currency savings". Yet, the respective law laid down minimum requirements, giving, however, authority to the Entities to further specify principles provided for by the State Law (Article 1 paragraph 4 and Article 29 of the State Law on Settlement of Debts Arising from Old Foreign Currency Savings). The Republika Srpska did so, in a manner most favourable to the citizens of the Republika Srpska. With regards to these „benefits", they refer to the Decision of the Constitutional Court no. U 5/98-I, which points to a possibility that the Entities offer a wide scope of protection of human rights and freedoms. As to the plan of depreciation, they consider it to be a „technical issue", which is irrelevant for review of the constitutionality. In addition, it is noted that the Decision of the Constitutional Court does not rule out a possibility for the Entities to partake in the realization of old foreign currency savings. It is furthermore emphasized that the Entities are the debtors and guarantors of old foreign currency savings, and, therefore, they have the right to issue bonds in their name, whereas the guarantees given by Bosnia and Herzegovina have only „formal", and not „essential" nature.

39. Also, the National Assembly refers to the exclusive jurisdiction as regards the issue of obligations.

40. Additionally, the National Assembly deems that the issue of old foreign currency savings has nothing to do with the responsibilities of the State under Article III(1)(e) of the Constitution of Bosnia and Herzegovina, since it involves no international element. Finally, the National Assembly underlines that the issue of payment of old foreign currency savings is a matter in which both the State and the Entities take part, on several grounds: verification process, enacting laws for different administrative and territorial levels, *etc*. Finally, it is pointed to certain regulations from within the area of financial policy of the State and Entities, based on which they hold that the State has no jurisdiction to issue bonds and give guarantees for them, whereas the Entities have the right to do so. In doing so, they refer to the Law on Debt and Guarantees of Bosnia and Herzegovina, (*Official Gazette of Bosnia and Herzegovina* no. 52/05), the Law on Central Bank (*Official Gazette of Bosnia and Herzegovina* no. 1/97), and the laws on privatization, the grounds on which the Republika Srpska did not „threaten" the guarantees of Bosnia and Herzegovina, but „took them over" based on the legal authority. As to the monetary policy of Bosnia and Herzegovina, the National Assembly holds that the issue of resolving the payment of old foreign currency savings does not fall within the scope of the monetary policy of Bosnia and Herzegovina. Finally, the National Assembly has proposed that the requests, as well as the proposals for the adoption of interim measures, are dismissed as ill-founded.

h) Reply by the Ministry of Finance and Treasury to the requests (nos. U 3/08, U 4/08 and U 5/08)

41. The Ministry of Finance and Treasury of Bosnia and Herzegovina upholds the requests of the applicants and maintains that a violation of the following Articles of the Constitution of Bosnia and Herzegovina occurred: I(1), I(4), II(1), III(1)(d) and (e) and IV(4) (a) and (e). In addition, the Ministry of Finance and Treasury of Bosnia and Herzegovina corroborates the positions given in the Decision of the Constitutional Court no. *U 14/05* and the Decision of the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina no. CH/98/375 *et al.* Finally, in the view of the Ministry of Finance and Treasury of Bosnia and Herzegovina there has been a violation of the principle of equality of citizens as well as of the rights laid down in the European Convention in Article 1 of Protocol No. 1 to the European Convention in conjunction with Article II(4) of the Constitution of Bosnia and Herzegovina.

IV. Relevant Law

42. **Constitution of Bosnia and Herzegovina**, in its relevant part reads as follows:

Article II

1. Human Rights

Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.

[…]

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: […]

k) The right to property

6. Implementation

Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above. […]

Article III

1. Responsibilities of the Institutions of Bosnia and Herzegovina

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

a) Foreign policy.

b) Foreign trade policy.

c) Customs policy.

d) Monetary policy as provided in Article VII.

e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina.

f) Immigration, refugee, and asylum policy and regulation.

g) International and inter-Entity criminal law enforcement, including relations with Interpol.

h) Establishment and operation of common and international communications facilities.

i) Regulation of inter-Entity transportation.

j) Air traffic control.

5. Additional Responsibilities

a) Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities. [...]

Article VII

There shall be a Central Bank of Bosnia and Herzegovina, which shall be the sole authority for issuing currency and for monetary policy throughout Bosnia and Herzegovina.

1. The Central Bank's responsibilities will be determined by the Parliamentary Assembly. [...]

43. **Law on Settlement of Debts Arising from Old Foreign Currency Savings** (*Official Gazette of Bosnia and Herzegovina* nos. 28/06, 76/06 and 72/07), as relevant, reads:

Article 1
(Subject of the Law)

(1) This Law regulates the procedure, manner and time-limits for settling the debts of Bosnia and Herzegovina arising from the old foreign currency savings deposited with domestic banks located in the territory of Bosnia and Herzegovina.

(2) Bosnia and Herzegovina shall be held responsible for settling the debts arising from the old foreign currency savings, whereas the funds shall be provided by the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District of Bosnia and Herzegovina.

(3) Provision of funds for unimpeded settlement of Debts arising from the old foreign currency savings shall not be subject to reallocation of public expenditure funds or budget rebalance.

(4) For the purpose of providing additional funds for settlement of Debts arising from the old foreign currency savings, the Ministries of Finance of Entities and District shall

be reviewing the budget on regular basis in order to find ways of reallocation of possible surplus budgetary funds aimed at creating more favourable conditions for repayment of old foreign currency savings.

(5) The provision of funds, as referred to in paragraph (2) of this Article, shall depend on the location of each deposit in the bank, its branch offices or its lowest-level units that were operating in the territory of Entities and District in which the foreign currency savings were deposited.

(6) As to providing the funds referred to in paragraph (2) of the said Article, Bosnia and Herzegovina shall take part in the provision of funds from the resources placed at her disposal after the succession of the former SFRY, as well as from other available resources and the Council of Ministers of Bosnia and Herzegovina, by its decision, shall determine the amount and the manner of use of the said funds.

(7) Settling the debts of Bosnia and Herzegovina referred to in paragraphs (1) and (2) of the said Article shall be preceded by the procedure for verification of claims. […].

Article 18
(Cash payment)

[…]

(2) If the verification of individual applications is completed and the claimant accepts the amount determined in the verification process, the claimant shall sign a verification certificate. Following the claimant's signing of statement waiving the right to appeal, a maximum of 100 KM, or the total savings up to the amount of 100 KM, shall be paid. Upon the completion of verification process the Agencies shall make the lists of all verified applications and their respective amounts.

(3) Furthermore, by the end of 2007 a maximum of 1,000 KM, or the total amount of savings up to 1,000 KM shall be paid to each individual claimant recorded in the Register upon his/her submission of verification certificate and the said amount also includes the amount paid in accordance with paragraph (2) of the Law. The remaining amount shall be reimbursed in State bonds in accordance with this Law. The payments made up to the amount of 1,000 KM shall be recorded by the Agencies in the verification certificate and that the rest of unpaid claims shall be settled in bonds. The claimant shall submit the bank particulars (bank name and bank account number) to the Agencies and the said data shall be entered in the verification certificate and Agencies' registers.

(4) The cash payments under paragraph (2) and (3) of the Article shall be made in accordance with the procedure envisaged by the enforceable laws of Entities and District. […]

Article 21
(Conditions)

(1) The amount of liabilities that has not been paid in cash in accordance with Article 18 of this Law shall be paid in bonds. The bonds shall be simultaneously issued in electronic form within 90 days from the day of the last cash payment in accordance with Article 18, paragraph (3) of the Law and no later than 31 March 2008, under the following conditions:

a) maturity date shall be 9 years and no later than 31 December 2016, whereas the timetable of bonds' maturity per years shall be determined by decision of the Council of Ministers of Bosnia and Herzegovina

b) annual interest of 2,5%

c) an option of redemption before maturity.

Article 22
(Issuance of Bonds)

(1) The verification certificate shall contain the amount of bonds to be issued to each individual claimant. The amounts recorded in the verification certificate, together with the name, address, bank name and bank account number of each claimant, as well as any other additional information that might be deemed necessary, shall be entered into the official register of the bonds' ownership kept by the Central Bank. At the time of issuance of bonds, the amount of bonds shall reflect the value of KM currency in relation to Euro in accordance with the official exchange rate of the Central Bank on the day of issuance. The Central Bank shall, through the bank referred to in Article 6, paragraph 3 of this Law, issue a certificate in a paper form which will certify the ownership over the bonds for each person entitled to the related right. This certificate shall contain the records on issuance of bonds for the bond owner. After that, the bonds shall be electronically recorded and be entirely transferable.

(2) The Agencies shall be obliged to cooperate and make the Register and the data base available to the official Register of the Central Bank.

Article 23
(Issuer of Bonds)

(1) The bonds shall be issued by Bosnia and Herzegovina on behalf of the respective Entities and District in accordance with the provisions of the Law.

2) Capital and interest on the bonds shall be directly paid by using the funds of Entities and District from the Single Treasury Account of Bosnia and Herzegovina. A

special escrow account and account for servicing the debt arising from the old foreign currency savings shall be opened in the Central Bank for this special purpose and the Ministry of Finance and Treasury of Bosnia and Herzegovina shall be in charge of this account.

3) Pursuant to Article 21 of the Law, payments on escrow accounts and debt servicing accounts shall be made on the basis of repayment plan to be prepared upon completing the verification procedure and finalizing the amount of bonds.

4) The settlement of debts arising from the old foreign currency savings shall have the same priority as the settlement of debts arising from external debt servicing.

5) Bosnia and Herzegovina shall assure settlement of debts arising from the old foreign currency savings referred to in paragraph 2 of this Article, as set forth by the Law on Debt and Guarantees of Bosnia and Herzegovina.

Article 26
(Enforceable laws)

The respective Entity Governments and District Assembly or the bodies authorized by them shall be in charge of passing the enforceable laws on the process of verification. […]

Article 29
(Laws of Entities and District)

The Entities and District shall pass their laws within 90 days from the day of entry into force of this Law, whereby the matter of this Law shall be regulated in more detail.

44. **Law on Central Bank of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* no. 1/97, 29/02, 8/03, 13/03, 14/03, 76/06 and 32/07).

Article 1

1. There is hereby established a Central Bank of Bosnia and Herzegovina, to be known as the Central Bank of Bosnia and Herzegovina (hereinafter referred to as the „Central Bank”). It will be headed by a Governing Board and it may not extend credit by creating money, operating in this respect as a currency board.

2. The Central Bank shall be a juridical person with full capacity under the law of Bosnia and Herzegovina, the law of the Federation of Bosnia and Herzegovina, and the law of the Republika Srpska. In particular, the Central Bank shall have the capacity to contract, to acquire and to dispose of movable and immovable property, and to be a party to legal proceedings. […]

Article 2
Objective and basic tasks of the Central Bank

1. The objective of the Central Bank shall be to achieve and maintain the stability of the domestic currency (Convertible Mark) by issuing it according to the rule known as a currency board.

[...]

3. The basic tasks of the Central Bank performed under the authority of its Governing Board shall be:

a. to formulate, adopt and control the monetary policy of Bosnia and Herzegovina by issuing the domestic currency (Convertible Mark) at the exchange rate as determined in Article 32. of this Law with full backing in freely convertible foreign exchange, and through its other functions as defined in this Law;

b. to hold and manage the official foreign exchange reserves of the Central Bank in a safe and profitable way;

c. to promote or to establish and maintain appropriate payment and settlement systems;

d. to issue regulations for the implementation of the activities defined in paragraph a of Article 2, section 3, of this Law;

[...]

f. to execute the monetary policy in accordance with paragraph a of Article 2, section 3, of this Law;

[...]

Chapter IV MONETARY FUNCTIONS AND OPERATIONS OF THE CENTRAL BANK

Article 31
Rule for issuing currency (Currency board arrangement)

[...]

Assets:

(E) any bills of exchange, promissory notes, certificates of deposit, bonds and other debt securities issued by residents of countries other than Bosnia and Herzegovina that are payable in freely convertible foreign currency and are held by or for the account of the Central Bank; and

Article 34
Other financial transactions of the Central Bank

1. Subject to the provisions of Sections 2 and 3 of this Article, the Governing Board of the Central Bank shall have authority to take all actions necessary to acquire, hold, and dispose of the foreign exchange reserve assets described in Article 31, Section 2, in a safe and profitable way.

[…]

Article 37
Money Market Operations

The Central Bank shall not engage in money market operations involving securities of any type.

Chapter VII RELATIONS OF THE CENTRAL BANK WITH OTHER PUBLIC INSTITUTIONS

Article 52
Banker, adviser and fiscal agent

1. The Central Bank shall act as the banker and the fiscal agent of Bosnia and Herzegovina, and such public agencies as the Presidency of Bosnia and Herzegovina shall determine provided, however, that no transaction carried out by the Central Bank may serve to extend financial assistance including credit to or for the benefit of Bosnia and Herzegovina.

[…]

4. The Central Bank will not act as a banker or a fiscal agent of either the Federation of Bosnia and Herzegovina or the Republika Srpska unless there is a joint decision of both Entities.

[…]

Article 55
Fiscal agency function

The Central Bank may, only through a trust fund and on such terms and conditions as it shall agree with the competent authorities of Bosnia and Herzegovina, act as the fiscal agent for the account of Bosnia and Herzegovina and its public agencies, in the following matters:

a. marketing of debt securities issued by them, or as registrar and transfer agent therefor;

b. payment of principal of, and interest and other charges on, such securities;

c. execution of payment transactions concerning their accounts at the Central Bank;

d. such other matters as shall be consistent with the objectives and the basic tasks of the Central Bank.

[…]

45. **Law on Conditions and Manner of Settlement of Debts Arising from Old Foreign Currency Savings by Issuance of Bonds in Republika Srpska** (*Official Gazette of the Republika Srpska* no. 1/08), in the relevant part, reads:

Article 2

(1) The amount of debt arising from old currency savings that shall be settled by the issuance of bonds shall be determined in accordance with this Law and the Decree on the Procedure of Verification of Claims and Cash Payments Arising from Old Foreign Currency Savings in the Republika Srpska (hereinafter the Decree), (Official Gazette of the Republika Srpska nos. 102/06, 124/06, 17/07, 62/07 and 105/07).

(2) The provision of funds for settlement of debt arising from old currency savings shall be secured by the Republika Srpska. […]

Article 8

(1) The amount of liabilities that has not been paid in cash in accordance with the Law on Settlement of Debts Arising from Old Currency Savings and the Decree shall be paid by issuance of bonds of old foreign currency savings (hereinafter the bonds).

(2) The issuance of bonds may be performed through several successive issuance sessions with different dates of issuance and under the same issuance conditions as stipulated by this Law.

(3) The bonds are entirely transferable securities issued in the immaterialized form -electronic form, issued in series, on the basis of which the owners of bonds shall have the right to collect their capital and interest in accordance with this Law and the Decision on Issuance.

Article 9

(1) The bonds shall be issued under the conditions as follows:

[…]

g) maturity date: five years from the date of issuance;

[…]

(2) Payment of matured capital and calculated interest amount shall be performed by the transfer of money to the account of the bond-owner by the end of seventh day from the maturity date of capital and interest with no deduction of expenses or fees of the Central Register of Vouchers AD Banja Luka (hereinafter the Central Register).

(3) The Central Register shall perform the tasks of payment agent in accordance with the concluded contract.

(4) The bonds shall be interpolated into the stock-exchange market of the Banja Luka Stocks Exchange AD Banja Luka (hereinafter the Banja Luka Stock Exchange).

Article 10

(1) The bonds shall be direct and unconditional obligation of the Republika Srpska, shall be reciprocally equal and at least of the same rank as any other current or future debts for the payment of which the funds are secured by the Republika Srpska.

(2) The Republika Srpska may at any time purchase bonds under the market price or in another manner in accordance with the decision of the Republika Srpska Government (hereinafter the Government) under the condition that, in the case of public bid purchase, any such bid shall be equally available to all bond-owners.

(3) The bond-owner shall not have right to claim premature maturity of bonds, i.e. to declare any of the bonds mature and payable before its regular maturity.

Article 11

The procedure of bond issuance shall incorporate:

a) adoption of the decision on issuance and

b) registration of bonds against the accounts of Central Register.

Article 12

(1) The decision on issuance of bonds shall be passed by the Government.

[…]

(3) The payment plan determining time limits of capital and interest payment shall be the integral component of the Decision on issuance of bonds.

(4) The Decision on issuance of bonds shall be published in the Official Gazette of the Republika Srpska and at least once in a daily newspaper available on the whole territory of Bosnia and Herzegovina.

Article 13

(1) The person authorized to enforce the Decision on issuance of bonds shall be obliged to submit the request for registration (entry) of bonds to the Central Register within eight days from the date of adoption of the Decision on issuance of bonds.

(2) In addition to the request for registration of bonds the person authorized to enforce the Decision on issuance of bonds shall submit the Decision on issuance of bonds and the report on debts arising from old currency savings that shall be settled by the issuance of bonds as verified in accordance with the Law on Settlement of Debts Arising form Old Currency Savings and the Decree. [...]

(4) The APIF shall be responsible for the accuracy of data both in individual and consolidated reports on verification of claims referred to in paragraph 3 f this Article.

(5) The right of ownership and disposing of bonds shall be acquired with the date of registration thereof in the Central Register.

(6) Republika Srpska shall not be entered in the Register of issuers before the Commission for Vouchers of the Republika Srpska.

Article 14

(1) The Central Register shall be obliged to register the issuance, on the basis of the received Decision on issuance and Request for registration of bonds together with the report referred to in Article 13 para. 2 of this Law, to open and maintain the account of the bond-owner, to register and keep data on obtaining of ownership and rights arising from it, as well as to issue reports, statements and certificates on the state and changes of accounts of the bond-owners in accordance with provisions regulating the stock exchange market and acts of the Central Register.

(2) The Central Register shall be obliged to inform the Banja Luka Stock Exchange on registration of bonds.

(3) Bonds issued in accordance with this Law shall be put to the official stock market of the Banja Luka Stock Exchange on the basis of Report prepared by the Central Register.

(4) Provisions regulating the stock exchange market shall be applied to the bonds trade on the secondary bond market.

Article 15

The expenses of the Central Register arising from opening of accounts for the bond-owners, registration of issued bonds and the transmission of first statement of account confirming his/her ownership in the issuance of bonds performed under this Law shall be born by the Republika Srpska.

Article 16

The Government shall pass the Decision on Issuance of Bonds within 60 days from the date of last cash payment arising from the old foreign currency savings and not later than on 1 March 2008. [...].

46. Article 19 of **the Decree on Procedure for Verification of the Claims and Cash Payables Arising From the Old Foreign Currency Savings Deposits in the Republika Srpska** (*Official Gazette of the Republika Srpska* nos. 102/06, 124/06, 17/07, 62/07 and 105/07), in the relevant part, reads:

Article 19

[...]

(3) A maximum of 1,000 KM, or the total amount of savings up to 1,000 KM shall be paid to each individual claimant recorded in the Register and the said amount also includes the amount paid under paragraph (1) of this Article.

[...]

(7) In addition to the payments referred to in paragraphs 2 and 3 of this Article, the Government shall, according to its financial means, take a decision on the procedure and dynamics of additional cash payments not exceeding KM 1000 or in the total amount of KM 1000.

[...].

V. Admissibility

47. The requests for review of constitutionality were lodged by the Chairman and the two Members of the Presidency of Bosnia and Herzegovina and by the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, which means that the requests were lodged by authorized persons as set forth in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. The requests concern the review of constitutionality of the challenged provisions of the Law on Conditions and Manner of Settlement of Debts Arising from Old Foreign Currency Savings by Issuance of Bonds in the Republika Srpska (*Official Gazette of Republika Srpska* no. 1/08), dated 12 January 2008, the Decree on the Process of Verification of Claims and Cash Payments Arising from Old Foreign Currency Savings in the Republika Srpska (*Official Gazette of Republika Srpska* nos. 102/06, 124/06, 17/07, 62/07 and 105/07), and the Law on Settlement of Debts Arising from Old Foreign Currency Savings (*Official Gazette of Bosnia and Herzegovina* nos. 28/06, 76/06 and 72/07), which were enacted by the National Assembly

of the Republika Srpska, the Government of the Republika Srpska and the Parliamentary Assembly of Bosnia and Herzegovina.

V(a) As to the jurisdiction to review the constitutionality of „the laws" (U 3/08, U 4/08, U 5/08 and U 10/08)

48. The Constitutional Court has no dilemmas as to its jurisdiction under Article VI(3)(a) line 2 of the Constitution of Bosnia and Herzegovina to review the constitutionality of the two challenged laws, one of the Republika Srpska and one of Bosnia and Herzegovina. Therefore, taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of the Constitutional Court, the Constitutional Court has established that the requests concerned, in the part related to the Law on Conditions and Manner of Settlement of Debts Arising from Old Foreign Currency Savings by Issuance of Bonds in the Republika Srpska and the State Law on Settlement of Debts Arising from Old Foreign Currency Savings, are admissible, as they were filed by authorized persons and as there is not a single formal reason under Article 17(1) of the Rules of Constitutional Court for which the requests would be considered inadmissible.

V(a) As to the jurisdiction to review the constitutionality of „the decree" (U 5/08)

49. An issue arises in relation to the Constitutional Court's jurisdiction to review the consistency of the Decree on the Process of Verification of Claims and Cash Payments Arising from Old Foreign Currency Savings in the Republika Srpska.

50. The National Assembly of the Republika Srpska made an objection to the jurisdiction.

51. Article VI(3)(a) line 2, in the first sentence of the Constitution of Bosnia and Herzegovina, prescribes, *inter alia*, the jurisdiction of the Constitutional Court to review „whether any provision of an Entity's constitution or law is consistent with this Constitution".

52. Nevertheless, the Constitutional Court holds it unnecessary in the present situation to examine the admissibility of the request. Namely, although the challenged Decree of the Government of the Republika Srpska on the Process of Verification of Claims and Cash Payments Arising from Old Foreign Currency Savings in the Republika Srpska is formally legally in force, the Decree is *de facto* ineffective and of no practical relevance.

53. The provisions of Article 19 items 3 and 7 of this Decree were implemented. Article 65, (1)(4) of the Constitutional Court's Rules stipulates that the Constitutional Court

shall terminate the proceedings where during the proceedings „the prerequisites for the proceedings to be conducted no longer exist or the Constitutional Court establishes that it would be irrelevant to proceed with further procedure provided that human rights are respected."

54. In view of the above and taking into account the provision of Article 65(1)(4) of the Rules of the Constitutional Court, according to which the Constitutional Court shall take a decision terminating the proceedings when during the proceedings it establishes that it would be irrelevant to proceed with further procedure, the Constitutional Court has decided as stated in the enacting clause of this Decision.

VI. Merits

55. The present case concerns the two different requests. The first request, which will be first in chronological order to be resolved, relates to the review of constitutionality of Articles 22 and 23 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings. The second request is related to the review of constitutionality of the Law on Conditions and Manner of Settlement of Debts Arising from Old Foreign Currency Savings by Issuance of Bonds in the Republika Srpska. Both requests, as established above, are admissible.

VI(a) As to the review of constitutionality of Articles 22 and 23 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings

56. Applicant Mr. Nebojša Radmanović, the Member of the Presidency of Bosnia and Herzegovina, claims that the provisions of Articles 22 and 23 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings are unconstitutional. These provisions read as follows:

Article 22
(Issuance of Bonds)

(1) The verification certificate shall contain the amount of bonds to be issued to each individual claimant. The amounts recorded in the verification certificate, together with the name, address, bank name and bank account number of each claimant, as well as any other additional information that might be deemed necessary, shall be entered into the official register of the bonds' ownership kept by the Central Bank. At the time of issuance of bonds, the amount of bonds shall reflect the value of KM currency in relation to Euro in accordance with the official exchange rate of the Central Bank on the day of issuance. The Central Bank shall, through the bank referred to in Article 6, paragraph 3 of this Law,

issue a certificate in a paper form which will certify the ownership over the bonds for each person entitled to the related right. This certificate shall contain the records on issuance of bonds for the bond owner. After that, the bonds shall be electronically recorded and be entirely transferable.

(2) The Agencies shall be obliged to cooperate and make the Register and the data base available to the official Register of the Central Bank.

Article 23
(Issuer of Bonds)

(1) The bonds shall be issued by Bosnia and Herzegovina on behalf of the respective Entities and District in accordance with the provisions of the Law.

2) Capital and interest on the bonds shall be directly paid by using the funds of Entities and District from the Single Treasury Account of Bosnia and Herzegovina. A special escrow account and account for servicing the debt arising from the old foreign currency savings shall be opened in the Central Bank for this special purpose and the Ministry of Finance and Treasury of Bosnia and Herzegovina shall be in charge of this account.

3) Pursuant to Article 21 of the Law, payments on escrow accounts and debt servicing accounts shall be made on the basis of repayment plan to be prepared upon completing the verification procedure and finalizing the amount of bonds.

4) The settlement of debts arising from the old foreign currency savings shall have the same priority as the settlement of debts arising from external debt servicing.

5) Bosnia and Herzegovina shall assure settlement of debts arising from the old foreign currency savings referred to in paragraph 2 of this Article, as set forth by the Law on Debt and Guarantees of Bosnia and Herzegovina.

57. In his request, the applicant alleges that the challenged provisions of Articles 22 and 23 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings are inconsistent with Article VII of the Constitution of Bosnia and Herzegovina since the Central Bank has not been given the responsibilities foreseen in Articles 22 and 23 of the Law on Settlement of Debts Arising from Old Foreign Currency Savings or in the Law on Central Bank.

58. In its reply, the Central Bank of Bosnia and Herzegovina states that, pursuant to Article 52 of the Law on Central Bank, this institution shall act as the banker and the fiscal agent of Bosnia and Herzegovina, *i.e.* that it shall not act as a banker and a fiscal agent of either of the Entities, unless there is a joint decision of both Entities.

59. The Constitutional Court holds that the request is ill-founded for the following reasons:

60. The Central Bank is a constitutional institution of Bosnia and Herzegovina. Article VII(1), the first line, stipulates that the Central Bank shall be the sole authority for issuing currency and for monetary policy throughout Bosnia and Herzegovina. Accordingly, this is „the exclusive" responsibility of the Central Bank of Bosnia and Herzegovina determined by the Constitution. Nevertheless, Article VII(1), item 1, additionally stipulates that the responsibilities of the Central Bank of Bosnia and Herzegovina shall be determined by the Parliamentary Assembly.

61. In the view of the Constitutional Court, the constitutional authority of the Parliamentary Assembly to determine the responsibilities of the Central Bank of Bosnia and Herzegovina through laws cannot be construed as authorising the Parliamentary Assembly to determine the responsibilities exclusively related to the issuance of currency and monetary policy. In determining the responsibilities of the Central Bank of Bosnia and Herzegovina, however, the Parliamentary Assembly must abide by the Constitution of Bosnia and Herzegovina and, particularly, the provisions related to the division of responsibilities between the State and its administrative-territorial units and the scope of activity of their bodies in order for the Central Bank of Bosnia and Herzegovina not to undertake the responsibilities which are not within the scope of responsibilities of the State, which would amount to a violation of the principle of „complex" state referred to in Article I(3) of the Constitution of Bosnia and Herzegovina, or in order for the Central Bank of Bosnia and Herzegovina not to undertake the responsibilities of other bodies, which would amount to a violation of the principle of division of powers as an inherent element of the rule of law referred to in Article I(2) of the Constitution of Bosnia and Herzegovina. To corroborate such position, the Constitutional Court refers to Article 4(1) of the Law on Central Bank, stipulating that „The Central Bank shall represent Bosnia and Herzegovina in all inter-governmental meetings, councils and organizations concerning monetary policy and *the other matters that are within its jurisdiction*." Consequently, the Parliamentary Assembly, as the legislative body that enacted this Law, has held that, in addition to monetary policy, *other responsibilities* may also be assigned to the Central Bank.

62. Indeed, in the Law on Central Bank, the Central Bank has certain responsibilities that are not so much linked with „monetary policy" and „issuance of currency" within the meaning of Article VII(1), the first line of the Constitution of Bosnia and Herzegovina. Thus, pursuant to Article 2(3)(e) of the said Law, the Central Bank shall „coordinate the activities of the agencies responsible for bank licensing and supervision in the Entities […]." Furthermore, the Central Bank of Bosnia and Herzegovina acts as a bank and

the Law on Central Bank sets out the functions of the Central Bank, which would be inherent to it as a financial institution. Thereby, Article 4(2) of the Law on Central Bank stipulates that „the Central Bank may provide *banking services* for the benefit of foreign governments, foreign central banks and monetary authorities, and for the benefit of international organizations in which it or Bosnia and Herzegovina participates." Likewise, Article 52 *et seq*. of the Law on Central Bank stipulates that the Central Bank shall act as the banker and the fiscal agent of Bosnia and Herzegovina and of such public agencies determined by the Presidency of Bosnia and Herzegovina in the Law on Central Bank. In addition, the Central Bank shall act as the financial adviser or the financial consultant or the depository and payment representative. As to the Central Bank's role of „the fiscal agent" of Bosnia and Herzegovina, it should encompass the responsibilities for managing and administering fiscal matters, including payments of dividends for vouchers, shares or bonds that reached maturity as well as calculation and payment of interest rate in accordance with the legal provisions. Article 55 of the Law on Central Bank in fact determines, *inter alia*, that the Central Bank, as the fiscal agent, is entitled to issue debt securities in the capacity of the registrar or the transfer agent (paragraph 1(a)), or to pay principal, interest and other charges on such securities (paragraph 1(b)).

63. Article 22(1) of the State Law on Settlement of Debts Arising from Old Foreign Currency Savings determines that the Central Bank shall keep the official register of the bonds' ownership for bonds to be issued upon a presentation of the verification certificate related to the old foreign currency savings. In addition, the Central Bank, pursuant to the same provision, shall issue a certificate in a paper form, which will certify the ownership over the bonds for each person entitled to the related right. Furthermore, Article 23(2) of the State Law on Settlement of Debts Arising from Old Foreign Currency Savings provides that the Central Bank shall open a special *escrow* account for servicing the debt arising from old foreign currency and the Ministry of Finance and Treasury of Bosnia and Herzegovina shall be in charge of this account.

64. With reference to the reasoning on the responsibilities of the Central Bank of Bosnia and Herzegovina and especially its fiscal agent role, the provisions of Articles 22 and 23 of the State Law on Settlement of Debts Arising from Old Foreign Currency Savings are not disputable for the Constitutional Court. The Central Bank, as a bank, is entitled to provide such services to Bosnia and Herzegovina, which, as administrative-territorial unit and legal subject, is indisputably entitled to issue bonds whenever Bosnia and Herzegovina deems it necessary. The Constitutional Court finds therein no inconsistency with the Constitution of Bosnia and Herzegovina and, especially, because it does not undermine the constitutional-legal system of Bosnia and Herzegovina.

65. Finally, the Constitutional Court particularly points to the fact that the Parliamentary Assembly of Bosnia and Herzegovina has enacted the Law on Settlement of Debts Arising from Old Foreign Currency Savings, the provisions of which are challenged before the Constitutional Court. Article VII(1), the first line, does not stipulate *expressis verbis* that the responsibilities of the Central Bank shall be determined exclusively by a single law on the Central Bank. Therefore, the Constitution of Bosnia and Herzegovina itself does not exclude the possibility that these responsibilities shall be determined on the basis of several laws and, in this case, these laws should be enacted by legislator at the state level. This is particularly corroborated by the fact that the framer of the Constitution used the notion implying that the constitutional responsibilities of the Central Bank may be determined on the basis of several laws enacted by legislator at the state level („the responsibilities of the Central Bank shall be determined by the Parliamentary Assembly").

66. Finally, the Constitutional Court highlights that the purpose of Articles 22 and 23 of the State Law on Settlement of Debts Arising from Old Foreign Currency Savings is, *inter alia*, to secure the highest level of internationally recognized human rights and fundamental freedoms (Article II(1) of the Constitution of Bosnia and Herzegovina) in terms of a maximum technical and operational functioning and safeguarding of the right to payment of „old foreign currency savings", as the right to property referred to in Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

67. In view of the above, the Constitutional Court holds that Articles 22 and 23 of the State Law on Settlement of Debts Arising from Old Foreign Currency Savings are in compliance with the Constitution of Bosnia and Herzegovina.

VI(b) As to the review of constitutionality of the Law on Conditions and Manner of Settlement of Debts Arising from Old Foreign Currency Savings by Issuance of Bonds in the Republika Srpska

68. The applicants, the Chairman of the Presidency of Bosnia and Herzegovina, Dr Haris Silajdžić (U 3/08), the Member of the Presidency of Bosnia and Herzegovina, Mr. Željko Komšić (U 4/08) and the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, Mr. Sulejman Tihić (U 5/08) hold that the Law on Conditions and Manner of Settlement of Debts Arising from Old Foreign Currency Savings by Issuance of Bonds in the Republika Srpska is unconstitutional. In their requests, the applicants underline that the provision of this Law determining the issuer of bonds, the requirements to issue bonds, the amortization plan and bonds' maturity as well as the guarantees given for their payment upon maturity, are unconstitutional.

69. Namely, Article 8(2) of the said Law stipulates that „the issuance of bonds may be performed through several successive issuance sessions with different dates of issuance and under the same issuance conditions as stipulated by this Law." Article 9(1)(g) of the mentioned Law stipulates „maturity date: five years from the date of issuance", while paragraph 2 provides that „payment of matured capital and calculated interest amount shall be performed by the transfer of money to the account of the bond-owner by the end of seventh day from the maturity date of capital and interest with no deduction of expenses or fees of the Central Register of Vouchers AD Banja Luka („the Central Register"). Article 10(1) of this Law prescribes that „bonds shall be a direct and unconditional obligation of the Republika Srpska, shall be reciprocally equal and at least of the same rank as any other current or future debts for the payment of which the funds are secured by the Republika Srpska." Article 11 governs the procedure of bond issuance by the Republika Srpska, which encompasses the following: (a) adoption of the decision on issuance and (b) registration of bonds against the accounts of Central Register. In Article 12(1) it is stipulated that the decision on issuance of bonds shall be passed by the Government of the Republika Srpska, and paragraphs 2 and 3 prescribe the integral parts of decision on issuance of bonds, including the payment plan. Article 13(1) provides for that „the person authorized to enforce the Decision on issuance of bonds shall be obliged to submit the request for registration (entry) of bonds to the Central Register within eight days from the date of adoption of the Decision on issuance of bonds." Paragraph 2 of the same Article prescribes additional obligations of the person authorized related to the registration (entry) of bonds to the Central Register. Paragraph 5 of this Article stipulates that „the right of ownership and disposing of bonds shall be acquired with the date of registration thereof in the Central Register." Article 14 determines the obligations of the Central Register, which include, *inter alia*, the obligation to register the issuance, to open and maintain the account of the bond-owner, to register and keep data on obtaining of ownership and rights arising from it, as well as to issue reports, statements and certificates on the state and changes of accounts of the bond-owners in accordance with the provisions regulating the stock exchange market and acts of the Central Register. In addition, Article 15 of this Law governs the issue of expenses of the Central Register for its services as well as other obligations thereof. Article 16 of the said Law prescribes that the Government of the Republika Srpska shall pass the Decision on Issuance of Bonds „within 60 days from the date of last cash payment arising from old foreign currency savings and not later than 1 March 2008.

70. Unlike the mentioned Law, the State Law on Settlement of Debts Arising from Old Foreign Currency Savings also determines the issuer of bonds, the requirements to issue bonds, the amortization plan and bonds' maturity as well as the guarantees given for

their payment upon maturity. Thus, Article 1(2) stipulates that „Bosnia and Herzegovina shall be held responsible for settling the debts arising from old foreign currency savings, whereas the funds shall be provided by the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District of Bosnia and Herzegovina". Article 21 stipulates the conditions related to the issuance of bonds. Paragraph 1 of this Article determines the time limit for issuance of bonds related to the amount of liabilities that has not been paid in cash, which is no later than 31 March 2008. Additional conditions related to the issuance of bonds are as follows: (a) maturity date shall be 9 years and no later than 31 December 2016, whereas the timetable of bonds' maturity per years shall be determined by decision of the Council of Ministers of Bosnia and Herzegovina; (b) annual interest of 2,5%; and (c) an option of redemption before maturity. Article 22 of the said Law stipulates that the amounts recorded in the verification certificate shall be entered into the official register of the bonds' ownership kept by the Central Bank, which shall, „through the bank referred to in Article 6 paragraph 3 of this Law, issue a certificate in a paper form which will certify the ownership over the bonds for each person entitled to the related right." Article 23(1) of the said Law stipulates that Bosnia and Herzegovina shall issue the bonds on behalf of the respective Entities and District. Pursuant to paragraph 2 of the same Article, „capital and interest on the bonds shall be directly paid by using the funds of Entities and District from the Single Treasury Account of Bosnia and Herzegovina. A special escrow account and account for servicing the debt arising from old foreign currency savings shall be opened in the Central Bank for this special purpose and the Ministry of Finance and Treasury of Bosnia and Herzegovina shall be in charge of this account." Paragraph 3 of this Article prescribes that „pursuant to Article 21 of the Law, payments on escrow accounts and debt servicing accounts shall be made on the basis of repayment plan to be prepared upon completing the verification procedure and finalizing the amount of bonds." Pursuant to paragraph 4 of this Article, „the settlement of debts arising from old foreign currency savings shall have the same priority as the settlement of debts arising from external debt servicing." Finally, paragraph 5 of this Article stipulates that „Bosnia and Herzegovina shall guarantee the settlement of debts arising from old foreign currency savings referred to in paragraph 2 of this Article, as set forth by the Law on Debt and Guarantees of Bosnia and Herzegovina."

71. A comparison of these two laws clearly shows that there are a number of provisions overlapping on the subject-matter of these laws and, obviously, they are not identical. It particularly concerns the time period, terms and conditions related to the issuance of bonds as well as the guarantees given for payment thereof. This gives rise to a conflict between the legal provisions enacted at the two different administrative-territorial levels, which concern the identical subject-matter.

72. In fact, the applicants claim that the Republika Srpska, by enacting its law autonomously governing the field already regulated by the State Law, has violated the provisions of line 4 of the Preamble to the Constitution of Bosnia and Herzegovina, Article I(4), Article II(4) in conjunction with Article II(3)(k) and Article 1 of Protocol No. 1 to the European Convention, Article III(1)(d) in conjunction with Articles VII, III(1)(e) as well as Article II(2) of Annex 2 to the Constitution of Bosnia and Herzegovina. The National Assembly denies these claims and refers to the reasons presented in paragraph 35 *et sec* of the present Decision. On the other hand, the Ministry of Finance and Treasury of Bosnia and Herzegovina corroborates the applicants' position (see paragraph 40 of the present Decision).

73. Firstly, the Constitutional Court holds that the payment of „old foreign currency savings" raises an issue of property rights and their protection in connection with Article II(3)(k) and Article 1 of Protocol No. 1 to the European Convention. The protection of this right is the responsibility of both the State and the Entities. Consequently, the instant case involves the concurrent responsibility, i.e. overlapping of responsibilities of two administrative-territorial levels in charge of regulating and implementing the issue of payment of „old foreign currency savings" and thus the constitutionality of both laws quite possible. Also, the Constitutional Court especially points to the provisions of Article II(1) and Article II(6) of the Constitution, which clearly specify the obligation of both the State and the Entities to safeguard the human rights, and this means that the aforementioned must be secured also through adequate regulations to be enacted by the State as well as by the Entities.

74. Therefore, in addition to the State, the Entities may enact laws regulating the property issue, as already stated in the Decision on Admissibility and Merits of the Human Rights Commission within Constitutional Court no. CH/98/375 *et al,* and the Decision of the Constitutional Court no. *U 14/05*. Namely, the Commission concludes that there is a clear indication of the responsibility of the State to regulate „old foreign currency savings", at least in setting out the general principles to be applied. Moreover, the Commission underlines that the fact that the Entity (in this case the Federation of Bosnia and Herzegovina) has enacted the Law on Determination and Manner of Settlement of the Internal Obligations of the Federation of Bosnia and Herzegovina does not release the State from the obligation to resolve this issue, at least in the principled manner, at the state level and in accordance with Article 1 of Protocol No. 1 to the European Convention, which directly falls within the responsibility of the State (paragraph 1154). In its Decision no. *U 14/05*, the Constitutional Court concludes that pursuant to Article II(1) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina and both

Entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms. Furthermore, the Constitutional Court underlines that „Bosnia and Herzegovina, within its responsibilities in light of Article III(5)(a) of the Constitution of Bosnia and Herzegovina and with purpose of fulfilling the obligations from Annex VI to the General Framework Agreement, is responsible for enacting the legislative framework for resolving the issues of old foreign currency savings in a unified manner for all citizens of Bosnia and Herzegovina. This obligation of Bosnia and Herzegovina stems from its exclusive responsibilities set out in Article III(1)(e) of the Constitution of Bosnia and Herzegovina. Only upon fulfilling that condition will the Entities and the Brčko District of BiH be able, within their respective jurisdictions, to govern that issue in accordance with the principles previously determined through a unified legislation enacted at the level of Bosnia and Herzegovina."

75. Next, on the question whether the Entities have exceeded their jurisdiction through their regulations, *i.e.* whether the Entities have regulated the field of „old foreign currency savings" in its entirety, the Constitutional Court is of the opinion that the Entities have not exceeded their jurisdiction through their regulations, given that the State Law had been enacted earlier and clearly specified the objectives as well as the limitations and competencies of the Entities and the Brčko District of BiH. In addition, on the question whether the Entities have exceeded their constitutional jurisdiction and penetrated the area of the State with regard to the issue of more favourable conditions for payment of „old foreign currency savings", the Constitutional Court cannot find that these provisions are unconstitutional. Namely, the State Law as amended in September 2007 (presently Article 1(4) of the said Law) clearly stipulates that „for the purpose of providing additional funds for settlement of Debts arising from old foreign currency savings, the Ministries of Finance of Entities and District shall be reviewing the budget on a regular basis in order to find ways of reallocation of possible surplus budgetary funds aimed at creating more favourable conditions for reimbursement of old foreign currency savings." Therefore, the State Law anticipates the possibility of derogations and limitations of the Entities' law from the State Law. Therefore, the creation of more favourable conditions for payment of old foreign currency savings has legal grounds and pursues the aim of ensuring „the highest level of internationally recognised human rights and fundamental freedoms" (Article II(1) of the Constitution of BiH). On the other hand, the State Law stipulates the upper limits on bonds' maturity, which is 9 years (Article 21(1)(a) of the Law) and, subsequently, the Council of Ministers has determined a maturity date of 7 years. Finally, as to the question whether the Entities have exceeded their jurisdictions stipulated by laws, the Constitutional Court underlines that, pursuant to Article VI(3)(a) of

the Constitution of BiH, the Constitutional Court is not competent to assess the agreement or consistency between the Entities' laws and the State Law, but it is competent to assess the constitutionality of both laws. Consequently, the Constitutional Court may consider only the issue which is based on the Constitution of BiH.

76. Nevertheless, the Constitutional Court deems that it is not necessary to review the constitutionality of the challenged regulations in relation to the constitutional provisions referred to by the applicants. Namely, as to Article 1 of Protocol No. 1 to the European Convention in conjunction with Article II(4) of the Constitution of Bosnia and Herzegovina, the Constitutional Court underlines that a distinction among „the depositors" is created within the Entities by differing laws. In fact, more favourable conditions for payment of „old foreign currency savings", provided in the Republika Srpska, have resulted in positive discrimination of the depositors in the Republika Srpska. Yet, such discrimination does not originate from the Entity's law but from Article 1(4) of the State Law on Settlement of Debts Arising from Old Foreign Currency Savings which, in fact, stipulates that the Entities *i.e.* Brčko District shall be entitled to create the distinctions among the depositors in accordance with the financial possibilities of the Entities *i.e.* Brčko District. Furthermore, the Constitutional Court does not hold that such regulation of the relationship between the State and the Entities in respect of payment of „old foreign currency savings" is in violation of Article III(1)(d) taken in conjunction with Article VII of the Constitution of Bosnia and Herzegovina as the payment of old foreign currency savings has no effect on monetary policy of Bosnia and Herzegovina. „Monetary policy" implies the issuance of the domestic currency with full backing in freely convertible foreign currency at the fixed rate of KM 1 per EUR 0.51129 (Article 2(3) of the Law on Central Bank), which is under the exclusive jurisdiction of the State authority – the Central Bank. Moreover, the payment of old foreign currency savings does not relate to Article III(1)(e) of the Constitution of Bosnia and Herzegovina as it regards the „internal" debt of Bosnia and Herzegovina towards its citizens, and it does not entail the international obligations of Bosnia and Herzegovina.

77. In view of the above, the Constitutional Court holds that the provisions 8, 9, 10, 11, 12, 13, 14 and 16 of the Law on Conditions and Manner of Settlement of Debts Arising from Old Foreign Currency Savings by Issuance of Bonds in the Republika Srpska (*Official Gazette of Republika Srpska* no. 1/08) are consistent with the Constitution of Bosnia and Herzegovina.

VII. Conclusion

78. First, the Constitutional Court established that Articles 22 and 23 of the State Law on Settlement of Debts Arising from Old Foreign Currency Savings are consistent with the Constitution of Bosnia and Herzegovina as the Parliament of Bosnia and Herzegovina has the responsibility under Article VII of the Constitution of Bosnia and Herzegovina to determine, through the Law on Central Bank, that the Central Bank of Bosnia and Herzegovina has a role of the fiscal agent for Bosnia and Herzegovina with regard to bonds to be issued for the purpose of settling the debts arising from „old foreign currency savings".

79. In addition, the Constitutional Court has established that the protection of human rights and freedoms, including the issue of payment of „old foreign currency savings", is the responsibility of both the State of Bosnia and Herzegovina and the Entities. Therefore, the Republika Srpska has not violated the Constitution of Bosnia and Herzegovina by providing more favourable conditions for payment of „old foreign currency savings", as it is in accordance with Articles II(1) and II(6) of the Constitution of Bosnia and Herzegovina.

80. Given the Decision of the Constitutional Court in the present case, it is not necessary to consider the adoption of interim measures requested by the Member of the Presidency of Bosnia and Herzegovina, Mr. Željko Komšić (U 4/08), and the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, Mr. Sulejman Tihić (U 5/08).

81. Pursuant to Article 61(1) and (3) and Article 65(1)(4) of its Rules, the Constitutional Court has decided as stated in the enacting clause of this Decision. An integral part of this Decision shall make Separate Dissenting Opinion of Judge Seada Palavrić and Separate Partially Dissenting Opinion of Judge Valerija Galić.

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

Seada Palavrić
President
Constitutional Court of Bosnia and Herzegovina

SEPARATE DISSENTING OPINION OF JUDGE PALAVRIĆ

With reference to the majority's decision of the Constitutional Court in case no. U 3/08, (joinder of requests nos. *U 3/08*, *U 4/08*, *U 5/08* and *U 10/08*), which was adopted at the plenary session held on 4 October 2008

- I join the Separate Partially Dissenting Opinion of Judge Valerija Galić to the Decision of the Constitutional Court and I give my support to all the arguments presented by Judge Galić;
- I submit my own Separate Dissenting Opinion to the Decision of the Constitutional Court, for the following reasons:

At the outset, I consider that the Constitutional Court has fully avoided dealing with the issue of old foreign currency savings since the said savings, in their essence, constitute a public debt. If we are aware that public debt, i.e. the state debt constitutes a total debt that a state, at certain moment, owes to its creditors in the country or abroad and which the state may finance, i.e. return the principal debt and accrued interest by way of issuing bonds or in some other way, we will definitely conclude that the old foreign currency savings constitute the debt of the State of Bosnia and Herzegovina, i.e. its debt to domestic creditors, which means its internal public debt.

In support of the aforesaid, I would like to remind you that the former SFRY, as a State, had guaranteed for the old foreign currency savings. In Article I(1) of the Constitution of Bosnia and Herzegovina, it is clearly stipulated that the State of Bosnia and Herzegovina will continue to be the state, in other words: *The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be „Bosnia and Herzegovina", shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders*. It indisputably follows from the mentioned provision of the Constitution of BiH that Bosnia and Herzegovina is as a legal successor of the former SFRY and that, as such, it is internationally recognized. Given the aforesaid fact, there is no disputing that Bosnia and Herzegovina is a legal successor of former state when it comes to the guarantees for the payment of old foreign currency savings as an internal public debt of the state.

The State of Bosnia and Herzegovina commenced fulfilling its obligation by adoption of the Law on Settlement of Debts Arising from Old Foreign Currency Savings. Moreover, the Parliamentary Assembly of Bosnia and Herzegovina passed this law by implementing the decisions of the Human Rights Commission and decisions of this court. That law

was not passed as a framework law, but rather by this law the State *explicite* provided that the funds would be collected from the two Entities and the BiH Brčko District in the course of a unified procedure to be conducted by the Central Bank and that the Ministry of Finance and Treasury would manage the funds of the said account as it is done in any other state. According to the law, neither the Entities nor the BiH Brčko District were entitled to pass the laws, neither were they entitled to pass any by-laws on any issue except for the issue of **verification** of old foreign currency savings. Hence, the State only required the exact data about the amount of internal debt of BiH when it comes to the old foreign currency savings. The said law provided that the State, the Entitles and the BiH Brčko District would be finding funds to be transferred to the unique account from which, depending on the point of collection, the foreign currency saving would be paid. However, the authorities of the Republika Srpska acted as if the said law did not exist at all, as if there was no State of Bosnia and Herzegovina, as if the Republika Srpska is the state and as if the RS is the only authority responsible for internal debt arising from the old foreign currency savings accounts of the savers from its area. The fact that the RS jeopardized the complete process of public debt management, which concerns the old foreign currency savings in the whole of Bosnia and Herzegovina, has never been a matter of concern for the authorities of the Republika Srpska.

Regretfully, the Decision of the Constitutional Court failed to present a clear position of the Constitutional Court with respect to the reply sent by the National Assembly of the Republika Srpska, wherein, *inter alia*, the following is stated: it is a legal frame whereby the independent bank system of the Republika Srpska has been recognized and established independently of the banks in the rest of Bosnia and Herzegovina and whereby the recognition the obligations arising from the old foreign currency savings were taken over by the Republika Srpska." Accordingly, there is a tendency to build a completely independent bank system in the Republika Srpska in which regard the laws of the Republika Srpska and Constitution of Republika Srpska were referred to as legal basis. No reference was made to the Constitution of Bosnia and Herzegovina. It is quite clear that the provisions of the Constitution of Bosnia and Herzegovina could not be referred to as a legal basis for passing the disputed law since the responsibility for the issues that are concurrently regulated by the laws of the Republika Srpska does not fall within the scope of Entities' responsibilities. Moreover, the laws adopted by the Republika Srpska refer to the fact that the turnover with issued bonds will be conducted at the Banja Luka Stock Exchange, whereby the basic principles under Article I (4) of the Constitution of BiH have been automatically infringed, according to which *Bosnia and Herzegovina and the Entities shall not impede full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina.*

Furthermore, I consider that the Republika Srpska, by its legislative activity in this segment, i.e. in three cases (U 3/08, U 4/08 and U 5/08), interfered with the explicit competencies of the State and thus jeopardized and, for the time being, halted the process of implementation of the Law on Settlement of Debts Arising from the Old Foreign Currency Savings in the BiH Federation and the BiH Brčko District. However, not only that this process has been halted by the acts of the Republika Srpska, but the very process of public debt management has been endangered as well, although the law has stipulated that the internal debt is at the same level as external debt of Bosnia and Herzegovina. In my opinion, this is a very unconstitutional act which caused the damage to the State of Bosnia and Herzegovina. Definitely, in taking the said decision there was a lack of understanding that this case is not an appeal since the issue was not related to the protection of an ordinary property right, but rather to the equality of all citizens of Bosnia and Herzegovina, i.e. to the principle of legal state and rule of law.

The decision also failed to take into account the reply of the Ministry of Finance and Treasury, in which he warned about the process of public debt management. I refer to the letter of the Minister of Finance and Treasury of Bosnia and Herzegovina dated 9 January 2008, which was sent to the High Representative for BiH, USA Embassy in BiH, Delegation of the European Commission in Bosnia and Herzegovina, International Monetary Fund and World Bank. The Minister, *inter alia*, wrote as follows: *By the latest amendments of the Law, inter alia, the bonds' maturity period of nine years has been shortened. This kind of prescribed period provides for even a shorter period, which will be finally realized after the completion of verification procedure and submission of data to the Ministry. However, the matter of concern is the fact that the National Assembly of Republika Srpska urgently adopted the Law dealing with the old foreign currency savings, whereby the completion of activities on implementation of the Law and the compliance with the deadline for issuance of bonds for the purpose of settlement of debts were brought into question. Pursuant to the Law which was adopted by the Republika Srpska, the maturity period of five years was determined. Such an arrangement is contradictory to and may undermine the systematic relations determined by the law on the level of BiH, which is founded on the principles of the Constitutional Court's decision. Moreover, taking into account the entire economic situation in BiH, we would like to point out that the repayment period of five years is not acceptable, since it would jeopardize the macroeconomic stability and fiscal sustainability of the country, etc*. I hold that the Decision of the Constitutional Court failed to give answers to the statements presented by the BiH Ministry of Finance and Treasury.

If the Decision had taken into its consideration the statements of the BiH Minister of Finance and Treasury or other applicant's arguments, it would have been unavoidably

concluded, when it comes to Article 29 of the State Law on Settlement of Debts Arising From the Old Foreign Currency Savings, that the Entities and the BiH Brčko District were under the obligation to pass its laws within 90 days time-limit, whereby they would in detail regulate the matter which is the subject of this Law. The term that is used is ***in detail*** and that term is not to be interpreted any differently, and the state Law has regulated all the issues in detail, except for the fact that the Entities and the BiH Brčko District were to pass the regulations on verification of old foreign currency savings. Accordingly, they were assigned with passing the verification regulations only. And, even if there were any other issue to be regulated, I reiterate, it would not mean that the said matter should be regulated any differently than it was regulated by the state law, which is based on the Constitution of Bosnia and Herzegovina.

Regardless of obvious violations of the Constitution of Bosnia and Herzegovina, which, in my opinion, were committed, even if the Republika Srpska was had been authorized to pass the law, which it did pass, such a law should not have been based on the principles that jeopardize the macroeconomic stability of entire State and its citizens, nor the well-being or the economic development, which includes market oriented economy. Finally, even when the decisions of the Constitutional Court refer to Article III(5)(a), i.e. to the responsibilities transferred from the Entities to the State, the conclusion follows that the law, which was passed in this regard, had only given the possibility to the Entities to pass the regulations on verification of old foreign currency savings.

Finally, the arguments that have been presented in the decision of the Constitutional Court concerning this legal matter have definitely failed to convince me that there is no violation of the Constitution of Bosnia and Herzegovina in the acts of the Republika Srpska, to be more precise, in its **Law** on **Conditions and Manner of Settlement of Debts Arising** from **Old Foreign Currency Savings by Issuance of Bonds in the Republika Srpska**. I consider it undisputable that the old foreign currency savings represent the public debt and that those savings constitute the internal debt, which falls within exclusive responsibility of the State. Line 4 of the Preamble of the Constitution of BiH has been violated by the mentioned acts of the Republika Srpska, in other words the promotion of general well-being and economic development through protection of privately owned property have been prevented by those acts, as well as the promotion of market oriented economy. The following provisions have been also violated: Article I(1) of the Constitution of BiH which concerns the continuity of the State of Bosnia and Herzegovina as a legal successor of the obligations of former SFRY relating to the old foreign currency savings; Article I/2 of the Constitution of BiH, whereby the functioning of BiH as a legal state has been guaranteed; Article I(4) of the Constitution of BiH, whereby

the turnover of goods, services, capital and persons has been limited; Article III(1)(d) of the Constitution of BiH according to which the monetary policy falls within the exclusive responsibility of the State as provided for under Article VII of the Constitution of BiH and Article II(1)(e) of the Constitution of BiH, in which it is stated that the financing of the institutions and international obligations of Bosnia and Herzegovina falls within the exclusive responsibility of the State.

Moreover, the decision of the Constitutional Court which was adopted in regards to the aforesaid issue, in my opinion, is inconsistent with the relevant jurisprudence of the Constitutional Court of BiH when it comes to the appellate jurisdiction of the Constitutional Court of BiH according to Article VI(3)(b) of the Constitution of BiH. For example, I will refer to the Decision of the Constitutional Court in case no. AP 1391/06, whereby in paragraph 45, the position was taken that by the abolishment of the provisions of the Law on Establishing and Manner of Settling the Internal Debt of the Federation of Bosnia and Herzegovina and provisions of the Law on Establishing and Manner of Settling the Internal Debt of the Republika Srpska on the issue old foreign currency savings and by passing the legislative frame for resolving the issues of the old foreign currency savings, this matter has been assigned to the State of Bosnia and Herzegovina. This position of the Constitutional Court was supported by the Commission which adopted a decision on further legal remedies in cases relating to the old foreign currency savings (see, paragraph 34 of the Decision), and concluded that passing of the law, whereby the issue of old foreign currency savings would be resolved in the whole of Bosnia and Herzegovina **in a unified manner**, falls within the responsibility of the State. Also, since the responsibility for resolving the issue of payment of claims arising from the old foreign currency savings has been assigned to the State, the Constitutional Court, in paragraph 46 of its decision, concluded that the Federation of Bosnia and Herzegovina did not interfere with the appellants' right to the property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of the Protocol no. 1 to the European Convention.

SEPARATE PARTIALLY DISSENTING OPINION OF JUDGE GALIĆ

Pursuant to Article 41 of the Rules of the Constitutional Court (*Official Gazette of BiH* no. 60/05 and 64/05), I am presenting my separate dissenting opinion to the Decision of the Constitutional Court of BiH no. *U 3/08*, which was adopted at the plenary session of the Constitutional Court, held on 4 October 2008.

I do agree with the part of the mentioned decision, whereby the request of Mr. Nebojša Radmanović, the Member of Presidency of Bosnia and Herzegovina, was dismissed in regards to the review of constitutionality of Articles 22 and 23 of the Law on Settlement of Debt Arising from the Old Foreign Currency Savings (*Official Gazette of Bosnia and Herzegovina* nos. 28/06, 76/06 and 72/07).

I also agree with the part of the mentioned decision, whereby the proceedings was suspended upon the request of Mr. Sulejman Tihić, the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, for review of constitutionality of Article 19 of the **Decree** on **Procedure for Verification** of the **Claims and Cash** Payables **Arising from the Old Foreign Currency Savings** Deposits in the **Republika Srpska** (*Official Gazette of the Republika Srpska* nos. 102/06, 124/06, 17/07, 62/07 and 105/07).

However, I do agree with the part of the Decision whereby the requests of Dr Haris Silajdzić, the Chairman of the Presidency of Bosnia and Herzegovina, Mr. Željko Komšić, the Member of the Presidency of Bosnia and Herzegovina and Mr. Sulejman Tihić, the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, for review of constitutionality of Articles 8,9,10,11,12,13,14, and 16 of the **Law** on **Conditions and Manner of Settlement of Debts Arising** from **Old Foreign Currency Savings by Issuance of Bonds in the Republika Srpska** (*Official Gazette of the Republika Srpska*, No, 1/08) were dismissed.

My opinion is different from the opinion of the majority of judges of the Constitutional Court, who considered that the challenged provisions are in accordance with the Constitution of BiH, and the reasons are as follows:

As to the challenged Law, the Constitutional Court concluded that when it comes to the protection of human rights and freedoms, including the issue of payment of „old foreign currency savings, the competent bodies are both the State of Bosnia and Herzegovina and Entities. Furthermore, the Constitutional Court concluded that the Republika Srpska,

while anticipating the better conditions for payment of „old foreign currency savings, did not violate the Constitution of Bosnia and Herzegovina since their acts are in accordance with Article II(1) and Article II(6) of the Constitution of Bosnia and Herzegovina. In the reasoning of the Decision, in paragraphs 72 through 76, the arguments have been presented in detail, which served as a basis for the conclusion on the constitutionality of the challenged law.

I agree with the opinion of the majority of judges that the issue „old foreign currency savings" raises an issue of property rights and their protection in conjunction with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of the Protocol no.1 of the European Convention. Therefore, there is no disputing that, according to Article II(1) and Article II(6) of the Constitution, there is an obligation to protect human rights as referred to in the Catalogue of Rights under Article II of the Constitution of BiH, which also includes the right to property of the State and Entities.

However, the subject of review by the Constitutional Court was the law *in abstracto* and therefore the decision in this regard must not be limited to that specific case, but it is rather that decision should have an *erga omnes* effect (in relation to everyone). In my opinion, the Constitutional Court, while judging in this matter, was exclusively dealing with the protection of rights, in other words with the protection of rights of its own citizens in the Republika Srpska, which means that the Court was insufficiently dealing with the issue of jurisdiction. In my opinion, the issue of jurisdiction should have been the primary task in this constitutional-legal dispute. Hence, the essential point of my dissenting from the majority's decision is related to the manner in which the procedure of review of constitutionality of the challenged Law was conducted.

It is my opinion that in the instant case, from the aspect of constitutional law, the Constitutional Court was faced with the very serious issue of relationship of responsiblities between, on the one hand, the State of Bosnia and Herzegovina and, on the other hand, the Entities and the BiH Brčko District when it comes to „the payment of old foreign currency savings". The Constitutional Court dealt with the issue of jurisdiction over the „old foreign currency savings" in its case no. *U 14/05* of 2 December 2005 while resolving the request of Mr. Nikola Špirić, the Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing the request, which was submitted for review of Entity Laws and the Law of BiH Brčko District relating to the „old foreign currency savings". By the said decision the Constitutional Court granted the request and established that the challenged laws are inconsistent with Article III of the Constitution of Bosnia and Herzegovina. In the mentioned decision the Constitutional Court conducted a detailed analysis of the continuity of obligations and

responsibilities of Bosnia and Herzegovina relating the issue of „old foreign currency savings" and concluded, as follows: *The Constitutional Court considers that Bosnia and Herzegovina, within its responsibilities, and in light of Article III(5)(a) of the Constitution of Bosnia and Herzegovina and with purpose of fulfilling the obligations from Annex 6 to the General Framework Agreement, is responsible for enacting the legislative framework for resolving the issues of old foreign currency savings in a unified manner for all citizens of Bosnia and Herzegovina. Only upon fulfilling that condition will the Entities and the Brčko District be able, within their respective jurisdictions, to govern that issue in accordance with the principles previously determined through a unified legislation enacted at the level of Bosnia and Herzegovina.*

Following the implementation of the aforementioned decision, the Parliamentary Assembly of Bosnia and Herzegovina passed the Law on Settlement of Debts Arising from Old Foreign Currency Savings (*Official Gazette of Bosnia and Herzegovina* nos. 28/06, 76/06 and 72/07). The Law determines the scope of authorities entrusted to the Entities and the BiH Brčko District. Pursuant to Articles 26 and 29 of the State law, the Entities and BiH Brčko District have been entrusted with passing enforceable regulations on the verification procedure, as well as with passing their own regulations, whereby the matter which is the subject of the state law will be regulated in detail.

Although it is undisputable that the Constitutional Court, according to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, is not competent to examine whether the an entity law is harmonized or consistent with the state law, but it is only called upon to examine the constitutionality of either of the mentioned laws, as stated in paragraph 74 of the Decision of the Constitutional Court, in my opinion we should not disregard the fact that that by passing the state law, which was aimed at implementing the Decision of the Constitutional Court no. *U 14/05*, a new relationship between the State of Bosnia and Herzegovina and the Entities, and the BiH Brčko District was created with regards to the issue of jurisdiction over the „old foreign currency savings. That relationship, in my opinion, should not be viewed as a relationship of hierarchical subordination of the state law, but rather as a relationship of constitutional jurisdiction in the context of regulating the issue of „payment of old foreign currency savings". Moreover, although the Decision *U 14/05* is not a constitutional law, it has its authority for amending the position on the issue of jurisdiction referred to in the said decision, and therefore much stronger arguments are required than those stated in Decision no. *U 3/08.*

In my opinion, by parallel but different regulation of the mentioned issues, the Republika Srpska exceeded the scope of its jurisdiction and authorities entrusted by the

state law. Therefore, I hold that in the instant case we cannot talk about the concurrent jurisdiction, i.e. about the overlapping of jurisdictions of two administrative-territorial levels in charge of regulating the issue of „old foreign currency savings" as stated in paragraph 73 of the Decision of the Constitutional Court.

As to the position of the Constitutional Court which justifies departure from the Entity law from the State Law by arguments that in the instant case the issue is also about the „positive discrimination", I hold that the „positive discrimination" is justified only when a specific dispute occurs and not when the issue is about the abstract control of the law. I consider that in the instant case the positive discrimination brings into question the principle of the rule of law under Article I(2) of the Constitution of BiH, in particular its integral parts - legal certainty and general equality before the law for all the citizens, i.e. for all the owners of „old currency savings", which was the aim of the state law. So, the aim was to determine unified principles and standards for paying the old foreign currency savings to all owners of „old foreign currency savings accounts" in the territory of Bosnia and Herzegovina.

For the mentioned reasons I could not agree with the majority's opinion, i.e. with the opinion of my respected colleges judges and I also consider that this part of the applicant's request is justified and that the provisions of the challenged law are inconsistent with Article I(2) of the Constitution of BiH in conjunction with Article III(1)(e) and III(5)(a) of the Constitution of BiH.

Case no. U 11/08

DECISION
ON ADMISSIBILITY
AND MERITS

Request of twelve members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, for a review of the constitutionality of the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina

Decision of 30 January 2009

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2) line 2, 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), in Plenary and composed of the following judges:

Mr. David Feldman, Vice-President,

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Ms. Constance Grewe,

Mr. Krstan Simić

Having deliberated on the request lodged by **the twelve Members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina,** in case no. **U 11/08**, at its session held on 30 January 2009, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by the twelve Members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, for review of the constitutionality of the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 25/04, 93/05, 32/07 and 15/08) is hereby dismissed.

It is hereby established that the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 25/04, 93/05, 32/07 and 15/08) was enacted in compliance with the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette 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 4 June 2008, the twelve members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina („the applicants"), lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina (*Official Gazette of BiH* nos. 25/04, 93/05, 32/07 and 15/08; hereinafter referred to as „the challenged law").

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina were requested on 9 July 2008 to submit their replies to the request.

3. The House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („Parliamentary Assembly") failed to reply to the request.

4. Upon a proposal made by the Judge Rapporteur, the Constitutional Court, pursuant to Article 15(3) of the Rules of the Constitutional Court, addressed the Office of the High Representative („the OHR") and asked for its written observations in respect of the relevant request.

5. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were forwarded to the applicants on 27 October 2008.

6. Pursuant to Article 93(1) line 2 and (3) of the Rules of the Constitutional Court, the Constitutional Court took a decision that Ms. Seada Palavrić, the President of the Constitutional Court and Judge Mirsad Ćeman would not participate in the work and the decision-making procedure relating to the request since they had participated as members of the Parliamentary Assembly in the enactment of the challenged law.

III. Request

a) Statements from the request

7. The applicants state that the Parliamentary Assembly enacted the challenged law, as imposed by the High Representative on an interim basis, and amendments thereto pursuant to Article IV(4)(a) of the Constitution of Bosnia and Herzegovina („the Constitution of BiH"), which embodies the Parliament's universal responsibility in the field of legislative power. According to the applicants' allegations, „the Parliamentary Assembly of Bosnia and Herzegovina did not specify the provision, i.e. the constitutional basis for giving it the mandate to regulate the matter in question". In the view of the applicants, the Parliamentary Assembly has no mandate to regulate the matter in question through legislation given that these matters do not fall within the scope of its responsibilities under Article III(1) of the Constitution of BiH. Furthermore, the applicants assert that Article III of the Constitution of BiH leaves no room for doubt that the field of judiciary falls under the exclusive responsibility of the Entities and that, by applying the accepted methods of interpretation of all Articles of the Constitution of BiH, and particularly of Article II, „which relates to the universal human rights and freedoms", the applicants have been unable to recognize or establish the constitutional basis for enacting the challenged law. In addition, it is stated that, the legislator, on the other hand, failed to refer to the constitutional basis for enacting the said Law under Article III(5)(a), whereby it would be possible to transfer formally this responsibility from the Entities to the Parliamentary Assembly. In the view of the applicants, at present, the judiciary in BiH is bulky, disorganized, non-functioning and inefficient in which corruption and bias have not been eliminated or rooted out as well as petty politics and adjudication under national and other standards.

b) *Amicus curiae* – Written Observations by OHR

8. The OHR contends that the applicants' request that the law be declared null and void on the basis of an omission to quote the appropriate constitutional provision in its preamble arises from a misunderstanding. In this context, it is stated that the necessity to indicate in the preamble of laws their constitutional basis is a formal requirement provided for under the Unified Rules for Legislative Drafting in the Institutions of Bosnia and Herzegovina adopted in January 2005, but the Rules of Procedures of the Houses of the Parliamentary Assembly in force at the time of the adoption of the challenged law did not contain such a requirement as they did not provide detailed rules related to the content of the preamble of laws enacted by the Parliamentary Assembly. The consistent practice of the Parliamentary Assembly before the adoption of the new Rules of Procedure illustrates

that the Preamble of laws refers to Article IV(4)(a) of the Constitution of BiH as the constitutional basis for the Parliamentary Assembly to enact legislation rather than as a basis to exercise responsibility over a particular field of competencies. As stated in the Observations, the aforementioned is confirmed by the Laws adopted pursuant to III(5)(a) or III(5)(b) of the Constitution of BiH originating from transfer agreements concluded by the Entities. Both preambles of the Law Establishing the Company for the Transmission of Electric Power in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 35/04) and the Law on Indirect Taxation System in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 44/03, 52/04, 34/07 and 4/08) contain references to Article II(4)(a) of the BiH Constitution while no reference to Articles III(5((a) and III(5)(b) respectively were included. In this regard, the OHR quoted the Decision of the Constitutional Court in the case related to the constitutionality of the Law Establishing the Company for the Transmission of Electric Power in Bosnia and Herzegovina. In the said decision, the Constitutional Court stated as follows: „it is indisputable that the provision of Article III(5)(b) of the Constitution of Bosnia and Herzegovina was respected when the relevant Law was adopted, considering the fact that the relevant law was adopted on the basis of the Agreement signed on 2 June 2003 by Prime Ministers from both Entities". Thus, in the opinion of OHR, by doing so, the Constitutional Court took into account the actual constitutional basis for Bosnia and Herzegovina to regulate this field and did not only consider the fact that the Parliamentary Assembly, within the Preamble of the said Law, only indicated Article IV(4)(a) of the Constitution as a basis to enact legislation.

9. Also, the OHR holds that the applicants' allegation that there is no constitutional basis for adopting the challenged law, is unsubstantiated since it is indisputable that the challenged law was adopted pursuant to Article III(5)(b) of the Constitution of BiH as originating from the transfer agreement. In this context, the OHR underlines that the explanation attached to the Draft Law, forwarded by the Council of Ministers to the Parliamentary Assembly, expressly states that the constitutional basis for adopting the law is contained in Article III(5) of the Constitution of Bosnia and Herzegovina. In addition, evidence that the challenged law was adopted under such transfer can be found in Articles 92 and 93 of the challenged law, which stipulate that the Entities' laws and the original Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina shall be repealed as of the entry into force of the challenged law.

10. Concerning the applicants' assertion that judicial and prosecutorial matters fall under the exclusive jurisdiction of the Entities, the OHR refers to the Decision of the Constitutional Court no. *U 26/01* in the case related to the Law on Court of BiH, where the Constitutional Court of BiH declared the said Law to be in conformity with the Constitution

of Bosnia and Herzegovina. Furthermore, in the view of OHR, the fact that „there is a role for Bosnia and Herzegovina in judicial and prosecutorial matters notwithstanding any transfer was further reflected in the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, which was enacted on 23 May 2002." Additionally, it is stated that the Transfer Agreement was concluded because certain matters covered by the challenged law were falling within the responsibilities of the Entities and that the effect of such agreement was to transfer to the institutions of Bosnia and Herzegovina matters concerning the „affairs and functions of judges and prosecutors" that were still falling within the responsibility of the Entities.

11. Finally, according to the OHR, the applicant's request is unfounded as it relies on the wrong assumptions that the obligation to denote the constitutional basis of the law in the Preamble relates to the constitutional basis for the Institutions of Bosnia and Herzegovina to exercise responsibility over specific matter rather than to the constitutional basis for the Parliamentary Assembly to enact legislation and that a breach of such obligation renders the law null and void. Moreover, the OHR holds that the constitutional basis for the adopting the challenged law exists and was made clear by the proponent of the Law and that such constitutional basis was accepted by the Parliamentary Assembly.

IV. Relevant Law

12. **Constitution of Bosnia and Herzegovina,** in the relevant part, reads**:**

Article III(1)

I. Responsibilities of the Institutions of Bosnia and Herzegovina

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

a) Foreign policy.

b) Foreign trade policy.

c) Customs policy.

d) Monetary policy as provided in Article VII.

e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina.

f) Immigration, refugee, and asylum policy and regulation.

g) International and inter-Entity criminal law enforcement, including relations with Interpol.

h) Establishment and operation of common and international communications facilities.

i) Regulation of inter-Entity transportation.

j) Air traffic control.

Article III(2)(b), in the relevant part, reads:

Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honor the international obligations of Bosnia and Herzegovina […]

Article III(3)(a)

All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.

Article III(5)

a) Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.

b) Within six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects.

Article IV(4)

The Parliamentary Assembly shall have responsibility for:

a) Enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution.

b) Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.

c) Approving a budget for the institutions of Bosnia and Herzegovina.

d) Deciding whether to consent to the ratification of treaties.

e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.

13. Pursuant to Article IV(4)(a) of the Constitution of Bosnia and Herzegovina, the Parliamentary Assembly of Bosnia and Herzegovina, at the session of the House of Representatives held on 11 May 2004 and at the session of the House of Representatives held on 21 May 2004, adopted the

Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 25/04)

CHAPTER I - GENERAL PROVISIONS

Article 1

Establishment

(1) This Law establishes the High Judicial and Prosecutorial Council, and regulates: its work, organization, competencies, powers and the conditions and mandate for the holding of judicial and prosecutorial power, the appointment of judges and prosecutors, the disciplinary responsibility of judges and prosecutors, the temporary suspension from office of judges and prosecutors, the incompatibility of judicial and prosecutorial service with other functions, the termination of mandates of judges and prosecutors and other questions related to the work of the High Judicial and Prosecutorial Council (hereinafter „the Council").

(2) The Council is an independent organ of Bosnia and Herzegovina and has legal personality.

(3) The provisions of the Law on Ministries and Other Bodies of the Administration of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina nos. 5/03 and 42/03) and the Law on Administration of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina no. 32/02) shall not apply to the Council.

14. **Agreement on the Transfer of Certain Entity Responsibilities through the Establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH* no. 16/04 of 27 March 2004)

Federation of Bosnia and Herzegovina and Republika Srpska

1. In the exercise of Article III(5)(b) of the Constitution of Bosnia and Herzegovina, the Entity of the Federation of Bosnia and Herzegovina („the Federation") and the

Entity of the Republika Srpska („the Republika Srpska") hereby agree to transfer certain responsibilities for their respective judiciaries, including matters concerning the affairs and functions of judges and prosecutors, to an institution of Bosnia and Herzegovina to be known as the High Judicial and Prosecutorial Council of Bosnia and Herzegovina („the Council") from the day of entering into the force of the new Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina.

2. The Council shall be responsible for autonomy, independence, impartiality, professionalism and efficiency, including also the prosecutorial function, in the Federation and the Republika Srpska, as well as at the level of Bosnia and Herzegovina.

3. The Federation and the Republika Srpska shall provide support to the Council in accordance with their obligations under Article VIII(3) of the Constitution of Bosnia and Herzegovina.

Bosnia and Herzegovina

4. Bosnia and Herzegovina shall assume the responsibilities transferred to it by the Entities, as defined in this Agreement.

5. In cooperation with the Independent Judicial Commission, the Council of Ministers of Bosnia and Herzegovina shall prepare the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina. The said Law shall be in line with the requirements set out in this Agreement and the relevant European and international standards.

6. The Council of Ministers of Bosnia and Herzegovina shall put forward a draft Law to the Parliamentary Assembly of Bosnia and Herzegovina.

7. Bosnia and Herzegovina shall provide suitable premises and sufficient funds for the work of the Secretariat so that the Council may commence its activities within one month as of the entry into force of the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina, for the purpose of facilitating the transformation into a single Council.

V. Admissibility

15. Pursuant to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to whether any provision of an Entity's constitution or law is consistent with this Constitution. Such disputes may be referred by one-fourth of the members of either chamber of the Parliamentary Assembly.

16. The relevant request for review of constitutionality was filed by the twelve members of the House of Representatives of the Parliamentary Assembly, who constitute one-fourth of the members of this chamber, which means that it was filed by authorized persons as set forth in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. In addition, the request concerns the review of constitutionality of the challenged law, which was enacted by the Parliamentary Assembly, in which case the Constitutional Court is competent to take decisions, as referred to in the mentioned Article of the Constitution of Bosnia and Herzegovina.

17. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of Constitutional Court, the Constitutional Court has established that the request is admissible as it was filed by authorized persons and as there is not a single formal reason under Article 17(1) of the Rules of the Constitutional Court, which would render the request inadmissible.

VI. Merits

18. In essence, the applicants hold that in view of the restrictions related to the responsibilities specified in Article III(1) of the Constitution of BiH, the Parliamentary Assembly had no constitutional basis to enact the challenged law. The applicants also argue that the legislator failed to refer to the constitutional basis for enacting the said Law under Article III(5)(a), whereby it would be possible to transfer formally this responsibility from the Entities to the Parliamentary Assembly.

19. Considering that the applicants challenge the constitutional basis for enacting the challenged law, the Constitutional Court shall examine the request within a wider constitutional context, but not limiting itself to the provisions of the Constitution of BiH referred to in the applicants' request.

20. In its observations, the OHR states the fact that the challenged law was enacted on the grounds and as the result of the Agreement on the Transfer of Certain Entity Responsibilities through the Establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina („the Agreement") and that following the signing of the Agreement, the Draft Law was prepared and proposed to the Parliamentary Assembly by the Council of Ministers. In addition, it is mentioned in the Observations that the explanation of the Draft Law stated that the constitutional basis for the adoption was contained in Article III(5) of the Constitution of Bosnia and Herzegovina and that the Transfer Agreement was also appended to the Draft Law. In its Observations, the OHR takes the position that the relevant request is unfounded. In fact, the OHR contends

that the applicants' request originates from a misunderstanding that the law should be declared null and void for a failure to quote the appropriate constitutional provision in the preambles of laws enacted by the Parliamentary Assembly, where Article IV(4)(a) of the Constitution of BiH is specified as the constitutional basis for the Parliamentary Assembly to enact legislation rather than as a basis to exercise responsibility over a particular field of competencies. In addition, it is mentioned in the Observations that there are other cases where the Laws were adopted at the state level based on transfer agreements concluded by the Entities. For example, both preambles of the Law Establishing the Company for the Transmission of Electric Power in Bosnia and Herzegovina and of the Law on Indirect Taxation System in Bosnia and Herzegovina contain references to Article IV(4)(a) as the basis on which these laws were enacted. In assessing the constitutionality of the mentioned law, the Constitutional Court, in its Decision no. *U 17/05* (see, Constitutional Court, Decision on Admissibility and Merits of 26 May 2006, *Official Gazette of Bosnia and Herzegovina* no. 87/06), took into account the actual constitutional basis for Bosnia and Herzegovina to regulate the field transferred to the State by the agreement concluded between the Entities in terms of Article III(5)(a) of the Constitution of BiH, and it was not relevant to quote Article IV(4)(a) of the Constitution of BiH within the Preamble of the Law as a basis to enact legislation.

21. In examining the allegations stated in the request, the Constitutional Court has invoked Article III of the Constitution of BiH, which regulates the issue of responsibilities of and relations between the Institutions of Bosnia and Herzegovina and the Entities and, in paragraph 1 of this Article, itemizes the responsibilities of the Institutions of Bosnia and Herzegovina. These are the exclusive responsibilities of the Institutions of Bosnia and Herzegovina and there is no constitutional basis upon which these responsibilities could be transferred to the Entities. Paragraph 2 of the aforementioned Article stipulates the responsibilities of the Entities and their obligation to provide all necessary assistance to the Government of Bosnia and Herzegovina to enable it to honor its international obligations, as well as to provide a safe and secure environment for all persons in their respective jurisdictions. This paragraph specifies no other exclusive responsibilities of the Entities, but paragraph 3 of this Article stipulates that all governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.

22. Based on further analysis of the constitutional provision of Article III, the Constitutional Court notes that, although Article III(3) of the Constitution of BiH stipulates that all governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities, paragraph 5(a)

confers the powers on Bosnia and Herzegovina to assume certain responsibilities of the Entities, defined in the Constitution of BiH by the notion of „additional responsibilities". According to the Constitutional Court's interpretation, the aforementioned Article distinguishes three independent hypothesis: Bosnia and Herzegovina shall assume responsibility for (1) such other matters as are agreed by the Entities; (2) matters that are provided for in Annexes 5 through 8 to the General Framework Agreement; and (3) matters that are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina according to Articles III(3) and III(5) of the Constitution of Bosnia and Herzegovina (see, Constitutional Court, Decision no. *U 26/01* of 28 September 2001, published in *the Official Gazette of BiH* no. 4/02).

23. The Constitutional Court has concluded that the challenged law was enacted after the Entities had entered into the Agreement in accordance with Article III(5) of the Constitution of BiH, whereby they had given the approval on the establishment of the Institution of Bosnia and Herzegovina under the name „High Judicial and Prosecutorial Council" as of the entry into force of the new Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina. The Council of Ministers undertook to put forward a Draft Law to the Parliamentary Assembly. Hence, it is undisputed that Bosnia and Herzegovina, in terms of Article III(5)(a) of the Constitution of BiH, assumed the responsibility from the Entities in this field of judiciary, after the consent of the Entities, whereby the constitutional basis for enacting the challenged law as well as amendments thereto was created. Namely, what the applicants find disputable is that Article IV(4)(a) of the Constitution of BiH, which embodies the universal responsibility in the field of legislative power, is stated in the Preamble of the challenged law as the constitutional basis to enact the said law and not Article III(5)(a) of the Constitution of BiH, whereby „it would be possible to transfer formally this responsibility from the Entities to the Parliamentary Assembly of Bosnia and Herzegovina." In this context, the Constitutional Court highlights that the formal transfer of the responsibility from the Entities to the State was carried out by the Agreement, whereby the responsibility for the establishment of the High Judicial and Prosecutorial Council was transferred at the state level. The Parliamentary Assembly enacted the challenged law in the field transferred to the state level, thereby it acted within the scope of its competence under Article IV(4)(a) of the Constitution of BiH.

24. By construing the relevant provisions of the Constitution of BiH, referred to in the reasons of the present Decision, the Constitutional Court has concluded that the Parliamentary Assembly had the constitutional basis for enacting the challenged law since

it enacted the Law in the field that had been transferred to the state level based on the Agreement between the Entities, pursuant to Article III(5) of the Constitution of BiH. The Constitutional Court holds that an omission to quote the appropriate constitutional provision in the preamble of the Law cannot be the reason to declare the challenged law unconstitutional, given the undisputed competence of the Parliamentary Assembly to enact the challenged law.

25. The Constitutional Court has concluded that the challenged law was consistent with the Constitution of Bosnia and Herzegovina.

VII. Conclusion

26. By construing the relevant provisions of the Constitution of BiH, referred to in the reasoning of the present Decision, the Constitutional Court has concluded that the Parliamentary Assembly had the constitutional grounds to enact the challenged law since it enacted the Law in the field that had been transferred to the state level based on the Agreement between the Entities, pursuant to Article III(5) of the Constitution of BiH. The Constitutional Court holds that a failure to refer to the appropriate constitutional provision in the preamble of the Law does not constitute the reason for declaring the challenged law as unconstitutional, given the undisputed competence of the Parliamentary Assembly to enact the challenged law.

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

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

Seada Palavrić
President
Constitutional Court of Bosnia and Herzegovina

Case no. U 16/08

DECISION
ON ADMISSIBILITY
AND MERITS

Request of Dr Milorad Živković, the First Deputy Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, for a review of the constitutionality of Article 13(2) of the Law on the Court of BiH.

Decision of 28 March 2009

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) 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), in Plenary and composed of the following judges:

Mr. David Feldman, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Ms. Constance Grewe

Mr. Krstan Simić

Having deliberated on the request of **Dr Milorad Živković, the First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina,** in case no. **U 16/08**, at its session held on 28 March 2009 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request filed by Dr Milorad Živković, the First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, for review of the constitutionality of Article 13(2)(b) of the Law on the Court of BiH (*Official Gazette of Bosnia and Herzegovina* nos. 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 35/04, 61/04 and 32/07) is hereby dismissed.

It is *hereby* established that Article 13(2) of the Law on the Court of BiH (*Official Gazette of Bosnia and Herzegovina* nos. 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 35/04, 61/04 and 32/07) is consistent with Articles I(2), III(1)(g), III(3)(a) and III(5)(a) of the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 24 October 2008, Dr Milorad Živković, the First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina („the applicant"), lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of Article 13(2) of the Law on the Court of BiH (*Official Gazette of Bosnia and Herzegovina* nos. 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 35/04, 61/04 and 32/07). The applicant also requested the Constitutional Court to issue an interim measure „suspending" the challenged legal provision pending a decision on the request.

II. Procedure before the Constitutional Court

2. Pursuant to Article 93(1)(2) of the Rules of the Constitutional Court, the Constitutional Court has taken a decision that Ms. Seada Palavrić, the President of the Constitutional Court, and Mr. Mirsad Ćeman, Judge, shall not participate in the work and the decision-making process relating to the request since, as members of the Parliamentary Assembly, they participated in the adoption of the decision that is the subject of dispute.

3. The Constitutional Court adopted a decision on interim measure no. *U 16/08* on 17 November 2008, dismissing the applicant's request for interim measure as ill-founded.

4. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina („the House of Representatives") and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the House of Peoples") were requested on 27 October 2008 to submit their replies to the request.

5. On 12 November 2008, the House of Representatives submitted its reply to the request. The House of Peoples submitted its reply on 26 January 2009.

6. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply to the request was forwarded to the applicant on 22 December 2008.

7. On 2 February 2009, the Constitutional Court has, pursuant to Article 15(3) of its Rules, asked the Office of the High Representative for Bosnia and Herzegovina („the OHR") and the OSCE Mission to Bosnia and Herzegovina („the OSCE") to submit their written opinions on allegations from the request.

8. The OSCE submitted its written opinion on 19 February and the OHR on 24 February 2009. The opinions of both the OSCE and OHR were submitted to the applicant on 6 March 2009.

9. On 18 March 2009, the applicant submitted his remarks in relation to the opinions of the OSCE and OHR.

III. Request

a) Statements from the request

10. The applicant states that pursuant to the provision of Article III of the Constitution of Bosnia and Herzegovina, the institutions of Bosnia and Herzegovina have no jurisdiction to enact criminal code regulations in the field of judicial power given that the judicial systems of the Entities and the Brčko District of BiH („the Brčko District of BiH") are an integrated system. The applicant holds that Article III(1)(g) of the Constitution of BiH stipulates the responsibilities of the Institutions of Bosnia and Herzegovina in the field of criminal code, as envisaged in the wording *inter-Entity criminal code enforcement*. The applicant further states that, accordingly, the mandate of the Parliamentary Assembly of Bosnia and Herzegovina („the BiH Parliamentary Assembly") is determined within its legislative responsibility. In addition, the applicant underlines that *notwithstanding the seriously questionable quality of the jurisdiction of the Parliamentary Assembly to enact the Law on the Court of [BiH]*, or other laws in the field of criminal code, the request for review of the constitutionality is limited only to Article 13(2) of the mentioned Law, which establishes further jurisdiction of the Court of Bosnia and Herzegovina („the Court of BiH"), under certain circumstances, over criminal offences anticipated by the criminal codes of the Entities and the Brčko District of BiH.

11. In the applicant's view, the challenged provision introduces a competition contrary to the principles of the division of jurisdiction between the courts, and particularly so because this represents the introduction of supremacy of the Court of BiH which is not anticipated

by the constitutional-legal system of Bosnia and Herzegovina. Next, the applicant points to the fact that pursuant to Article III(3) of the Constitution of Bosnia and Herzegovina *[a]ll governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities*, while Article III(5)(a) stipulates that Bosnia and Herzegovina may assume responsibilities from the Entities in certain cases, as prescribed. However, the applicant highlights that there is a procedure of transfer of jurisdiction from the Entities to Bosnia and Herzegovina envisaged in the Republika Srpska pursuant to the cited provision of the Constitution of Bosnia and Herzegovina and that, in his opinion, the transfer of jurisdiction from the Entity to the State in the present case was done contrary to the provisions of the Constitution of Bosnia and Herzegovina. In this direction, the applicant states that it relates to *a silent transfer of jurisdiction* from the Entities to the institutions of the State and, in his opinion, this *may seriously endanger the trust of both the peoples and the Entities in the constitutional changes* in Bosnia and Herzegovina. Consequently, the applicant holds that the challenged provision of Article 13(2) of the Law on the Court of BiH is inconsistent with the rule of law stipulated in Article I(2) of the Constitution of Bosnia and Herzegovina.

12. In addition, the applicant holds that the challenged provision of the Court of BiH creates a wide space for manipulation and *even for political processes in the territory of Bosnia and Herzegovina* and endangers the legal certainty of the citizens of Bosnia and Herzegovina and brings them into an unequal position, which is contrary to the fundamental principles of human rights. Furthermore, the applicant states that the confirmation of the aforementioned would be best shown by *an analysis of up-to-date proceedings based on the contested provision, the criminal offences for which they were brought before the Court, and particularly the functions they used to exercise during the time of the trial and the manner in which those proceedings were terminated with an outline of the ensuing consequences for those persons and their families*.

13. Finally, the applicant is of the opinion that the challenged provision is in violation of the Constitution of Bosnia and Herzegovina primarily because of *the unconstitutional (silent) transfer of jurisdiction from the Entities to the Court of Bi[H]*, and because of a breach of the rule of law guaranteed under Article I(2) of the Constitution of Bosnia and Herzegovina. For the aforementioned reasons, the applicant suggested that the Constitutional Court hold a public hearing, hear the positions of the representatives of the Entities, and, if necessary, of legal experts and NGOs engaged in the protection and promotion of human rights and, that, after the public hearing, take a decision rendering the challenged provision of Article 13(2) of the Law on the Court of BiH ineffective.

b) Reply to the request

14. The Constitutional and Legal Commission of the House of Representatives submitted its opinion in which it is stated that the request in question was considered by the Constitutional and Legal Commission of the House of Representatives at its 55th session held on 12 November 2008 and, by a vote with 5 votes „in favor", 2 „against" and 1 „abstain", it concluded that the challenged law had been adopted on 12 November 2000 by the High Representative for BiH and that the BiH Parliamentary Assembly adopted the relevant law at the session of the House of Peoples of 25 June 2002 and at the session of the House of Representatives of 3 July 2002. In addition, it is stated that the Constitutional and Legal Commission „remains supportive of the position of the challenged Law."

15. The House of Peoples submitted the opinion of the Legal and Constitutional Commission which states that the House of Peoples, at its 30th session held on 26 January 2009, voted in connection with the request, and that „two votes were 'in favor' (Serb representatives in the Commission) and three votes 'abstained' and that in this manner the request did not get the support."

c) Opinion of the OHR

16. As for the first applicant's argument relating to claim that in the area of judiciary there is no responsibility of the institutions of Bosnia and Herzegovina for enactment of criminal code legislation, the OHR contends that the Constitutional Court has already given answer to this issue in decision no. *U 26/01* (published in *the Official Gazette of BiH* no. 4/02) in which it proclaimed the Law on Court of BiH consistent with the Constitution of Bosnia and Herzegovina. Also, the OHR finds that this decision has given an answer to the applicant's allegations concerning Article IV(4)(a) of the Constitution of Bosnia and Herzegovina, stating that the applicant's allegation that this Article „follows the provision of Article III of the Constitution of BiH" cannot be accepted but that it applies to all the provisions of the Constitution of Bosnia and Herzegovina that constitute a basis for the State to enact legislation.

17. As to the applicant's claim that there is no constitutional responsibility of the institutions of Bosnia and Herzegovina for the enactment of legislation in the field of criminal code, the OHR emphasized that the competence of the institutions of Bosnia and Herzegovina is provided for by Article III(1)(g) but it is not the only ground. As the present request for review of constitutionality is limited to Article 13(2) of the Law on Court, the OHR stated it shall focus these written observations on the responsibilities of the institutions of Bosnia and Herzegovina under Article III(l)(g) and III(5) of the

Constitution of Bosnia and Herzegovina. In that regard, the OHR stated that this provision forms the part of an organizational law further defining the jurisdiction of the institutions of Bosnia and Herzegovina over criminal matters that are essential for the very existence of the Bosnia and Herzegovina as a state and/or have consequences beyond the territory of an Entity or the Brčko District of Bosnia and Herzegovina and/or could have such detrimental consequences for the Bosnia and Herzegovina as a state that the institutions of Bosnia and Herzegovina must ensure the enforcement of those criminal matters. Further, the OHR contends that Article III(5) of the Constitution of Bosnia and Herzegovina obliges the state to assume responsibility over matters that are necessary to preserve the sovereignty, territorial integrity, political independence and international personality of Bosnia and Herzegovina.

18. As a result, as further stated, the institutions of Bosnia and Herzegovina have to take all necessary measures to cope with such matters, including enacting of legislation in certain areas in the field of criminal code. The OHR therefore respectfully submits that the criminal jurisdiction of the Court of Bosnia and Herzegovina under Article 13(2)(a) is not based on a tacit „transfer of responsibility from entities to Bosnia and Herzegovina" as claimed by the applicant, but rather on the necessity to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina. The OHR finds that the institutions of Bosnia and Herzegovina have, by enacting Article 13(2) of the Law on Court, „chosen to rely in part on criminal offences prescribed by the Entities (and the District) while establishing specific rules of jurisdiction that enable an institution established at State level to enforce such criminal offence whenever it falls within the responsibilities of the State as foreseen under Article III(5)(a) of the Constitution of Bosnia and Herzegovina".

19. The OHR further notes that certain criminal offences that primarily protect other values, such as the „economic criminal offences", may by their repercussions have influence on the national security, i.e. the sovereignty, territorial integrity, political independence, and international personality and therefore require the institutions of Bosnia and Herzegovina to regulate them. To that end, the OHR referred to official text of the Constitution of BiH in the English language according to which the words „law enforcement" are not exclusively associated with the police, but also include the tasks of the prosecutor's office and of the courts in the field of criminal code. It is further stated that the legislation of Bosnia and Herzegovina applies to the entire territory of Bosnia and Herzegovina and were it not for the jurisdiction of the Court of Bosnia and Herzegovina in international and inter-Entity criminal code enforcement, there would be legal gap, as the Constitution does not envisage that the responsibilities of the institutions of Bosnia

and Herzegovina may be assumed by the Entities. This responsibility of the institutions of Bosnia and Herzegovina over international and inter-entity criminal code enforcement is two-fold. On the one hand, Bosnia and Herzegovina must ensure enforcement of criminal compulsion regarding certain criminal offences that are, by their very nature, international or inter-entity. This would certainly apply to the offence of smuggling of goods. On the other hand, any offence that is provided by law of the Entities or the District could, whenever it produces consequences beyond the territory of an Entity or Bosnia and Herzegovina, falls within the responsibility of Court of Bosnia and Herzegovina when it creates a jurisdiction for the institutions of Bosnia and Herzegovina over certain criminal offences that co-exists with the jurisdiction of the Entities and the District over those offences. Therefore, by the challenged provision of the Law on the Court of BiH, the jurisdiction over inter-entity law enforcement matters was defined by providing for the type of consequence criminal offences must produce for this offence to fall within the jurisdiction of the Court of Bosnia and Herzegovina. The OHR further states that the existence of those particular consequences is a factual question and may only be established by the Court of Bosnia and Herzegovina itself on a case-by-case basis and whether the Court of Bosnia and Herzegovina has overstepped its jurisdiction so as to interpret Article 13(2) of the Law on Court in a way that places this provision at variance with the Constitution may therefore be established by the Constitutional Court after the Court of Bosnia and Herzegovina has finally decided on its jurisdiction by rendering a final and binding verdict in a particular case.

20. As to the submission of the applicant that the contested provision is unconstitutional under the „rule of law" principle guaranteed and reaffirmed by Article I(2) of the Constitution, the OHR notes that element underlying the notion of rule of law, and indeed one of the most important, is the need to ensure that nobody is above the law. However, the OHR asserts that it is doubtful whether this principle could even in theory be met by entrusting bodies of the Entities and Brčko District of BiH with the prosecution of offences that meet the conditions provided for under Article 13(2) of the Law on Court of BiH. The OHR emphasizes that it belongs to the institutions of Bosnia and Herzegovina to ensure that cases with have the consequences referred to in the challenged Article reach a court and are processed before a court in accordance with the law. It is precisely because they affect the State that the offences need to be prosecuted at the level of state and by failing to entrust an institution at the State level with the prosecution of offences that are detrimental to the state, the institutions of Bosnia and Herzegovina would essentially fail their responsibilities and would leave to institutions that represent only a portion of the territory and population of the State to appreciate what is and what is not detrimental to the overall domestic and international interests of the State.

21. For the reasons described above, the OHR believes that Article 13(2) of the Law on Court is in conformity with the Constitution of Bosnia and Herzegovina and that the enactment of such provision corresponds to a constitutional obligation for the institutions of Bosnia and Herzegovina to exercise their responsibilities under, *inter alia,* Articles III(1)(g) and III(5)(a) of the Constitution of Bosnia and Herzegovina.

d) Opinion of the OSCE

22. In its opinion, the OSCE contends that the *rationale* behind granting jurisdiction to the Court of BiH for the protection of the values listed in Article 13(2)(a) of the Law on Court of BiH, has a clear foundation in the language of Article III(5)(a) of the Constitution, which gives the State the responsibilities which are necessary to preserve those values that are listed in this provision. The OSCE emphasized that the Criminal Codes of both Entities and the Brčko District include Chapters dedicated to crimes against their respective constitutional orders, their territorial integrity, and their security while the Criminal Code of BiH has a Chapter dedicated to the integrity of BiH. From a simple comparison of these provisions, one can reasonably conclude, as stated by the OSCE, that those crimes that are not covered by the BiH Criminal Code may nevertheless endanger BiH's sovereignty, territorial integrity, political independence, national security or international personality. For instance, the OSCE refers to the assassination or kidnapping of the highest officials of the Entities which is not included in the BiH Criminal Code, yet such crimes have the potential to endanger the State as a whole. In sum, the OSCE concludes that the assertion of jurisdiction by the Court of BiH in this field, under the conditions established in item *a,* is necessary in order to enable BiH to effectively carry out its responsibilities under the Constitution of Bosnia and Herzegovina.

23. As for Article 13(2)(b) of the Law on Court of BiH, the OSCE states that the connection between the efficient administration of justice, the rule of law, and the full enjoyment of human rights is strong and well established in international and regional instruments. The OSCE referred to its decision no. 5/06 (Ministerial Council, Bruxelles 2006, 5 December 2006) where it recognized that „efficient and effective criminal justice systems can only be developed on the basis of the rule of law and on the protection of human rights and that the rule of law itself requires the protection of such criminal justice systems". Further, the OSCE stated that Decision of the OHR which enacted the challenged provision, expressly mentions, within the preamble, the goal of fighting criminal activities which infringe on the economic, fiscal, commercia1 and other social rights and interests of the citizens of Bosnia and Herzegovina and to strengthen the rule of law in order to create the ground for economic growth and foreign investments.

24. Bearing in mind the aforesaid, the OSCE further asserted that there is a limited scope of economic crimes or crimes against official duty, including corruption, within the Criminal Code of BiH. For instance, the crimes of embezzlement, fraud, abuse of office, or causing bankruptcy prescribed under the Entities' Codes are either not included in the BiH Criminal Code, are defined in away that limits their scope to the conduct of officials of the BiH institutions. However, the OSCE notes that „there is little room for doubting that these and other related crimes included in the Entities' Codes may be detrimental for the economy of BiH, or may cause serious economic damage beyond the territory of an Entity or the Brčko District". This likelihood, as further stated, is increased by the fact that, under the Constitution, the budget of BiH depends on contributions from the Entities (Article VIII(3)). Therefore, the OSCE considers that serious damages to the financial situation or the misuse of the assets of one of the Entities, will have repercussions on the economy and stability of the entire State and consequently undermine the enjoyment of internationally and constitutionally recognized economic and social rights by its citizens, as provided for by Article 1 of the Constitution of Bosnia and Herzegovina. Based on the above, the OSCE stated that it can be concluded that the assertion of jurisdiction by the Court of BiH in this field, under the conditions established in item *b,* is necessary in order to enable BiH to effectively carry out its responsibilities under the Constitution of Bosnia and Herzegovina.

25. In light of applicant's statement on violation of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina, the OSCE noted that that the creation of courts at the state level having the power, under certain conditions, to assert their jurisdiction on crimes originally under the competence of local courts, has been realized in other strongly decentralized European countries, such as Switzerland and Spain. This has been done in response to a need to increase the efficiency and effectiveness of the criminal justice system as „it was held that certain modalities of perpetration of economic crimes, due to their complexity, may require that investigations and trials are carried out by an office of the prosecutor and a court at the state level having better resources, as well as possessing territorial jurisdiction over the whole country". Further, the OSCE notes that the same rationale lies behind the creation of the Court of BiH and of the Office of the Prosecutor's of BiH which, among other reasons, were established in order to overcome some of the problems related to the excessive fragmentation of the judicial system and of law enforcement agencies in BiH. In relation to the principle of legal certainty and equality before the law, the OSCE noted that the judiciary will have to develop a coherent case-law on the application of the provision and be particularly careful in establishing whether those conditions are met in each case. In addition, judicial remedies for misapplications

of Artic1e 13(2) are available at different stages of the criminal proceedings but also possibility of using the appellate jurisdiction of the Constitutional Court of Bosnia and Herzegovina. Thus, the OSCE is of the opinion that Article 13(2) of the Law on Court of BiH is constitutional.

IV. Relevant Law

26. **Decision of the High Representative in Bosnia and Herzegovina of 24 January 2009 enacting the Law re-amending the Law on the Court of Bosnia and Herzegovina** (*Official Gazette of BiH* no. 3/03)

*[…] **Recalling** further paragraph 12.1 of the Declaration of the Peace Implementation Council which met in Madrid on 15 and 16 December 1998, which made clear that the said Council considered that the establishment of the rule of law, in which all citizens had confidence, was a prerequisite for a lasting peace, and for a self-sustaining economy capable of attracting and retaining international and domestic investors;*

*[…] **Bearing in mind** the reinvigorated strategy for judicial reform to strengthen the Rule of Law efforts in Bosnia and Herzegovina in 2002/03 which was endorsed by the Steering Board of the Peace Implementation Council on 28 February 2002 and noting that the aforementioned strategy was devised in response to calls by the authorities in Bosnia and Herzegovina for firmer International Community actions to tackle economic crime, corruption and problems inherent in the judicial system.*

*[…] **Bearing in mind** that criminal activities continue to infringe on the economic, fiscal, commercial and other social rights and interests of the citizens of Bosnia and Herzegovina and that the establishment of a Special Panel for Organized Crime, Economic Crime and Corruption within the aforesaid Court of Bosnia and Herzegovina will advance the robust fight against crime in Bosnia and Herzegovina;*

*[…] **Convinced** of the vital importance to Bosnia and Herzegovina of ensuring that the rule of law is strengthened and followed in order to create the ground for economic growth and foreign investment and for all the reasons as aforesaid;*

The High Representative hereby issues the following

DECISION ENACTING THE LAW RE-AMENDING THE LAW ON COURT OF BOSNIA AND HERZEGOVINA, WHICH IS HEREBY ATTACHED AS AN INTEGRAL PART OF THIS DECISION

The said Law shall enter into force as a law of Bosnia and Herzegovina, with effect from the date provided for in Article 13 thereof, on an interim basis, until such time as the

Parliamentary Assembly of Bosnia and Herzegovina adopts this Law in due form, without amendment and with no conditions attached.

27. **Law on the Court of BiH** (*Official Gazette of Bosnia and Herzegovina* nos. 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 35/04, 61/04 and 32/07)

Article 2

Article 13 of the Law shall be deleted and the following new Article 13 shall be inserted:

(...) 2. The Court has further jurisdiction over criminal offences prescribed in the Laws of the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District of Bosnia and Herzegovina when such criminal offences:

a) endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina;

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

28. **Constitution of Bosnia and Herzegovina**, in the relevant part, reads:

Article I(2)

Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.

Article III(1)(g)

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

g) International and inter-Entity criminal code enforcement, including relations with Interpol.

Article III(3)(a)

All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.

Article III(5)(a)

Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.

V. Admissibility

29. The request for review of constitutionality was filed by the First Deputy Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, which means that it was filed by an authorized person as set forth in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. In addition, the request is related to the review of constitutionality of the challenged law, which was enacted by the High Representative and then adopted by the Parliamentary Assembly of BiH, in which case the Constitutional Court is competent to take decisions, as referred to in Article VI(3)(a) line 2 of the Constitution of Bosnia and Herzegovina.

30. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of Constitutional Court, the Constitutional Court has established that the request is admissible as it was filed by an authorized person and as there is no a single formal reason under Article 17(1) of the Rules of the Constitutional Court, which would render the request inadmissible.

VI. Merits

31. The Constitutional Court notes that the applicant essentially placed three issues before the Constitutional Court. Firstly, the applicant finds that the competencies were transferred from the Entities to Bosnia and Herzegovina by application of Article 13(2) of the challenged law, which is inconsistent with the provisions of Article III(3)(a) and III(5)(a) of the Constitution of Bosnia and Herzegovina. Secondly, the applicant finds that the challenged provision is inconsistent with Article III(1)(g) of the Constitution of BiH as the jurisdiction of the institutions in the criminal field is strictly limited to jurisdiction as stipulated under Article III(1)(g) of the Constitution of Bosnia and Herzegovina, with an emphasis on „implementation of inter-entity criminal regulations”. Thirdly, the applicant finds that this provision of the challenged law is inconsistent with the principle of rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina as it „endangers the

legal certainty of the citizens of Bosnia and Herzegovina" and brings them into an unequal position „which represents one of the basic principles of human rights."

32. Having regard to the essence of the applicant's allegations from the request in regards to the first question, the Constitutional Court first points out that the Constitutional Court, in its Decision *U 26/01* of 28 September 2002 (published in the *Official Gazette of BiH* no. 4/02), has established that the challenged law is consistent with the Constitution of Bosnia and Herzegovina. In particular, the Constitutional Court has underlined that the challenged law is not in violation of Article III(3)(a) of the Constitution of Bosnia and Herzegovina and this issue was considered primarily in the context of Article I(2) of the Constitution of Bosnia and Herzegovina, *i.e.* the principle of the rule of law. In this regard, the Constitutional Court has reasoned that the Constitution of Bosnia and Herzegovina gives the responsibilities and jurisdiction to Bosnia and Herzegovina in order to ensure its sovereignty, territorial integrity, political independence and international personality, the highest level of internationally recognized human rights and fundamental freedoms and free and democratic elections (Decision *U 26/01*, paragraph 18). Furthermore, as to Article III(5)(a) the Constitution of Bosnia and Herzegovina, the Constitutional Court has underlined that Bosnia and Herzegovina may assume, *inter alia*, the responsibilities that are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina under Article III(3) and III(5) of the Constitution of Bosnia and Herzegovina. In this context, the Constitutional Court has considered Article IV(4) which provides that the Parliamentary Assembly shall enact legislations as necessary to implement decisions of the Presidency (or for implementation of the responsibilities of the Assembly as per this Constitution) and stated that the mentioned Article does not require the consent of the Entities (*idem*, paragraph 21).

33. Subsequently, the Constitutional Court has concluded that under these circumstances, „Bosnia and Herzegovina is authorized to establish, in the areas under its responsibility, other mechanisms, besides those provided for in the Constitution of Bosnia and Herzegovina, and additional institutions that are necessary for the exercise of its responsibilities, including the setting up of a court to strengthen the legal protection of its citizens and to ensure respect for the principles of the European Convention". In addition, the Constitutional Court has concluded that „although it is not the task of the Constitutional Court to express an opinion on whether it is appropriate to enact a certain law, the Constitutional Court observes that in the context of Bosnia and Herzegovina, the establishment of the Court of Bosnia and Herzegovina can be

expected to strengthen the rule of law which is one of the fundamental principles of any well-functioning state democracy".

34. Therefore, in the aforementioned decision, by establishing that it is consistent with Article III(3)(a) and III(5)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court has thoroughly resolved the issue of responsibility of Bosnia and Herzegovina for enacting Law on Court of BiH as a mechanism to establish the institution essential for implementation of the responsibilities of the State. This assessment also includes the issue of responsibility of the Court of BiH, which is resolved by the said law, including its jurisdiction over criminal offences. The Constitutional Court also notes that after the Constitutional Court's Decision *U 26/01* had been rendered, the challenged law was amended on several occasions and the relevant amendments encompassed the issue of responsibility so that by the challenged provision the subject matter competence of the Court of BiH, under the circumstances stipulated by challenged provision, entails its jurisdiction over criminal offences anticipated in the criminal codes of the Entities and the Brčko District of BiH. However, the Constitutional Court finds that the relevant amendments concern the classification of criminal offences which fall under the subject matter competence of the Court of BiH within its existing competence to adjudicate criminal offences. The Constitutional Court holds that the issue of division of the subject matter competence within the domestic legal system, as well as the issue related to the offences that would fall within the subject matter competence of a court within the established judicial scheme does not raise issue of constitutionality of challenged provisions in relation to Article III(3)(a) and III(5)(a) of the Constitution of Bosnia and Herzegovina. Also, the Constitutional Court holds that the provision of Article 13(2) of the challenged law does not raise again an issue relating to the transfer of jurisdiction from the Entities to the State, especially on account of the fact that the issue of responsibility of the State to enact the Law on the Court of BiH and to establish its jurisdiction therein has already been resolved.

35. In view of the above, the Constitutional Court holds that the provision of Article 13(2) of the Law on the Court of BiH is consistent with Article III(3)(a) and III(5)(a) of the Constitution of Bosnia and Herzegovina.

36. In regards to the second question concerning the conformity of the challenged provision with Article III(1)(g) of the Constitution of Bosnia and Herzegovina, the Constitutional Court finds that the text of the provision of Article III(1)(g) of the Constitution of Bosnia and Herzegovina implies an obligation and jurisdiction of the state to generally implement criminal code when it has international or inter-entity character, which was pointed to by the OHR in its opinion. This implies obligation of the state to secure application of the

criminal compulsion for certain criminal offences which are international or inter-entity, but also for those offences which are stipulated in criminal codes of the entities and Brčko District of BiH whenever they produce consequences beyond the territorial units. In the Constitutional Court's opinion, the opposite interpretation of this provision would not only be linguistically incorrect but would also lead to a very narrow interpretation of its scope, as it suggests that the state of Bosnia and Herzegovina does not have jurisdiction to take and implement regulations in the criminal field. To the contrary, the Constitutional Court contends that Article III(1)(g) implies and includes jurisdiction of the institutions of Bosnia and Herzegovina over certain criminal offences which are at the same time covered by the jurisdiction of both the entities and Brčko District. This further implies that the challenged provision of Article 13(2) of the Law on Court of BiH essentially stipulates conditions for complete implementation of the obligations of the state arising under Article III(1)(g) of the Constitution of Bosnia and Herzegovina and under which its institutions can assume that jurisdiction.

37. Therefore, the Constitutional Court finds that the challenged provision of Article 13 (2) of the Law on Court of BiH is consistent with Article III(1)(g) of the Constitution of Bosnia and Herzegovina.

38. The applicant also holds that the challenged provision endangers the legal certainty of the citizens of Bosnia and Herzegovina and brings them into an unequal position, which is contrary to the fundamental principles of human rights and the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina. In this direction, the applicant points out to necessity of the analysis of the criminal proceedings conducted based on the contested provision before the Court of BiH stating that „application of the challenged provision would have damaging consequences for the accused and their families in such cases".

39. Taking into account that the principle of legal certainty referred to by the applicant represents the first criterion of the rule of law in general, the Constitutional Court shall examine whether the challenged provision meets the requirements of legal certainty as the element of the rule of law. In that regard, the Constitutional Court emphasizes that the legal certainty, *inter alia*, implies that the established mechanisms and institutions function in accordance with the laws, which must be prospective, open, clear and relatively stable, and which must apply equally to all. In addition, this principle entails the prohibition of arbitrariness in decision-making process and in acting of all authorities, which must operate in accordance with the law and within the scope of authority conferred upon them by law. In this regard, this principle also implies the existence of procedural guarantees.

40. Bringing this into relation with the specific issue, the Constitutional Court points out that the manner in which the competent authorities will regulate the issue of subject matter competence of the courts as well as the possibility of taking over jurisdiction over certain matters, falls within the state's margin of appreciation. In addition, the fact that certain issues are determined as the subject matter competence of one and not another court within the established judicial scheme of the state, in general, in itself does not amount to a violation of the principle of legal certainty, *per se*. On the other hand, however, the margin of appreciation enjoyed by the State is not absolute but subject to limitation with respect of the principle of the rule of law, which, as already stated, must be sufficiently specific and clear to prevent arbitrariness in decision-making process.

41. In that regard, the Constitutional Court observes that Article 13(1) of the Court of BiH stipulates, as a rule, that the Court of BiH has jurisdiction over criminal offences defined in the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina. Paragraph 2 of the same Article specifies the exceptions to this rule and establishes further jurisdiction of the Court of BiH over criminal offences anticipated in the criminal codes of the Entities and the Brčko District of BiH in two cases. Firstly, Article 13(2)(a) of the Law on Court of BiH stipulates that the Court of BiH has further jurisdiction over criminal offences „(...) when such criminal offences endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina". Such provision, in the opinion of the Constitutional Court, is in compliance with the principle of rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina. Namely, certain criminal offences stipulated by the laws of the entities and Brčko District of BiH can endanger values enumerated in Article 13(2)(a) of the Law on Court of BiH. It is therefore the obligation of the state to effectively protect those values pursuant to the obligation of the state under Article III(5)(a) of the Constitution of Bosnia and Herzegovina and thereby pursuant to the principle of the rule of law under Article I(2) of the Constitution of BiH. Constitutional Court finds that granting jurisdiction to the Court of BiH, as the institution of Bosnia and Herzegovina, including its jurisdiction over criminal offences under conditions stipulated in the first item of para 2 of Article 13 of the Law on Court of BiH allows Bosnia and Herzegovina to meet its obligations as stipulated by the Constitution, which is not inconsistent with the principle of rule of law and legal certainty. To the contrary, these principles in fact require the existence of adequate mechanisms through which the state could secure action in compliance with its regulations and primarily in compliance with the Constitution. In addition, Constitutional Court finds that such provision is sufficiently clear where it stipulates the specific requirements to be satisfied for the Court of BiH to have jurisdiction in criminal offences

anticipated in the criminal codes of the Entities and the Brčko District of BiH. Thus this provision does not dispute in any manner the principle of rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina.

42. As for Article 13 (2)(b) of the Law on Court of BiH, Constitutional Courts notes that the legislator, as the condition for creating jurisdiction of the Court of BiH, has anticipated a list of legal standards in this provision: „serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina", „serious economic damage or other detrimental consequences beyond the territory of an Entity or the Brčko District of Bosnia and Herzegovina". The Constitutional Court notes that the use of legal standards in setting up norms is common to cover situations that are similar but at the same time very different in a way that one norm (with firmly determined terms) cannot be applied to all. On the other hand, they are numerous so that each situation would call for its own norm. Further, Constitutional Court reiterates that the legal standards are normative terms which change its contents depending on each particular case while essentially remaining the same. As it is impossible to determine their contents for every particular case in advance, certain undefined terms are used such as „conscience", „dangerous" public moral", „public order", „serious damage" etc. Being that the norm that uses legal standards does not determine their contents in advance, it is necessary for the competent subjects to do so in each individual case when applying such a norm. They must consider certain objective standards and goals of norm in order to avoid arbitrariness.

43. The Constitutional Court notes that the provision of Article 13(2)(b) is exactly such a norm. It envisages the jurisdiction of the Court of BiH for criminal offences as stipulated by the criminal codes of the entities and Brčko District of BiH, providing some of the conditions of this article in the form of legal standards are met. In addition, this provision at the same time assigns authority to the Court of BiH to determine the contents of the legal standards as provided in the challenged provision, while minding the fact that it should carefully establish whether the stipulated conditions are met in each particular case, depending on the given circumstances. Therefore, the Constitutional Court finds that setting up of norms in the challenged provision is not inconsistent with principle of the rule of law and legal certainty. At the same time, Constitutional Court notes that such standardized provision of Article 13(2)(b) of the Law on Court of BiH imposes additional and serious obligation on the judiciary to determine, through consistent development of the court case- law, the contents of these standards as well as to decide, in each particular case, considering the given circumstances, whether stipulated conditions for jurisdiction of the Court of BiH are met.

44. As to the applicant's referring to the violation of principle of „equality before the law" caused by the manner of application of provision of Article 13(2)(b) of the Law on Court of BiH, the Constitutional Court notes that the applicant wishes that that the Constitutional Court, within its competence under Article VI(3)(a), examines a violation of the human rights of individuals *in abstracto*, which is not possible. Namely, the human rights safeguarded by the European Convention for the Protection of Human Rights and fundamental Freedoms („the European Convention") and by Article II(3) of the Constitution of Bosnia and Herzegovina are the human rights to which each individual is entitled and may be referred to by each individual being a victim of a breach of any right protected under the European Convention. The Constitutional Court notes that it is possible that inappropriate application of the challenged provision can result in violation of the human rights in individual cases. However, such possible violation is not related to the constitutionality of the provision itself, but rather to its application in each individual case. In that regard, the Constitutional Court highlights that the possibility to review the relevant decisions of the Court of BiH concerning the application of the aforementioned provision on each individual, is envisaged within the appellate jurisdiction of the Constitutional Court under Article VI(3)(b). Therefore, the Constitutional Court finds that the provision of Article 13 (2)(b) of the Law on Court of BiH does not dispute the issue of equality before the law but it creates obligation of the Court of BiH to be aware of this principle in each individual case.

45. Based on the aforementioned, the Constitutional Court finds that the challenged provision of Article 13(2) of the Law on the Court of BiH is consistent with the rule of law as stipulated by Article I(2) of the Constitution of Bosnia and Herzegovina.

VII. Conclusion

46. The Constitutional Court concludes that the provision of Article 13(2) of the Law on Court of BiH is consistent with Articles (III)(3)(a) and III(5)(a) of the Constitution of Bosnia and Herzegovina, as the issue of division of the subject matter competence within the domestic legal system, as well as the issue related to the offences that would fall within the subject matter competence of a court within the established judicial scheme, does not raise an issue as to whether the challenged provision is consistent with Articles (III)(3)(a) and III(5)(a) of the Constitution of Bosnia and Herzegovina. Also, in its earlier decision the Constitutional Court has concluded that Bosnia and Herzegovina has jurisdiction to enact the Law on Court of BiH. Also, the Constitutional Court concludes that the challenged provision is consistent with Article III(1)(g) of the Constitution of Bosnia and Herzegovina being that this provision stipulates conditions for full implementation

of obligations the state arising under Article III(1)(g) of the Constitution of Bosnia and Herzegovina and under which its institutions have jurisdiction.

47. The Constitutional Court also concludes that the provision of Article 13(2) of the Law on the Court of BiH is consistent with the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina and that it does not dispute legal certainty or equality before the law of the individual. Namely, the Constitutional Court concludes that item (a) of this provision allows meeting of the constitutionality stipulated obligation of the state to protect sovereignty, territorial integrity, political independences, national security and international personality of Bosnia and Herzegovina and meeting of these constitutional obligations is one of the requirements of the rule of law in the democratic states. Further, the Constitutional Court concludes that this principle is not disputed in item (b) of the challenged provision, being that it generally stipulates situations in which the Court of BiH shall have jurisdiction under certain conditions. In addition, this provision gives authority but also creates obligation of the Court of BiH when applying this principle, to carefully consider each individual case while complying with the principle of „legal certainty" and „equality before the law" as indivisible element of the principle of the rule of law.

48. As stipulated under Article 41 of the Rules of the Constitutional Court, the annex to this decision comprises Separate Concurring Opinions of Vice-President Miodrag Simović and Judges Mato Tadić and Separate Dissnenting Opinion of Judge Krstan Simić.

49. Pursuant to Article 61(1), (2) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

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

Seada Palavrić
President
Constitutional Court of Bosnia and Herzegovina

SEPARATE CONCURRING OPINION OF JUDGE SIMOVIĆ

Although I share the majority opinion in finding no violation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, I would like to emphasize the following:

(1) In its Decision no. *U 26/01* of 28 September 2001 (*Official Gazette of Bosnia and Herzegovina* no. 4/02), relating to the review of constitutionality of the Law on the Court of BiH (*Official Gazette of Bosnia and Herzegovina* no. 29/00), the Constitutional Court has already established that Bosnia and Herzegovina has jurisdiction to enact the Law on the Court of BiH as a mechanism for establishing an institution necessary for enforcement of the responsibilities of the State. This includes the matter of jurisdiction of the Court of BiH, which is regulated by that Law, including its jurisdiction over criminal matters. Therefore, in the aforementioned Decision, the Constitutional Court entirely resolved the matter of jurisdiction of the Court of BiH to enact the Law on Court of BiH.

(2) Following the adoption of the aforementioned decision of the Constitutional Court, the Law on Court of BiH was amended on several occasions (*Official Gazette of BiH* nos. 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04 and 32/07). These amendments cover the challenged provision of Article 13, paragraph 2. That provision stipulates that under certain conditions as specified by that provision, the Court of BiH is competent to adjudicate criminal offences referred to in the laws of the Entities and Brčko District of BiH.

(3) In this respect, it needs to be noted that the manner in which the competent authorities will regulate the jurisdiction of the courts and possibility of assuming the jurisdiction over certain matters, give rise to an issue falling within the scope of the margin of appreciation of the State. This is particularly important for the regulations covering the criminal field and aiming at ensuring the conduct of fair trial. One of the inherent elements of the fair trial is its lawfulness closely linked to the matter of subject-matter jurisdiction of the court. In order to effectuate the full exercise of the right to a fair trial through such a concept of the principle of lawfulness, the legislator must prescribe clear rules implying that only the court which is designated as competent one according to the law can adjudicate the criminal matters over which it has jurisdiction. On the other hand, if the legislator also wants to enact the rules providing that another court can assume the subject-matter jurisdiction over certain criminal matters, then it must, in order to observe the principle of rule of law generally, and the principle of lawfulness as its inherent element, clearly and precisely provide for the conditions under which it can take place.

(4) In my opinion, item (a) of paragraph 2 of Article 13 of the Law on the Court of BiH, as it is also established in the Constitutional Court's Decision no. *U 16/08*, is sufficiently clear in prescribing precise conditions to be fulfilled in order for the Court of BiH to be competent to deal with the criminal offences referred to in the criminal codes of the Entities and Brčko District of BiH.

However, item (b) of paragraph 2 of Article 13 of the Law on the Court of BiH gave rise, during the proceedings relating to the review of its constitutionality of BiH, to serious issues as to whether the challenged provision met the requirements relating to its quality at the extent required by the principle of the rule of law provided for in Article I(2) of the Constitution of BiH or the principle of legal certainty as its inherent element. In particular, it is indisputable that the legislator, in item (b) of paragraph 2 of Article 13 of the Law on the Court of BiH, has provided for a series of legal standards as requirements to establish the jurisdiction of the Court of BiH leaving discretionary power with the court to assess in each particular case whether some of these standards have been fulfilled. As it is stated in the reasoning of Decision no. *U 16/08*, Article 13, paragraph 2, item (b) of the Law on the Court of BiH imposes additional and serious obligation on the judiciary to determine, through consistent development of the court's case-law, the content of these standards as well as to decide in each particular case, taking into account the circumstances, whether the stipulated conditions for jurisdiction of the Court of BiH are met. It is also noted that an inappropriate application of the challenged provision may amount to the violation of human rights in individual cases. In my opinion, a typical example of inappropriate reasoning on application of the challenged provision is given in case no. *AP 785/08* for the reasons mentioned in the Joint Separate Dissenting Opinion of the Vice-President of the Constitutional Court, Ms. Valerija Galić and myself wherein we expressed our disagreement with the aforementioned decision of 31 January 2009.

According to the case-law of the European Court of Human Rights, the national courts are obliged to give reasons for their decisions, but this cannot be understood as requiring a detailed answer to every argument. However, if the submission is substantially relevant to the outcome of the case, the court must deal with it in its judgment. Therefore, the court decision must contain the reasons on which it is grounded and it must contain the reasoning all the more so if the submission is substantially relevant to the outcome of the dispute. The court decision must contain the reasons as its basis and the reasons must be convincing. Otherwise, there is a violation of Article 6, paragraph 1 of the European Convention (see *ECtHR, Van der Hurk vs. the Netherlands*, judgment 19 April 1994, paragraph 61). The case-law is mostly reduced to the fact that the court must give the reasoning for its decision but this is not understood as requiring a detail answer to every argument.

Although the issue of violation of individual rights was raised under the Constitutional Court' appellate jurisdiction provided for by Article VI(3)(b) in Case no. *AP 785/08*, and

in Case no. *U 16/08*, the Constitutional Court dealt with the review of constitutionality of a precise norm *in abtracto,* the same issue was essentially raised in these two cases. In my opinion, the decision in case no. *AP 785/08* should have instructed the courts to apply this provision in the manner which was not in violation of the Constitution of BiH and the rights laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was in fact violated in that case.

(5) Furthermore, it should be noted that it follows from the Constitutional Court's jurisprudence that the Constitutional Court, if necessary and while conducting the proceedings under the appellate jurisdiction, has the competence to proceed with review of constitutionality within the meaning of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina. In my opinion, the Constitutional Court could have made the legislator aware of the necessity to intervene in the challenged provision in Case no. *AP 785/08* by examining the quality of the challenged provision. In that way the standards mentioned in the challenged provision would be placed within the appropriate framework and limit the court's discretionary assessment of the issue of competence by certain objective criteria, which would be a guideline in deciding whether some of the provided standards is applicable. This would certainly not mean that the challenged provision would be declared invalid and would not be applied until the legislator amends it. Taking into account that the procedure amending the Law on the Court of BiH is still pending, in my opinion such a decision by the Constitutional Court would produce appropriate positive effects.

Regretfully, the majority decision of the Constitutional Court in Case no. *AP 785/08,* wherein the appeal has been rejected as inadmissible for being premature, was taken before Decision no. *U 16/08*, thus preventing the Constitutional Court to deal with this issue in such a manner.

(6) Moreover, I proposed that the adoption of Decision no. *U 16/08* is postponed because, as I indicated, the procedure for amending the Law on the Court of BiH is pending. These amendments have also been proposed by the State Strategy for the Work on War Crimes Cases adopted by the Council of Ministers of Bosnia and Herzegovina at the 71st session held on 29 December 2008. The Strategy emphasizes *inter alia* that the Constitutional Court of BiH, in Case no. AP 1785/06 of 30 March 2007, took the view that the case-law regarding the war crimes cases should be harmonized as soon as possible. The significance of this decision rests on the Constitutional Court's principle position on the justification of application of the relevant Criminal code of BiH to the trials and punishments of war crimes based on the provision of Article 4(a) of that Law and Article 7, paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the obligation of the courts of the Entities and Brčko District to follow the case-law of the Court of BiH insofar as these cases are concerned.

However, my proposal to postpone the decision-making procedure in case no. U 16/08 (until the Parliamentary Assembly of Bosnia and Herzegovina takes a position on the proposed amendments to Article 13 of the Law on the Court of BiH) was not accepted. In my opinion, such proposal is in accordance with the doctrine of *judicial self-restraint* of the Supreme Court of the USA, whose author is famous Justice *Holmes*. It is well known that a lot has been written on the need for the judicial self-restraint in terms of refraining from unnecessary interference with the legislative sphere and assessment of consistency of laws in the last several decades. There is almost not a single work on the American control of constitutionality in which the doctrine of self-restraint, which prevails over judicial activism which marked previous period, is not emphasized. Following the American model, a lot of modern systems of constitutional judiciary have stipulated certain measures in their constitutional texts or they have developed the case-law to prevent overly powerful judiciary or possible kritocracy. Thus, the constitutional courts of Germany, Austria, Italy and other countries often refer to „self-limitations" and refraining from „politicizing the judiciary". All the above mentioned systems apply a presumption in favour of the constitutionality of law by accepting a standpoint that a law cannot be declared null and void as long as there is a possibility for interpreting it as being in compliance with the constitution. Furthermore, in the event of doubt or several possible interpretations, a possibility which the law considers to be consistent with the constitution should be taken as a proper one. The same aim is to be achieved by constitutional and law provisions whereby it is determined that the courts should deal with legal issues only, without assessing the political opportunisms of laws.

(7) I voted in favor of the decision in case no. *U 16/08* with all due respect for the arguments in the reasoning of the decision, wherein it is stated that the provision of Article 13, paragraph 2, item b) of the Law on the Court of BiH is not in violation of the „rule of law" principle or the legal certainty *per se*, although I am still of the opinion that it was necessary, as I have already stated, for the Constitutional Court to be more decisive in pointing to a need for prescribing more precise criteria for taking over the subject-matter jurisdiction by the Court of BiH from other courts, which have been already predetermined under law when it comes to criminal matters. The above is necessary for the purpose of avoiding arbitrariness in taking a decision, for ensuring legal certainty and for strengthening confidence of public in the entire system of judicial authority, which would be seriously jeopardized by taking over the subject matter jurisdiction in an arbitrary manner.

SEPARATE CONCURRING OPINION OF JUDGE TADIĆ

1. In the procedure of resolving the request for review of constitutionality of Article 13, paragraph 2, item b) of the Law on Court of BiH, the Constitutional Court dismissed the applicant's request and established that the challenged provision is not inconsistent with the Constitution of BiH.

I am among the majority of judges who supported the above opinion. Namely, the issue of constitutionality of passing the Law on the Court of BiH was resolved in a previous decision of the Constitutional Court no. *U 26/01*, whereby it was established that the enactment of law was in accordance with the BiH Constitution. In light of the above, it is hard to say that the BiH Parliamentary Assembly is not authorized to also prescribe the jurisdiction of an institution of BiH to be established in accordance with the Constitution and that the related law provision is unconstitutional in itself.

2. However, the issue which was insufficiently dealt with in this decision and the subject of the discussion, is related to the fact that even where a law (a provision of law) is not unconstitutional in itself, it does not mean that the related law or some provisions of that law, pursuant to the Constitution and international standards, should not comply with the criteria of the **quality of law.**

Accordingly, in its decision *Busuioc v. Moldova,* judgment of 21 December 2004, the European Court of Human Rights states, as follows: „A norm cannot be regarded as a „law" unless it is formulated with sufficient precision to enable the person to regulate his or her conduct: he or she must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

3. An imprecise norm may have consequences for the legal certainty and rule of law, which brings the quality of law into question although it is not unconstitutional in itself. It is exactly this case where the challenged provision is imprecisely defined, where the objective criteria are lacking (such as, for example: the amount of damage/gain, the offence committed in two Entities or in one of the two Entities or in the Brčko District or in several cantons or in some other more clear way) which, if in place, would eliminate any arbitrariness in application of this provision or any inconsistency we are faced with right now. Additionally, a person would be informed of the consequences that he /she might be faced with even in regards to the jurisdiction of the relevant body (court).

4. Therefore, the legislator should be aware of the aforesaid when passing a law. As to possible amendment to this law, the legislator should define this norm in detail so as to be consistent with the principle of legal certainty and rule of law guaranteed under the Constitution of BiH.

SEPARATE DISSENTING OPINION OF JUDGE SIMIĆ

In the procedure of resolving the request for review of constitutionality of Article 13, paragraph 2, item b) of the Law on Court of BiH, the Constitutional Court dismissed the applicant's request and established that the challenged provision is not inconsistent with the Constitution of BiH.

Regretfully, I have to point out that I did not give my support to the opinion of majority of judges for the following reasons:

In my opinion, the request for review of constitutionality of Article 13, paragraph 2, item b) of the Law on the Court of BiH has raised two questions that should be answered.

First, is the Parliamentary Assembly of BiH authorized to pass the challenged provision and, secondly, has the prescribed provision met the criteria relating to the quality of law?

Indeed, taking the Decision of the Constitutional Court no. *U 26/01* as a staring point, whereby it was established that the enactment of the Law on the Court of BiH was consistent with the Constitution, it follows that the Parliamentary Assembly is authorized to prescribe the competence of that institution, and therefore it is hard to find arguments that the said provision of the Law is unconstitutional in itself.

However, in my opinion the Court and the decision should have dealt with a central issue as to whether the related norm has met the quality of law criteria.

Article 1, item 2) of the BiH Constitution prescribes that Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law, and legal certainty constitutes one of the fundamental principles of the rule of law and this legal certainty also ensures human rights to the largest possible extent, in which case Article 2, item 1) of the BiH Constitution obligates both Entities to ensure the highest level of internationally recognized human rights and fundamental freedoms. The quality of law also represents an international standard that is fully upheld by the European Court of Human Rights, which, in its decision *Busuioc vs. Moldova*, judgment of 21 December 2004, stated: „A norm cannot be regarded as a „law" unless it is formulated with sufficient precision to enable the person to regulate his or her conduct: he or she must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

After referring to the modern legal systems of the European states, I could not find that an important criminal-legal norm was so imprecisely and so widely defined. As an

exception, there are two states that have applied the possibility supported by the challenged provision. These states are Spain and Switzerland.

However, the actions of the mentioned states have only confirmed that such a possibility exists and, in my opinion, that possibility is not questionable given the decision of the Constitutional Court of BiH no. *U 26/01*. However, the methodological approach of this state is quite different and that is the reason why I still believe that my position is correct. The mentioned states have regulated this issue in a way so as to reducing it to exceptional cases while complying with the international standards on one hand, and with the specific nature of the state system (Switzerland) on the other, which means that in this way they have regulated this issue in a very precise manner and managed to establish a standard of quality of law which guarantees the legal certainty to its citizens.

I join the opinion expressed in paragraphs 3 and 4 of the Separate Concurring Opinion by Judge Mato Tadić.

Case no. U 5/06

DECISION
ON ADMISSIBILITY
AND MERITS

Request of Mr. Ivo Miro Jović, at the time the Chairman of the Presidency of Bosnia and Herzegovina, for a review of the constitutionality of Article 1 paragraph 1, Article 2, the last sentence, Article 6 paragraph 3, Article 10 paragraph 4, Article 12 paragraphs 1 through 3, Article 13 paragraph 2 item f) and Article 18 paragraph 2 – the part referring to three public RTV services, Article 3, Article 7 paragraph 2, Article 8 paragraph 3, Article 9 paragraph 1, the third and fourth sentence where it is stated that there shall be two TV and two radio stations in the territory of an Entity, and Article 9 paragraph 2, Article 12 paragraph 4, Article 26 paragraph 4 and Article 42, paragraphs 1 through 3, of the Law on Public Broadcasting System of Bosnia and Herzegovina

Decision of 29 May 2009

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 17(1)(3), Article 59(2)(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05 and 64/08) and Article 1 of the Decision on Amendments to the Rules of the Constitutional Court of Bosnia and Herzegovina of 29 May 2009), in Plenary and composed of the following judges:

Mr. David Feldman, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Ms. Constance Grewe

Mr. Krstan Simić

Having deliberated on the request of **Mr. Ivo Miro Jović, at the time the Chair of the Presidency of Bosnia and Herzegovina**, in case no. **U 5/06**, at its session held on 29 May 2009, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

It is considered that the request of Mr. Ivo Miro Jović, at the time, the Chair of the Presidency of Bosnia and Herzegovina, for review of the constitutionality of Article 1 paragraph 1, Article 2, the last sentence, Article 6 paragraph 3, Article 10 paragraph 4, Article 12 paragraphs 1, 2 and 3, Article 13 paragraph 2 item f) and Article 18 paragraph 2 – the part referring to three public broadcasting services; Article 3, Article 7 paragraph 2, Article 8 paragraph 3, Article 9 paragraph 1, the third and fourth sentence where it is stated that there shall be two TV and two radio stations in the territory of an Entity, Article 12 paragraph 4 and Article 42, paragraphs 1, 2 and 3 and Article 19 paragraph 2 of the Law on Public Broadcasting System of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 78/05) is hereby dismissed.

The request of Mr. Ivo Miro Jović, at the time the Chair of the Presidency of Bosnia and Herzegovina, for review of the constitutionality of Article 9, paragraph 2 and Article 26, paragraph 4 of the Law on Public Broadcasting System of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 78/05) is rejected, as the applicant withdrew the request.

This Decision shall be published in *Official Gazette of Bosnia and Herzegovina*, *Official Gazette of the Federation of Bosnia and Herzegovina*, *Official Gazette of the Republika Srpska* and *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 16 February 2006, Mr. Ivo Miro Jović, at the time the Chair of the Presidency of Bosnia and Herzegovina, („the applicant"), filed a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of Article 1 paragraph 1, Article 2, the last sentence, Article 6 paragraph 3, Article 10 paragraph 4, Article 12 paragraphs 1 through 3, Article 13 paragraph 2 item f) and Article 18 paragraph 2 – the part referring to three public broadcasting services, Article 3, Article 7 paragraph 2, Article 8 paragraph 3, Article 9 paragraph 1, the third and fourth sentence where it is stated that there shall be two TV and two radio stations in the territory of an Entity, and Article 9 paragraph 2, Article 12 paragraph 4, Article 26 paragraph 4 and Article 42, paragraphs 1 through 3, of the Law on Public Broadcasting System of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 78/05 **-** „the challenged Law"). On 19 May 2006, the applicant submitted a supplement to his request. In addition, the applicant requested that the Constitutional Court adopt an interim measure whereby it would suspend application of Article 42, paragraphs 1 through 3 of the challenged Law. The applicant reasoned the aforementioned request stating that the establishing and constituting of bodies in accordance with Article 42, paragraphs 1 through 3 of the challenged Law may cause detrimental consequences with regards to the protection of constitutional rights of the Croats within the public broadcasting system in Bosnia and Herzegovina. In addition, the applicant proposed that the Constitutional Court, in accordance with Article 46 of the Rules of the Constitutional Court, hold a public hearing in this case given the importance of this issue for the Croats, which is raised by this request. On 12 February 2009, the applicant submitted the specified request.

II. Procedure before the Constitutional Court

2. By its decision on interim measure no. *U 5/06* of 31 March 2006, the Constitutional Court dismissed the applicant's request for interim measure as ill-founded.

3. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 15 June 2007, both Houses of the Parliamentary Assembly of Bosnia and Herzegovina were requested to submit their replies to the request.

4. On 20 June 2007, the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina submitted its reply. The House of Representative of the Parliamentary Assembly of Bosnia and Herzegovina failed to submit its reply.

5. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply to the request was submitted to the applicant on 3 September 2007.

6. Pursuant to Article 46 of the Rules of the Constitutional Court, the Constitutional Court, at the plenary session held on 23 January 2007, decided to hold a public hearing in order to discuss the request in question and made a list of participants. According to the established list, the following participants were invited to attend the hearing: the applicant, representatives of both Houses of the Parliamentary Assembly of Bosnia and Herzegovina („Parliamentary Assembly"), representatives of the Board of Governors of the Radio-Television of Bosnia and Herzegovina, Federation of Bosnia and Herzegovina, Republika Srpska, Offices of Directors of the Radio-Television of Bosnia and Herzegovina, Federation of Bosnia and Herzegovina and Republika Srpska, University of Mostar, Faculty of Political Sciences in Sarajevo, Faculty of Political Sciences in Banja Luka, Association of BiH Journalists, Electronic Media Association, Association of Croatian Journalists, Institution of Ombudsman of the Federation of Bosnia and Herzegovina and Presidency of Bosnia and Herzegovina.

7. Pursuant to Article 46(1) of its Rules, the Constitutional Court held the public hearing on 30 January 2009. The applicant attended the public hearing in person and also Mr. Anto Grbić and Mr. Božo Žepic as representatives for the applicant. The following experts attended the public hearing: Mr. Zdravko Savija, representative of the RT RS, Ms. Hanka Vajzović and Mr. Mevludin Tanović, representatives of the Board of Governors of the RTV FBiH. After the public hearing, the applicant was given a time limit of 15 days to submit the specified request.

8. On 12 February 2009, the applicant submitted his specified request within a time limit given at the plenary session. The specified request was communicated to the House of Representatives and House of Peoples of the Parliamentary Assembly on 9 March 2009.

9. Pursuant to Article 93(1)(2) of the Rules of the Constitutional Court, the Constitutional Court has taken a decision on the exemption of the President Seada Palavrić and Judge Mirsad Ćeman from the work and the decision-making process on the request at hand, as they participated in the adoption of the contested law as the members of the Parliamentary Assembly.

III. Request

a) Statements from the request

10. In his request, the applicant claims that Article 1 paragraph 1, Article 2, the last sentence, Article 6 paragraph 3, Article 10 paragraph 4, Article 12 paragraphs 1 through 3, Article 13 paragraph 2 item f) and Article 18 paragraph 2 – the part referring to three public broadcasting services, Article 3, Article 7 paragraph 2, Article 8 paragraph 3, Article 9 paragraph 1, the third and fourth sentence where it is stated that there shall be two TV and two radio stations in the territory of an Entity, and Article 9 paragraph 2, Article 12 paragraph 4, Article 26 paragraph 4 and Article 42, paragraphs 1 through 3 of the challenged Law are inconsistent with Articles I(2), II(1), II(2) and II(3)(h), Article II(4) of the Constitution of Bosnia and Herzegovina and Articles 10 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") as well as with Article 19(2) of the International Covenant on Civil and Political Rights.

11. In the reasoning of his request, the applicant states that the standards that have been established by law to protect the equal rights of the constituent peoples and the equal usage of the three official languages within the system of public broadcasting at the Entities' level and the state level, put the Croats in BiH at a significant disadvantage compared to the other constituent peoples. The request therefore asserts the need for both normative and practical steps to preserve the ethnic, linguistic, cultural, religious and other features of the identity of the Croats in BiH. The applicant further supports his request by mentioning the circumstances under which the Law was enacted, including the fact that amendments proposed by the elected representatives of Croats in BiH were rejected. These amendments were proposed as possible arrangements for the protection and securing of identical and equal usage of Bosnian, Croatian and Serb language on three channels of a single Public BHRT or three public broadcasting services in three official languages. In the applicant's opinion, a failure to accept any of the proposed arrangements resulted in the enactment of the Law whose conception retains two public services at Entity level, one in the Republika Srpska which operates *de facto* in the Serb language and the other one in the Federation of BiH which operates mostly in the Bosnian language. Therefore,

the request states, „an asymmetry has been maintained concerning the said arrangements to the detriment of the Croatian language and in this way the damage has been caused to the Croats in BiH". In these allegations, the applicant basically challenges the provisions regulating three public broadcasting services and refers to the impossibility to set up a separate Croatian-language channel within the broadcasting service. In the view of the applicant, the challenged provisions are consequently inconsistent with Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention as well as with the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina.

12. According to the applicant, Article 9(2) of the challenged Law is too restrictive given the guarantees stipulated by Article 10(1) of the European Convention, for it is unclear which new RTV channels within the System Board this provision is related to, *i.e.* whether it is related to prospective privately owned RTV channels. In the applicant's opinion, this provision reflects political control over the public broadcasting system in BiH and this kind of arrangement fails to satisfy their requests within the public broadcasting system in BiH.

13. Furthermore, the applicant states that Articles 7(2), 8(3) and 26(4) of the challenged Law „fail to give an adequate indication that the representatives of all three constituent peoples will be equally represented in the System Board and that all three official languages will be certainly and equally used in the programmes of public broadcasting service. On the contrary, the existing arrangements under Articles 7(2) and 8(3), when practically applied, give ample room for abuse of rights of constituent people concerning their equal representation in the System Board". In addition, given the competences of the System Board, particularly when it comes to the programme principles relating to vital national interests of all constituent peoples and given the application of those principles in practice and following the constitutional principle on constituent peoples, the appellant considers that the challenged Law should provide guarantees for representation of constituent peoples and Others in the System Board in a precise, clear and appropriate manner, in other words, it should provide for equal representation of the constituent peoples. Furthermore, in the applicant's opinion, Article 26(4) of the challenged Law gives a general indication of representation of rights of constituent peoples and „equal" usage of three official languages and two alphabets within the programmes of public broadcasting system. Such kind of determination of equal representation of official languages, irrespective of mechanisms of implementation, is not acceptable to the Croats since they fear that unequal treatment of Croatian language may continue to be used in the programmes of public broadcasting services and that it would lead to jeopardizing freedom of expression of the Croats within

the programme of public broadcasting system of BiH. In view of the above, the applicant expresses concern that the Croatian language may possibly be more openly and more rigorously discriminated in the media arena in BiH and, on the other side, that the Croats, being deprived of equal right to their language in public broadcasting service, same as Bosniacs and Serbs, will be sentenced to a quiet, steady but also definite assimilation, which is the fate of every language, culture and traditional heritage when found in the media isolation". For the above stated reasons, the applicant holds that Articles 7(2), 8(3) and 26(4) of the challenged Law require special preciseness as to their application in practice without granting the discretion authority within the personnel structure.

14. In his supplement to the request of 19 May 2006, the applicant underlined the inconsistency of the mentioned provisions of the challenged Law and Articles 3(1) and 11(1) lines a-i of **the 1992 European Charter for Regional or Minority Languages („European Charter"). The applicant asserts that although the Croats in BiH are not national minority and the Croatian language is neither a regional nor minority language but it is an official language, this does not release BiH from its obligation to** set up a separate television channel in „a **regional or minority language",** *i.e.* in an official language which is less in use within a certain territory of BiH.

15. **The applicant proposed that the Constitutional Court** adopt an interim measure whereby it would suspend application of Article 42, paragraphs 1 through 3 of the challenged Law. The Constitutional Court has already decided on that applicant's request.

16. Finally, the applicant proposed that the Constitutional Court, in accordance with Article 46 of the Rules of the Constitutional Court, hold a public hearing in this case given the importance of the issue for the Croats, which is raised by this request.

a(a) Allegations set forth in the specified request submitted after the public hearing

17. In his closing arguments, the applicant outlined that he remained supportive of the request for review of the provisions of the Law as alleged in the request but that he withdrew the part of the request relating to the review of Article 9 paragraph 2 and Article 26(4) of the Law. In the reasoning of his closing arguments, the applicant mainly reiterated the allegations set forth in the request. He stressed that the European Charter in Bosnia and Herzegovina is applied directly in Bosnia and Herzegovina according to the Constitution of Bosnia and Herzegovina so that its ratification was irrelevant in terms of its application in Bosnia and Herzegovina in the present case as well. He outlined once again that it „was necessary and justified to establish a separate RTV channel in the Croatian language" in order to preserve identity and personality of the Croat people in Bosnia and Herzegovina.

b) Reply to the request

18. The House of Peoples of the Parliamentary Assembly submitted its reply which was signed by Mr. Ilija Filipović, Chair of the House of People. It was stated that they fully support the request of the applicant and that „for the same reasons they see no need to give any new proposals or additional reasoning". They essentially find that the right to establish institutions in own language is one of the fundamental collective and individual human and constitutional rights and freedoms and that the Constitutional Court will, by taking a decision, contribute to strengthening of mutual trust of the constitutional people and citizens as well as to stability of the state and society.

IV. Public hearing

The applicant's position

19. The applicant exposed in detail historical background of this case pointing to the necessity to preserve ethnic identity particularly that of the Croat people which represent, although constituent, a minority in Bosnia and Herzegovina. He pointed to the „majorisation" which was effectuated though the procedure of adoption of the challenged law, since the Croat representatives had not voted for the proposed law in the Parliamentary Assembly. In this context, he outlined that a clear opposition of the Croat people to the challenged law was manifested through the fact that the Croat members of the Constitutional Court had not voted in favor of the decision dismissing as ill-founded a request to establish that the proposed law was destructive to the national interest of Croat people. The applicant alleged the examples which, in his opinion, point to the process of assimilation of Croat people and particularly to the assimilation of Croatian language and custom. In expressing his dissatisfaction with the current broadcasting system, he pointed out that 83,000 Croats do not pay public broadcasting system subscription fee. As to the remaining part of his introductory speech, the applicant mostly reiterated the views set forth in the request and he concluded that „40% of Croats are missing and that media bears a large part of responsibility for this, which is the reason why there is a need for this kind of struggle".

20. Moreover, the applicant pointed out that the right to language is an individual and collective right and that the deprivation of that right would include deprivation of identity of one people, which the challenged law entailed. He outlined that the challenged law should be the expression of citizens' will, which was not the case here given the way in which it had been proposed and adopted and that in fact it did nothing but „bring about a situation of inequality, since this law does not recognize the peoples and it causes frustrations of an

entire people". He alleged that the challenged law provided in a discriminatory manner that only the entities had their own public broadcasting services, hat the peoples did not have it, that Croats lived in the common Entity and did not have the right to their own public broadcasting channel. Furthermore, he outlined that the Constitutional Court was requested to go beyond a mere juristic logic and to adopt more extensive approach while considering this case.

21. As to the application of the European Charter in Bosnia and Herzegovina, the applicant gave a historical background relating to the adoption and application of this international mechanism, its hierarchical position comparing to other general acts of the Council of Europe, particularly European Convention. The applicant left certain issues concerning the application of this mechanism open. He outlined that certain actions by the authorities in Bosnia and Herzegovina were in violation of the Charter, since the Charter was wrongly regarded as relating to the minority languages. In this respect, he referred to Article 3 of the Charter which covers official languages less in use in certain areas of the signatory Party to the Charter so that all rights laid down in the Charter were applicable. In this context, he pointed to all those rights conferred by the Charter. He outlined that the obligation of the signatory Parties to the Charter, including Bosnia and Herzegovina, was to provide the formal requirements for registration of institutions by the relevant bodies in those languages to which the Charter referred but also the creation of material prerequisites for establishment of such institutions. The applicant outlined that it was not only that it was not so in practice but quite the opposite actions were taken in practice such as the prohibition of use of ethnic determinants in official names of radio stations with the Croat label by the Regulatory Agency for Telecommunications of Bosnia and Herzegovina. Finally, the applicant raised the issue of „European principles" as a basis for organizing broadcasting system in Bosnia and Herzegovina as prescribed by the Feasibility Study on Accession of Bosnia and Herzegovina to the European Union. In the applicant's opinion, these indubitably include the principles set forth in the Charter as a European international instrument.

22. Upon the Court's question whether the fact that a law does not apply or is not upheld in the legislative procedure renders such law unconstitutional, the applicant answered that this was probably not the case in strictly formal terms but that the point was that in practice often happened that „something that suits someone applies, and something prescribed by the law does not apply by tacit outvoting."

23. Upon the Court's question whether in his opinion a new channel in the Croatian language should be in the standard Croatian language or in colloquial language, the applicant did not give a precise answer but he pointed to a need to preserve the identity of

Croat people through the language because of its progressive disappearance in everyday speech.

24. Upon the Court's question whether he believes that the real role of the Constitutional Court is to consider the validity of the law in respect of what is or what is not in the law, the applicant answered that the idea was not to apply something what did not exist in the Constitution but to apply in practice something stipulated by the law.

25. Upon the Court's question whether in the Law there is something about TV channels in the Croatian, Bosnian and Serb languages and whether the idea is to create separate channels in the languages of the peoples, although we refer to a multicultural society, the applicant answered that the creation of such channels would promote a multicultural society.

26. Finally, upon the Court's question whether the applicant's request refers to the issue of implementation of the challenged law or unconstitutionality of its provisions, the applicant was given a time limit of 15 days, upon his consent, to specify his request and to submit it to the Constitutional Court.

The position of Ms. Hanka Vejzović, professor at the Faculty of Political Sciences in Sarajevo, Department of Journalism

27. At the beginning, she answered questions asked by the Constitutional Court during the pubic hearing. In her opinion, the fact that a public broadcasting service or channel in the Croatian language in Bosnia and Herzegovina is not being set up, does not lead to restriction of the freedom of expression of the Croat people in Bosnia and Herzegovina nor discrimination of the Croat people when compared to two other peoples in the present situation with the current public broadcasting service but that rather one can speak of „Others" being discriminated against when compared to the constituent peoples. She further alleged that lack of broadcasting service in the Croatian language was not in violation of the European Charter, since no provision provided for a comparison to our situation in terms of language and that a separate channel within the current broadcasting system was not necessary to preserve our cultural, linguistic, religious and other identity, either Croat or that of any of these three constituent peoples. As to the question relating to the alleged violation of the right to freedom of expression, she outlined that every person was free to speak to his/her liking either in public and or private, and it was another matter what one had to listen in the context of the present situation, and that one could not say that the freedom of expression had been violated, nor that one people was being under threat but rather that all people were under threat because of the politics of the modern times,

and that given such context the problems should be resolved by cherishing tolerance and by raising the level of linguistic knowledge. She outlined that there was no room for the reference to the European Charter, since it referred to the languages of the minorities, whereas the Croat people are a constituent people. As to the real identity of the language (symbolic difference of one compared to others), she outlined that it was not ignored but it was equally treated in freedom of individual choice in media even in a more consistent manner than in case of linguistic practice of an average speaker of this language in Bosnia and Herzegovina. In support of that hypothesis she outlined that „it is enough only to list Croat newscasters and journalists (especially FTV) i.e. those who speak or strive to speak in the Croatian language".

28. Upon the Court's question whether she read in detail the European Charter whose certain provisions apply to the official languages in less use, and to the Court's reference to the provision relating to the possibility of establishing a separate channel, she answered that she had prepared herself for a public hearing that had been cancelled and that in her opinion the whole story became irrelevant in Bosnia and Herzegovina, since there were no problems in terms of communication and that hindrances were present at the level of symbolic values rather than communication values.

29. Upon the Court's question whether there is a danger of disappearance of linguistic identity in the manner that the generations could stop speaking, for example, Serb language which was in use in electronic media and whether there is a published research at the faculty where she gives lectures, she answered that there was no danger of uniform language, since this process was completed in Bosnia and Herzegovina. In this context, she outlined that Bosnia and Herzegovina was open to the so-called variants, that a rich system of relationships between synonyms had been developed and that the words that in certain circumstances were needed, had been chosen, which was the way we were taught how to be tolerant.

The position of Mr. Mevludin Tanović – Board of Governors of the RTV FBIH

30. At the beginning, he presented a thesis, by referring to its source, that there were no three different languages in Bosnia and Herzegovina but the Serb, Croatian and Bosnian languages were used only at the level of lexis. He pointed out that the issue raised in the request was of political nature rather than linguistic nature. He presented certain linguistic observations pointing to the matter of frequent linguistic synonyms when it comes to the languages used by the peoples in Bosnia and Herzegovina. He further outlined that the objection which could be raised when it came to the public broadcasting system was the issue whether the areas were equally recognized rather than the issue of sufficient

representation of the Croatian language. In his opinion, one broadcasting service should exist at the level of Bosnia and Herzegovina with regional newspaper bureaus.

31. Upon the Court's question whether the presented linguistic approach and its nature is a platform on which the activity of the Public Broadcasting Service is based, he answered that in principle the most frequent words „in our language" were used so that people could understand them; to the Court's question relating to the term „our language", he answered that he meant by that „our languages".

The position of Mr. Zdravko Savija – RT RS

32. As a member of the Commission which worked on drafting the challenged law, he outlined that the Commission had been limited in drafting the challenged law by the principles agreed by the Prime Ministers of the Entities, OHR and European Commission. In drafting the law, the Commission took account of the European Recommendation 96/10 which referred to the independence of the Public Broadcasting Service and which related to editing and presentation of news and current affairs programmes. In drafting the law, the aim was to harmonize the law with the basic international documents regulating this field, more precisely Directives of the Council of Europe and Convention on Transborder Television. He alleged that the Board of Governors of the RT RS was supportive of the applicant's request for establishing a channel in the Croatian language. However, he outlined that they did not support the view relating to the composition of the board of governors, since all constituted peoples were present in the boards of governors of all services. He outlined that the essence of the problem was the failure to implement certain provisions of the law such as the challenged provisions so that he proposed that the law should be submitted to the procedure for amending the law.

33. To the Court's question whether, within the framework of the legislative power, the raised issue of consideration of certain aspects relating to the establishment of a channel in the Croatian language, including its nature and aims, technical aspects, possible audience and obligations arising from the international instruments on human rights, particularly assessment of possible discrimination or disproportion in use of the Croatian language within the public broadcasting system in Bosnia and Herzegovina, he answered in respect of the possible discrimination that in July 2006 the Council of Europe had given a positive opinion on the law in question. As to the second part of the question, he outlined that a Commission within the competent ministry of the Council of Ministers was established in order to consider all aspects relating to establishing such a channel, and he added that the basis for establishing such channel was Article 9 of the challenged law.

34. To the Court's question whether the reason for reviewing the law with the aim of rendering the system more efficient, rational and effective was the Croat people's complaint about the discrimination, he answered that the first problem relating to the application of the law was the failure to form a Corporation composed of the members of the boards of all three systems due to the failure to appoint a Board of Governors of the Federal Television. He outlined that the appointment of Corporation would improve the functioning of the system and he also said that that this problem showed that the enacted laws were not enforced.

35. To the Court's question whether the essence of the problem relating to the challenged law is a misapplication or the provisions themselves, he answered that essentially the problem related to a delay in adoption of decisions and sub-law acts and failure to apply the laws. Furthermore, he explained in detail the problems relating to the non-application of the law pointing once again to the problem relating to the failure to establish the Corporation.

36. To the Court's question whether Article 26 of the challenged law is nothing but a „mere norm" and whether what is stipulated by that provision applies, he answered that it was not applied although it should be applied. In this respect, he outlined that the RT RS had obtained a license from the Communications Regulatory Agency unlike the BH RT and RTV FBiH which had not obtained it because of delay in appointment of a member of the board of governors. He confirmed that this provision was a „dead letter". To the Court's question whether the issuance of the license for the RT RS means that it fulfilled all requirements including the representation of the languages and cultures of other peoples, he answered that being granted a license of the system only meant that the standards to be met were obtained rather than that certain requirements had been fulfilled.

V. Relevant Law

37. The **Law on Public Broadcasting System of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* no. 78/05 of 8 November 2005), as relevant, reads:

Article 1

(1) This Law shall regulate the Public Broadcasting System of Bosnia and Herzegovina (hereinafter PBS BiH) and the relationship among the three public broadcasting services and the Joint Legal Entity within that system, as well as its activities and organization.

Article 2, as relevant, reads:

[…]

System License - individual licenses of the three public broadcasting services make up the System License

Article 3

(1) The Public Broadcasting System in Bosnia and Herzegovina shall consist of:

a) Radio – Television of Bosnia and Herzegovina (hereinafter: BHRT) as the public broadcasting service of Bosnia and Herzegovina.

b) Radio-Television of the Federation of Bosnia and Herzegovina (hereinafter: RTV FBiH), as the public broadcasting service of the Federation of Bosnia and Herzegovina.

c) Radio-Television of the Republika Srpska (hereinafter: RT RS), as the public broadcasting service of Republika Srpska,

d) Corporation of Public Broadcasting Services of BiH (hereinafter: Corporation).

(2) Laws on BHRT, RT RS and RTV FBiH shall be harmonised with the provisions of this Law.

(3) The sales turnover of goods and services amongst the members of the System shall be tax free.

Article 6, paragraph 3, reads as relevant:

[…]

(3) On behalf of all three public broadcasting services, the Corporation of Public Broadcasting Services...:

[…]

Article 7, paragraph 2

(2) The System Board shall be composed of 12 members. The System Board shall be composed of all members of the public broadcasting services' boards of governors (four members from each public broadcasting service), serving ex-officio.

Article 8, paragraph 3

(3) The System Board can make valid decisions when at least seven (7) members are present at the session (quorum) from all three broadcasting services. The System Board shall adopt decisions by majority of votes of the present members. In event of a tie, the vote is going with the chairman of the System Board.

Article 9, paragraph 1 as relevant read and paragraph 2 read:

(1) The Communications Regulatory Agency of Bosnia and Herzegovina shall assign frequencies to the public broadcasters, one TV and two radio stations for the whole territory of BiH, two TV stations and two radio stations for territories of respective entities, for the amount determined by the Agency. […]

(2) The Council of Ministers shall have the right to start the procedure for establishing a new RTV channel within the System after consulting the Agency and the System Board. The Council of Ministers shall consider the initiatives after producing an independent, transparent and comprehensive analysis that covers programme, range, technical, financial and other information that justify the establishment of a new channel.

Article 10, paragraph 4 as relevant reads:

[…]

The System Licence shall establish a complementary set of obligations for the three public broadcasting services covering:

[…]

Article 12

(1) The Corporation of Public Broadcasting Services of BiH is a jointly run structure amongst the public broadcasting services with equal rights and obligations towards all three public broadcasting services, BHRT, RTRS and RTV FBH.

(2) The three public broadcasting services shall establish the Corporation by this Law.

(3) The Corporation shall be obliged to introduce new technologies in agreement with all three public broadcasting services.

(4) The Corporation shall have its organizational units in Sarajevo, Banja Luka and Mostar.

Article 13, paragraph 2, item f

(1) The Corporation of Public Broadcasting Services of BiH shall be established by this Law.

[…]

f) Harmonising systems, policies and procedures across the three broadcasters, as defined by Article 6 of this Law.

Article 18, paragraph 2

[...]

(2) Organisational units responsible for tax in all three public broadcasting services shall supervise the collection of RTV tax and inform the System Board thereof.

Article 26, paragraph 4

[...]

(4) The programmes of the public broadcasting services shall recognize the rights of the constituent peoples and Others and shall be equally edited in the three official languages and two alphabets.

Article 42, paragraphs 1 through 3

(1) The constituting session of the System Board shall be called within 15 days from the appointment of the sufficient number of members of the Board of Governors of broadcasting services in order to form the quorum of the System Board. The current Boards of Governors shall exercise their duties until the establishment of the System Board and individual Boards of public broadcasting services.

(2) The Statute of the Corporation shall be approved by the System Board within 30 days from the constituting session.

(3) The Corporation shall be registered in accordance with the Law on Registration of Legal Entities Established by the Institutions of BiH (Law on Registration Official Gazette of BiH 37/03) within 45 days from the constituting session.

VI. Admissibility

38. In examining the admissibility of the request in part in which the applicant withdrew the request, the Constitutional Court referred to the provisions of Article 17(1)(3) of the Rules of the Constitutional Court.

Article 17(1)(3) of the Rules of the Constitutional Court reads:

A request shall be inadmissible in any of the following cases:

3. the applicant has withdrawn his/her request;

39. Following the public hearing, the applicant, in the specified request, withdrew part of the request related to the review of constitutionality of Article 9(2) and Article 26(4) of the challenged Law.

40. Taking into account the provision of Article 17(1)(3) of the Rules of the Constitutional Court according to which a request shall be rejected as inadmissible in case where the applicant has withdrawn his request, the Constitutional Court decided as stated in the enacting clause of this decision.

41. As to the remainder of the request, the Constitutional Court underlines that pursuant to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina including an issue as to whether any provision of an Entity's constitution or law is consistent with this Constitution. Such disputes may be referred to the Constitutional Court, *inter alia*, by a member of the Presidency.

42. The applicant, at the time of the request, was the member of the Presidency of Bosnia and Herzegovina, which means that the request was filed by an authorized person as required by Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

43. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of Constitutional Court, the Constitutional Court has established that the request is admissible as it was filed by authorized person and that there is not a single formal reason under Article 17(1) of the Rules of Constitutional Court for which the request would be considered inadmissible.

VII. Merits

44. The applicant claims that the provisions of the challenged Law are inconsistent with Articles I(2), II(1), II(2) and II(3)(h) and Article 10 of the European Convention, Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention as well as Article 19(2) of the International Covenant on Civil and Political Rights. In the supplement to his request, the applicant underlines the inconsistency between the provisions of the challenged Law and Articles 3(1) and 11(1) lines a-i of the European Charter.

The relevant provisions of the Constitution of Bosnia and Herzegovina, the European Convention and the International Covenant on Civil and Political Rights read:

Article I(2) of the Constitution of Bosnia and Herzegovina reads:

(2) Democratic Principles

Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.

Article II(1), II(2) and II(4) of the Constitution of Bosnia and Herzegovina reads:

1. Human Rights

Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.

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.

4. Non-Discrimination

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 II(3)(h) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

h) Freedom of expression [...]

Article 10 of the European Convention reads:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for

preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 19(2) of the International Covenant on Civil and Political Rights reads:

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

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.

European Charter for Regional or Minority Languages reads:

Article 2 – Undertakings

(1) Each Party undertakes to apply the provisions of Part II to all the regional or minority languages spoken within its territory and which comply with the definition in Article 1.

(2) In respect of each language specified at the time of ratification, acceptance or approval, in accordance with Article 3, each Party undertakes to apply a minimum of thirty-five paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter, including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11 and 13.

Article 3 – Practical arrangements

(1) Each Contracting State shall specify in its instrument of ratification, acceptance or approval, each regional or minority language, or official language which is less widely used on the whole or part of its territory, to which the paragraphs chosen in accordance with Article 2, paragraph 2, shall apply.

(2) Any Party may, at any subsequent time, notify the Secretary General that it accepts the obligations arising out of the provisions of any other paragraph of the Charter not already specified in its instrument of ratification, acceptance or approval, or that it will apply paragraph 1 of the present article to other regional or minority languages, or to other official languages which are less widely used on the whole or part of its territory.

(3) The undertakings referred to in the foregoing paragraph shall be deemed to form an integral part of the ratification, acceptance or approval and will have the same effect as from their date of notification.

Article 11(1), line a(i) reads:

(1) The Parties undertake, for the users of the regional or minority languages within the territories in which those languages are spoken, according to the situation of each language, to the extent that the public authorities, directly or indirectly, are competent, have power or play a role in this field, and respecting the principle of the independence and autonomy of the media:

a. to the extent that radio and television carry out a public service mission:

(i) to ensure the creation of at least one radio station and one television channel in the regional or minority languages; or […]

LEGAL ARGUMENTS PRESENTED DURING THE DELIBERAITONS ON THE MERITS OF THE REQUEST

A) Arguments according to which the challenged law is consistent with the Constitution of Bosnia and Herzegovina and International instruments

45. In the consideration of the allegations of a violation of the right to freedom of expression and discrimination, the case-law of the European Court of Human Rights, which gives great weight to Article 10 of the European Convention in protecting freedom of expression, is referred to as follows: the case of *Handyside* (see European Court of Human Rights, Judgment of 7 December 1976, Series A-24), the case of *Jerasild* (see European Court of Human Rights, Judgment of 23 September 1994, Series A-298), and the case of *the Observer and Guardian*, Judgment of 26 November 1991). The position of the European Court of Human Rights is particularly underlined, according to which a State, in regulating the public broadcasting, must observe not to violate the right of an individual to receive information (see European Court of Human Rights, the case of *Autronic AG*, Judgment of 22 May 1990, Series A-178).

46. In addition, in the deliberation of the case, it is referred to the Constitutional Court's Decision no. *U 10/05* relating to the request filed by Chair of the House of Peoples of the Parliamentary Assembly for the determination of existence of constitutional grounds to consider the Draft Law on the Public Broadcasting System of Bosnia and Herzegovina destructive to the vital national interest of Croats in Bosnia and Herzegovina. It is highlighted that the Constitutional Court already considered similar allegations in the

context of the, at the time, Draft Law, *i.e.* the present adopted challenged Law, as to the issue of restrictions on freedom of expression of the Croats. Specifically, the Constitutional Court considered whether the collective or individual rights of the Croats were violated based on the restrictions on the freedom of expression in the Croatian language, *i.e.* the impossibility of satisfying their cultural, educational and religious rights, which undisputedly represent the vital national interests. By reference to the positions taken in the mentioned decision it is emphasised that it would be relevant to mention the arguments summed up in the Constitutional Court's position according to which the then Draft Law on the Public Broadcasting System of Bosnia and Herzegovina is not destructive to the vital national interest of the Croat people in Bosnia and Herzegovina. In addition, the position taken in the said decision according to which *the Draft Law neither excludes nor favours any language of the constituent people in relation to other languages; on the contrary, Article 26 paragraphs 4 and 5 thereof guarantee equality of three official languages of the constituent peoples. The Draft Law does not contain provisions that would manifestly (prima facie) or necessarily suggest that the Croat language would not be equally represented with the other two languages of the constituent peoples, and Article 26 paragraphs 4 and 5 guarantee the equal representation of the Croat language* (see Constitutional Court, Decision no. *10/05* of 22 July 2005, published in *the Official Gazette of BIH* no. 64/05) is particularly highlighted. Furthermore, it is pointed to that the Constitutional Court reached the conclusion in the relevant case as follows: *given that the challenged provisions provide no privileged status to any of the constituent peoples to the detriment of another constituent people, there are no grounds for concluding that the challenged provisions are discriminatory for the Croats* (see, Decision no. *10/05,* cited above, paragraphs 44-47). In addition, it is indicated that the majority of the arguments presented at the public hearing related to the status of the Croatian language in Bosnia and Herzegovina compared to the languages of other constituent peoples. Also, the position is presented that the arguments related to the use of languages in the media and scope of representation of the Croatian language in the media in Bosnia and Herzegovina, where the applicant pointed to the possibility of assimilating the Croat people due to the lack of sufficient representation of the Croatian language in the media. The conclusion related to these positions is that the applicant failed to present any consistent parameters either analytical or statistical in support of his thesis. Next, it is pointed to that, in essence, the problems on which the applicant laid emphasis related to the application of the challenged law, and not to the provisions as such, as stressed at the public hearing by the applicant and the experts invited to attend the public hearing. Moreover, it is underlined that the Constitutional Court must limit its competence to the review of the provisions whose review is requested and that the arguments presented during the public hearing can not alter the Constitutional Court's view that the challenged law does not contain the provisions

which favour the language of either constituent people in Bosnia and Herzegovina to the detriment of other constituent peoples, thus preventing the Croat people from manifesting the freedom of expression in the Croatian language, *i.e.* from satisfying their cultural, educational and religious rights.

47. As to the allegedly discriminatory provisions challenged by the applicant with regards to the right to freedom expression, the explicit position of the Constitutional Court taken in the Decision no. *U 10/05* is highlighted, according to which *it is clear to the Constitutional Court that the Draft Law does not supply any grounds to infer that the Croat people would be discriminated against in relation to the other two peoples as regards representation of the Croat language, culture and traditional heritage in the programmes of the public broadcasters. Indeed, the provisions of Article 26 paragraphs 4 and 5 of the Draft Law clearly stipulate that the programmes of the public broadcasters shall be edited equally in three languages and two alphabets and they shall ensure equal representation of contents reflecting the heritage of all three constituent peoples. As noted above, this makes the case very different from Decision no. U 8/04 of 25 June 2004, where the relevant provisions of the law expressly made it possible to use only one or two of the languages of the constituent peoples as the official language or languages in higher education institutions. Nothing on the face of the Draft Law in the present case suggests that the Draft Law is intrinsically discriminatory or will be applied in a discriminatory way. Indeed, the indications are to the opposite effect. The Constitutional Court notes the claim that the Draft Law is destructive to the vital national interests of the Croat people in Bosnia and Herzegovina because the existing television stations of the Federation of Bosnia and Herzegovina and the Republika Srpska are de facto television stations in the Bosnian and Serb languages and satisfy the needs of the Bosniac and Serb peoples. However, the Constitutional Court does not accept that argument. The Constitutional Court considers that the programming principles and standards defined in Articles 26 and 27 of the Draft Law (with particular stress on equal representation of all three official languages, two alphabets, and the culture and traditional heritage in programme broadcasting) must be applied to all broadcasters at all levels (state, entity, cantonal, municipal).*

48. In the consideration of the allegations of a violation of the constitutional principle of „constituency of peoples" as regards the provisions prescribing the selection, composition and operation of the System Board, as well as the provisions regarding the enforcement of programme principles, it is emphasized that the Council for Protection of Vital National Interests of the Constitutional Court of the Federation of BiH considered the Entity Draft Law on the Public Broadcasting Service of the Federation of BiH, as a public service within the Public Broadcasting System of Bosnia and Herzegovina, concerning which it

concluded in its Decision no. *U 11/06* of 19 July 2006 the following: *the Draft Law on the Public Broadcasting Service of the Federation of Bosnia and Herzegovina violates the vital national interest of the constituent Croat people, for the reason that certain arrangements do not provide for the guarantees that they shall not be discriminated against in the equal exercise of the rights laid down in the Constitution of the Federation of Bosnia and Herzegovina*. Furthermore, as underlined in the positions presented, the conclusion reached in the aforementioned decision states that *it is necessary to clearly establish legal instruments of protection for all three constituent peoples and citizens, in a way eliminating any possibility of favouring any peoples, and also discrimination against equal use of language and alphabet, regard for national regional, traditional, religious, cultural and other traits of constituent peoples and all nationals of Bosnia and Herzegovina*.

49. In this context, the position taken in the Constitutional Court's Decision no. *U 10/05* is recalled again, where the Constitutional Court explicitly states that *the System Board cannot be said to be a representative body authorized to adopt legally binding acts within the scope of its jurisdiction as was the case in the matter of constitutionality of elections to the City Council of the City of Sarajevo in U 4/05, above. The conclusion to be drawn is that it would not be necessary to define the composition of the Board with respect to representation of the constituent peoples and Others*. For such a position, the Constitutional Court finds the stronghold in the positions from „the decision on constituency" and other decisions on constitutionality, according to which *effective participation of the constituent peoples in governmental organs is an element inherent to the notion of vital national interest of a constituent people (*see *mutatis mutandis*, Constitutional Court, Third Partial Decision no. *U 5/98 III* of 1 July 2000*)*, however; *effective participation of the constituent peoples in the authorities, if it falls outside the constitutional framework, must never be carried out or imposed at the expense of efficient operation of the state and its authorities* (see *mutatis mutandis*, Constitutional Court, Decision no. *U 8/04* of 25 June 2004).

50. The deliberations emphasized, as in the previous decision no. *U 10/05*, that because of the significance that the Public Broadcasting System has in Bosnia and Herzegovina it is necessary to consistently implement the provisions of the challenged Law, which guarantee the regard for the rights of constituent peoples and Others, especially the rights to equality of language, tradition, culture and faith, so that none of the peoples is discriminated against. Furthermore, it is true that the level of regard for these rights will depend on the implementation of the challenged Law, on the selection of the members to the System Board, and on ways in which they operate within the scope of their authority, and those are not issues falling under the framework of this assessment of the Constitutional Court.

51. Furthermore, the position is presented that although it may be noticed that the Croatian language is least represented in the territory of Bosnia and Herzegovina, it is evident that no one has ever been denied the right to speak in that language (with emphasis that Bosnia and Herzegovina is specific as there is the range of variation in one language and, consequently, it is difficult to make a distinction to this end). According to the view presented during the deliberations, the language is often used as the political means. It is particularly highlighted that the issues raised in the relevant request are present but they are not in the provisions of the challenged Law but in the implementation thereof, *i.e.* in practice. It is underlined that as to the purely formal grounds there is nothing disputable in the challenged provisions, that is to say that the form of the challenged Law is such that it is not discriminatory against the Croatian language.

52. Also, it is stated that the relevant issue in the present case is whether the principle of legal certainty and the rule of law, promoted by the Constitution of BiH, impose an obligation that the enacted laws should contain such norms that would reduce the possibility of infringing others' rights to a minimum. It is pointed to that no single provision contrary to the Constitution of BiH can be found in the challenged Law and, consequently, it is hard to find the violation referred to by the applicant.

53. As to the application of the European Charter, the view is presented that it is not necessary that the Constitutional Court gives its position as to whether or not the European Charter is applied directly in Bosnia and Herzegovina on the basis of the Constitution of Bosnia and Herzegovina or the application of the European Charter requires the ratification thereof. It is also stated that even if the applicant's interpretation is accepted that the European Charter is directly applied in Bosnia and Herzegovina, in order to apply the guarantees of this international instrument to languages which are not minority languages but rather the *official languages which are less in use,* it is necessary for Bosnia and Herzegovina to closely define the languages of that kind based on the facts which have to include all relevant data indicating that a certain language is less in use in a certain part or in the whole territory of Bosnia and Herzegovina. It is furthermore stated that, in designating the Croatian language as a language which is less in use in a certain part or in the whole territory of Bosnia and Herzegovina, one should be guided by the actual facts and parameters and the Constitutional Court is not competent to deal with such kind of assessment. It is concluded that only after meeting this formal requirement the State will be under the obligation to offer the guarantees of the European Charter in relation to the Croatian language as well, including the guarantees under Article 11, paragraph 1, item (a- i) referred to by the applicant.

54. In the consideration of the applicant's allegations that the challenged provisions are inconsistent with Article II(1) and II(2) of the Constitution of Bosnia and Herzegovina, it is underlined that it need not to be the subject of separate consideration given that the aforementioned allegations have not been substantiated.

B) Arguments according to which the Challenged Law is not consistent with the Constitution of Bosnia and Herzegovina and International instruments

55. These views expressed during the deliberation point to that in abstract judicial examination of the provisions challenged by the applicant and in the additional arguments presented by the applicant in his request and at the public hearing, it was expected that the Constitutional Court should not be entirely bound by the limitations of the Decision no. *U 10/05* and that, guided by the principles of the rule of law, it would come to opposite conclusions. In addition, it is stated that the consideration of the present case requires that the importance and essence of the issue be comprehended and that the relevant request should be understood primarily as involving the protection of human rights. Therefore, in resolving the request, it is necessary to take an approach that is not led by strict formal „constitutionality", wherein lies the major weakness of reasoning.

56. Furthermore, it is pointed to the fact that, since the establishment of the Public Broadcasting System of BiH, the legitimately elected representatives of the Croats in BiH have been expressing their disagreement over the broadcasting system as such and that they did not take part in the enactment of the challenged Law and, consequently, that was the reason why the issue of democratic procedure, while enacting such a law, was raised. It is stated that in the relevant case the logic of the majority decided one of the essential issues of human rights. It is indicated that the Croats are a constituent people equal to the other two constituent peoples in BiH but inferior in number and, given the mentioned fact and the constitutional position of the Croats, it may be difficult to grasp the problem of the Croats in BiH, as a people inferior in number, and to find an appropriate solution for that people; consequently, it is not surprising that the Croats may have the interests essential in preserving their ethnic, linguistic, cultural and religious identity more clearly expressed.

57. It is also highlighted that although the challenged Law stipulates, declaratory, the equal use of the three languages and, generally speaking, law cannot be declared unconstitutional due to the lack of any provision, the principle of the rule of law recognizes the possibility that the Constitutional Court, in accordance with the principle of the rule of law, may assess that a legal provision is unconstitutional due to the legal gap in regulating certain relations, which, for example, give rise to inequality or discrimination against a certain group.

58. According to the view presented, strictly speaking, as to the formal and material aspects of compliance of the challenged provisions with the Constitution of Bosnia and Herzegovina, the positions stated previously in the present decision may be well-founded; however, the challenged provisions are contrary to the meaning of the constitutional provisions, *i.e.* the provisions of the European Convention and other international human rights documents. Taking into account experiences in other European countries and the manner in which they have organized their systems, the view is presented that in case that the request were dismissed, it would open the possibilities that would limit the affirmation of the Croatian language within the Public Broadcasting System in BiH.

59. The model of the RTV service in Switzerland, the country where the official languages of the Swiss Confederation are German, French and Italian, is also mentioned within the position presented above. It is stated that the Romansh shall also be an official language of the Confederation when communicating with persons who speak Romansh (the provision of Article 70 of the Constitution which is, as already stated, almost identical to the provision in our Constitution, three languages and two alphabets). It is pointed to that the Swiss public broadcasting service uses all the official languages irrespective of a proportion of speakers of these languages (63.7% speak German, 20.4% French, 6.5% Italian and 0.5% Romansh).

60. In this context, it is stated that the three constituent peoples in Bosnia and Herzegovina must have equally satisfactory access to the Public Broadcasting System and an equal opportunity to express the ethnic, linguistic, cultural, religious and other features of their identity. According to these views, it is held that the Law on Public Broadcasting System of Bosnia and Herzegovina „perfidiously" regulates it so that the rights are secured to everyone but, essentially, the said Law does not stipulate any mechanism for securing these rights. In addition, it is underlined that particular attention should be paid to the applicant's allegations stated at the public hearing, according to which there are public broadcasting services in Bosnia and Herzegovina which produce programmes called „Let's speak Serbian" or „Let's speak Bosnian" but there is no such programme called „Let's speak Croatian".

61. As to the European Charter, it is emphasized that although it has not yet been ratified, in essence, there is no obstacle that the European Charter's principles are applied in Bosnia and Herzegovina, too, and incorporated in the legislation of Bosnia and Herzegovina. It is also stated that the said international instrument is applied directly in Bosnia and Herzegovina in accordance with the Constitution of Bosnia and Herzegovina. It is especially underlined that when it comes to the application of the European Charter,

the essential issue has not been addressed, *i.e.* the context of the European Charter as an integral part of the Constitution within the context of Article II(4) of the Constitution of BiH. The view is presented that, taking into account Article II(4) of the Constitution of BiH and the European Charter, there is no room for a position that the challenged provisions are not in contravention of the European Charter. It is further stated that there is no dilemma that European Charter is incorporated in Annex I to the Constitution of Bosnia and Herzegovina. To corroborate such position, the previous decisions of the Constitutional Court are mentioned, wherein the Constitutional Court, with regard to other international documents obligatory for Bosnia and Herzegovina, referred to some of those documents without observing whether or not it was ratified in BiH. Also, it is highlighted that the fact that the purpose of the European Charter is to protect groups which, due to their status of a national minority, do not have efficient protection of their rights to language dominated by the languages of majority groups, it may be more applicable to the language of one of the constituent peoples in Bosnia and Herzegovina. Consequently, according to the view presented, the applicant's allegations as to the consistency of the challenged law with the European Charter are well-founded.

C) Adoption of the Decision

62. Following the deliberation on the merits of the request, the Constitutional Court proceeded with the decision making procedure by invoking Article 1 of the Amendments to the Rules of the Constitutional Court of Bosnia and Herzegovina which reads as follows:

In Article 40 of the Rules of the Constitutional Court of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina nos. 60/05 and 64/08), new paragraphs 3 and 4 shall be added after paragraph 2 and read as follows:

3. Exceptionally, when less than a total number of nine judges participate in a decision-making procedure at the plenary session, for the reasons referred to in Article 93 paragraph 1 or Article 99 paragraph 6 of these Rules, as well as in the event that all of the judges have not been appointed or there is a incapacity of one of the judges to exercise his/her office due to illness during a considerable long period, unless a minimum of five judges votes identically on a draft decision on the appeal/request, it shall be considered that the decision is taken dismissing the request/appeal.

4. Reasoning of the decision referred to in the previous paragraph shall contain statements on all legal positions presented at the session.

63. Having in mind that not a single decision proposal received the affirmative vote of at least five judges, pursuant to Article 40(3) of the Rules of the Constitutional Court, it

is considered that the request is dismissed. Pursuant to Article 40(4) of the Rules of the Constitutional Court, the reasoning of this decision contains all legal positions presented at the session.

VII. Conclusion

64. It is considered that the request of Mr. Ivo Miro Jović, at the time Chair of the Presidency of Bosnia and Herzegovina, for review of the constitutionality of Article 1 paragraph 1, Article 2, the last sentence, Article 6 paragraph 3, Article 10 paragraph 4, Article 12 paragraphs 1, 2 and 3, Article 13 paragraph 2 item f) and Article 18 paragraph 2 – the part referring to three public broadcasting services; Article 3, Article 7 paragraph 2, Article 8 paragraph 3, Article 9 paragraph 1, the third and fourth sentence where it is stated that there shall be two TV and two radio stations in the territory of an Entity, Article 12 paragraph 4 and Article 42, paragraphs 1, 2 and 3 and Article 19 paragraph 2 of the Law on Public Broadcasting System of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 78/05) is dismissed since not a single decision proposal received the affirmative vote of at least five judges. Given that the applicant has withdrawn the request for review of the constitutionality of Article 9, paragraph 2 and Article 26, paragraph 4 of the challenged Law, this part of the applicant's request is rejected.

65. Pursuant to Article 17(1)(3) and Article 59(2)(2) of the Rules of the Constitutional Court and Article 1 of the Decision on Amendments to the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this Decision.

66. Within the meaning of Article 41 of the Rules of the Constitutional Court, the annex of this decision shall make the Joint Separate Dissenting Opinions of the Vice-President Valerija Galić and Judge Mato Tadić.

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

Prof. Dr. Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

JOINT SEPARATE DISSENTING OPINIONS OF VICE-PRESIDENT GALIĆ AND JUDGE TADIĆ

We cannot join the opinion of the Judges of the Constitutional Court of BiH, presented in the deliberation on the merits of the request for review of constitutionality of the Law on Public Broadcasting System of BiH finding the challenged law consistent with the Constitution of BiH.

Although our differing positions have been adequately substantiated as in the part of the Decision under B) items 55 through 61, we wish to refer to our Separate Dissenting Opinion in the case no. *U 10/05* concerning the request that sought a review of regularity of procedure and establishing the existence of the constitutional grounds that, at the time, the Draft Law on the Public Broadcasting System of Bosnia and Herzegovina is considered destructive to the vital national interests of the Croat people in BiH.

Our reasons for dissenting from the majority decision of the Judges of the Constitutional Court in case no. *U 10/05*, in principle, relate to the issue of the merits in this case as well.

In brief, we find that the request of Mr. Ivo Miro Jović, is founded on the Constitution of BiH and international human rights documents, particularly the European Charter for Regional or Minority Languages (1992). Regardless of the status of this Charter from the aspect of instruments on its ratification, it is, based on the Constitution of BiH, Annex I, as one of the additional human rights agreements, applied in BiH and therefore the principles referred to in the Charter should have been taken into consideration when regulating the Public Broadcasting System. We reiterate that there is no democratic society if pluralism, tolerance and progressiveness are not reflected within the institutional system of any given society and if that system is not subject to the rule of law especially if it fails to provide the compliance with the human rights protection.

In the instant case we find that the Public Broadcasting System in BiH, regulated by the contested law, cannot be successful if the conditions are not created for allowing the Croat people in BiH, as the smallest constituent people, to express, protect and develop its identity through promoting the Croatian language within the Public Broadcasting System.

Case no. U 15/08

**DECISION
ON ADMISSIBILITY
AND MERITS**

Request of Dr Haris Silajdžić, the Chairman of the Presidency of Bosnia and Herzegovina at the time of filing the request, to establish that the Decision of the Government of Republika Srpska granting consent to the Agreement entered into between Hill & Knowlton International Belgium and the Republika Srpska and the Memorandum of Agreement entered into between Quinn Gillespie & Associates, LLC („QGA") and the Republika Srpska, no. 04/1-012-2121/07 of 21 December 2007, item 614700 of the RS Budget („the RS Budget") for 2008, which reads „The allocation of funds for the Republika Srpska's representation abroad in the amount of KM 5,000,000", which is an integral part of the Decision of the RS National Assembly adopting the RS Budget for 2008, the Memorandum of Agreement entered into between QGA and the Republika Srpska, no. 04/1-2058/07 of 3 January 2008, which was signed on 24 December 2007, and the activities of the Republika Srpska carried out in the United States of America („the USA") either directly or indirectly on the basis of the Memorandum of Agreement, through their authorised Agent QGA, and directed towards the government, institutions and officials of the USA and officials of some international organisations, were inconsistent with Articles III(1)(a) and (b), III(3)(b), V(3)(a) and (c) and V(4)(a) of the Constitution of Bosnia and Herzegovina.

Decision of 3 July 2009

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

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. David Feldman

Mr. Mato Tadić

Mr. Krstan Simić

Mr. Mirsad Ćeman

Having deliberated on the request of **Dr Haris Silajdžić,** the Chairman of the Presidency of Bosnia and Herzegovina at the time of lodging a request**,** in case no. **U 15/08**, at its session held on 3 July 2009, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Dr Haris Silajdžić, the Chairman of the Presidency of Bosnia and Herzegovina at the time of lodging a request, to establish that the Decision of the Government of Republika Srpska granting consent to the Agreement entered into between Hill & Knowlton International Belgium and the Republika Srpska and the Memorandum of Agreement entered into between Quinn Gillespie & Associates, LLC and the Republika Srpska no. 04/1-012-2121/07 of 21 December 2007 (*Official Gazette of the Republika Srpska* no. 119/07), the Conclusion of the RS Government no. 04/1-012-2669/08 of 13 November 2008, item 614700 of the RS Budget for 2008, which reads „the allocation of funds for the Republika Srpska's representation abroad" which is an integral part of the Decision

of the RS National Assembly adopting the RS Budget for 2008 (*Official Gazette of the Republika Srpska* nos. 117/07), item 614700 of the RS Budget for 2009, which reads „the allocation of funds for the Republika Srpska's representation abroad", which is an integral part of the Decision of the RS National Assembly adopting the RS Budget for 2009 (*Official Gazette of the Republika Srpska* nos. 126/08), the Memorandum of Agreement entered into between Quinn Gillespie & Associates, LLC and the Republika Srpska, no. 04/1-2058/07 of 3 January 2008, which was signed on 24 December 2007, Annex I, no. 04/1-2015/08 of 8 December 2008, to the Memorandum of Agreement entered into between Quinn Gillespie & Associates, LLC and the Republika Srpska no. 04/1-2058/07 of 24 December 2007, and the activities of the Republika Srpska carried out in the United States of America either directly or indirectly on the basis of the Memorandum of Agreement entered into between Quinn Gillespie & Associates, LLC and the Republika Srpska, no. 04/1-2058/07 of 3 January 2008, through their authorised Agent Quinn Gillespie & Associates, Quinn Gillespie & Associates LLC and directed towards the government, institutions and officials of the United States of America and officials of certain international organisations, are inconsistent with Articles III(1)(a) and (b), III(3)(b), V(3)(a) and (c) and V(4)(a) of the Constitution of Bosnia and Herzegovina, 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 15 September 2008, Dr Haris Silajdžić, the Chairman of the Presidency of Bosnia and Herzegovina at the time of lodging the request („the applicant"), lodged the request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court"), in which it was requested that the Constitutional Court of BiH establish that the Decision of the Government of Republika Srpska („the RS Government") granting consent to the Agreement entered into between Hill & Knowlton International Belgium

and the Republika Srpska and the Memorandum of Agreement entered into between Quinn Gillespie & Associates, LLC („QGA") and the Republika Srpska, no. 04/1-012-2121/07 of 21 December 2007 (*Official Gazette of the RS* no. 119/07), item 614700 of the RS Budget („the RS Budget") for 2008, which reads „The allocation of funds for the Republika Srpska's representation abroad in the amount of KM 5,000,000", which is an integral part of the Decision of the RS National Assembly adopting the RS Budget for 2008 (*Official Gazette of the Republika Srpska* nos. 117/07, „the RS National Assembly"), the Memorandum of Agreement („the Memorandum") entered into between QGA and the Republika Srpska no. 04/1-2058/07 of 3 January 2008, which was signed on 24 December 2007, and the activities of the Republika Srpska carried out in the United States of America („the USA") either directly or indirectly on the basis of the Memorandum of Agreement, through their authorised Agent QGA, and directed towards the government, institutions and officials of the USA and officials of some international organisations, are inconsistent with Articles III(1)(a) and (b), III(3)(b), V(3)(a) and (c) and V(4)(a) of the Constitution of Bosnia and Herzegovina.

2. In addition, the applicant requested that the Constitutional Court of BiH order an interim measure so as to „end a flagrant and continuous violation of the BiH Constitution by the RS Entity and to prevent further unconstitutional expenditure of taxpayers' money" pending the decision upon the request.

3. In the supplement to the request dated 27 February 2009, the appellant requested that the Constitutional Court of BiH establish that the Conclusion of the RS Government no. 04/1-012-2669/08 of 13 November 2008, item 614700 of the RS Budget for 2009, which reads „the allocation of funds for the Republika Srpska's representation abroad in the amount of KM 4,600,000", which is an integral part of the Decision of the RS National Assembly adopting the RS Budget for 2009, no. 01-2078/08 of 23 December 2008 (*Official Gazette of the Republika Srpska no. 126/08*), and Annex I, no. 04/1-2015/08 of 8 December 2008, to the Memorandum of Agreement entered into between the QGA and the Republika Srpska no. 04/1-2058/07 of 24 December 2007, were inconsistent with Articles III(1)(a) and (b), III(3)(b), V(3)(a) and (c) and V(4)(a) of the Constitution of Bosnia and Herzegovina.

4. On 24 March 2009, the applicant submitted his reply to the replies of the RS National Assembly and the RS Government. The applicant also requested in his submission that the Constitutional Court of BiH hold a public hearing in terms of Article 46 of the Rules of the Constitutional Court.

II. Procedure before the Constitutional Court

5. By its Decision on the interim measure no. *U 15/08* of 17 November 2008, the Constitutional Court dismissed the appellant's request for an interim measure as ill-founded.

6. In addition, the Constitutional Court dismissed the applicant's request for a public hearing given that the request in question does not raise issues under Article 46 of the Rules of the Constitutional Court.

7. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the RS Government and the RS National Assembly were requested on 14 October 2008 to submit their replies to the request. On 5 March 2009, the Constitutional Court of BiH requested that the RS Government and the RS National Assembly submit their replies to the supplement to the request.

8. On 30 October and 3 November 2008, the RS Government and the RS National Assembly submitted their replies to the request. Also, on 23 March 2009, the RS National Assembly submitted its reply to the supplement to the request.

9. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request and supplement thereto were forwarded to the applicant on 4 and 27 March 2009.

III. Request

a) Statements from the request

10. The applicant states that the acts and the activities of the Republika Srpska are in violation of Articles III(1)(a) and (b), III(3)(b), V(3)(a) and (c) and V(4)(a) of the Constitution of Bosnia of and Herzegovina. The applicant underlines in his request that for some time the Republika Srpska has been conducting activities, which, under the Constitution of BiH, fall under sole responsibility of Bosnia and Herzegovina and its institutions. One of these activities is related to the political lobbying of foreign governments and international organisations. In addition to the fact that these activities are mainly of a political nature, they are also directed towards officials and officers of foreign governments and international organisations who are explicitly engaged in foreign affairs or foreign trade. In the applicant's view, in the present case, „the RS Entity assumes the activities in the USA relating to foreign policy and foreign trade, and these activities are directed towards the institutions and government officials and officers of that country and certain international organisations and their officials". These activities are performed

directly through the Agent authorised by the Republika Srpska, *i.e.* the lobbying firm QGA, or indirectly in organisation of the QGA, based on the Memorandum of Agreement. The applicant highlights that the said activities are funded from the ordinary budget of the Republika Srpska in the amount of USD 122,600 per month, which is at least USD 1,471,200 per year.

11. The applicant states that the issuance of interim measures and the expedient proceedings are justified „in order to end a flagrant and continuous violation of the BiH Constitution by the RS Entity and to prevent further unconstitutional expenditure of taxpayers' money." In addition, in the applicant's opinion, these requests are justified to protect the strategic interests of Bosnia and Herzegovina to be represented „through a single voice and a single message" before all foreign governments, institutions, officials, representatives as well as international organisations and their representatives.

12. The applicant has also expressed his concerns over the possible danger that the Constitutional Court of BiH may suspend these proceedings in case that one or more challenged acts are rendered ineffective in the course of proceedings. In this regard, the applicant states that the QGA and RS have established a practice to enter into the challenged Memorandums of Agreement on an annual basis. The first agreement was concluded for the period from 3 January to 31 December 2007 and the next one was concluded for the period from 3 January to 31 December 2008. In addition, the applicant underlines that the United States Department of Justice requires all persons, companies and other entities operational in the United States of America before the U.S. authorities on behalf of foreign governments or other foreign legal and physical persons, to make semi-annual reports, as prescribed by the law, of their relationship with the foreign principal including a detailed description of all related activities. Such statements must be filed within 30 days from the date on which the relevant six-month period has expired. This implies that the statement for the period 1 January to 30 June must be filed by 30 July of that year at the latest, while the statement for the period 1 July to 31 December must be filed by 30 January of the following year at the latest. The QGA's practice has been to fully avail itself of this time limit so that all statements filed in relation to the QGA's representation of the Republika Srpska have been filed either on 30 January or 30 July. A result of these particularities is a situation that such a dispute, the outcome of which almost entirely depends on evidence offered with regard to the type and range of the concrete activities carried out by the QGA on behalf of the Republika Srpska, cannot be initiated, even theoretically, prior to 1 August of the relevant year since the decisive evidence for each year are not available prior to the mentioned date. In such a situation, it is almost impossible for the Constitutional Court to complete the proceedings until the end of that year when, under the consistent practice

established by the QGA and the Republika Srpska, their Memorandum of Agreement is rendered ineffective. Moreover, evidence on the activities carried out in the second half of the relevant year are not available until the end of January of the following year, the time when the challenged act is already rendered ineffective.

13. Next, the applicant highlights that in case that the challenged act, *i.e.* the 2008 Memorandum of Agreement between the QGA and the RS Entity, is rendered ineffectice before the Constitutional Court's final decision on this issue, the public interests require that the Constitutional Court decide on the validity of such acts and related activities. Although the Memorandums of Agreement between the QGA and the RS Entity are made for the short time periods, the previous practice shows that they are subject to renewal. Hence, given the clear public interest to obtain a final decision in the present case, the Constitutional Court should not reject the request if the challenged act is rendered ineffective while the case is pending before the Constitutional Court. On the contrary, the Constitutional Court should apply the rule, according to which the cases of such an importance, which include short-term acts, have to be thoroughly examined as these cases are „capable of repetition, yet evading review".

14. In his supplement to the request, the applicant has notified the Constitutional Court about the legal and factual changes occurring after the submission of his request. In this context, the applicant has submitted the relevant documents and information. The applicant underlines that these documents clearly specify that the Republika Srpska has continued its foreign policy and foreign trade activities in the USA, which are directed towards the institutions and government officials and officers of that country, either directly through its authorised Agent QGA, or indirectly in organisation of the QGA. In this regard, the applicant specifically refers to U.S. Department of Justice, Exibit B to Registration Statement, which specifies that, on behalf of the RS Government, the QGA shall, *inter alia*, keep the policymakers of the Government of the USA informed. The following question: „Will you engage in political activities on behalf of the foreign client", the QGA answered affirmatively and marked the appropriate box („YES"). Together with the said attachment, the QGA has submitted Annex I as an integral part of the challenged Memorandum of Agreement. The applicant holds that the challenged acts should be considered in relation to the concrete foreign policy activities of the Republika Srpska, as challenged, carried out either directly or indirectly through the authorised agent QGA. The evidence, attached to the applicant's request and supplement thereto, clearly show those activities. In the applicant's view the challenged activities, by themselves and in combination with the challenged acts, should be considered as a violation of the provisions of the Constitution of BiH referred to in the request.

b) Reply to the request

15. In its reply to the request, the RS Government states that the request was not filed in accordance with the provisions of the Constitution of BiH, more precisely, in line with Article VI(3)(a) and the provisions of Article 19 of the Rules of the Constitutional Court of BiH. It is also underlined that the applicant uses the notion „the RS Entity", which is an unconstitutional category „as the Constitution of BiH recognises only the Republika Srpska". In addition, it is mentioned that Article VI(3)(a) of the Constitution of BiH relates to the disputes arising under the Constitution of Bosnia and Herzegovina with regard to any provision of an Entity's constitution or law, while the Rules of the Constitutional Court of BiH stipulate that a request for institution of proceedings shall contain the title of the challenged act with the name and number of the official gazette in which it is published. In the view of the RS Government, it is clear that the stated provisions of the Constitution of BiH relate to a typical review of constitutionality of general legal acts of lower legal force compared to the Constitution of BiH, *i.e.* the constitutions and laws of the Entities and, more precisely, the certain provisions thereof, since the review of constitutionality cannot be requested generally in relation to a lower legal act but specifically stating the particular provision of a challenged act as being unconstitutional. Furthermore, under the Constitution of Bosnia and Herzegovina, it is not possible that the Constitutional Court of BiH, of itself, extends its competence, as the U.S. Supreme Court does, as requested by the applicant. It is also pointed to that the applicant requested the review of constitutionality of the RS Budget, *i.e.* of one item thereof, which is not the substantive law, and of the Decision adopting the budget, which is an individual legal act, and of the individual legal acts, *i.e.* the decisions rendered by the RS Government. The RS Government holds that there is no constitutional basis to challenge such legal acts, *i.e.* these acts, under the Constitution of Bosnia and Herzegovina, cannot be subject to the review of constitutionality by the Constitutional Court of BiH. As to the Decision of the RS National Assembly adopting the Budget, it is highlighted that pursuant to Article III(3)(a) of the Constitution of Bosnia and Herzegovina, the Entities are responsible for adopting and executing their budgets since they collect original revenue and the Institutions of Bosnia and Herzegovina, in this respect, have no competence apart from the funds, which are to be secured by the Entities in accordance with Articles III(1) and VIII(3) of the Constitution of BiH, for functioning of the Institutions of Bosnia and Herzegovina.

16. The RS Government holds that the request for review of the constitutionality of „the activities of the RS Entity carried out indirectly or directly" exceeds the constitutional framework since these activities, having not an outcome representing the general legal act-law, under the Constitution, cannot be subject to review by the Constitutional Court

of BiH. In the view of the RS Government, a dispute of constitutional-legal nature is a specific dispute and its nature constitutes a general place in the theory of state and law as well as in the constitutional law. Otherwise, it would be possible to challenge any activity of any authority in Bosnia and Herzegovina or in the Entities before the Constitutional Court, and the Constitutional Court of BiH, of itself, would be in the position to conduct ordinary court proceedings, *i.e.* to examine and to determine the facts, to observe the rules related to adversary proceedings, which, according to the Constitution, is not possible since it is not an ordinary court. Consequently, according to the RS Government, the said activities cannot be subject to review by the Constitutional Court of BiH. Finally, the RS Government proposes that the relevant request be rejected as inadmissible for being inconsistent with Article VI(3)(a) of the Constitution of BiH, *i.e.* Article 19 of the Rules of the Constitutional Court of BiH.

17. In its reply, the RS National Assembly reiterates the same reasons as those of the RS Government for rejecting the request. Besides, it is pointed to that the budget is not the substantive law and that the Decision adopting the budget is an individual legal act, and that the Decision of the RS Government and the Memorandum of Agreement are the individual legal acts of the executive authorities. In the opinion of the RS National Assembly there is no constitutional basis to challenge such legal acts, *i.e.* these acts as well as the contested activities, under the Constitution of BiH, cannot be subject to review by the Constitutional Court of BiH.

18. In the reply to the supplement to the request, the RS National Assembly repeats that the present case does not relate to the review of constitutionality of the acts specified in Article VI(3)(a) of the Constitution of BiH (the Entity's constitution or law) but of the individual legal acts, *i.e.* the act which is a law only in a formal sense (the Decision adopting the Budget and the Budget), that is, the act which does not contain general legal norms, and of the activities of the Republika Srpska such as phone calls, talks, *etc*. It is further stated that the practical activities in themselves cannot be the subject matter of constitutional review.

IV. Relevant Law

19. **Constitution of Bosnia and Herzegovina**, in the relevant part, reads**:**

Article III(1)(a) and (b)

I. Responsibilities of the Institutions of Bosnia and Herzegovina

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

a) Foreign policy.

b) Foreign trade policy.

Article III(3)(b)

3. Law and Responsibilities of the Entities and the Institutions

b) The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities. All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.

Article V(3)(a) and (c)

The Presidency shall have responsibility for:

a) Conducting the foreign policy of Bosnia and Herzegovina.

c) Representing Bosnia and Herzegovina in international and European organizations and institutions and seeking membership in such organizations and institutions of which Bosnia and Herzegovina is not a member.

Article V(4)(a)

The Presidency shall nominate the Chair of the Council of Ministers, who shall take office upon the approval of the House of Representatives. The Chair shall nominate a Foreign Minister, a Minister for Foreign Trade, and other Ministers as may be appropriate, who shall take office upon the approval of the House of Representatives.

a) Together the Chair and the Ministers shall constitute the Council of Ministers, with responsibility for carrying out the policies and decisions of Bosnia and Herzegovina in the fields referred to in Article III(1), (4), and (5) and reporting to the Parliamentary Assembly (including, at least annually, on expenditures by Bosnia and Herzegovina).

20. **Decision of the RS Government granting consent to the Agreement entered into between Hill & Knowlton International Belgium and the Republika Srpska and the Memorandum of Agreement entered into between Quinn Gillespie & Associates, LLC and the Republika Srpska** (*Official Gazette of the RS* no. 119/07), in the relevant part, reads:

I

The consent is hereby granted to the Agreement entered into between HILL & KNOWLTON INTERNATIONAL BELGIUM and the Republika Srpska and the Memorandum of Agreement entered into between Quinn Gillespie & Associates, LLC and the Republika Srpska.

21. **Conclusion of the RS Government no. 04/1-012-2669/08 of 13 November 2008** reads:

1. The RS Government hereby grants consent to Annex II to the Agreement entered into between HILL & KNOWLTON INTERNATIONAL BELGIUM SA, HILL & KNOWLTON, 118 Avenue de Cortenbergh, 1000 Brussels and the RS Government and Annex I to the Memorandum of Agreement entered into between Quinn Gillespie & Associates, LLC and the Republika Srpska, on the renewal thereof for another 12 months.

2. Mr. Milorad Dodik, the Prime Minister of the Republika Srpska, is hereby empowered to sign the Annex referred to in item 1 of this Conclusion.

3. This Conclusion shall enter into force on the day of its issuance.

22. **Item 614700 of the RS Budget for 2008,** which is an integral part of the RS National Assembly's Decision adopting the RS Budget for 2008 (*Official Gazette of the RS* no. 117/07), in the relevant part, reads:

I

The RS National Assembly hereby adopts the RS Budget for 2008.

II

The RS Budget for 2008 shall be an integral part of the present Decision.

Item 614700 of the RS Budget for 2008

Allocation of funds designated for representation of the RS abroad in the amount of KM 5,000,000.

23. **Item 614700 of the RS Budget for 2009,** which is an integral part of the RS National Assembly's Decision adopting the RS Budget for 2009 (*Official Gazette of the RS* no. 126/08), in the relevant part, reads:

I

The RS National Assembly hereby adopts the RS Budget for 2009.

II

The RS Budget for 2009 shall be an integral part of the present Decision.

Item 614700 of the RS Budget for 2009

Allocation of funds designated for representation of the RS abroad in the amount of KM 4,600,000.

24. **Memorandum of Agreement entered into between QGA and the Republika Srpska**, in the relevant part, reads:

1. QGA, along with our subcontractor partner the Laurus Group („Laurus") will provide government and public relations services to Client related to:

(a) Helping Client brief U.S. government policy makers in both the Bush Administration and congress on the importance of a cohesive Client entity (QGA/Laurus);

(b) Developing a comprehensive U.S. media strategy to raise the profile of Client for U.S. audiences (QGA/Laurus);

(c) Overseeing client government relations strategy for the European Union and United Nations, the Office of the High Representative in BiH, including coordinating messaging and advocacy efforts (Laurus); and

(d) Developing an overreaching Client national communications strategy, including message development, communications organization and training (QGA/Laurus)

Client acknowledges and agrees that QGA is not a law firm and will not provide legal services or advice to Client.

25. **Annex I to the Memorandum of Agreement between QGA and the Republika Srpska**, no. 04/1-2058/07 of 24 December 2007, reads:

Article 1

The parties have hereby agreed to have the Memorandum of Agreement between QGA and the Republika Srpska extended for another 12 months, i.e. that it will be valid until 31 December 2009.

Article 2

The QGA is hereby obligated to present the Government of Republika Srpska with the Framework Plan of Activities for 2009, which will be an integral part of this memorandum, no later than January 15th 2009.

V. Admissibility

26. In examining the admissibility of the request, the Constitutional Court has invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

27. Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads:

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether an Entity's decision to establish a special parallel relationship with a neighbouring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

28. The applicant seeks that the Constitutional Court establish that the Decision of the RS Government granting consent to the Agreement entered into between Hill & Knowlton International Belgium and the Republika Srpska and the Memorandum of Agreement entered into between QGA and the Republika Srpska, Conclusion of the RS Government, Memorandum of Agreement entered into between QGA and the Republika Srpska and Annex I to the Memorandum of Agreement between QGA and the Republika Srpska, item 614700 of the RS Budget for 2008, which is an integral part of the Decision of the RS National Assembly adopting the RS Budget for 2008, item 614700 of the RS Budget for 2009, which is an integral part of the Decision of the RS National Assembly adopting the RS Budget for 2009, and the activities of the Republika Srpska carried out in the USA either directly or indirectly on the basis of the Memorandum of Agreement through the authorised Agent QGA and directed towards the government, institutions and officials of the United States of America and officials of some international organisations, are inconsistent with Articles III(1)(a) and (b), III(3)(b), V(3)(a) and (c) and V(4)(a) of the Constitution of Bosnia and Herzegovina.

29. In considering the admissibility of the request in question, the Constitutional Court of BiH underlines that according to the provision of Article VI(3)(a) of the Constitution of BiH, the Constitutional Court of BiH shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between Bosnia and Herzegovina and an Entity. The Constitutional Court holds that the present case relates to a dispute between Bosnia and Herzegovina and the Entity of Republika Srpska in respect of division of competencies arising from Article III(1)(a) and (b) of the Constitution of Bosnia and Herzegovina, and it raises the issues under Articles III(3)(b), V(3)(a) and (c) and V(4)(a) of the Constitution of Bosnia and Herzegovina. Accordingly, pursuant to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court of BiH has exclusive competence to decide on the relevant dispute.

30. Furthermore, the relevant request for review of the constitutionality was submitted by the Chairman of the Presidency of Bosnia and Herzegovina at the time of filing a request. This means that the request was filed by an authorised person referred to in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

31. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of the Constitutional Court, the Constitutional Court has established that the request meets the admissibility criteria since it is filed by an authorised person and there are no formal reasons under Article 17(1) of the Rules of Constitutional Court that would render the request inadmissible.

VI. Merits

32. The applicant states that the activities of the Republika Srpska carried out in the USA either directly or indirectly on the basis of the Memorandum of Agreement through their authorised Agent QGA, and directed towards the government, institutions and officials of the USA and officials of certain international organisations are inconsistent with the provisions of Articles III(1)(a) and (b), III(3)(b), V(3)(a) and (c) and V(4)(a) of the Constitution of Bosnia and Herzegovina.

33. In examining the allegations stated in the request, the Constitutional Court has invoked Article III of the Constitution of BiH, which governs the issue of responsibilities and relationships between the Institutions of Bosnia and Herzegovina and its Entities. The responsibilities of Bosnia and Herzegovina are specified in paragraph 1 of this Article and those include, *inter alia*, foreign policy and foreign trade policy. In addition, Article V(3)(a) and (c) stipulates the responsibilities of the Presidency of Bosnia and Herzegovina for conducting the foreign policy of Bosnia and Herzegovina, representing Bosnia and

Herzegovina in international and European organizations and institutions, and seeking membership in such organizations and institutions of which Bosnia and Herzegovina is not a member. Article V(4)(a) prescribes the procedure for appointment of the Chairman of the Council of Ministers and Ministers of Foreign Affairs and Foreign Trade, *i.e.* their responsibility for carrying out the policies and decisions of Bosnia and Herzegovina in the fields referred to in Article III(1), (4), and (5) of the Constitution of BiH.

34. The quoted constitutional provisions clearly specify that Bosnia and Herzegovina and its institutions have the responsibility for foreign policy and policies in other fields falling within the sole jurisdiction of Bosnia and Herzegovina.

35. The Constitutional Court holds it unnecessary to define the Bosnia and Herzegovina's foreign policy framework but it needs to underline the undisputed fact that foreign policy and foreign trade policy are the sole responsibility of Bosnia and Herzegovina, as stipulated in Article III(1)(a) and (b) of the Constitution of BiH. Also, the Constitutional Court of BiH recalls that the Entities have a constitutional basis for adopting their budgets, which determine a financial framework for revenue and expenditure. In the present case, the adoption of such a budget whereby the funds are allocated, *inter alia*, for the Republika Srpska's representation abroad is not *per se* inconsistent with the Constitution of Bosnia and Herzegovina as it does not constitute a takeover of or interference with foreign policy and foreign trade policy of Bosnia and Herzegovina. However, the Constitutional Court of BiH considers that the issue of compliance with the constitutional division of responsibilities between Bosnia and Herzegovina and the Entities may be raised in case where the activities, which are undertaken by officials of the Entities and financed from the budgets of the Entities, constitute a takeover of or interference with some of the responsibilities of Bosnia and Herzegovina. Considering the activities undertaken by the Republika Srpska in the present case, the Constitutional Court of BiH holds that it did not relate to the establishment of diplomatic relations with another country, the conclusion of an agreement with another country or international organisation, nor did the Republika Srpska, through the aforementioned activities, represented itself abroad as an independent state, which would bring into question the division of responsibilities in respect of foreign policy and foreign trade policy.

36. The Constitutional Court of BiH holds that the aforementioned activities undertaken by the Republika Srpska were aimed at lobbying abroad for the interest of the Republika Srpska as an Entity. Therefore, the Constitutional Court of BiH holds that the activities undertaken by the Republika Srpska as well as the formal acts passed by the Republika Srpska as the basis for any such activities contain nothing that relates to the sole responsibility of Bosnia and Herzegovina in the field of foreign affairs or foreign trade.

37. Accordingly, the Constitutional Court holds that the applicant's complaints alleging a violation of the provisions of Articles III(1)(a) and (b), III(3)(b), V(3)(a) and (c) and V(4)(a) of the Constitution of Bosnia and Herzegovina are ill-founded.

VII. Conclusion

38. The Constitutional Court holds that a series of formal acts and activities undertaken by one of the Entities may raise an issue of existence of a dispute between the Entity and Bosnia and Herzegovina over an issue under the Constitution of Bosnia and Herzegovina in respect of which the Constitutional Court of BiH has sole jurisdiction to decide. However, in the present case, the Constitutional Court has concluded that a series of formal acts and activities undertaken by the Republika Srpska, as referred to by the appellant, do not constitute a takeover of or interference with foreign policy or foreign trade policy and are not inconsistent with Articles III(1)(a) and (b), III(3)(b), V(3)(a) and (c) and V(4)(a) of the Constitution of Bosnia and Herzegovina.

39. Pursuant to Article 41 of the Rules of the Constitutional Court, the Separate Opinions by the Vice-President Seada Palavrić and Judge Mirsad Ćeman shall make an integral part of this Decision.

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

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

Prof. Dr. Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

SEPARATE OPINION OF VICE-PRESIDENT PALAVRIĆ

1. I fully agree with the decision of the majority in Case no. U 15/08, in the part relating to the „admissibility".

2. As to the merits, I do not agree with the majority's decision. With all due respect to my colleagues, I hold that the request is well-founded. Accordingly, in my view, there is a violation of the provisions of Articles III(1)(a) and (b), III(3)(b), V(3)(a) and (c) and V(4)(a) of the Constitution of Bosnia and Herzegovina.

3. The reasons for my position relate to the activities carried out outside Bosnia and Herzegovina, *i.e.* at the international level, by the Republika Srpska, as pointed to by the applicant.

4. Namely, it is undisputed that any administrative-territorial unit or public subject is entitled to carry out activities at the international level outside Bosnia and Herzegovina such as those involving a partnership between cities or universities, cooperation in the provision of municipal services, *etc*. Moreover, it is undisputed that it can carry out lobbying activities. However, in so doing, it must respect the exclusive right of the State of Bosnia and Herzegovina to determine, define and carry out its foreign policy (Article III(1)(a) of the Constitution of BiH), which is the responsibility of the Presidency of Bosnia and Herzegovina at the state level (Article V(3)(a) of the Constitution of BiH) and, in a certain way, the responsibility of the Council of Ministers of Bosnia and Herzegovina (Article V(4)(a) of the Constitution of BiH). This entitlement of the State, *i.e.* the obligation of the Entities to adhere to the responsibilities of the State, clearly follows not only from the provisions defining the division of responsibilities between the State of Bosnia and Herzegovina and its Entities (*inter alia*, Article III of the Constitution of BiH) but also explicitly follows from the provision of Article III(3)(b) of the Constitution of BiH. Finally, the Entities always have to bring their activities into line with the fact that they do not dispose of any type of „statehood" nor are they allocated an international legal personality by the Constitution of BiH, and they are subject to the „sovereignty" which exclusively appertains to Bosnia and Herzegovina (see *U 5/98-III*, paragraph 27 *et seq*.). This is not affected by the fact that, in addition to the State, other, lower administrative-territorial units, including the Entities, have certain rights to be present at the international level (see *U 5/98-I*, paragraph 40 *et seq*.).

5. Next, I consider that a definition of foreign policy and foreign trade policy should have been given in the decision (paragraph 35 of the decision) in order to indicate the

boundary line between the activities at the international level which may be carried out solely by the State, *i.e.* its authorised representatives and those that may be carried out by other public subjects. This may be corroborated by the fact that foreign policy, viewed as constitutional responsibility, is a complex segment of the overall responsibility of Bosnia and Herzegovina as it has the effect within Bosnia and Herzegovina as well as at the international level, both through formal acts (international agreements, making of formal statements that are internationally binding such as recognition of states, initiation of international disputes, establishment of diplomatic relations, *etc*.) and through informal activities and acts, such as negotiations, statements, interviews, *etc*. Only by a detailed interpretation of the notion „foreign policy" can one truly understand what it means „the subject-matter jurisdiction" of the State within this field, in which other subjects, including the Entities, cannot interfere with primarily due to their lack of international personality.

6. In the present case, by analysing all legal and factual activities undertaken by the Republika Srpska, which is the subject-matter of review in the present case, I am positive that there is a violation of the aforementioned provisions of the Constitution of BiH. The reason for this is not just the essence but also the form of the activities themselves.

First of all, the Republika Srpska, also by using the name of the entity, which comprises the word „republic", undertook all preparatory activities in a non-transparent manner when it comes to the State of Bosnia and Herzegovina. The same applies to the execution of the activities themselves. An objective observer could not conclude on the basis of any activity undertaken by the Republika Srpska that the Republika Srpska as an Entity belongs to the State of Bosnia and Herzegovina, which is an independent, sovereign and internationally recognised state, but one could come to a conclusion that those are the properties of the Republika Srpska although it is just one of the two Entities of the State of Bosnia and Herzegovina. This is corroborated by the documentation a) and b) attached to the applicant's request, *i.e.* the registration statements where it is written „the Republika Srpska" in the part indicating name of foreign principal. Therefore, there is no reference to Bosnia and Herzegovina nor is there anything indicating that the Republika Srpska is a part of Bosnia and Herzegovina acting in international relations and foreign policy as a province or region or administrative unit. Next, in the part indicating the foreign principal's main address it is written „the Office of the Prime Minister of the Republika Srpska, Banja Luka, Srpska", without any indication that the Republika Srpska is within Bosnia and Herzegovina and that it is one of its two Entities. In paragraph 5 of the same document, the following question „is your foreign principal any of the following…." is answered „foreign government" and, as a branch office or agency represented by the registrant, it is stated „the Office of the Prime Minister".

Each of these aforementioned assertion confirm that the Republika Srpska in the case concerned acted not as an integral part of Bosnia and Herzegovina but as an independent state conducting its foreign policy, which falls under the sole responsibility of Bosnia and Herzegovina. In the Memorandum of Agreement between QGA and the Republika Srpska, under item d), the term „national" is used, which implies „statehood". In my view, as to the states which have several levels of government, the principle of loyalty to the central level of government as well as mutual solidarity must be adhered to. However, in the present case it has not occurred nor it is occurring. For those reasons as well as because of the recent past of Bosnia and Herzegovina, I hold that the provision of Article III(1)(a) of the Constitution of BiH should not be restrictively but broadly construed in favour of the state level of government although I am aware that the trends in Europe are inclined towards the opposite direction given that the European provinces or entities do not deny their own countries as they form an integral part thereof.

7. Furthermore, when it comes to international activities, all the subjects, both State and Entities, are entitled to carry out only those activities that are assigned to them also within the State. Accordingly, an Entity is not entitled to undertake any activity outside Bosnia and Herzegovina unless authorised to carry out such an activity within Bosnia and Herzegovina. In fact, the non-transparent activities do not allow the examination as to whether this obligation has been complied with.

Finally, both the subjects selected by the Republika Srpska for international cooperation that have been lobbied in favour of the Republika Srpska and the objectives that are to be achieved (in *helping Client brief U.S. government policy makers in both the Bush Administration and Congress on the importance of a cohesive Client entity (QCA/"Laurus"); developing a comprehensive U.S. media strategy to raise the profile of Client for U.S. audiences (QCA/"Laurus"); overseeing Client government relations strategy for the European Union and United Nations, the Office of the High Representative in BiH, including coordinating messaging and advocacy efforts („Laurus"); and developing an overarching Client national communications strategy, including message development, communications organization and training (QCA/"Laurus"*) relate to the circle of partners with whom solely the State of Bosnia and Herzegovina should have relations. The reason for this is the aforementioned lack of international personality of the Republika Srpska. Therefore, the states, international organisations, *etc*. should establish their relations exclusively with the State of Bosnia and Herzegovina.

8. Lastly, I hold that all acts, irrespective of their legal or factual nature, if used in a manner to aid any unconstitutional activity (such as budget items) should also be declared unconstitutional.

SEPARATE OPINION OF JUDGE ĆEMAN

Pursuant to Article 41(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of BiH* nos. 60/05, 64/08 and 51/09), I hereby join the Separate Opinion of Seada Palavrić, the Vice-President of the Constitutional Court of BiH, which is contrary to the Decision of the Constitutional Court of Bosnia and Herzegovina on the merits in case no. U 15/08 of 3 July 2009.

Case no. U 5/09

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Ilija Filipović, at the time Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina lodged a request for review of the constitutionality of the Law on Protection of Domestic Production under the CEFTA

Decision of 25 September 2009

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) 2 and Article 61(1) and (2) and Article 63(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Mr. Miodrag Simović President

Ms. Valerija Galić Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. David Feldman

Mr. Krstan Simić

Mr. Mirsad Ćeman

Having deliberated on the request of **Mr. Ilija Filipović, the Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina,** in case no. **U 5/09**, at its session held on 25 September 2009, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

It is hereby established that the Law on the Protection of the Domestic Production under the CEFTA (*Official Gazette of Bosnia and Herzegovina* no. 49/09) is inconsistent with Article III(3)(b) of the Constitution of Bosnia and Herzegovina.

The Law on the Protection of the Domestic Production under the CEFTA (*Official Gazette of Bosnia and Herzegovina* no. 49/09) is hereby quashed in its entirety pursuant to Article 63(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The quashed Law on the Protection of the Domestic Production under the CEFTA (*Official Gazette of Bosnia and Herzegovina* no. 49/09) shall be rendered ineffective as of the day following the date of publication of this

Decision in the *Official Gazette of Bosnia and Herzegovina*, pursuant to Article 63(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The Decision of the Constitutional Court of Bosnia and Herzegovina on an interim measure no. U 5/09 of 3 July 2009 shall remain in effect until the Law on the Protection of the Domestic Production under the CEFTA (*Official Gazette of Bosnia and Herzegovina* no. 49/09) has been rendered ineffective.

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 30 June 2009, Mr. Ilija Filipović, Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the applicant") lodged a request for review of the constitutionality of the Law on Protection of Domestic Production under the CEFTA (*Official Gazette of Bosnia and Herzegovina* no. 49/09), („the challenged Law"). The applicant also requested the Constitutional Court to issue an interim measure whereby it would suspend the application of the challenged Law pending a decision on the request.

II. Procedure before the Constitutional Court

2. By its Decision no. *U 5/09* of 3 July 2009, the Constitutional Court granted the applicant's motion for interim measure and ordered the interim measure suspending the application of the challenged Law pending a decision on the request.

3. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the House of Peoples"), the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina („the House of Representatives") and Mr. Jerko Ivanković-Lijanović, the member of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina („the proponent of the challenged Law") were requested on 17 July 2009 to submit their replies to the request.

4. On 28 August 2009, the House of Representatives and the proponent of the challenged Law submitted their replies to the request. In addition to his reply to the request, the

proponent of the challenged Law attached an extensive documentation. Also, on 31 August 2009, the proponent of the challenged Law submitted the same reply and attached the same documentation. On 4 September 2009, the House of Peoples submitted its reply to the request.

5. Pursuant to Article 15(3) of the Rules of the Constitutional Court, a certain number of authorities, organizations and individuals were requested to submit their written expert opinions significant for the decision of the Constitutional Court in this case. The Constitutional Court took into considerations the submitted opinions when adopting the decision in this case.

6. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were forwarded to the applicant on 4 September 2009.

7. On 27 July 2009, the Farmers' Association of Bosnia and Herzegovina („the Farmers' Association") sent an open letter to the Constitutional Court.

8. On 23 September 2009, the Commission for Recommending Measures and Protection of the Domestic Agricultural Production within the Ministry of Foreign Trade and Economic Relations submitted the recommendation/request for annulling interim measure on suspension of application of the challenged law.

9. On 25 September 2009, the Union of Farmers' Associations of the Zapadnohercegovački (*Western-Herzegovina*) Canton submitted the open letter stating its disagreement with the positions and protests of the Farmer's Association regarding review of the constitutionality of the challenged law.

III. Request

a) Statements from the request

10. The applicant states that during the procedure for adopting the challenged Law he offered a number of arguments related to the unconstitutionality and harmful effects of certain provisions of the contested Law for the long term interest of the State of Bosnia and Herzegovina and for the consistent application of the CEFTA (the Central European Free Trade Agreement), but his arguments were not considered. In addition, the applicant states that it was the first time that the enactment of the challenged Law was opposed by the state's executive authority and the relevant international organisations and institutions. According to the applicant, given the possible consequences at national and international levels in case of the application of the challenged Law, it is possible to assume that there will be further disagreements in the future between the Parliamentary Assembly and the

Council of Ministers, since the Council of Ministers will not and cannot take over the responsibility for implementation of the Law which it did not propose and the adoption of which it opposed, and which may have serious political consequences.

11. Furthermore, the applicant alleges that the reasons and objectives of the protection of domestic production are not disputed nor is the right of every country to do so contested, but it is the manner in which it has been done and the selective approach which affects two neighboring countries members of the CEFTA and the procedure which is contrary to the concluded international agreements and possible long-term economic and political consequences, which the challenged Law might produce. In addition, the applicant alleges that „Article III(3)(b) of the Constitution of Bosnia and Herzegovina provides that 'the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities' and that 'the mutual cooperation' as well as 'the fulfillment of international obligations accepted in good faith' are the States' responsibilities, such as the CEFTA, so that, in the applicant's opinion, the challenged Law is in violation of these two principles and, thereby, in violation of the Constitution of Bosnia and Herzegovina, which is an integral part of the Dayton Peace Agreement and which is the fundamental law on which the entire legal system of Bosnia and Herzegovina rests." The applicant next mentions a definition of the principle related to the obligation of the States to mutually cooperate as formulated in the 1970 Declaration (the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations). The applicant states in his request that Article 5 of the challenged Law discriminates against the Republic of Croatia and Republic of Serbia and their goods, which practically constitutes a „customs war" introduction. The applicant next refers to the principle of fulfillment of accepted international obligations in good faith, as formulated in Article 2(2) of the Charter of the United Nations and he states that the Agreement on Amendment of and Accession to the CEFTA and Annex 1 thereto, as a ratified international agreement, enjoy supremacy over national laws. Therefore, the applicant holds that the challenged Law is in violation of the CEFTA in substantive terms, since it is contrary to Article 5 of the Annex to the CEFTA which provides that *no new customs duties on imports…shall be introduced,* and in procedural terms, because of the failure to act in accordance with the provisions of Article 23*bis* and Article 24(1), (2) and (3) of Annex 1 to the CEFTA as the proponent of the challenged Law did not have consultations. In addition, he did not try to solve any differences or to immediately inform the relevant parties and Joint Committee. It is also stated that the proponent of the challenged Law failed to establish in an exact manner that a serious disturbance had occurred in the markets.

12. The applicant furthermore states that the challenged bill was proposed to the House of Representatives by its member who is a co-owner of the „Lijanovići" Production and Trading Company from Široki Brijeg; therefore, a conflict of interest exists in respect of the proponent. In the applicant's view, the application of the challenged Law would give rise to an additional collision between the legislative and executive authorities, which, not only are not the proponent of the challenged Law but, together with the relevant Ministry, gave negative opinion on the challenged Law and consequences of its application.

13. In addition to the request, the applicant submitted an extensive documentation including the correspondence in which the national authorities and international institutions expressed their opposition and reservation over the adoption of this Law. In its opinion relating to the Draft Law dated 10 June 2008, the Council of Ministers alleges that the concluded and ratified Agreement on Amendment of and Accession to the CEFTA, as an international agreement, is of a higher rank than national laws, that this Agreement (Section C - Contingent Protection Rules) provides for the instruments for protection of domestic production in cases of excessive imports and that certain procedures are required in the event of imposition of such measure. Furthermore, the applicant alleges that Article 5 of the challenged Law proposes the violation of the CEFTA and that the proposal for the challenged law is unjustified, unfounded and in violation of the provisions of the International Agreement.

14. Furthermore, in the letter of the Head of European Commission Delegation to Bosnia and Herzegovina of 10 March 2009 addressed to the then Chair of the House of Peoples, it is emphasized that the challenged Law may be incompatible with the CEFTA as well as that it may not be in keeping with the Stabilization and Association Agreement, which underlines the importance of regional cooperation and, in Article 14, it even refers explicitly to the CEFTA as an important element. It is therefore proposed that Bosnia and Herzegovina first have a consultation with the relevant CEFTA Parties with a view to finding a mutually acceptable solution within the spirit and the letter of the CEFTA.

15. In addition, *aide-mémoire* from the Embassy of the Republic of Croatia in Bosnia and Herzegovina was submitted together with the request. Ambassador of the Republic of Croatia in Bosnia and Herzegovina presented it to the Ministry of Foreign Affairs of Bosnia and Herzegovina on 25 March 2009. On 1 April 2009, the *aide-mémoire* was submitted to the House of People. The *aide-mémorie* emphasizes that the statistics show no indicators which would indicate serious disturbance to the markets by the application of CEFTA and that this Agreement stipulates that any importing country may take appropriate bilateral safeguard measures (Article 23 and 23*bis*) against the other party to the Agreement in case of serious damaging consequences for domestic producers or in case of significant

imbalance in the economy sector pursuant to Article 24 of the Agreement. However, this procedure in the instant case was not conducted. It is further stated that by the adoption of the Draft Law, the products from the Republic of Croatia would be placed in an unequal position in the market of Bosnia and Herzegovina which is not in the spirit of the CEFTA and which would have immeasurable consequences both in terms of economy and politics, on the bilateral relations between the two countries.

16. The applicant submitted a note of the Ministry of Foreign Affairs and European Integrations of the Republic of Croatia of 5 May 2009, addressed to the Ministry of Foreign Affairs of Bosnia and Herzegovina in which it is stated that the enactment of such a protectionist and discriminatory law is an entirely unjustified move that would lead to damaging consequences not only for the bilateral relations but also for the credibility of Bosnia and Herzegovina and it will bring into question its capability to fulfill its obligations undertaken in respect of the stabilization and association process. In its note of 19 June 2009, the Ministry of Foreign Affairs and European Integration of the Republic of Croatia presented almost identical positions and the Ministry of Economy of the Republic of Croatia did so in its letter of 28 April 2009, which was sent to the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina.

17. The letter of the Ministry for Economic Development of Montenegro of 11 May 2009 attached to the request states that the enactment of the challenged law, which introduces the customs rates for more than 900 products originating from Serbia and Croatia and leaves the possibility for the same to happen with the products from other signatory states without the procedures of the CEFTA being conducted, would amount to violation of its application and result in far-reaching consequences.

b) Reply to the request

18. In its reply to the request, the House of Representatives states that the Constitutional Commission, at its 76th session held on 25 August 2009, considered the request of the Constitutional Court for observations and comments and it found that the Parliamentary Assembly of Bosnia and Herzegovina („the Parliamentary Assembly") adopted the challenged Law at the 46th session of the House of Representatives held on 18 February 2009 *i.e.* at its 31st session of the House of Peoples held on 18 June 2009. In addition, it is stated that during the discussion it was also noted that, prior to the adoption of the challenged Law, the proponent had on several occasions submitted the Law with same or similar content to go through the parliamentary procedure, but it was not adopted. Finally, it is stated that, after the discussion, the Constitutional Commission of the House of Representatives was unable to reach a unified position or majority position as regards

the request for review of the constitutionality of the Law on Protection of Domestic Production under the CEFTA.

19. The Constitutional Commission of the House of Peoples states that it considered the relevant request at its session of 1 September 2009 and that, by a vote with 4 votes „in favour" and 2 „against", the Constitutional Commission concluded that it could not support the applicant's request and that it opposed his request.

20. The proponent of the challenged Law underlines that the main goal of any State, including BiH, is to ensure economic and other prosperity of its citizens and society as a whole. The Constitution of BiH prescribes in the Preamble that the goal of BiH is „to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy". It is further emphasized that „the State enters into international and legal, economic, political and other relations for the sake of welfare of its own citizens and of the society as a whole. In that context, BiH joined the CEFTA and cannot allow now, due to the failure to enforce safeguard measures under the CEFTA, to suffer immeasurable economic damage that would affect the state and its citizens." The proponent of the challenged Law states that the House of Representatives reached a number of conclusions obliging the Council of Ministers of BiH to prepare measures for alleviating the consequences of the CEFTA. Given that the Council of Ministers of BiH had ignored and „hindered the implementation of the obligations under the CEFTA", the Parliamentary Assembly enacted the challenged Law whereby it, *inter alia*, met the obligations under the Joint Declaration, the definition of which follows after Article 52 of the CEFTA. In addition, the proponent of the challenged Law also states that the Joint Declaration „clearly shows that BiH must enact regulations governing the rules, procedures and certain technical issues in order to implement safeguard measures under Articles 21, 22 and 23 referred to in the Joint Declaration. Likewise, it is necessary to regulate procedures for the implementation of Article 23*bis*, as it was incorporated into the CEFTA at the request of BiH". Accordingly, the proponent of the challenged Law highlights that the obligation under the Joint Declaration has been met by the challenged Law. Furthermore, it is underlined that the House of Peoples temporarily suspended the procedure of enactment of the challenged Law while the Constitutional Commission of the House of Peoples was checking the conformity of the challenged Law with the Constitution and legal system in BiH and for that reason the procedure of enacting the challenged Law took longer than foreseen. Next, the proponent of the challenged Law states that already in 2005, by way of the decision of the Council of Ministers of BiH, Bosnia and Herzegovina introduced safeguard measures against the Republic of Croatia and the Republic of Serbia (*Official Gazette of BiH* no. 17/05), whereby Bosnia and Herzegovina did not suffer any political or economic damage nor did it violate the international free trade agreements.

Appropriate measures were introduced solely against these two countries, because there was no significant import from other CEFTA Parties nor was deficit recorded as regards products on which the measures are imposed in accordance with Article 23*bis* of the CEFTA and, accordingly, the provisions of the mentioned Article could not be applied to those countries. In addition, it is underlined that the Parliamentary Assembly, while enacting the challenged Law, fully complied with the Agreement and the challenged Law defines the procedures on the implementation of safeguard measures under Articles 21, 22 and 23, as well as under Article 23*bis*, used as a condition for signing the CEFTA by Bosnia and Herzegovina. According to the proponent of the challenged Law, it was established that a rather significant disturbance occurred in domestic regulatory mechanisms. One such example mentioned by the proponent of the challenged Law relates to the F BiH Budgets for 2008 and 2009 in which incentives in agriculture were reduced by 50% and amount only 3% of the budget, whereas incentives in the Republic of Croatia are much higher. Furthermore, the proponent of the challenged Law highlights that he notified the Republic of Croatia and the Republic of Serbia about serious disturbance to the domestic regulatory mechanisms and, as a consequence, serious disturbance to the market, and that he sought consultations a week before the entry into force of the challenged Law. As to the applicant's assertions according to which the principles of international law have been violated, *i.e.* the responsibilities of the States to cooperate with each other and to fulfill the international obligations they committed to in good faith, and as to the allegations that Article 5 of the challenged Law has introduced discrimination against the Republic of Croatia and the Republic of Serbia, the proponent of the challenged Law holds that the applicant disregards one of the most important principles of international law, „the fairness", as well as the fact that the mentioned law does not recognize the term of discrimination of states. The proponent of the challenged Law underlines that Article 23*bis* of the CEFTA clearly defines that measures may only relate to certain parties to the Agreement, which import products that are subject to measures, and not to all the signatories to the agreement, as BiH does not import any product whatsoever from some signatories that are subject to measures under the challenged Law; it is also undisputed that Bosnia and Herzegovina has had for a long time a great deficit in trade exchange with these two countries, which clearly shows that these two countries have a privileged position in the market. Therefore, the proponent of the challenged Law holds that Article 5 of the challenged Law „introduces measures at the time of consultations held with these two countries, which have started in accordance with Article 23*bis* of the CEFTA, and that an appropriate settlement will be reached through consultations." He also emphasizes that, contrary to the applicant's assertions, no new tariffs have been introduced; rather, in accordance with Article 23*bis* of the CEFTA, measures are being taken during consultations with the Republic of Croatia and Republic of Serbia in the form of collecting

MFN tariffs (existing tariffs) that have been in force in BiH since 2005. Next, as to the applicant's claims that the proponent of the challenged Law failed to initiate consultations or to prove that serious disturbance to the market occurred within the meaning of Articles 23*bis* and 24 of the CEFTA, the proponent of the challenged Law underlines that, prior to the entry into force of the challenged Law, he duly informed the competent bodies of the Republic of Croatia and Republic of Serbia of serious disturbance to the market or to the domestic regulatory mechanisms. He also emphasized that that he conducted discussions with the representatives of the Republic of Croatia and was awaiting for discussions on consultations with the representatives of the Republic of Serbia. The proponent of the challenged Law also states that representatives of these countries possess data on trade exchange, since they have their institutes of statistics, thus it was not necessary to provide them with such data. The proponent of the challenged Law next states that in accordance with the applicable regulations he as an authorized representative is authorized to propose laws and that the challenged Law was adopted by majority vote. Moreover, the proponent of the challenged Law highlights that the request is not based on the facts and he proposes that the Constitutional Court reject the request, quash the interim measure and allow the application of the challenged Law, in order for the consultations to carry on with the Republic of Croatia and Republic of Serbia, and in order to find an appropriate solution that will probably entail amendments to the challenged Law on the Protection of Domestic Production, including Article 5 thereof. Finally, given the importance of the challenged Law, the proponent requests that a public hearing be held in the case at hand.

21. In addition to his reply, the proponent of the challenged Law attached an extensive documentation relating to the procedure before the enactment of the challenged Law as well as the letters addressed to the relevant authorities of the Republic of Croatia and Republic of Serbia after the adoption of the challenged Law (the conclusions and opinion of both Houses of the Parliamentary Assembly of Bosnia and Herzegovina and relevant Commissions, which relate to the consideration of the draft Law; the Council of Ministers' Decision on Suspension of the Application of the Zero Tariff Rate under the Agreements on Free Trade concluded with the Republic of Croatia, the Republic of Serbia and Montenegro; Decision of the Government of the Republic of Croatia on introducing a temporary safeguard measure when importing semi-hard cheeses and cheese substitutes; the Mid-Term Strategy for the Agriculture Sector Development in the Federation of BiH, Table regarding mutual trade exchange with the Republic of Croatia and the Republic of Serbia and the Budgets of the Republic of Croatia for 2008 and 2009).

IV. Relevant Law

22. The **Constitution of Bosnia and Herzegovina**, in the relevant part, reads:

Preamble

Based *on respect for human dignity, liberty, and equality,*

Dedicated *to peace, justice, tolerance, and reconciliation,*

Convinced *that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society,*

Desiring *to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy,*

Guided *by the Purposes and Principles of the Charter of the United Nations,*

Committed *to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina in accordance with international law, […]*

Article I(2)
Democratic Principles

Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.

Article I(4)
Movement of Goods, Services, Capita, and Persons

There shall be freedom of movement throughout Bosnia and Herzegovina. Bosnia and Herzegovina and the Entities shall not impede full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. Neither Entity shall establish controls at the boundary between the Entities.

Article III(3)(b)

The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.

23. **Annex 1 to the Agreement on Amendments of and Accession to the Central European Free Trade Agreement** (*Official Gazette of Bosnia and Herzegovina* no. 9/07), as relevant, reads:

ANNEX 1

Article 1(1)
Objectives

1. The Parties shall establish a free trade area in accordance with the provisions of the present Agreement and in conformity with the relevant rules and procedures of the WTO. The free trade area shall be established in a transitional period ending at the latest on 31 December 2010.

CHAPTER I
GENERAL OBLIGATIONS APPLICABLE TO TRADE IN ALL GOODS

Article 5
Customs Duties on Imports: Standstill

No new customs duties on imports, charges having equivalent effect, and import duties of a fiscal nature shall be introduced, nor shall those already applied be increased, in trade between the Parties as from the day preceding the signature of this Agreement.

CHAPTER III
AGRICULTURAL PRODUCTS

Article 10
Customs Duties on Imports

1. Customs duties on imports, all charges having equivalent effect, and other import duties of a fiscal nature on products specified in Annex 3 to this Agreement shall be reduced or abolished according to the schedules listed in that Annex.

2. The Parties shall apply Most Favoured Nation (hereinafter referred to as „MFN") duty on imports of products listed in Annex 3 when this is lower than the preferential customs duties specified in Annex 3.

3. The Parties shall examine within the Joint Committee the possibilities of granting to each other further concessions no later than 1 May 2009.

CHAPTER V
GENERAL PROVISIONS

C. — Contingent Protection Rules

Article 23
General Safeguards

1. The Parties confirm their rights to take a safeguard measure in accordance with Article XIX of GATT and the WTO Agreement on Safeguard Measures under conditions laid down in the Joint Declaration referring to this Article.

2. Notwithstanding paragraph 1, where as a result of the obligations incurred by a Party under this Agreement any product is being imported in such increased quantities and under such conditions from a Party to this Agreement as to cause or threaten to cause:

a. serious injury to domestic producers of like or directly competitive products in the territory of the importing Party, or

b. serious disturbances in any sector of the economy which could bring about serious deterioration in the economic situation of the importing Party,

the importing Party may take appropriate bilateral safeguard measures against the other Party to this Agreement under the conditions and in accordance with the relevant procedures laid down in Article 24.

Article 23bis

Notwithstanding other provisions of this Agreement, and in particular Article 23, given the particular sensitivity of the agricultural market, if imports of products originating in one Party, which are the subject of concessions granted pursuant to Annex 3, cause serious disturbance to the markets or to their domestic regulatory mechanisms, in another Party, both Parties shall enter into consultations immediately to find an appropriate solution. Pending such solution, the Party concerned may take the appropriate measures it deems necessary.

Article 24
Conditions and Procedures for Taking Measures

1. Before initiating the procedure for the application of measures provided for in Articles 20, 21 and 23 the Parties shall endeavour to solve any differences between them through direct consultations.

2. If a Party subjects, to an administrative procedure having as its purpose the rapid provision of information on the trend of trade flows, imports of products that may give rise to a situation referred to in Article 23, it shall inform the Parties concerned.

3. Without prejudice to paragraph 7 of the present Article, a Party, which considers resorting to measures provided for in Articles 20, 21 and 23, shall promptly notify any concerned Party and the Joint Committee thereof and supply all relevant information. The Joint Committee shall examine the case without delay and may make any recommendation needed to put an end to the difficulties notified. In the absence of such recommendation within 30 calendar days of the matter being referred to the Joint Committee, or if the practice objected to is not abolished within the period fixed by the Joint Committee, and if the problem persists, the complaining Party may adopt appropriate measures necessary in order to remedy the situation.

4. Measures as provided for in Articles 21, 23 and 42 shall be restricted with regard to their extent and duration to what is strictly necessary in order to remedy the problem and shall not be in excess of the injury caused by the practice. Priority shall be given to those measures which least disturb the functioning of this Agreement.

5. Bilateral safeguard measures under Article 23, paragraph 2 shall consist of an increase in the corresponding rate of duty applicable under this Agreement. The resulting rate of duty shall not exceed the lesser of:

a. the MFN applied rate of duty in effect at the time the action was taken, or

b. the MFN applied rate of duty in effect on the day immediately preceding the date of entry into force of this Agreement.

Bilateral safeguard measures shall contain clear elements progressively leading to their elimination and shall not be taken for a period exceeding one year. They can be renewable two times at most. No measure shall be applied to the import of a product that has previously been subject to such a measure for a period of two years since the expiry of the measure.

6. Measures taken in accordance with the Articles referred to in paragraphs 4 and 5 shall be notified immediately to the other Parties and to the Joint Committee. The Joint Committee shall monitor the implementation of these measures, in particular with a view to their relaxation or abolition as soon as possible.

7. Where exceptional and critical circumstances requiring immediate action make prior examination or information, as the case may be, impossible, the Party concerned may, in the case of Article 23, paragraph 2 apply forthwith provisional measures strictly necessary to remedy the situation. Such provisional measures may only apply for at most 200 calendar days. Provisional measures shall be notified without delay and consultations between the Parties shall take place as soon as possible within the Joint Committee and in accordance with the relevant paragraphs of this Article.

CHAPTER VII
JOINT DECLARATIONS

Joint Declaration concerning the Application of WTO Rules and Procedures

To the extent that references are made in the context of this Agreement, to the rules and procedures set out in Annex 1A, Annex 1B and Annex 1C of the Marrakech Agreement establishing the World Trade Organisation, the Parties agree to apply them irrespective of whether or not they are members of WTO.

Joint Declaration on Articles 21, 22 and 23

The Parties declare that they shall not apply anti-dumping, countervailing or safeguard measures until they have issued detailed internal regulations laying down rules and procedures and determining technical issues relating to the application of such measures. The Parties shall ensure full conformity of their internal regulations with the relevant WTO provisions including Articles VI and XIX of the GATT and the Agreement on the implementation of Article VI, the Agreement on Subsidies and Countervailing Measures and the Agreement on Safeguards. After such legislation has been implemented, the Parties shall apply any anti-dumping duties, countervailing or safeguard measures in full conformity with the relevant WTO provisions.

24. The **Law on Protection of Domestic Production under the CEFTA** (*Official Gazette of Bosnia and Herzegovina* no. 49/09)

Article 1
(Subject of the Law)

This Law shall govern the manner of implementation of the Agreement on Amendment of and Accession to the Central European Free Trade Agreement and, in particular, the application of Chapter V, C.— Contingent Protection Rules, thereof.

Article 2
(Implementation)

Rules under Article 1 of the present Law and Articles 22 and 23 of the Agreement on Amendment of and Accession to the Central European Free Trade Agreement shall be applied in line with the Law on Foreign Trade Policy (Official Gazette of BiH no. 7/98), Decision on Measures for Protection of Domestic Production Against Excessive Import (Official Gazette of BiH no. 30/02) and Decision on the Procedure for and the Manner of the application of anti-dumping or compensatory duties (Official Gazette of BiH no. 77/05).

Article 3
(Applicant)

Motion initiating the implementation of the rules under Article 23bis of the Agreement on Amendment of and Accession to the Central European Free Trade Agreement shall be submitted to the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina by one or more agricultural producers of the same or similar group of products in the customs territory of Bosnia and Herzegovina.

Article 4
(Submission procedure)

Motion shall be submitted in written form for the same or similar groups of agricultural products for which it is proved that a significant trade deficit exists, due to importation of the same or similar group of agricultural products from one or more signatory countries to the Agreement on Amendment of and Accession to the Central European Free Trade Agreement.

Article 5
(Collection of full MFN rate of duty)

Customs authorities shall collect full MFN rates of duties stated in column 4 of the Customs tariff of Bosnia and Herzegovina (Official Gazette of BiH, No 91/05) on imported goods referred to in the customs tariff chapters 02, 04, 16.01, 16.02, 20 and 22, originating from the Republic of Croatia and the Republic of Serbia.

Article 6
(Coming into force)

This Law shall come into force on the eightieth day from the date on which it has been published in Official Gazette of BiH.

25. The **Vienna Convention on the Law of Treaties** of 23 March 1969 (*Official Gazette of SFRY* – International Treaties and Other Agreements no. 30/72 and *Official Gazette of R BiH* nos. 2/92 and 25/93) as relevant, reads:

OBSERVANCE OF TREATIES

Article 26
Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

V. Admissibility and Merits

26. The request for review of the constitutionality was submitted by the Chair of House of Peoples, which means that it was filed by an authorized person as set forth in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. The subject matter of the request is the review of constitutionality of the challenged Law, which was enacted by the Parliamentary Assembly of BiH. Pursuant to Article VI(3)(a) of the Constitution of BiH, the Constitutional Court is competent to decide on the review of constitutionality of the challenged Law.

27. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of Constitutional Court, the Constitutional Court establishes that the request is admissible as it has been filed by an authorized person. However, pursuant to Article 17(1) of the Rules of the Constitutional Court „the request is inadmissible in any of the following cases: the Constitutional Court is not competent to take a decision".

28. The Constitutional Court is obviously competent to review the constitutionality of a law; the question is, however, whether, in the present case, the possible inconsistency of the challenged law with the CEFTA refers to a problem of constitutionality of the law. The Constitution of BiH does not contain any explicit provision defining the rank of international treaties in domestic law or attributing jurisdiction in this field to the Constitutional Court.

29. Nevertheless, the silence concerning this question cannot be interpreted as a clear decision on the Court's lack of jurisdiction. Firstly the internationalization is one of the most characteristic general principles of this Constitution. So already the Preamble underlines that the three constituent people are *guided* by the Purposes and Principles *of the Charter of the United Nations*; *committed* to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina *in accordance with international law*; *determined* to ensure full respect for *international humanitarian law*; *inspired* by the *Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as* other human rights instruments, (...)." Furthermore, the Constitution gives direct effect to number of international treaties, especially in the field of human rights, and stipulates that the European Convention on Human Rights has „*priority over all other law*" (Article II). Thus the Constitution is itself part of an international treaty. In the case-law of the Constitutional Court, a number of international treaties are referred to when it comes to the constitutional review of laws (for instance *U 4/05, AP 143/04*, etc.).

30. Secondly, there is no constitutional provision regulating the introduction of international treaties in domestic law as condition for their applicability; in particular, the Constitution does not prescribe to „transform" international rules in domestic law through a law. If consequently international treaties on human rights have a quasi-constitutional rank, there is no indication of a simply ordinary legislative rank for the other treaties in the Constitution. On the contrary, Article III(3)(b) in which the supremacy of the Constitution is established, mentions the *general principles of international law* that *shall be an integral part of the law of Bosnia and Herzegovina and the Entities* and have to be respected by the domestic law. In this provision, the supremacy of the Constitution is closely linked either to the general principles of international law either to the competencies of the Constitutional Court, since the latter is charged with the constitutional review of the laws and more generally with upholding the Constitution (Article VI).

31. Consequently, the jurisdiction of the Constitutional Court cannot be generally excluded. The question is nonetheless whether the general principles of international law entail any indication on the relationship between domestic laws and ratified international treaties. The Constitutional Court observes that one of the fundamental principles of international law, as referred to by the applicant, is the principle of *pacta sunt servanda,* i.e. the *fulfillment in good faith of obligations under international law*. This rule coming out of customary international law is also contained in Article 26 of the Vienna Convention on the Law of Treaties. It is obviously a part of the most general principles of international law (see ICJ, case concerning the Land and Boundary between Cameroon and Nigeria, judgment of 10 October 2002, opinion of Judge Ranjeva, point 3, and opinion of Judge Koroma, point 15: *the rule of pacta sunt servanda (the sanctity of treaties), a rule which forms an integral part of international law and is as old as international law itself*. In the case at hand, it is not necessary however to answer the question whether it constitutes a *jus cogens* rule, as suggested by the applicant. The said rule stipulates that *every treaty in force is binding upon the parties to it and must be performed by them in good faith*. Pursuant to the rule of *pacta sunt servanda* which constitutes *an integral part of the law of Bosnia and Herzegovina and the Entities*, within the meaning of Article III(3)(b) of the Constitution of Bosnia and Herzegovina, the CEFTA Convention imposes obligations on Bosnia and Herzegovina on the basis of multilateral treaties entered into by SFRY and taken over by Bosnia and Herzegovina.

32. In view of the aforesaid, the Constitutional Court concludes that it is at least competent to review the laws which are adopted on the subjects having been previously covered by ratified treaties with regard to Articles VI(3)(a) and VI(3)(c). Moreover, the Constitutional Court emphasized in its Decision *U 1/98* (*Official Gazette of Bosnia and Herzegovina* no. 22/98) that the principle of effective protection of the Constitution of Bosnia and

Herzegovina by the Constitutional Court arises under Article I(2) of the Constitution of Bosnia and Herzegovina. Therefore, the Constitutional Court holds that the request is admissible.

33. Further, the Constitutional Court points out the fact that Bosnia and Herzegovina ratified the CEFTA through appropriate procedure by the decision of the Presidency and Parliamentary Assembly of BiH. Pursuant to Articles 4 and 52 of the CEFTA, the Agreement entered into force for Bosnia and Herzegovina on 22 November 2007. Article 1 of Annex 1 to the CEFTA stipulates the objective of the Agreement, which obligates *the Parties to establish a free trade area in accordance with the provisions of the Agreement and in conformity with the relevant rules and procedures of the WTO by no later than 31 December 2010.* In Chapter I, which defines general obligations applicable to trade of all goods, Article 5 governs customs duties on imports, a standstill clause, which stipulates the following: *No new customs duties on imports, charges having equivalent effect, and import duties of a fiscal nature shall be introduced, nor shall those already applied be increased, in trade between the Parties as from the day preceding the signature of this Agreement.* Furthermore, in Chapter III, which relates to agricultural products, Article 10 governs import duties and it stipulates that *customs duties on imports, all charges having equivalent effect, and other import duties of a fiscal nature on products specified in Annex 3 to this Agreement shall be reduced or abolished according to the schedules listed in that Annex* (paragraph 1).

34. In addition, Contingent Protection Rules are stipulated in Chapter C of Annex 1 to the CEFTA, so that they foresee the possibility of introducing anti-dumping measures (Article 22) and general safeguard measures (Article 23) and Article 24 stipulates the conditions and procedures for taking measures, while Article 25 regulates balance of payments difficulties. However, as to the applicant's request, the key provision is comprised in Article 23*bis* of Annex 1 to the CEFTA, which prescribes especially the procedure of appropriate measures taken by the concerned Parties: *Notwithstanding other provisions of this Agreement, and in particular Article 23, given the particular sensitivity of the agricultural market, if imports of products originating in one Party, which are the subject of concessions granted pursuant to Annex 3, cause serious disturbance to the markets or to their domestic regulatory mechanisms, in another Party, both Parties shall enter into consultations immediately to find an appropriate solution. Pending such solution, the Party concerned may take the appropriate measures it deems necessary.*

35. In view of the aforesaid, the Constitutional Court holds that, pursuant to the rule of *pacta sunt servanda*, there is an undisputable obligation of the institutions in Bosnia and Herzegovina and first of all of the legislator, to comply with the provisions of the treaties and to execute them in good faith. Consequently, there is an obligation of the institutions of Bosnia and Herzegovina to bring all laws into line with the provisions of the CEFTA.

36. The Constitutional Court concludes that obviously the challenged law does not conform with these obligations. In particular, the challenged law constitutes an unilateral measure while the CEFTA authorizes safeguard measures or protection of domestic agriculture only according to the rules and procedures of CEFTA and WTO. That means that such measures cannot directly contravene the measures regulated by the provisions of the CEFTA and WTO rules and procedures referred to in Article 1 and CEFTA Joint Declarations and that they have to be temporally limited. But, first of all, and whatever might be the content of these measures, they have to be negotiated with the other contracting parties.

37. In view of the above, the Constitutional Court holds that it is not necessary to examine the other allegations of the applicant and that the challenged Law, as a whole, is inconsistent with the provisions of the CEFTA. It concludes that the provision of Article III(3)(b) of the Constitution of Bosnia and Herzegovina has been violated by enactment of this law.

VI. Conclusion

38. There is a violation of Article III(3)(b) of the Constitution of Bosnia and Herzegovina in case where the domestic law is not in conformity with the general rule of international law *pacta sunt servanda* according to which *every treaty in force is binding upon the parties to it and must be performed by them in good faith,* as well as where it is not in conformity with the provisions of international treaty joined by Bosnia and Herzegovina.

39. Pursuant to Article 61(1) and (2) and Article 63(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of the present decision.

40. Given the present Decision, the former Decision of the Constitutional Court of Bosnia and Herzegovina on an interim measure no. *U 5/09* of 3 July 2009 shall remain in effect until the challenged Law has been rendered ineffective.

41. Within the meaning of Article 41 of the Rules of the Constitutional Court, the Annex of this decision shall make Separate Dissenting Opinion by the President Miodrag Simović and Joint Separate Dissenting Opinion by Judges David Feldman and Tudor Pantiru.

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

Prof. Dr. Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

SEPARATE DISSENTING OPINION OF JUDGE SIMOVIĆ

1. I respectfully disagree with the opinion of the majority of judges in case no. U 5/09, in the part concerning the „admissibility" for the following reasons:

2. It is correct that the Constitution of Bosnia and Herzegovina („the Constitution of BiH"), which itself has a dual legal nature (officiates both as the highest legal act of the state and as an international legal act), strongly amplifies the significance of international law in Bosnia and Herzegovina. It also ought to serve as an orientation in interpreting the constitutional text. However, none of its provisions regulate in a general manner the relationship between the domestic and international law, including the relationship between the Constitution of BiH and international law. The Constitution of BiH only defines the constitutional law status of individual international law acts but not that of the entire international (treaty) law. Due to the lack of such general provision, and regardless of the importance that international law has for the state, it has been necessary, in every individual case, to establish the nature of the legal position of any individual international law act within the legal system of Bosnia and Herzegovina. In that regard, I consider that the legal system of Bosnia and Herzegovina does not recognize a „quasi-constitutional"status of the legal act, referred to in the majority decision.

3. These conclusions, in my opinion, are also not influenced by the fact that there is no legal act in Bosnia and Herzegovina which would require the transformation of international law into domestic legal system, but only signing and ratification by the legislator – Article IV(4)(d) of the Constitution of BiH. Namely, the legal technique of introducing the international law (monism *versus* dualism) does not state *per se* the status of international law within the domestic legal system.

4. With such an approach in mind and in particular when dealing with an interpretation of the provision of Article III (3) (b) of the Constitution of BiH, I do agree with the majority decision that the international legal principles constitute a part of the Constitution of BiH, but for the following reasons. The original English and French versions of the Constitution of BiH clearly differentiate the terms „law" (in the sense of a concrete legal act) and „law" (in the sense of an entire legal system). Thus, the provisions of lines 6 or 7 of the Preamble, Article II(2) or Article III(1)(g) of the Constitution of BiH use the expression „pravo" (Engl. *law*; Fran. *droit*), while the provisions of Article V(1)(a) or Article VI(3)(c) – use the expression „zakon" (Engl. *a law*; Fran. *loi*). In the provision of Article III (3) (b) of the Constitution of BiH, the expression „the law" of Bosnia and Herzegovina is used. In the unofficial translation of the Constitution of BiH, which has been done by the Office of the High Representative for Bosnia and Herzegovina, and which is used

by the Constitutional Court of BiH in its work, the expression „pravni poredak" („legal order") is used. „The law" includes the Constitution of BiH, while „legal order" includes constitutional order. Thereby, to say that international law principles are not a part of the Constitution of BiH is insupportable.

5. Also, I do agree with the majority opinion that the principle of *pacta sunt servanda* is one of the recognized principles of the international law, which the Constitutional Court of BiH, as a part of the Constitution of BiH, must protect. However, the constitutional law position of this principle does not automatically lead to a conclusion that the entire international treaty law, which has to be entered into in accordance with the international law principle *pacta sunt servanda,* represents a constitutional law standard which, as such, the Constitutional Court of BiH is obliged to protect. Thus, neither the violation of an individual concrete international law agreement such as the Central European Free Trade Agreement (CEFTA) in this concrete case, regardless of the fact how apparent it may be, leads to an automatic violation of the principle of *pacta sunt servanda*. If interpreted in this manner, the entire international treaty law obtains a constitutional law level, which has not been the intention of the author of the Constitution.

6. We are dealing with a violation of constitutional law principle of *pacta sunt servanda* only when a state in general and not in individual or concrete cases, acts inconsistent with the postulates of this principle, i.e. interprets this principle inconsistent with the Vienna Convention on the Law of Treaties of 1969. In case of violation of concrete provisions of CEFTA and without prejudging the existence of any other manner of judicial protection on domestic level, a system on international level (Article 23 et seq. of the Agreement on Amendment of and Accession to the Central European Free Trade Agreement) is provided.

7. In the context of the very consequences of this decision, I join the Separate Dissenting Opinion of Judges David Feldman and Tudor Pantiru. In addition, I consider such interpretation inconsistent with the provisions of Article X of the Constitution of BiH. Namely, the Parliamentary Assembly of Bosnia and Herzegovina ratifies international treaties under the standard legislative procedure – Article IV(3)(c) of the Constitution of BiH. If, by ratification, such treaties also become the constitutional law standard of control (e.g.: CEFTA), then, indirectly, also the scope of the Constitution of BiH is becoming broader, without complying with the procedure contained in Article X of the Constitution of BiH.

8. In view of the above, I consider the request inadmissible in terms of Article 17(1) of the Rules of the Constitutional Court of BiH, because a concrete international treaty law is not protected nor it gains a constitutional rank through the general principle of international law of *pacta sunt servanda*, which has constitutional rank based on Article III (3) (b) of the Constitution of BiH.

JOINT SEPARATE DISSENTING OPINION OF JUDGES FELDMAN AND PANTIRU

In this case, the Constitutional Court (the Court) has held, by a majority, that the *Law on the Protection of the Domestic Production under the Central European Free Trade Agreement (CEFTA)* (*Official Gazette of Bosnia and Herzegovina* no. 49/09) (the Law), passed by the Parliamentary Assembly of Bosnia and Herzegovina (the Parliamentary Assembly), is unconstitutional because it is inconsistent with the obligations of Bosnia and Herzegovina under the CEFTA, a multilateral treaty to which Bosnia and Herzegovina is a party.

The majority in their reasons hold that there is a constitutional requirement for Laws to be consistent with the international treaty obligations of Bosnia and Herzegovina. They point to Article III.(3)(b) of the Constitution of Bosnia and Herzegovina (the Constitution), which provides in part that the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina. The principle *pacta sunt servanda* is, they say, a general principle of international law, and so forms part of the law of the state. It compels obedience to treaty obligations. This is a constitutional requirement, according to the majority, because international law and the Constitution are inextricably bound together by the origin and status of the Constitution as an international treaty (Annex 4 to the General Framework Agreement for Peace, the Dayton Agreement) and the status of various international human-rights treaties under Article II of the Constitution: see paragraph 29 of the Decision. As international law is so closely connected to the Constitution, and there is no provision in the Constitution requiring legislation before a treaty can have effect in internal law in Bosnia and Herzegovina, the majority argue that the Constitution impliedly imposes an obligation on the institutions of Bosnia and Herzegovina to comply with treaty obligations. A Law which contravenes an obligation of Bosnia and Herzegovina under a treaty is accordingly invalid: see paragraphs 30-32 of the Decision on the competence of the Court, and paragraphs 33-36 on the merits.

This implies (although the Decision does not expressly say so) that general principles of international law and, by virtue of the principle *pacta sunt servanda*, obligations of Bosnia and Herzegovina under treaties to which it is party, stand above other forms of law (including Laws passed by the Parliamentary Assembly) in the normative hierarchy of Bosnia and Herzegovina. As a result, it would follow from the Decision of the majority that a Law which is inconsistent with an obligation of Bosnia and Herzegovina under an international treaty (or, it would seem as a matter of logic, any rule of customary international law) is unconstitutional.

We are unable to accept that reasoning or that conclusion. We recognize that the case is highly controversial diplomatically, commercially, socially and economically. We do not comment on the diplomatic, commercial, social or economic merits of the challenged Law; indeed, we are not qualified to express a view on such matters. However, the decision of the majority deals with fundamentally important and novel issues concerning the nature of the Constitution, its relationship to international law, and the powers of the Parliamentary Assembly. It is in relation to those matters, rather than the validity or invalidity of this particular Law, that our disagreement relates.

The constitutional status of the principle pacta sunt servanda

Professor Sir Ian Brownlie draws attention to the difficulty of defining 'general principles of international law'. The phrase:

'…may refer to rules of customary international law, to general principles of law as in Article 38(1)(c) [of the Statute of the International Court of Justice], or to logical propositions resulting from judicial reasoning on the basis of existing pieces of international law and internal law analogies. What is clear is the inappropriateness of rigid categorization of the sources. Examples of this type of general principle are the principles of consent, reciprocity, equality of states, finality of awards and settlements, the legal validity of agreements, good faith, domestic jurisdiction, and the freedom of the seas. In many cases these principles are to be traced to state practice. However, they are primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer directly connected with state practice. In a few cases the principle concerned, though useful, is unlikely to appear in ordinary state practice.' [Professor Sir Ian Brownlie, Principles of Public International Law 6th edn. (Oxford: Oxford University Press, 2003), pp. 18-19.]

Later he writes:

'The Vienna Convention [on the Law of Treaties] prescribes a certain presumption as to the validity and continuance in force of a treaty, and such a presumption may be based upon pacta sunt servanda as a general principle of international law: a treaty in force is binding upon the parties and must be performed by them in good faith.' [Ibid., pp. 591-592 (footnotes omitted).]

We therefore accept that the principle *pacta sunt servanda* is an important principle of international law, without which the making of treaties would be undermined: see Professor Malcolm Shaw, *International Law,* 6th edn. (Cambridge: Cambridge University Press, 2008), p. 104. We accept, too, that it is a general principle of international law within the meaning of Article III(3)(b) of the Constitution.

However, this does not in itself determine the status of the principle in the normative hierarchy of Bosnia and Herzegovina established by the Constitution.

We are not persuaded by the implication from the argument of the majority that the principle, with other general principles of international law, has constitutional status equivalent to that of the express provisions of the Constitution. We consider that it forms part of the law of Bosnia and Herzegovina, but ranks below the Constitution and is at most equal to the status of Laws. Our reasons are as follows.

First, the way in which Article II of the Constitution is drafted requires us to distinguish between the provisions of a particular treaty, the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) and other norms and forms of public international law. Article II(2) of the Constitution expressly provides that the European Convention is to apply directly in Bosnia and Herzegovina and have priority over all other law. Article III(3) merely makes the general principles of international law an integral part of the law of the state. This seems to us to indicate that the general principles have a status lower than the European Convention, and equal to other law. If that is so, a Law may exclude the operation of a general principle of international law for particular purposes in the law of Bosnia and Herzegovina on the *lex posteriori* principle: a later law overrides or supersedes an earlier law of equal status.

Secondly, in view of the indeterminacy of the sources of general principles of international law, to which Professor Brownlie draws attention in the first passage quoted above, it seems to us that to allow such principles to form one of the criteria for assessing the constitutional validity of Laws would introduce undesirable uncertainty into the law of Bosnia and Herzegovina. It is true that the Constitutional Court is given express authority, by Article VI(3)(c) of the Constitution, to decide 'issues referred by any court in Bosnia and Herzegovina…concerning the existence or scope of a general rule of public international law pertinent to the court's decision'; and for the purposes of this case we are prepared to assume, without deciding, that a 'general rule of public international law' probably has the same meaning as 'general principles of public international law' mentioned in Article III.3. However, this does not authorize the Constitutional Court (much less any other court in Bosnia and Herzegovina) to hold that a Law is invalid because it is inconsistent with such a principle or rule. Allowing a court to do so would give very considerable power—arguably discretionary power—to judges to decide on the criteria for assessing the validity of laws. We consider that such a power can be conferred only by express provision in the Constitution.

This view is strengthened by a third, related, consideration. It is true, as the majority point out, that the Preamble to the Constitution states that its framers were ‘Committed to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina in accordance with international law’ (emphasis supplied). However, the Preamble also states that the framers were ‘Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a democratic society’, and Article I.2 provides in part that ‘Bosnia and Herzegovina shall be a democratic state…’ The Parliamentary Assembly is an elected and democratically accountable legislature. We consider that the democratic authority of the Parliamentary Assembly to make Laws has at least as much constitutional weight as general principles of international law.

Fourthly, whilst it is an undeniable fact that the Constitution originated in an international treaty and contains many provisions requiring adherence to various treaties in different ways, we do not consider that this requires or permits us to conclude that the Constitution as it operates in the state is so closely connected to international law that it gives a special, constitutional status to international law. We recall that, in the Court’s decision of 30th January 2009 in Case U 12/08 (Request of 68 Delegates of the National Assembly of the Republika Srpska seeking resolution of a conflict of jurisdiction between the Republika Srpska and the Federation of Bosnia and Herzegovina in relation to the enforcement of the judgment of the European Court of Human Rights in the case of *Karanović v Bosnia and Herzegovina*, Application no. 39462/03, Judgment of 20th December 2007), the Court held that it was not competent to order the enforcement by Bosnia and Herzegovina or one of the Entities of a judgment of the European Court of Human Rights in favour of the appellant which had not been implemented by the state or its Entities. The Court drew attention to the fact that the European Convention has its own enforcement mechanism, supervised by the Committee of Ministers of the Council of Europe, and decided that that provided the exclusive method for securing the enforcement of judgments of the European Court of Human Rights. In our view, the position in relation to CEFTA, which also contains provisions governing the resolution of differences between states parties (see Articles 23bis and 24 of CEFTA), is analogous.

For these reasons, we do not accept that the Constitution allows the Court to invalidate a Law of the Parliamentary Assembly by reference to general principles of international law. On the contrary, in our view the constitutional arguments, on balance, favour the contrary conclusion.

The constitutional status of particular treaty provisions

Even if we are wrong about that, we do not accept that giving constitutional status to the general principle *pacta sunt servanda* in relation to treaties has the effect of making all treaties, rather than the general principle itself, part of the law of Bosnia and Herzegovina. It seems to us that, if the framers of the Constitution had wanted to produce that effect, it would have been straightforward for them to specify it in the text of the Constitution. By specifying that certain treaties are to have particular effects in, and that general principles of international law are to be integral to the law of, Bosnia and Herzegovina and the Entities (and the Brčko District) the Constitution clearly implies that treaties which are not mentioned are not to have such effects: *expressio unius, exclusio alterius*.

The majority seeks to give all treaty provisions a status within the law of Bosnia and Herzegovina and the Entities (and the Brčko District) as an application of the principle *pacta sunt servanda*. This seems to us to be illegitimate. The argument of the majority uses the status of the general principles of international law to produce a result which is inconsistent with the express provisions of the Constitution as we have understood and interpreted them. We do not consider it to be an appropriate judicial exercise of constitutional interpretation.

The consequences of the majority's reasoning and decision

If the arguments of the majority are applied in future cases, it would have a number of consequences which we consider to be unfortunate.

First, it would allow any Law to be challenged under Article VI(3)(a) of the Constitution on the ground of inconsistency with any provision of any treaty which binds Bosnia and Herzegovina in international law. This represents a broadening of the power of the Court to review legislation beyond what might have been expected on a straightforward reading of the Constitution.

Secondly, it would involve a significant narrowing of the legislative jurisdiction of the Parliamentary Assembly of Bosnia and Herzegovina and the legislatures of the Entities and the Brčko District beyond what might have been expected on a straightforward reading of the Constitution.

Thirdly, and as a result, it would mark a small but significant shift in the constitutional balance of power away from the democratically accountable legislative bodies towards the judiciary which would be required to give internal effect to the international rule of law. This may or may not be desirable, but some people would regard it as weakening the

democratic institutions of Bosnia and Herzegovina which were not particularly powerful beforehand.

On both principled and pragmatic grounds we consider that these consequences would be likely to be undesirable in at least some cases.

Conclusion

For those reasons, we would have held that:

a) the principle *pacta sunt servanda* has no more weight in the law of Bosnia and Herzegovina, the Entities and the Brčko District than Laws duly passed by legislatures;

b) the principle *pacta sunt servanda* does not in any case entail giving provisions of treaties a status superior to that of Laws under the Constitution;

c) the challenged Law is therefore valid.

We therefore respectfully dissent.

Jurisdiction – VI(3)(b) of the Constitution of Bosnia and Herzegovina

Case no. AP 1516/06

DECISION
ON ADMISSIBILITY

The appeal of Ms. Kosana Antunović and Ms. Branka Mitermajer against the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. Rev-803/05 of 4 April 2006

Decision of 17 Septembar 2008

The Constitutional Court of Bosnia and Herzegovina sitting as a Grand Chamber composed of the following judges: Ms. Seada Palavrić, President, Mr. Miodrag Simović and Ms. Valerija Galić, Vice-Presidents, Mr. Mato Tadić and Mr. Krstan Simić, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(2) and Article 59(2)(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), having deliberated in case no. **AP 1516/06** upon the appeal of Ms. **Kosana Antunović** and Ms. **Branka Mitermajer**, at its session held on 17 September 2008, adopted the following

DECISION ON ADMISSIBILITY

The appeal lodged by Ms. Kosana Antunović and Ms. Branka Mitermajer against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. Rev-803/05 of 4 April 2006 is hereby rejected as inadmissible for being manifestly (*prima facie*) 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

1. On 26 May 2006, Ms. Kosana Antunović and Ms. Branka Mitermajer („the appellant") from Sarajevo, represented by Ms. Merdžana Škaljić, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina („the Supreme Court") no. Rev-803/05 of 4 April 2006.

2. The predecessor of the appellants, Ms. Zdravka Antunović was an occupancy right holder of an apartment located in Sarajevo, Trg međunarodnog prijateljstva 2/IX. During the war, the predecessor of the appellants vacated the apartment and had repossessed it in 2001 in accordance with Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina. After the repossession of the apartment, the predecessor of the appellants instituted a procedure for purchasing the apartment. The predecessor of the

appellants went abroad for a medical treatment but she authorized Ms. Branka Mitermajer (the power of attorney no. 452/02 of 21 January 2002 verified by the Municipal Court of Belgrade) to represent her in the procedure for purchasing the apartment in question.

3. The appellant, Ms. Branka Mitermajer signed a sales contract for purchase of the apartment with a holder of the right of disposal of the apartment, namely the Institute for Work Capacity Evaluation Sarajevo on 4 March 2002, which was followed by the contract legalization by the Public Attorney's Office of the Sarajevo Canton („the Attorney's Office") on 21 March 2002.

4. The predecessor of the appellants deceased on 24 March 2002. Based on the Ruling of the Municipal Court II Sarajevo no. O:1830/02 of 3 October 2002, the appellants were declared presumptive heirs.

5. Following the death of the predecessor of the appellants, the holder of the right of disposal of the apartment did not want to conclude the procedure for purchase of the apartment by referring to Article 9 of the Law on Sale of Apartments with Occupancy Rights („the Law on Sale of Apartments") finding that the appellants were not entitled to seek the completion of the procedure for purchase of apartment, since the predecessor of the appellants was the only holder of the occupancy right without any other member of the family household.

6. For this reason, the appellants brought an action for establishing the legal validity of the sales contract. By the first-instance judgment of the Municipal Court of Sarajevo, no. P-2452/02 of 23 April 2004, which was upheld in the judgment of the Cantonal Court of Sarajevo, no. Gž-1317/04 of 16 February 2005, the appellants' claim was dismissed. By the final decision of the Supreme Court, no. Rev-803/05 of 4 April 2006, which is the subject of the review of constitutionality by the Constitutional Court, the revision-appeal of the appellants was dismissed.

7. In the reasons for the appealed judgment, the Supreme Court noted that the contract in question was absolutely null and void within the meaning of Article 103 of the Law on Obligations, since it was inconsistent with the positive regulations. In particular, the Supreme Court explained that an international power of attorney had to be certified by the competent authority of the foreign country, and, in addition to this, legalized by putting a special seal called *apostille*. The Supreme Court dismissed as ill-founded the appellants' complaint that the legalization was not necessary, since the „legal transactions" with the then Federal Republic of Yugoslavia was established and the Attorney's Office had legalized the contract and thus ratified its lawfulness.

8. The appellants complain of the violation of 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 for the Protection of Human Rights and Fundamental Freedoms („the European Convention"). The appellants allege that the fact that the courts misapplied the substantive law amounted to the violation of this right.

In examining the admissibility of the appeal, the Constitutional Court took into account the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(2) of the Rules of the Constitutional Court.

Article VI(3)(b) of the Constitution of Bosnia and Herzegovina as relevant reads:

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.

Article 16(2) of the Rules of the Constitutional Court reads as follows:

The Constitutional Court shall reject an appeal as being manifestly (prima facie) ill-founded when it establishes that the request of the party to the proceedings is not justified or when the presented facts do not in any way justify the allegation of a violation of the constitutional rights and/or when the Constitutional Court establishes that the party to the proceedings is not a „victim" of a violation of the constitutional rights, so that the examination of the merits of the appeal is superfluous.

9. The Constitutional Court holds that the appeal is inadmissible, since it is *prima facie* ill-founded for the following reasons:

10. The present case concerns the legal validity of a sales contract within the meaning of Law on Sale of Apartments, given the fact that the sales contract was signed by a person authorized by the buyer, who had her power of attorney and which was certified by the foreign court. The appellants are not the „buyers" of the apartment in question but one of them, Ms. Branka Mitermajer is the person authorized by the buyer. In such capacity, they cannot be the protected holders of property rights within the meaning of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. However, since the „buyer" of the apartment deceased and the appellants were declared presumptive hears in accordance with a ruling of the competent court, they may claim that their 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 has been violated, provided they produce evidence showing that they have a justified property interest according to the law, i.e. property expectations safeguarded by the force of law.

11. In order for it to be so, the Constitutional Court must reach a conclusion that the sales contract was legally valid for the rights and obligations to be transferred to the appellants. In particular, the Constitutional Court, in accordance with its case-law, holds that the moment of conclusion of the contract, not the moment of filing an application with the competent subject in charge of purchase of the apartment, is decisive in the cases of purchase/privatization of the apartments in the state ownership (*AP 1129/04* of 17 January 2005, paragraph 30). If an occupancy right holder or a member of family household of the occupancy right holder does not conclude a sales contract at all or if they conclude it but in an unlawful manner, one may not consider that „the property rights and obligations" are being transferred to the heirs in case of death of the occupancy right holder or the member of his/her household. In that case, the heirs, under the law, have no justified property interest and their application is *ratione personae* incompatible with the Constitution of Bosnia and Herzegovina, i.e. the European Convention. Therefore, the Constitutional Court shall now examine whether the lower-instance courts have made arbitrary application of the positive regulations.

12. As to the legalization of the foreign public documents, the Constitutional Court notes that two regulations were applicable. On the one hand, the Hague Convention Abolishing the Requirements of Legalization for Foreign Public Documents of 5 October 1961 has been applicable from 1962 (*Official Gazette of the FNRY* no. 10/62). On the other hand, the Law on the Legalization of Public Documents in International Transactions, which has been applicable from 1973 (*Official Gazette of the SFRY* no. 6/73), requires a so called full legalization of the foreign public documents. The full legalization is a procedure implying the chain authentication of a public document in the country from which the public documents originates and chain authentication of a public document by the national public authorities. The Hague Convention Abolishing the Requirements of Legalization for Foreign Public Documents facilitates the simplified legalization so as to only require the certification through the seal called *apostille* by the competent authority of the country from which a public document originates. The Law on Legalization of the Public Documents in International Traffic applied to all those countries which were not the signatories of the Hague Convention Abolishing the Requirements of Legalization for Foreign Public Documents.

13. These regulations are still in force in accordance with Article 2 of Annex II to the Constitution of Bosnia and Herzegovina. According to Article 2(4) of the Hague Convention Abolishing the Requirements of Legalization for Foreign Public Documents is of subsidiary character, i.e. it applies only if the State did not sign, *inter alia,* inter-state agreements regulating this matter differently. Bosnia and Herzegovina did not

conclude such an agreement with the Republic of Yugoslavia until 2005 when it ratified the Agreement on the Mutual Assistance in Civil and Criminal Matters (*Official Gazette of Bosnia and Herzegovina* – International Agreements no. 11/05). Article 21 of that Agreement provides for the exemption from legalization of public documents, if a signature and official seal are put thereon. Prior to this, the Hague Convention Abolishing the Requirements of Legalization for Foreign Public Documents applied to the public documents from the Federal Republic of Yugoslavia.

14. Turning to the instant case, the sales contract was signed in 2002. Therefore, at the time of signing, the power of attorney was to fulfill the formal requirements under the Hague Convention Abolishing the Requirements of Legalization for Foreign Public Documents, which, in Article 4 paragraph 1, required an *apostille* to be placed on the document. The appellant's power of attorney did not meet this requirement. Therefore, the courts correctly established that the power of attorney given to the authorized person was „unlawful" and thereby the signature of the authorized person on the contract did not have the necessary legality so that the contract was inconsistent with the positive regulations within the meaning of Article 103 of the Law on Obligations.

15. However, the appellant holds that this formal deficiency was „legalized" by the fact that the contract was certified by the competent Cantonal Public Attorney. The Constitutional Court points to the fact that the Public Attorney's Office is a special state authority which takes measures and resorts to legal mechanisms with the aim of protecting property and property interests (Law on Attorney's Office - Revised Text: *Official Gazette of the Canton of Sarajevo* nos. 12/01, 20/02). In the instant case, this is the Cantonal Attorney's Office Sarajevo, since this case concerns the property of the Sarajevo Canton, which should be transformed into private property through the sales contract. However, the Attorney's Office does not have capacity as judicial authority to decide the legal validity but it protects the interests of a party to the proceedings and it even acts in the capacity as representative. Therefore, the fact that the Cantonal Attorney's Office approved the sales contract does not exclude the court's jurisdiction to establish whether the contract was valid in case of institution of the proceedings. In that case, the certification by the Attorney's Office may only be an indication for the court that the contract is valid and it cannot be of obligatory nature. Therefore, a final conclusion can only be given by the competent court.

16. Finally, the appellants referred to the case-law of the Constitutional Court in case no. *AP 389/04* (of 26 March 2005) considering that the legal view expressed in that decision may apply to their case. The Constitutional Court, however, holds that the instant case and case no. *AP 389/04* are significantly different matters justifying the Constitutional Court's

view to follow the case-law in case no. *AP 389/04*. In particular, case no. *AP 389/04* concerns a concluded gift agreement, thus a real property transaction, as is the case of the appellants. Furthermore, both cases concern formal deficiency in the contracts. In case no. *AP 389/04* one of the contracting parties did not legalize her signature at the competent court as required by Article 9, paragraph 2 of the Law on *Turnover of Real Properties (Official Gazette of the SR BiH nos. 38/78, 29/80, 4/89 and 22/912 and Official Gazette of the RBIH* nos. 21/92, 3/93, 17/93, 13/94, 18/94 and 33799), where in the instant case there is a deficiency in terms of valid power of attorney for signing the contract. In case no. *AP 389/04* the Constitutional Court held that this deficiency was not „fatal" for validity of the contract, since the legislator, in paragraph 4 of that Law, which was applicable at the time of conclusion of the contract (in 1982), made an exception so as to exempt the contracting parties to legalize the signature at the competent court if, *inter alia*, the contract was fulfilled either in prevailing part or completely. The court concluded that this exception could apply to this case, since its terms were completely fulfilled (paragraph 26). Therefore, the Constitutional Court, by connecting the exception referred to in Article 9, paragraph 4 of the Law on Turnover of Real Properties with Articles 70 and 103 of the Law on Obligations, held that the contract was not contrary to the positive regulations. Unlike that case, in the instant case, the authorized appellant concluded a contract in 2002, which means at the time when the Law on Turnover of Real Properties did not provide any exception relating to the power of attorney of one the contracting parties. Therefore, the Constitutional Court does not see any possibility of applying that case-law and the exceptions under Article 70 of the Law on Obligations to the contract in question.

17. Finally, the Constitutional Court concludes that the prescribed form of legalization through *apostille* is necessary to comply with the principle of state sovereignty and legal certainty, since Bosnia and Herzegovina through the *apostille* provides a guarantee from another state that the matter concerns a competent authority and original signature by a state official person, and thus protects the legal interests of other parties to the proceedings, which could be the subject of legal transactions with the holder of legalized public document. Therefore, there is a justified public interest in having such a procedure and formalities, which the Constitutional Court does not consider as an excessive burden. Finally, these requirements are prescribed by the law, i.e. relatively known international convention which is published in the official gazettes and is available to the public. The lack of awareness of these regulations inflicts damages and does not exempt anybody from the consequences thereof (*ignorantia juris non excusat, ignorantia legis neminem excusat*).

18. Taking into account the aforesaid, the Constitutional Court confirms the view of the lower-instance courts that the concluded contract is null within the meaning of Article 103 of the Law on Obligations. The legal view of the lower-instance courts was not arbitrary. Given the fact that the contract is null, it is of no legal effect and, thus, the appellants, in the capacity as presumptive heirs of the deceased person, do not have „legitimate property expectations" since the law does not guarantee it to them. Therefore, they cannot claim that their right to property within the meaning of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 o Protocol No. 1 to the European Convention has been violated

19. Taking into account the aforementioned, the provision of Article 16(2) of the Rules of the Constitutional Court, according to which the appeal shall be rejected as inadmissible if it manifestly (*prima facie*) ill-founded, the Constitutional Court has decided as stated in the enacting clause of this Decision.

20. Pursuant 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

Case no. AP 785/08

**DECISION
ON ADMISSIBILITY**

The appeal of Mr. Tomislav Martinović, Mr. Miroslav Ćorić, Mr. Dragan Brkić, Ms. Nadžida Galešić, Mr. Josip Merdžo, Mr. Srećko Glibić and Mr. Jozo Vladić against the Decision of the Court of Bosnia and Herzegovina no. X-K-07-383 of 22 January 2008

Decision of 31 January 2009

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1) and 4(14) and Article 59(2)(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05 and 64/08), in Plenary composed of the following judges: Ms. Seada Palavrić, President, Mr. David Feldman, Mr. Miodrag Simović and Ms. Valerija Galić, Vice-Presidents, Mr. Tudor Pantiru, Mr. Mato Tadić, Ms. Constance Grewe, Mr. Krstan Simić and Mirsad Ćeman, Judges, having deliberated on the appeal of Mr. **Tomislav Martinović et al.,** in case no. **AP 785/08**, at its session held on 31 January 2009, adopted the following

DECISION ON ADMISSIBILITY

The appeal lodged by Mr. Tomislav Martinović, Mr. Miroslav Ćorić, Mr. Dragan Brkić, Ms. Nadžida Galešić, Mr. Josip Merdžo, Mr. Srećko Glibić and Mr. Jozo Vladić against the Decision of the Court of Bosnia and Herzegovina, no. X-K-07-383 of 22 January 2008 is rejected as inadmissible for being premature.

Pursuant to Article 77(6) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Decision on Interim Measure no. AP 785/08 of 17 September 2008 shall be rendered ineffective.

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 Brčko District of Bosnia and Herzegovina*.

Reasoning

1. In the period from 12 to 24 March 2008, Mr. Tomislav Martinović from Biletić Polje represented by Mr. Dragan Barbarić, a lawyer practicing in Mostar, Mr. Miroslav Ćorić from Mostar represented by Davor Šilić, a lawyer practicing in Mostar, Mr. Dragan Brkić, Mr. Josip Merdžo, Mr. Srećko Glibić and Mr. Jozo Vladić, all from Mostar, represented by Mr. Zdravko Rajić, a lawyer practicing in Mostar and Ms. Nadžida Galešić from

Mostar („the appellants") lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Decision of the Court of Bosnia and Herzegovina („the Court of BiH"), no. X-K-07-383 of 22 January 2008. Appellants Miroslav Ćorić and Tomislav Martinović supplemented their appeals on 8 and 25 April 2004.

2. The appellants also submitted a request for an interim measure whereby the Constitutional Court would suspend any action of the Court of BiH envisaged under the Criminal Procedure Code of BiH pending the adoption of a final decision on the above appeals.

a) Procedure before the Constitutional Court

3. Pursuant to Article 93(1)(3) of the Rules of the Constitutional Court of BiH and on personal request by Judge Mato Tadić, the Constitutional Court took a decision that he would not participate in the work and decision-making procedure relating to this case.

4. By Decision no. AP 785/08 of 17 September 2008, the Constitutional Court granted the appellants' request for an interim measure so that the Court of BiH was ordered to suspend the proceedings and refrain from taking any actions in the case conducted upon the Indictment of the Prosecutor's Office of Bosnia and Herzegovina („the Prosecutor's Office of BiH"), no. KT-474/05 of 13 December 2007.

5. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 14 April 2008 the Constitutional Court requested the Court of BiH and the Prosecutor's Office of BiH as parties to the proceedings to submit their replies to the appeals no. AP 785/08, no. AP 849/08 and no. AP 881/08.

6. The Court of BiH submitted its reply on 25 April 2008. The Prosecutor's Office of BiH submitted its reply on 30 April 2008.

7. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeals were submitted to the appellants on 2 September 2008.

8. Taking into account that the Constitutional Court received several appeals within its jurisdiction concerning the same factual and legal basis, the Constitutional Court, in accordance with Article 31(1) of the Rules of the Constitutional Court, adopted a decision on the merger of the cases in which regard a single proceedings will be conducted and a single decision will be adopted under number AP 785/08. The following appeals have been merged: AP 785/08, AP 849/08, AP 850/08, AP 878/08, AP 880/08, AP 881/08 and

AP 882/02. In view of the aforementioned, the Constitutional Court requested no specific replies to other appeals.

b) Facts of the Case

9. By the Indictment of the Prosecutor's Office of BiH, no. KT-474/05 of 13 December 2007, which was confirmed by the Court of BiH on 18 December 2007, the appellants, together with other persons, were charged with the criminal offences of abuse of office or authority referred to in Article 383, paragraph 3 of the Criminal Code of Federation of Bosnia and Herzegovina („the Criminal Code of F BiH"), and appellants Tomislav Martinović and Srećko Glibić were additionally charged with a criminal offence of failure to report a criminal offence or perpetrator referred to in Article 345, paragraph 2 in conjunction with Article 31 of the Crimianl Code of F BiH, while the appellant Jozo Vladić was charged with a criminal offence of abuse of office or authority – accessories under Article 383, paragraph 3 in conjunction with Article 33 of the Criminal Code of F BiH.

10. The appellants filed preliminary motions challenging the Indictment and the said motions were related to the issue of formal defects in the Indictment, subject-matter jurisdiction of the Court of BiH, unlawfully obtained evidence, and the appellants also sought the separation of the proceedings. In its challenged decision no. X-K-07/393 of 22 January 2008, the Court of BiH dismissed as ill-founded all preliminary motions of the appellants and other accused persons. As to the objection to the competence, the Court of BiH expounded that it took into its consideration Article 13 of the Law on Court of BiH, whereby the subject-matter jurisdiction of the Court of BiH is prescribed over the criminal offences referred to in the Criminal Code of F BiH and other laws of Bosnia and Herzegovina. Further, the Court of BiH noted that in paragraph 2 of the mentioned provision it is stated that the Court of BiH has jurisdiction over criminal offences prescribed in the Laws of the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District of Bosnia and Herzegovina when such criminal offences: a) endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina; b) may have serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina or may have other detrimental consequences to Bosnia and Herzegovina or may cause serious economic damage or other detrimental consequences beyond the territory of an Entity or the Brčko District of Bosnia and Herzegovina.

11. Moreover, the Court of BiH explained that in the course of deciding the said matter it kept in mind Article 25, paragraph 1 of the Criminal Procedure Code of BiH which stipulates that the Court shall decide, as a rule, to conduct joint proceedings and render a

single verdict if the same person is charged with several criminal offenses, or if several persons participated in commission of the same criminal offense. In the instant case, as stated by the Court of BiH, appellants Tomislav Martinović, Srećko Glibić, Dragan Brkić, Miroslav Ćorić and two other accused persons were charged with several criminal offenses, as follows: criminal offense of abuse of office or authority under Article 383, paragraph 3 of the Criminal Code of F BiH and criminal offense of failure to report a criminal offense or a perpetrator under Article 345, paragraph 2 in conjunction with Article 31 of the F BiH. Moreover, more than one of the accused persons took part in the commission of criminal offenses referred to in other counts of the indictment. Given those facts, the Court of BiH concluded that in the instant case several criminal acts had been committed „by the top official of the Government and Cantonal Ministry of Interior who were primarily tasked with discovering criminal offenses." Further, the Court of BiH stated that the offenses were being committed in systematic manner and for a long period of time, „the extent of causing detrimental consequences beyond the boundaries of a canton and Entity, which, *inter alia*, have been reflected in the gradual loss of confidence of citizens in the governmental institutions leading to the feeling of legal uncertainty".

12. The Court of BiH also dismissed the motion relating to formal defects in the indictment by arguing that the confirmed indictment contains all the elements referred to in Article 227, paragraph 1 of the Criminal Procedure Code of BiH. Although, as stated by the Court of BiH, „the description of offences could have been more specific (…), the given description nevertheless points to legal characteristics of criminal offences the accused have been charged with." The Court further points out that for the purpose of removing the previously noticed defects, the indictment was referred back to the Prosecutor's Office to amend it, and after the indictment had been amended by the BiH Prosecutor it was confirmed. The Court of BiH found that the motion challenging the lawfulness of evidence obtained was also ill-founded stating that the accused only objected to the manner in which the Prosecutor had presented the evidence „and, in doing so, they failed to give an explanation what makes the said evidence unlawful, but they rather expressed their disagreement with the factual allegations of the indictment." The Court of BiH also recalled that expressing a disagreement with the factual substrate of the indictment is not the matter to be decided within the meaning of Article 233 of the Criminal Procedure Code of BiH and that the defense would have an opportunity to present evidence during the main trial, „and the Court will reconsider the allegations about the evidence being unlawfully obtained and if it proves to be justified, the said evidence will be put aside".

13. As to the separation of the proceedings concerning some of the accused persons, the Court of BiH concluded that this motion should be viewed in its correlation with the

conclusion of the Court where it declared that it has subject-matter jurisdiction over this criminal matter. Given the Court's conclusion in which it declared itself competent to deal with the Indictment of the Prosecutors' Office, the Court of BiH dismissed the motion filed by several accused persons, among whom there were some appellants, whereby they sought the separation of the proceedings in a way as to conduct further proceedings before the Court in Mostar, as ill-founded. The Court of BiH reasoned that most of the accused have been charged with the commission of several criminal offenses and it follows from the factual description of the indictment that several accused persons took part in the commission of those offenses. The Court of BiH notes that it is a fact that some of the accused persons, among whom were Josip Merdzo, Nadzida Galesic and Jozo Vladic who were accused for only one criminal offence each, but the Court stated that they had taken part in the commission of the said criminal offense together with other accused persons. Further, the Court of BiH notes that the Prosecutor intends to hear numerous witnesses in the proceedings and to present many pieces of real evidence and some will be presented upon all counts of indictment. Therefore, the Court of BiH considers that the separation of the proceedings in regards to some of the accused persons would jeopardize the principle of cost-effectiveness of the proceedings that the court should be cautious of *ex officio.*

a) Allegations of the appeal

14. The appellants claim that by the challenged decision of the Court of BiH their right to a fair trial has been violated which is safeguarded under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"). The appellants are of the opinion that their right to a fair trial has been violated by dismissing their motion challenging the subject-matter jurisdiction of the Court of BiH over this specific criminal matter because the Court of BiH wrongly established that there were conditions for this Court to conduct a trial in this criminal matter. Namely, the appellants claim that the Cantonal Court in Mostar („the Cantonal Court") has jurisdiction over the criminal proceedings and that the challenged decision is a result of misapplication of the law. The appellants also consider that in this manner their right to have a trial before „a tribunal established by law" is being violated since this right is prescribed under Article 6 paragraph 1 of the European Convention. In this regard, the appellants also referred to the position of the Constitutional Court taken in Case no. *AP 51/01* (previously numbered as *U 34/01*) of 22 June 2001 arguing that the appeal is admissible regardless the fact that the criminal proceedings have not been completed by adoption of a final and legally binding decision and that the guarantees envisaged under Article 6 of the European Convention are related to the whole proceedings including the investigation phase. Further, the appellants claim that

the rules set forth in the European Convention provide for the compliance with a principle of a fair and lawful criminal proceeding and they also point out that the law stipulates that a criminal sanction can only be imposed after legally conducted proceedings upon meeting legally prescribed conditions. The aforesaid is aimed at protecting a presumed perpetrator of criminal offense from arbitrariness of state bodies, as well as protecting citizens from unjustified criminal prosecution and conviction.

15. The appellants further state that there is no dispute as to establishing the jurisdiction of the Court of BiH over criminal offences prescribed in the laws of the Federation of BiH, Republika Srpska and Brčko District, but this jurisdiction may be established only under certain and strictly formal conditions prescribed by law. With the said aim the appellants refer to Article 13, paragraph 2 of the Law on Court of BiH stating that the Prosecutor's Office should have proved that by the alleged commission of criminal offences the appellants are charged with the conditions provided for under the mentioned provision have been met. The appellants state that the Court of BiH „tried to justify its subject-matter jurisdiction, but the said reasoning is „arbitrary and lack legal reasons which led the Court to issuing such a decision, and even if those reasons had been mentioned they are incomprehensible and wrong within the meaning of the legal provisions". The appellants also claim that the Prosecutor's Office tried to justify its jurisdiction by claiming that large amounts of money are involved in this case due to which those criminal offences may have serious or detrimental repercussions to the economy of Bosnia and Herzegovina or other detrimental consequences for Bosnia and Herzegovina, while the Court of BiH claims that those offences were being committed in a systematic manner and for a long period of time to the extent of causing detrimental consequences beyond the boundaries of a canton and Entity, which, *inter alia*, have been reflected in the gradual loss of confidence of citizens in the governmental institutions leading to the feeling of legal uncertainty. Accordingly, while the Prosecutor's Office, as stated by the appellants, refers to the pecuniary damage, the Court of BiH refers to non-pecuniary damage and presents in detail its opinion why they consider that „damage as a special circumstance envisaged in the provisions of Article 358, paragraph 3 and Article 383, paragraph 3 of the Criminal Code of F BiH does not exist in this case at all".

16. The appellants explained in detail their allegations about their right to a fair trial being violated due to the dismissal of the rest of their preliminary motions, the issue of formal defects in the indictment, unlawfulness of evidence and the issue of separation of the proceedings. Appellants Miroslav Ćorić and Dragan Brkić complain of the violation of the right under Article 8 of the European Convention, but they failed to explain the said allegations. In the reasoning of the request for interim measure the appellants state

that the proceedings are being conducted by the court lacking the jurisdiction and that the Indictment is represented by the Prosecutor's Office which lacks the subject-matter jurisdiction and that by continuation of the work of the bodies lack the mentioned jurisdiction an irreparable damage was caused to the appellants.

b) Reply to the appeal

17. In its reply to the appeal the Court of BiH stated that due to the status of the case, i.e. the stage of main trial, the Court is not able, for the purpose of preservation of impartiality of the court and the judges in charge, to conduct an analysis of the allegations of the appeal relating to the state of facts and assessment of evidence, which will be the subject of contradictory criminal hearing, and „which cannot be the matter to be considered by the Constitutional Court of Bosnia and Herzegovina since its appellate jurisdiction is limited to the constitutional issues." The Court of BiH states that at the hearing held on 22 April 2008, the Trial Chamber decided that the proceedings would be conducted before that court as a court which has the subject-matter jurisdiction. To be precise, the Court of BiH is of the opinion that its subject-matter jurisdiction over this criminal matter is based on the provisions of Article 13, paragraph 2 of the Law on Court of BiH and Article 23 of the Criminal Procedure Code of BiH. The Court of BiH states that all criminal offenses the appellants are charged with are prescribed in the Criminal Code of F BiH, but that the detrimental consequences of those offences go beyond the boundaries of a canton and Entity. Further, the Court BiH has taken a stand that, according to the allegations of the appeal, the issue is about the criminal offenses committed within the boundaries of the cantonal government, i.e. the area of responsibility of the Ministry of Interior and that those offences were being committed for a long period of time and the actions were being undertaken „in the most important segments of the mentioned ministry", which had an effect on the loss of confidence of the BiH citizens in the governmental institutions, i.e. the security institutions, and the Court of BiH also states that by the mentioned offenses the appellants and other accused persons had contributed to the loss of a feeling of legal security among the citizens. Therefore, the Court of BiH concluded that it has the subject-matter jurisdiction over this specific legal matter stating that it had decided on the said issue in accordance with legal provisions and therefore a conclusion cannot be made that the appellants' right to a fair trial under Article 6, paragraph 1 of the European Convention was violated by the manner in which the Court of BiH applied the Law on Court of BiH and the Criminal Procedure Code of BiH when it decided the issue of subject-matter jurisdiction. The Court further states that the application of legal provisions in the instant case has no elements from which a conclusion could be made that the law was arbitrarily applied or that the appellants were discriminated against.

18. The Court of BiH considers that the appeals are premature and that the conditions have not been met for lodging the appeal against the decision of the Court of BiH about the preliminary motions since the challenged decision is not a final decision of the court and it is not a result of the complete criminal proceedings. Namely, the preliminary motions are usually submitted against the indictment which became legally effective on the day of its confirmation, whereby the preliminary proceedings has been finalized and the case entered into a stage of regular criminal proceedings. Controlling the indictment through preliminary motions, as further stated by the Court of BiH, does not constitute a final decision on the criminal matter. This stand point is supported by the fact that the Court must be cautious of its jurisdiction throughout the whole criminal proceedings (Article 28, paragraph 1 of the Criminal Procedure Code of BiH), and that during the whole proceedings a decision may be adopted on the separation of the proceedings provided that the prescribed conditions are met (Article 26 of the Criminal Procedure Code of BiH). In support of these allegations, the Court of BiH refers to the decisions of the Constitutional Court no. *AP 307/04* of 19 April 2004 and no. *AP 431/04* of 17 May, from which it follows that the Constitutional Court took a position that the issue of compliance with the principle of a fair trial may be viewed only on the basis of the proceedings as a whole.

19. In its reply to the appeal the Prosecutor's Office stated that the Court of BiH properly established its jurisdiction over this specific criminal matter by assessing the facts and evidence in an appropriate manner. In doing so, as considered by the Prosecutor's Office, there was no misinterpretation, misapplication or disregard of any constitutional right of the appellants, neither was the law arbitrarily or discriminatorily applied. Moreover, the Prosecutor's Office considers that there were no procedural violations and it also considers that the facts were not established in a way as to constitute the violation of the Constitution of Bosnia and Herzegovina, neither was there any arbitrariness in the assessment of evidence, and the abovementioned are the requirements set forth by the Constitutional Court so that it can examine the manner in which the regular courts established the facts and assessed the evidence. In this regard, the Prosecutor's Office invokes the decisions of the Constitutional Court no. *AP 307/04* of 19 April and *AP 661/04* of 22 April 2005. The Prosecutor's Office is of the opinion that, within the meaning of Article 13, paragraph 2 of the Law on Court of BiH, the Constitutional Court of BiH is not competent to decide on the issue whether there is a jurisdiction of the Court of BiH over this legal matter. Therefore, the Prosecutor's Office of BiH refers to the decision of the Constitutional Court in Case no. *U 6/02* of 5 April 2002. The Prosecutor's Office considers that the Preliminary Hearing Judge adopted the mentioned decision in a manner prescribed under the Criminal Procedure Code of BiH and that she sufficiently explained

the reasons for which the preliminary motions had been dismissed, which undoubtedly means that there was no arbitrariness in taking the above decision.

20. Furthermore, the Prosecutor's Office points out that even though they do not want to enter into discussion about the state of facts, they consider that the Court of BiH properly concluded that there was a mutual relation between the criminal offenses referred to in Article 25 of the CPC of BiH and persons charged in the Indictment including the criminal offenses covered by the Indictment. The Court also properly concluded that there was a systematic and continuous commission of criminal offenses resulting in detrimental consequences corresponding to multimillion amounts that go beyond the boundaries of the Entity and canton. As to the allegations about irreparable damage that the appellants would sustain in case that the proceedings continues before the Court of BiH, the Prosecutor's Office states that, except for their arbitrary statements about the alleged lack of impartially of the Court of BiH and Prosecutor's Office, the appellants failed to offer the reasons for which they consider that the proceedings before the Court of BiH would be detrimental in comparison with the proceedings that would be conducted before the Cantonal Court. Therefore, the Prosecutor's Office suggests that the appeal be rejected as *prima facie* ill-founded or be rejected as inadmissible for the lack of jurisdiction of the Constitutional Court to take a decision in this matter or for being premature since the issues the appellants complain about have not been resolved by adoption of a final and legally binding decision because these issues may be decided in any stage of the proceedings, in other words by the time the main trial is completed.

21. In examining the admissibility of the appeal, the Constitutional Court invoked the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(1) and (4)(14) of the Rules of the Constitutional Court.

Article VI(3) (b) of the Constitution of Bosnia and Herzegovina reads as follows:

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.

Article 16(1) and 4(14) of the Rules of the Constitutional Court

The Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

4) an appeal shall also be inadmissible in any of the following cases:

(14) the appeal is premature;

22. According to these provisions, the appeal may be filed only against the judgment or decision in which proceedings in certain case have been already completed.

23. In the instant case, the subject of the appeal is the decision of the Court of BiH, number X-K-07/383 of 22 January 2008, whereby a decision was taken on the preliminary motions of the appellants challenging the indictment of the Prosecutor's Office of BiH, no. KT-474/05 of 13 December 2007, against which there are no other effective legal remedies available under law, but the appellants consider that by the challenged decision their right to a fair trial has been violated.

24. The Constitutional Court recalls that while the proceedings are in progress no answer could be given as to whether the appellants have or whether they will have a fair trial before the court. Pursuant to the case-law of the Constitutional Court and European Court of Human Rights, the issue of compliance with the principle of fair trial should be considered on the basis of the proceedings as a whole. Bearing in mind the complexity and multi-instance criminal proceedings, prospective failures and deficiencies arising in one stage of the proceedings may be corrected in some of the next stages of the proceedings. Hence, in general terms, it is not possible to establish whether criminal proceedings were fair until the proceedings are completed by adoption of a legally binding decision (see European Court of Human Rights, *Barbera, Messeque and Jabardo vs. Spain,* judgment of 6 December 1988, Series A, no. 146, paragraph 68 and Constitutional Court, Decision no. *U 63/01* of 26 June 2003, paragraph 18, published in the *Official Gazette of Bosnia and Herzegovina* no. 38/03).

25. As to the appellant's case, the Constitutional Court considers that the decision of the Court of BiH, which is challenged by the appeal and related to the motions concerning formal defects in the indictment, unlawfulness of evidence and separation of the proceedings is not a decision which represent a result of the entire criminal proceedings against the appellants within the meaning of finally establishing the justification of criminal accusation against them because by the challenged decision only the stated preliminary motions of the appellants were dismissed including the motions of other accused persons against the indictment of the Prosecutor's Office of BiH. Accordingly, the procedure of establishing the justification of criminal accusation against the appellants and other accused persons is in progress and it follows that the instant appeal is premature in regards to the mentioned motions of the appellants and alleged violations of their right to a fair trial.

26. As to the issue of subject-matter jurisdiction, the Constitutional Court points out that in its case no. *AP 51/01* of 22 June 2001 it took a position that an issue of the right to a fair trial can be examined in relation to issue of subject-matter jurisdiction of the court

although the criminal proceedings are not completed i.e. it is at the stage of investigation. In reasoning of its decision, the Constitutional Court refers to undisputed jurisprudence of the European Court that the fairness of the criminal proceedings can only be reviewed when the proceedings are finalized. However, the Constitutional Court also took position that „the Constitutional Court of BiH is a domestic institution of appellate jurisdiction in the view of the rights and freedoms guaranteed by the Constitution of Bosnia and Herzegovina, and in that sense, regardless of the fact that the proceedings are not finalized, it has to point out violations of the rights guaranteed by the European Convention, and the Constitution of Bosnia and Herzegovina".

27. When deciding the present appeal, the Constitutional Court certainly had in mind its position expressed in this decision, but also the fact that from adoption of this decision to today, it also, in its numerous decision it adopted since, clearly and unequivocally took a position that the rights safeguarded by the European Convention can be most effectively protected through interpretation of its provisions pursuant to superseding jurisprudence of the European Court and former European Commission for Human Rights. It is exactly for those reasons that the Constitutional Court found in this case that it is necessary to examine in this light the position from decision no. *AP 51/01* and therefore found it justified to adopt interim measure, in order to allow more detailed examination of application of Article 6 paragraph 1 of the European Convention in these cases and eventually decide on change of practice in such cases, which does not, however, prejudice the final decision of the court.

28. Following the completion of the procedure pursuant to its Rules, the Constitutional Court established that the jurisprudence of the European Court is clear and unequivocal – the „criminal charges" within the meaning of Article 6 paragraph 1 of the European Convention are not resolved by any procedural ruling which could be adopted during the criminal proceedings. Such a conclusion does not change the fact that the appeal against the ruling dismissing the motion on lack of subject-matter jurisdiction is not admissible, as this fact is not critical for deciding whether it is possible to apply Article 6 paragraph 1 of the European Convention at this stage of the proceedings. Primarily, Article 28 of the Criminal Procedure Code of BIH provides the following: „The Court shall be cautious of its jurisdiction and as soon as it becomes aware that it is not competent, it shall issue a decision that it lacks jurisdiction and once such decision has taken legal effect, it shall forward the case to the competent court (...)." This provision unambiguously relates to the obligation of the court at any stage of proceedings thus even in the appeal proceedings. Also Article 297 paragraph 1 item g of the Criminal Procedure Code of BiH provides that an essential violation of the provisions of criminal procedure occurs „if the Court

reached a verdict and was not competent, or if the Court rejected the charges improperly due to a lack of competent jurisdiction." Essentially, this implies that the appellants shall have possibility to raise the issue of subject-matter jurisdiction of the Court of BiH in the present case in possible appeal against the first instance judgment after such a judgment is adopted. On the other hand, even if they fail to do so, the appellate court would be obligated to be mindful of issue *ex officio* during the entire proceedings.

29. Taking into account the consistent case-law of the European Court and its own prevailing jurisprudence, the Constitutional Court concludes that the challenged ruling of the Court of BiH is not a decision which would in any part represent a result of the entire criminal proceedings against the appellant, within the meaning of establishing whether „criminal charges" against them are well- founded, as the challenged rulings resolved only procedural issues i.e. it was only decided whether the preliminary motions of the appellant against the indictment were well-founded including the issue of the subject matter jurisdiction. Being that the procedure for establishing whether „the criminal charges" against the appellants were well-founded within meaning of Article 6 paragraph 1 of the European Convention before the Court of BiH, it follows that the appeals are premature. The Constitutional Court will not consider the allegations of appellants Miroslav Ćorić and Dragan Brkić that Article 8 of the European Convention has been violated, since there is nothing indicating the violation of that right.

30. Having regard to Article 16(4)(14) of the Constitutional Court's Rules, according to which the appeal shall be rejected as inadmissible if it is premature, the Constitutional Court decided as set out in the enacting clause.

31. Taking into account the decision of the Constitutional Court in this case, the Decision on interim measure no. *AP 785/08* of 17 September 2008 shall be rendered ineffective.

32. Pursuant to Article 41 of the Rules of the Constitutional Court, the annex to this decisions contains Joint Separate Dissenting Opinion of the Vice-President Valerija Galić and Judge Miodrag Simović and Separate Dissenting Opinion of Judge Krstan Simić.

33. According 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

JOINT SEPARATE DISSENTING OPINION OF JUDGES GALIĆ AND SIMOVIĆ

We regret that we cannot agree with the majority opinion of the judges of the Constitutional Court of Bosnia and Herzegovina that in the instant case there has been no violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6, paragraph 1 of the European Convention. Therefore, pursuant to Article 41 of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05 and 64/08), we hereby give our joint separate dissenting opinion to the aforementioned decision for the following reasons:

I. Admissibility

(1) In the instant case, the subject of the appeal is the Decision of the Court of BiH, no. X-K-07/383 of 22 January 2008, whereby that Court decided the appellants' preliminary objections to the Indictment of the Prosecutor's Office, no. KT-474/05 of 13 December 2007, against which an appeal is not permissible. The appellants are of the opinion that this Decision is in violation of their right to a fair trial. According to the case-law of the Constitutional Court and European Court of Human Rights, the issue of respect of the principle of fairness of the trial should be considered based on the proceedings as a whole. Taking into account the complexity of the case and the fact that the proceedings were conducted at several instances, possible failures and omissions arising at one stage of the proceedings may be rectified at another stage of the proceedings. Therefore, generally, it is not possible to determine whether the criminal proceedings were fair pending a legally final and binding decision (see ECtHR, *Barbera, Massegue and Jabardo vs. Spain*, judgment of 6 December 1988, Series A no. 146, paragraph 68, and Constitutional Court, Decision *U 63/01* of 26 June 2003, paragraph 18, published in the *Official Gazette of Bosnia and Herzegovina* no. 38/03).

(2) We agree with the majority's decision of the Constitutional Court that in the instant case the ruling of the Court of BiH, which is challenged by the appeal, in the part relating to the objections relating to the formal deficiencies in the Indictment, unlawfulness of evidence and separation of the proceedings, is not a decision representing the result of the proceedings as a whole against the appellant within the meaning of the final determination of the indictment against them. The reason for this is the fact that the challenged ruling has dismissed the aforementioned preliminary objections of the appellants and other accused persons against the confirmed indictment of the Prosecutor's Office of BiH. Therefore, the proceedings of determination of well-foundedeness of the Indictment against the

appellants and other accused persons in pending so that the appeal premature insofar as the appellant's objections and possible violation of the rights to a fair trial are concerned (Article 16(4)(11) of the Rules of the Constitutional Court).

(3) Moreover, by the challenged Decision, the Court of BiH resolved a preliminary issue of subject-matter jurisdiction of that court over this case. The appellants complain that the challenged Decision implying the subject-matter jurisdiction of the Court of BiH over this case is in violation to their right to a fair trial. In this regard and taking into account the aforementioned view that the fairness of the proceedings is dealt with after the proceedings are completed by a legally binding and final decision, we consider that although it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (ECommHR, *Crociani and Others vs. Italy,* Application no. 8603/79 and Other, Decisions and Reports, no. 22, page 216). In particular, ensuring the lawfulness of the proceedings is the basic requirement without which there is no „fair trial" under Article 6, paragraph 1 of the European Convention. The guarantees of the fair trial in criminal matters under this Article began at the moment of bringing an indictment, which is a term having an autonomous meaning within the European Convention. In particular, according to the European Court of Human Rights a „charge", for the purposes of Article 6 paragraph 1 may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect (see ECtHR, *Foti and Others vs. Italy*, judgment of 10 December 1982, Series A no. 56). Furthermore, it follows from one of the recent judgments of the European Court of Human Rights (*Salduz vs. Turkey*, November 2008, paragraph 50) that Article 6, i.e. application of Article 6 of the European Convention, depending on the circumstances of the case, may be relevant before a case is sent for trial. Therefore, all guarantees of the right to a fair trial must be provided to a person against whom a „charge" has been brought, which is possible only in the lawful proceedings.

(4) Taking this into account, we are of the opinion that the issue of the subject-matter jurisdiction is an issue of ensuring a tribunal established by law in a case, i.e. this issue is an issue of lawfulness of the proceedings as a requirement for ensuring the fairness of the proceedings in general. In this regard, the Constitutional Court took the view in a previous case that the appeal is admissible with regards to the decision on the subject-matter jurisdiction, since an appeal against the decision whereby this issue is resolved is not admissible (see Decision of the Constitutional Court n*o. AP 51/01* of 22 June 2001, paragraph 14). Although paragraphs 25 to 27 of Decision no. 785/08 give the reasons for changing the view expressed in Decision no. *AP 51/01*, taking into account the aforementioned, particularly the fundamental significance of the right to a fair trial in every democratic society, our opinion is that the appeal against the challenged decision,

in the part relating to the issue of the subject-matter jurisdiction of the Court of BiH is admissible, regardless of the fact that the proceedings at the moment of filing the appeal have not been completed.

II. Merits

(5) The appellants challenge the decision claiming that the decision of the Court of BiH with regards to the jurisdiction is in violation of their 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. The appellants are of the opinion that in the instant case the Court of BiH is not a „tribunal established by law" within the meaning of Article 6 paragraph 1 of the European Convention, since it erroneously and arbitrarily interpreted the provisions of Article 13, paragraph 2 of the Law on Court of BiH and thus it established its jurisdiction to deal with this case, but the Cantonal Court of Mostar has the subject-matter jurisdiction to deal with case relating to the offence with which they are charged. Insofar as these allegations are concerned and the requirements under Article 6 paragraph 1 of the European Convention which provide that the court must be established by a court, taking as a starting point the practice of the supervisory bodies of the European Convention, this case fulfill the requirements under Article 6 paragraph 1 of the European Convention from the aspect of organizational framework of judiciary.

(6) However, the case-law of the European Court of Human Rights relating to the issue of jurisdiction in the context of the term „tribunal" set the criteria which it uses in making decisions on whether the institution in question is concerned as a „tribunal" under Article 6 paragraph 1 of the European Convention. According to these criteria, a „tribunal" is characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (see, ECtHR, *Belilos vs. Switzerland*, judgment of 29 April 1988, Series A no. 132, p. 129, paragraph). Therefore, according to the Court's case-law, a „tribunal" is characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (see also, ECtHR, *H. v. Belgium*, judgment of 30 November 1987, Series A no. 127-B, p. 34, paragraph 50). Therefore, in order to meet the requirement of „a tribunal established by law" under Article 6, paragraph 1 of the European Convention, not only must the tribunal be established by law as required by Article 6, paragraph 1 of the European Convention but also it must adjudicate within the jurisdiction prescribed by law.

(7) In the instant case, it is indisputable that the appellants are charged with the criminal offences prescribed by the Criminal Code of the Federation of Bosnia and Herzegovina,

over which the Cantonal Court of Mostar has the subject-matter jurisdiction. Furthermore, it is not disputable that Article 13, paragraph 2 of the Law on Court of Bosnia and Herzegovina provides that the Court of BiH has jurisdiction over criminal offences defined in laws of the Entities and the Brčko District, in two cases, i.e. when such criminal offences: endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina; or may have serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina or may have other detrimental consequences to Bosnia and Herzegovina or may cause serious economic damage or other detrimental consequences beyond the territory of an Entity or the Brčko District of Bosnia and Herzegovina. It follows from the aforementioned provision that in order for the Court of BiH have the subject-matter competence to decide the cases under Article 13, paragraph 2 of the Law on Court of BiH, there must be clear indications that the action of the accused persons may cause detrimental and serious consequences to the State within the meaning of the aforementioned provisions.

(8) In order to answer the question whether the requirements prescribed by the law have been fulfilled in order to take over the competence in the instant case, the Constitutional Court should assess the reasons given by the Court of BiH in this respect. Taking into account the case-law of the European Court and the case-law of the Constitutional Court, according to which it is not the courts' task to review the findings of the ordinary courts as to the facts and positive law (see, for example, ECtHR, *Pronina vs. Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01) but whether the proceedings meet the requirements under Article 6, paragraph 1 of the European Convention. One of these standards is the obligation of the court to, *inter alia*, give reasons for its decisions (see, ECtHR, *Kuznetsov et al., vs. Russia*, 11 judgment of 2007, Application no. 184/02) in the manner which would not leave the impression of arbitrariness in determination of facts and application of law.

(9) In the reasons for the challenged decision of the Court of BiH, in the part relating to the objection to the subject-matter jurisdiction of the Court of BiH, the following reason for dismissal is stated: (...) in this case several criminal offences were committed by the top officials of the Government and Cantonal MoI whose primary task was to work on discovering criminal offences". It is further stated that the offences were being committee in a systematic manner and for a long period of time, which resulted in the detrimental consequences going beyond the boundaries of the Canton and Entity. All the aforesaid had effect on the weakening of confidence of the citizens in the governmental institutions and in the feeling of legal uncertainty".

(10) In our opinion, the aforementioned reasons do not meet the standards under Article 6 paragraph 1 of the European Convention. The fact that the appellants held offices in

the Government and Ministry of „one Canton" cannot, in itself, be the reasons for taking over the competence within the Article 13, paragraph 2, item b) of the Law on Court of BiH. Quite the contrary, the appellants' status as officials can be taken into account only in relation to other objective reasons which would clearly point to the fact that the criminal offences with which these official are charged may have „serious repercussions" or „detrimental consequences to the economy of Bosnia and Herzegovina" or „serious economic damage or other detrimental consequences beyond the territory of an Entity". Moreover, in order for the reasons for such a view to meet the requirements under Article 6 paragraph 1 of the European Convention it is not enough to refer to the term „detrimental consequences" but it is necessary to objectify and concretize as much as possible.

(11) Moreover, the fact, as it is alleged by the Court of BiH, that „the offences were being committed in a systematic manner and for a long period of time, which resulted in the detrimental consequences going beyond the boundaries of the Canton and Entity, „does not contain a precise reason which could lead to the objective conclusion that the appellants' actions could cause or caused a consequence under Article 13, paragraph 2(b) of the Law on Court of BiH. Furthermore, the reasoning as such does not show what such consequences do or may entail in particular, which would justify the establishment of the subject-matter jurisdiction of the Court of BiH. In this connection, the reasoning of the Court of BiH that „such consequences have been reflected in the gradual loss of confidence of citizens in the governmental institutions leading to the feeling of legal uncertainty" is arbitrary. The confidence which the public must have in the public authorities, particularly the courts, in a democratic society is indeed important. However, there is nothing in the reasons of the Court of BiH which would objectively point to a direct relation between the possible loss of confidence of citizens in the governmental institutions and the criminal offences with which the appellants are charged, all the more so since criminal proceedings were instituted against the appellants as high officials. This, certainly, may only lead to the strengthening of the confidence in the institutions of the system and the conviction of the public that nobody shall have immunity from prosecution regardless of his/her status within the authority. Therefore, in the instant case, the fact that nobody shall have immunity from prosecution and that the proceedings are conducted before the competent court established by law in the manner prescribed by the law which must meet other requirements under Article 6 paragraph 1 of the European Convention are necessary for the confidence of the public in the authorities and the feeling of legal certainty, and not proceedings conducted by the Court of BiH.

(12) In other words, the reasons which in the instant case the Court of BiH gave for its decision that it is a court which has the subject-matter jurisdiction over the criminal

proceedings against the appellant do not meet the standards under Article 6 paragraph 1 of the European Convention. Our opinion is that the reasoning is not clear and precise so as to conclude which objective and precise reasons were taken into account by the Court of BiH in taking such decision. In that manner, the issue of respect of the principle that everyone is entitled to tried by „tribunal established by law" and thus the lawfulness of the proceedings which should be conducted against the appellants.

(13) Finally, we should point to a very important fact that a special judicial control of charges is exercised through the preliminary objections (whereby the appellants challenge the confirmation of the indictment by the Court of BiH) at the initiative of the accused person and his attorney. This is a difference in comparison to the confirmation of the indictment which is a kind of control of the facts of the indictment by the judge in charge of preliminary hearing, which is undertaken *ex officio*. The first control may be called judicial, factual or obligatory control of the indictment, and the second one indirect, facultative control or the control subject of the parties. The purpose of both controls of charges is that the accused person is not unnecessarily brought before the tribunal - if the legal requirements are not fulfilled.

It is useful to bring preliminary objections to the prosecutor before the adoption of a decision – in order to make it possible for him/her to give his/here response to the allegations of defense (which was done by the judge for preliminary hearing of the Court of BiH). In addition, the law does not prevent the judge for preliminary hearing from scheduling and holding a hearing relating to the submitted objections, all the more so if (such as in the instant case) the lawfulness of evidence or the subject-matter jurisdiction of the court is challenged. According to the rules applicable to the main hearing, at that hearing the evidence proposed by the parties and attorney (including the right of the judge for preliminary hearing to have presented certain pieces of evidence decided by him/her). The purpose of this is to fully and correctly establish the facts and take a decision on objections. In this manner, the parties and defense counsel equally participate in each stage of the criminal proceedings, whereby fair proceedings are guaranteed. Regretfully, the judge for preliminary hearing of the Court of BiH did not use such a possibility.

(14) Unlike other judges of the Constitutional Court, we conclude that by the challenged decision of the Court of BiH, in the part dealing with the jurisdiction of the Court of BiH in this criminal case, the threshold of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention has been reached and that this constituted a violation of the appellants' right to a fair trial.

SEPARATE DISSENTING OPINION OF JUDGE SIMIĆ

Taking as a starting point the fact that the challenged Decision of the Court of Bosnia and Herzegovina is not a decision which, in any part, is representative of the result of the entire criminal proceedings against the appellant, since the challenged decisions decided only procedural issues, including the issue of subject-matter jurisdiction, I have held and I still hold that the appeal is premature (inadmissible) at this stage of the proceedings.

In support of the aforementioned view I refer to the consistent case-law of the European Court that it is not possible, in principle, to establish whether criminal proceedings were fair until the proceedings are completed by the adoption of a legally binding decision. The prevailing jurisprudence of the Constitutional Court, which has a strong basis in the provisions of Articles 28 and 297, paragraph 1(g) of the Criminal Procedure Code of Bosnia and Herzegovina is orientated towards that direction.

In particular, Article 297, paragraph 1 (g) of the Criminal Procedure Code of Bosnia and Herzegovina provides that there is a violation of the provisions of criminal procedure „if the Court reached a verdict and was not competent, or if the Court rejected the charges improperly due to a lack of competent jurisdiction".

In the indictment, the Prosecutor's Office of Bosnia and Herzegovina claims as follows: „The Court of BiH and the Prosecutor's Office have jurisdiction over this matter, since large amounts of money are involved in this case. Therefore, those criminal offences may have serious or detrimental repercussions to the economy of Bosnia and Herzegovina or other detrimental consequences for Bosnia and Herzegovina, or detrimental consequences beyond the boundaries of the Entities or the District of Brčko of Bosnia and Herzegovina - Article 13 of the Law on Court of BiH."

However, this case gives rise to several important issues which I would like to mention in this opinion.

First of all, the allegations of the Prosecutor's Office of Bosnia and Herzegovina relating to the establishment of its jurisdiction over this case are arbitrary, and the legal formulations are also arbitrarily referred to, where the Prosecutor's Office fails to specify these legal provisions in relation to each accused person, which would be sufficient for establishing its jurisdiction.

However, the challenged decision of the Court of Bosnia and Herzegovina does not contain the reasons for supporting the views of the Prosecutor's Office relating to

the establishment of the subjection-matter jurisdiction over this case. Several persons filed appeals with the Constitutional Court, stating different factual description of the commission of offences and different classification of offences so that the obligation of both the Prosecutor's Office and Court of Bosnia and Herzegovina, in respect of each appellant, is to give adequate reasons for considering itself competent under Article 13, paragraph 2 of the Law on Court of Bosnia and Herzegovina, which provides that this Court will have the jurisdiction over criminal offences prescribed in the Laws of the Federation of Bosnia and Herzegovina, Republika Srpska and District Brčko of Bosnia and Herzegovina.

It appears that each appellant represents a case on its own, if it does not relate to a form of co-perpetration, that the Prosecutor's Office and the Court are obligated, while establishing its jurisdiction according to Article 13, paragraph 2 of the Law on Court of Bosnia and Herzegovina, to give arguments justifying the establishment of this jurisdiction. The courts of the Entities have jurisdiction over these criminal offences, where the jurisdiction of the Court of Bosnia and Herzegovina is an exception, and the principle of fair trial requires the Court of Bosnia and Herzegovina in such cases to make a clear distinction as to the jurisdiction of the Entity courts. It is true that the Court of Bosnia and Herzegovina has a margin of appreciation to decide it but, in principle, the margin of appreciation cannot be a basis for arbitrary application but it ranges within the norm. During the discussion on this case, one of my honorable colleagues pointed out that this was a matter of court practice. In principle, I certainly agree with that view. However, insofar as such sensitive issues are concerned, a case-law must be established in accordance with high standards relating to its control and compliance with the legal norm. Taking the aforementioned into account and with due respect, I cannot even fathom which standards were followed in establishing the subject-matter jurisdiction over the following criminal offences: criminal offence of illegal interceding, lack of commitment in working, abuse of office or official authority and criminal offence of tempering with evidence as it is stated in item 12 of the Indictment.

From the aspect of the rule of law, the principle of efficiency and economy of the proceedings also imposes the need to establish a consistent case-law on such issues because of the organization and seat of the Court of Bosnia and Herzegovina. I would like to remind you that in a well-known case dealt by the Court of BiH, 11 persons were accused, they were arrested publicly, the length of the hearing was 30 days, 15 witnesses were heard, 9 judgments of acquittal were rendered and 2 convicting judgments which have not become legally binding yet. The accused persons and witnesses from Banja Luka were coming to the Court of Bosnia and Herzegovina in Sarajevo, which illustratively points to

possible consequences from the aspect of efficiency and economy of the proceedings in the event that clear legal standards establishing the subject-matter jurisdiction of the Court of Bosnia and Herzegovina in case were in which Entity courts and those of the Brčko District of Bosnia and Herzegovina have primary jurisdiction.

In particular, from the aspect of economy and efficiency of the proceedings and the whole application of the principle of rule of law, we have to point to the consequences which may arise in the appellate proceedings if a court of appeal consequently the provision of Article 297, paragraph 1(g) of the Criminal Procedure Code of Bosnia and Herzegovina.

Secondly, from the aspect of principle of legal certainty, which is one of the fundamental human rights guaranteed by the Constitution and European Convention for the Protection of Human Rights and Fundamental Freedoms, this case has given rise to the issue of quality of law, i.e. the provision of Article 13, paragraph 2 of the Law on Court of Bosnia and Herzegovina.

The European Court of Human Rights defines the principle of legal certainty as follows: „A norm cannot be regarded as a „law" unless it is formulated with sufficient precision to enable the person to regulate his or her conduct: he or she must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (*Busuioc vs. Moldova*, judgment of 21. December 2004, paragraph 52).

I would like to remind that the issue of so-called parallel competencies is a very sensitive one even in the systems of other States, and it is present in the systems in Europe, in Spain and Switzerland.

In Spain, it is established by Amendments to Article 65(4) and 88 of the Organic Law on Judicial Power no. 6/1985 of 1 July, reading as follows:

Article 65(4): The procedure for execution of European arrest warrant and procedure for passive extradition, regardless of the place of residence or the place where a person to which the procedure relates has been arrested".

Article 88: „In the City of Madrid, there may be one or several tribunals for preliminary investigation proceedings, the jurisdiction of which covers the whole territory of Spain, which shall conduct investigation in the proceedings to be conducted before the Criminal Department of the National Court or Central Criminal Courts, is applicable, and which shall deal with the cases relating to the execution of the European arrest warrant and the procedure for passive extradition according to the prescribed requirements."

Significant difference can be made in relation of the jurisdiction of Bosnia and Herzegovina. The parallel competence is established in favor of the Supreme Court, which is a link in the judicial system of Spain with legal powers to supervise the work of the lower-instance courts. This is a situation analogous to the judicial systems of the Entities. I would like to reiterate that this is a competence appearing in the matter of passive jurisdiction, which in any system represents an obligation of the State, and this competence can in no way be compared to the manner in which the Court of Bosnia and Herzegovina has jurisdiction over the offences (falling within the competence of the courts of the Entities) prescribed by the Laws of the Entities and the Brčko District. Our judicial system also provides that the affairs relating to the extradition fall within the responsibility of Bosnia and Herzegovina, i.e. Court of Bosnia and Herzegovina.

As to the competencies of the Criminal Department of the National Court of Spain, the aforementioned Article 65 provides as follows: „A fraud or speculation on prices of items, which causes or may cause serious consequences on the safety of trade, State economy, or a damage to the inheritance in general to the persons within the territory, which falls under the competence of several courts."

However, in comparison to our jurisdiction, this provision has two particularities.

On the one hand, this relates to the criminal offences which affects the persons on the territory covered by several courts, and, on the other hand, this offence is not and offence falling under the competence of lower-instance courts. It *de facto* represents the sublimation of a legal situation which may arise in practice.

Moreover, Article 337 of the *Code Penal Suisse* (21 December 1937) provides for the federal jurisdiction over certain criminal offences which originally fall under the competence of the cantons, although provided that such criminal offences have been committed outside the country or in several cantons.

As I have already indicated, these are two country in Europe, which relate the issue of parallel competences in this manner, although the Spanish legislation regulates quite difference issues irrelevant from the aspect of our jurisdiction.

The solutions provided for by the Suisse legislation are neither adequate support to the solutions in our legislation.

The Suisse legislation establishes parallel competencies in case of commission of a criminal offence outside the country or in several countries, where a standard for our legislation is that the consequences have occurred on the territory of another Entity or the Brčko District of Bosnia and Herzegovina.

A clear distinction is made here, since the commission of criminal offences are realistic, tangible manifestations representing the basis for establishing the competence, where the consequences may be differently perceived by different institutions, persons etc.

Finally, the legal solutions in Spain and Switzerland fully meet the requirements relating to the principle of legal certainty as defined by the European Court of Human Rights, and the provision of Article 13, paragraph 2 of the Court of Bosnia and Herzegovina „does not enable the person to regulate his or her conduct so as to foresee the consequences which a given action may entail".

In particular, a simple analysis of a number of cases dealt by the courts of the Entities would show that in principle there is no criterion to distinguish the cases over which the Court of Bosnia and Herzegovina establish its jurisdiction, which seriously violates the principle of legal certainty.

In the instant case, proceedings against these two appellants (count 4 of the Indictment) had been conducted before the cantonal courts in respect of the same criminal offences (they were concluded with a final and binding decision), which entailed more considerable consequences for the budget than in this case so it is hard to understand the basis for the cantonal courts to act upon that case, where the Prosecutor's Office and Court of Bosnia and Herzegovina are competent in this case.

If Bosnia and Herzegovina wishes to establish the principle of legal certainty, Article 13, paragraph 2 of the Law on Court of Bosnia and Herzegovina must prescribe provisions which shall make it possible for every person to regulate his or her conduct to foresee the consequences which a given action may entail. The applicable provisions of Article 13, paragraph 2 of the Law on Court of Bosnia and Herzegovina do not make it possible for persons to objectively foresee the consequences which their actions may entail, which is contrary to the principle of legal certainty.

Case no. AP 1423/05

**DECISION
ON MERITS**

Appeal of „Pres-sing" LLC and Mr. Senad Avdić against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, no. Gž-41/05 of 26 April 2005 and the Judgment of the Cantonal Court of Sarajevo, no. P-25/04 of 17 January 2004

Decision of 8 July 2006

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(2), Article 59(2)(1) and (2), Article 60 and Article 61(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), as a Plenary and composed of the following judges:

Ms. Hatidža Hadžiosmanović, President

Mr. Miodrag Simović, Vice-President

Mr. David Feldman, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Mr. Jovo Rosić,

Having deliberated on the appeal of **„Pres-Sing" LLC, et al.,** in case no. **AP 1423/05,** at its session held on 8 July 2006 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by „Pres-sing" LLC Sarajevo and Mr. Senad Avdić against the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, no. Gž-41/05 of 26 April 2005 and the judgment of the Cantonal Court of Sarajevo, no. P-25/04 of 17 January 2004 is dismissed as ill-founded with respect to Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention on Protection of Human Rights and Fundamental Freedoms.

The appeal lodged by Pres-sing" LLC Sarajevo and Senad Avdić against the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, no. Gž-41/05 of 26 April 2005 and the judgment of the Cantonal Court of Sarajevo, no. P-25/04 of 17 January 2004 May 2004 is rejected as inadmissible with respect to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention on Protection of Human Rights and Fundamental Freedoms since it is manifestly (*prima facie*) 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 6 July 2005 „Pres-sing" LLC and Mr. Senad Avdić („the appellants") from Sarajevo, represented by Mr. Nikica Gržić, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina („the Supreme Court"), no. Gž-41/05 of 26 April 2005 and judgment of the Cantonal Court of Sarajevo („the Cantonal Court"), no. P-25/04 of 17 January 2004. On 20 February 2006 the appellants submitted a supplement to the appeal.

II. Procedure before the Constitutional Court

2. Pursuant to Article 21(1) and (2) of the then Rules of Procedure of the Constitutional Court, the Supreme Court, the Cantonal Court and party to the proceedings, Ms. Seada Palavrić („the plaintiff") were requested on 21 July 2005 to submit their replies to the appeal.

3. The Cantonal Court submitted its reply on 28 July 2005. The Supreme Court and the plaintiff failed to submit their replies to the appeal.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply was communicated to the appellant on 14 February 2006.

5. Pursuant to Article 39(1)(1) and (2) of the Rules of the Constitutional Court, Judge Seada Palavrić was exempted from taking part in the discussion and deliberation in this case.

III. Facts of the Case

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

7. The plaintiff brought a lawsuit against the first appellant as a publisher and the second appellant as editor-in-chief of the independent news magazine „Slobodna Bosna" („Slobodna Bosna"), the reason being an article under the headline *What a bloody shambles within the SDA (the Party of Democratic Action)* and heading *Seada Palavrić' Jewelry Stolen From Bičakčić' House* appeared in Issue no. 370 of 18 December 2003 of that magazine. The plaintiff alleged that „Slobodna Bosna" had waged a real media campaign against her in the summer 2003, which had culminated in the article dated 18 December 2003. The plaintiff pointed out that the defendants alleged fabrications in that article and that *the article has left room for doubt in readers mind* as the appellants, by using the words *her temporary (?) apartment* and *the robbery took place in the alternative apartment of representative Palavrić* unquestionably claimed that *the house is located in a newly built fancy residential settlement of Sarajevo, and (...) Palavrić used one apartment out of three in a spacious house with 500 square meters of floor space.* Moreover, the plaintiff alleged that the text was illustrated with a photograph showing her saying a prayer, reciting *Al-Fatiha* (1st *surah* or chapter from the Qur'an). In this way she was actually portrayed as an alleged religious person while in fact being unscrupulous person. This deeply hurt her religious feelings. The plaintiff alleged that other lies were set forth in the text such as: *In addition to the apartment located in Nahorevska Street, Seada Palavrić is a temporary user of the apartment located in the Koševsko Brdo area, in a building owned by the Government of the Federation of BiH. Due to the shortness of time, we could not verify who was living in Seada Palavrić' apartment located in Koševsko Brdo area nor could we verify the amount of the rent that was being paid for her „alternative" apartment in Nahorevska Street where the robbery had taken place. However, the fact that she is using two apartments encourages unpleasant rumors that are circulating about Representative Seada Palavrić.* Moreover, the plaintiff alleged that the heading itself was vulgar and that it offended her as a woman and made her feel ashamed before her husband and the public".

8. The plaintiff outlined that the appellants had made false allegations about her in an article under the heading „*After having been evicted twice, Palavrić moved into Edhem Bičakčić' house* and headline *Two times is twice* appeared in „Slobodna Bosna", Issue no. 371. The following is stated in that text: *Up until recently, Palavrić has not been using her apartment in the Koševsko Brdo area, nor has she been using the apartment in Edhem Bičakčić' house but a third apartment into which she moved illegally and which she tried to have registered as hers* and that the plaintiff *moved into an abandoned apartment believing that she would provide relevant papers for its privatization with the help of her 'Party' colleagues.* The plaintiff requested the appellants to make corrections in the article published in „Slobodna Bosna", Issues nos. 370 and 371. However, the correction was not published on the same pages as those on which the article was published but on page

52, under the column „Reactions". Moreover, the plaintiff alleged that in addition to her correction, the appellants added their own reaction under the title *What did you actually deny?*, so that they did not reply to the plaintiff's request for correction but defamed her once again ascribing her nationalism through the claim: (…) *she is not able to speak about anything without first giving it certain ultimate political overtones, which she uses to prove that the Bosniacs are being threatened.*

9. According to the judgment of the Cantonal Court, no. P-25/04 of 17 January 2005, the appellants were obliged to jointly and severally pay the plaintiff damage compensation in the amount of 7,000.00 KM along with the default interest and costs of the proceedings. Moreover, they were obliged to publish the enacting clause of the judgment in the first next issue of „Slobodna Bosna". The first instance court presented all proposed pieces of evidence and concluded that the parties to the proceedings did not contest the fact that the following were published in „Slobodna Bosna: the articles in question, denial by the plaintiff and reaction of the editorial board of „Slobodna Bosna". The court considered the plaintiff's assertions as credible. Namely, the plaintiff alleged before the court that she had never lived in a house with a surface of 500 square meters, nor had she ever lived in Edhem Bičakčić' house. She alleged that the photograph showing the house and illustrating the text of the disputable article of 18 December 2003 was not the house in which she had lived. Having inspected the relevant documents, the court established that on 7 May 2003 a contract on lease had been concluded between Đ. M. and Parliamentary Assembly of Bosnia and Herzegovina („Parliamentary Assembly") in order to provide the plaintiff an accommodation for the official purposes. Moreover, the court established that the plaintiff had vacated a studio apartment owned by the Parliamentary Assembly, as indicated in the minutes taken on 14 May 2003. The first instance court found that the plaintiff had never lived in Edhem Bičakčić' house, had never moved into any apartment in an illegal way, thus had never been evicted, especially not two times, had never tried to „provide relevant papers" for the apartment into which she had allegedly moved illegally but „she had been living legally in one apartment for five years and then had moved into another one".

10. Taking into account the established facts, the first instance court found that the defendants failed to submit any piece of evidence in support of their allegations and they did no contest the evidence presented by the plaintiff, which was the reason for the court to conclude that the appellant had presented false facts about the plaintiff. The first instance court concluded that the appellants violated the provisions of Article 19 the Law on the Media, providing as follows: *Media shall release accurate, impartial, objective information based on the proved facts with the respect of human dignity and fundamental rights of others*. Furthermore, the court concluded that the appellants violated the Law on the Protection against Defamation as they failed to release accurate

and objective information despite the fact that they had an opportunity to address the competent authorities in order to verify it as seven months elapsed from the date on which the plaintiff had moved to the date on which the disputable article had been published. The first instance court held that the appellant's allegations were correct only as to the irrelevant matters (the plaintiff's jewelry had been stolen, she had lived in a studio apartment seven days following the conclusion of the contract of lease), which was the reason why the defendants' expression might not be considered reasonable within the meaning of the Law on Defamation. Furthermore, the first instance court held that the appellants' referred to the *Lingens* case of the European Court of Human Rights without any foundation as the *Lingens* case was dealing with the value-judgments, whereas the case at hand dealt with the facts „which were proved to be unfounded".

11. In deciding on the appellant's appeal against the first instance judgment, the Supreme Court by its judgment no. Gž-41/05 of 26 April 2005 partially granted the appeal and modified the first instance judgment in the part dealing with the amount relating to non-pecuniary damage compensation so that the plaintiff was awarded 4,000.00 KM instead of 7,000.00 KM. The Supreme Court upheld the remaining part of the first instance judgment. According to the reasons of the judgment of Supreme Court, the first instance court correctly established that the allegations set forth in the disputable newspaper article constituted expressions of false facts in terms of their content, thus defamation within the meaning of the Law on the Protection against Defamation, which caused damage to the plaintiff. The Supreme Court held that the defendants had in no way substantiated their allegations according to which the plaintiff had used two apartments at the same time, and in particular the allegation that that she had used a third apartment, *which she tried,* as stated in the text, *to enter into books as her own apartment*. By contrast, the Supreme Court held that the amount of the awarded non-pecuniary damage compensation was too high given the circumstances of the case at issue. The Supreme Court therefore reduced the amount of the compensation as indicated in its judgment. Finally, the Supreme Court held that the first instance court's decision on the costs of the proceedings was correct and in accordance with Article 386(2) of the Law on Civil Procedures given the type of the dispute and legal basis for awarding a damage compensation for defamation.

IV. Appeal

a) Statements from the appeal

12. The appellants complain of a violation of their right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for Protection of Human Rights and Fundamental Freedoms („European

Convention") and their right to freedom of expression under Article 10 of the European Convention. They allege that Article 2 paragraph 2 of the Law on Protection against Defamation guarantees not only the right to freedom of commendable or non-offensive expression but also the expression which might offend, shock or disturb because the media „as public observers and conveyors of information play an important role in democratic process". In that respect, the appellants allege that they informed the general public of the plaintiff's frequent change of home address in their column „Mini market" in which they are publishing information and comments of minor importance, including those which are satiric and contain casual information. The appellants hold that the plaintiff, as a public official, i.e. representative of the House of Representatives of the Parliamentary Assembly must tolerate a higher degree of criticism than other citizens even if it may be information or ideas which offend or disturb as provided for by the case-law of the European Court of Human Rights. The appellants therefore consider that the challenged judgments are in violation of their right to freedom of expression. They propose that the challenged judgments be annulled and the plaintiff's request be dismissed.

b) Reply to the appeal

13. The Cantonal Court has challenged the allegations from the appeal and holds that the appellants' complaints about the violation of the right to a fair trial are unfounded as the appellants were given an opportunity to have a fair trial within the meaning of Article 6 of the European Convention. Furthermore, the Cantonal Court holds that the right to freedom of expression has not been violated either, as it was established that the appellants alleged false facts about the plaintiff, which was the reason to award her damage compensation, as indicated in the reasons of the Cantonal Court's judgment. Finally, the Cantonal Court proposes that the appeal should be dismissed.

V. Relevant Law

14. **Law on Protection against Defamation of the Federation of Bosnia and Herzegovina** (*Official Gazette of Federation of BiH* no. 19/03) so far as relevant part reads as follows:

Purpose of the Law

Article 1

This Law regulates civil liability for harm caused to the reputation of a natural or legal person by the making or disseminating of an expression of false fact identifying that legal o r natural person to a third person.

Principles to be achieved by the law

Article 2

The intent of regulating civil liability as provided for in Article 1 of this Law is to attain:

a) the right to freedom of expression, as guaranteed by the Constitution of the Federation of Bosnia and Herzegovina and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette of Bosnia and Herzegovina, number 6/99), which constitutes one of the essential foundations of a democratic society, in particular where matters of political and public concern are involved;

b) the right to freedom of expression as it protects both the contents of an expression as well as the manner in which it is made, and is not only applicable to expressions that are received as favorable or inoffensive but also to those that might offend, shock or disturb;

c) the essential role of media in the democratic process as public watchdogs and transmitters of information to the public.

Responsibility for defamation

Article 6

(1) Any person who causes harm to the reputation of a natural or legal person by making or disseminating an expression of false fact identifying that legal or natural person to a third person is liable for defamation.

(2) For defamation made through media outlets the following are jointly responsible: author, editor, or publisher of the expression or someone who otherwise exercised control over its contents.

(3) A person referred to in paragraphs 1 and 2 of this Article (hereinafter: a person who allegedly caused harm) is responsible for the harm if they willfully or negligently made or disseminated the expression of false fact.

(4) Where the expression of false fact relates to a matter of political or public concern, a person who allegedly caused harm is responsible for the harm caused in making or disseminating the expression if he or she knew that the expression was false or acted in reckless disregard of its veracity.

(5) The standard of responsibility in paragraph 4 of this Article also applies where the injured person is or was a public official or is a candidate for public office, and

exercises or appears to the public to exercise substantial influence over a matter of political or public concern.

(...)

Article 7

(1) There shall be no liability for defamation where:

a) by the expression an opinion was made, or if the expression is substantially true and only false in insignificant elements;

b) the person who allegedly caused the harm was under a statutory obligation to make or disseminate the expression, or made or disseminated the expression in the course of legislative, judicial or administrative proceedings;

c) the making or dissemination of the expression was reasonable.

2. In making such a determination for reasonableness as determined by paragraph 1(c) of this Article, the court shall take into account all circumstances of the case particularly (...):

Article 8
Obligation to Mitigate Harm

An allegedly injured person shall undertake all necessary measures to mitigate any harm caused by the expression of false fact and in particular requesting a correction of that expression from the person who allegedly caused the harm.

VI. Admissibility

15. 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.

16. 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.

17. In examining the admissibility of the appeal with respect to the allegations on violation of the right to a fair trial provided for in Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention, the Constitutional Court invoked the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(2) of the Rules of the Constitutional Court.

Article VI(3)(b) of the Constitution of Bosnia and Herzegovina reads as follows:

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.

Article 16(2) of the Rules of the Constitutional Court reads as follows:

The Constitutional Court shall reject an appeal as being manifestly (prima facie) ill-founded when it establishes that the request of the party to the proceedings is not justified or when the presented facts do not in any way justify the allegation of a violation of the constitutional rights and/or when the Constitutional Court establishes that the party to the proceedings is not a „victim" of a violation of the constitutional rights, so that the examination of the merits of the appeal is not necessary.

18. At the stage of examining the admissibility of the case the Constitutional Court must establish, *inter alia*, whether the conditions that were enumerated in Article 16(2) of the Rules of the Constitutional Court are met for taking a decision on merits. In this regard the Constitutional Court outlines that according to its jurisprudence and the case-law of the European Court of Human Rights („the European Court") the appellant must point to the 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 are no *prima facie* evidence, which would, with sufficient clarity, indicate that the mentioned violation of human rights and freedoms is possible (see the European Court, the *Vanek vs. Slovakia* judgment of 31 May 2005, Application no. 53363/99 and Constitutional Court, Decision no. *AP 156/05* of 18 May 2005) and if the facts in which regard 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 ECtHR, the *Mezőtúr-Tiszazugi Vízgazdálkodási Társulat vs. Hungary* judgment of 26 July 2005, Application no. 5503/02), as well as when it is established that the party to the proceedings is not a „victim" of a violation of the constitutional rights.

19. The appellants failed to specify grounds for their allegations that they had no fair trial within the meaning of Article 6(1) of the European Convention, but it appears that they consider that the first instance court incorrectly assessed the presented evidence, wrongly found a defamation, i.e. incorrectly established the facts and wrongly applied the substantive law. However, according to the case-law of the European Court and Constitutional Court, it is not the courts' task to review the findings of the regular courts as to the facts and application of the substantive law (see ECtHR, *Pronina vs. Russia*, and Decision on Admissibility of 30 June 2005, application no. 65167/01). The Constitutional Court cannot generally substitute its own appraisal of the facts or evidence for that of the

regular courts but it is the regular courts' task to appraise the presented facts and evidence (see ECHR, *Thomas vs. United Kingdom,* judgment of 10 May 2005, Application no. 19354/02). It is the Constitutional Court's task to ascertain whether the proceedings in their entirety, including the way in which the evidence was taken, were fair as required by Article 6(1) of the European Convention and whether decisions of the regular courts are in violation of the constitutional rights (see Constitutional Court, Decision no. *AP 20/05* of 18 May 2005.)

20. In the instant case, the mere fact that the appellant is dissatisfied with the outcome set forth in the challenged decisions cannot by itself raise an arguable claim of violation of the right to a fair trial under Article 6 paragraph 1 of the European Convention, whereas the appellant do not indicate any procedural error, nor are such errors obvious present (see ECtHR, the *Mezőtúr-Tiszazugi Vízgazdálkodási Társulat vs. Hungary* judgment of 26 July 2005, Application no. 5502/02). In the case at hand, the Constitutional Court did not find anything which would indicate that the relevant regulations have been applied in an arbitrary or unfair manner to the detriment of the appellant, nor are there any other elements which would point to the procedural unfairness within the meaning of Article 6 paragraph 1 of the European Convention.

21. Taking into account all the aforesaid, the Constitutional Court holds that the part of the appellants' appeal relating to the alleged violation of the 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 is manifestly (*prima facie)* ill-founded as there is no „arguable claim" within the meaning of Article 16(2) of the Rules of the Constitutional Court.

22. The appellants complain about a violation of the right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the of the European Convention. In this respect, the Constitutional Court considers that the appeal has met the requirements set forth in Article 16(2) of the Rules of the Constitutional Court as it is not manifestly (*prima facie)* ill-founded. Furthermore, in the case at hand the subject of challenge by the appeal is the judgment of Supreme Court, no Gž-41/05 of 26 April 2005 against which there are no effective legal remedies available under law. The appellants received the challenged judgment on 18 May 2005 and the appeal was filed on 6 July 2005, i.e. within the time-limit of 60 days as it is prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal meets the requirements set forth in Article 16(4) of the Rules of the Constitutional Court as there is not any other formal reason that would render the appeal inadmissible.

23. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16 (1)(2) and (4) of the Rules of the Constitutional Court, the

Constitutional Court has established that the present appeal meets the admissibility requirements as to the allegations on the violation of the rights to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention.

VII. Merits

24. The appellants complain that the challenged judgments are in violation of their right under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10(1) of the European Convention.

Article II(3)(h) 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:

(...)

h) freedom of expression

Article 10 of the European Convention reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

25. The freedom of expression is *condition sine qua non* for existence and maintenance of every democratic society, hence a guarantee of all other human rights and freedoms. In the event of a conflict between that right and other guaranteed human rights and freedoms, the courts must take into account that every limitation imposed on that freedom, with the aim of protecting other constitutional rights, may be an exception to the rule, which is allowed in a democratic society only if it does not jeopardize the rule but confirms it.

26. Therefore, jeopardizing the freedom of expression and freedom of media in any manner does not imply jeopardizing some personal journalists' rights that are guaranteed by the Constitution. First of all it means, jeopardizing their function, which is a decisive one for maintaining any democratic society and jeopardizing democracy itself as a type of rule and assumption for exercise of all other proclaimed human rights and freedoms.

27. However, this does not imply that the freedom of expression is absolute and unrestricted by anything. In democratic and rule of law states, no human right and freedom, no matter how crucial, is not and cannot be absolute and unrestricted. Since an absolute freedom and absolute right are *contradictio in adjecto*, the manner in which a certain legal principle is interpreted and applied, remains decisive and at the same time disputable. Therefore, the role and the task of the independent judiciary is a key one in every individual case in order to clearly determine the boundary between the justified and necessary and unjustified and unnecessary limits that confirm a certain principle as a rule or deny it as a mere declaration.

28. Article 10 of the European Convention is structured in such a manner that the first paragraph defines the protected freedoms while second paragraph stipulates the circumstances under which a public authority may interfere with the enjoyment of freedom of expression.

29. Article 10 of the European Convention is a specific one since it protects the expression that bears a risk of jeopardizing or it really jeopardizes the interest of others. As correctly alleged by the appellants, this Article protects not only the information and the ideas that are received positively or that are regarded as free of danger or those to which there is no attitude but also those that offend, shock and disturb. That is exactly what is necessary for tolerance and pluralism without which no democratic society can exist (see ECtHR, the *Handyside vs. the United Kingdom* judgment of 7 December 1976). The European Court of Human Rights, in case *Castells* (see ECtHR, the *Castells vs. Spain* judgment from 1992), in which the appellant was sentenced to imprisonment since he offended Spanish government, accusing it in newspapers of being *criminal* and *the one that hides crime perpetrators against the Basks people,* found that *dominant position, which a government has, makes it be restrained in conducting criminal proceedings, especially when other means are available in reaction to the unjustified attacks and criticism of their enemies through media.*

30. As already expressed in decisions of the European Court of Human Rights and Constitutional Court, a careful distinction needs to be made between information (facts) and opinion (value-judgments). The existence of facts can be demonstrated, whereas the

truth of value-judgments is not susceptible of proof (see ECtHR, the *Lingens* judgment of 8 July 1986 and Constitutional Court, Decision no. AP-1004/04 of 2 December 2005). In addition, even in reference to the facts, the defense is acknowledged on the basis of the honest intention in giving media a „*space for mistakes*" (see ECHR, the *Dalban vs. Romania* judgment of 1999). In principle, a defense based on an honest intention is a kind of substitute for proving the truthfulness. When a journalist has a legitimate aim, when something is of importance for public and when reasonable efforts have been invested in confirmation of the facts, media will not be held responsible even if it is established that facts have been false.

31. Any restriction, condition, limitation or any kind of interference with the freedom of expression may be applied only to a certain exercise of this freedom while the contents of the right to freedom of expression always remains untouched. Public authorities have the possibility, not the obligation, to impose restrictive or punitive measure against the exercise of the right to freedom of expression. Generally, in Bosnia and Herzegovina, the form of restriction of the freedom of expression is introduced by the laws on protection against defamation. These laws, in addition to stipulating in detail the conditions relating to the compensation for damage caused by defamation, impose very strict requirements for application of those provisions and, in some aspects, provide larger degree of the protection of freedom of expression than the minimum specified by the European Convention.

32. In this respect, the Constitutional Court emphasizes that Article 8 of the Law on Protection against Defamation provides, as one of the requirements, that an allegedly injured person shall undertake all necessary measures to mitigate any harm caused by the expression of false fact and in particular requesting a correction of that expression from the person who allegedly caused the harm. The Constitutional Court holds that according to the aforementioned Article of the Law on Protection against Defamation, the actions mentioned above are to be taken before bringing a lawsuit. Moreover, according to the provisions of Article 6(5) of the Law on Protection against Defamation, if the injured person is a person who exercises or appears to the public to exercise substantial influence over a matter of political or public concern (a public official) and, if such person brings a lawsuit, the injurer shall be held responsible for damage caused if he/she willfully or negligently made or disseminated the expression of false facts.

33. Compensation of damage in the civil lawsuit, determined as the compensation for damage done to someone's dignity and reputation, represents a clear interference with the exercise of the right to freedom of expression. Pursuant to Article 10 paragraph 2 of the European Convention, the authorities can interfere with exercise of right to expression

only if three cumulative conditions are met: a) interference is prescribed by law b) the aim of interference is protection of one or more stipulated interests or values c) interference is necessary in a democratic society. The courts must follow these three conditions when considering and deciding on the cases that refer to the freedom of expression. In case *Tolstoy Miloslavski* (see ECtHR, the *Tolstoy Miloslavski vs. United Kingdom*, judgment from 1995), the European Court of Human Rights concluded that the amount of the compensation for damage itself represents violation of Article 10 of the European Convention since *it does not mean that the jury had right to determine the damage by its discretion since, according to the Convention, the determination of damage for defamation must be reasonably proportionate to damage caused to someone's reputation.*

34. In the instant case, the challenged judgments were rendered on the basis of the Law on Protection against Defamation. Therefore, the interference has been prescribed by law. The Law was published in *Official Gazette*, its wording is clear, accessible and foreseeable and, as already said, offers a wider scope of protection of freedom of expression that the minimum provided for by the European Convention.

35. The challenged judgments are rendered in the civil lawsuit that was initiated by the plaintiff against the appellants for damage that was caused to her reputation. Therefore, it is clear that the objective of interference was the protection of „reputation or rights of others", i.e. the protection of the plaintiff's reputation, which certainly represents a legitimate aim.

36. The Constitutional Court has yet to establish whether the means that have been used are proportional to the aim sought to be achieved. As it has been already stated, the objective that the challenged judgments refer to is the protection of „reputation and rights of others", and „means" represents the court's order whereby the appellants are ordered to pay the compensation for the damage caused to the reputation of the plaintiff. In order to prove that the interference was „necessary in a democratic society" it is necessary to prove the existence of „an urgent social need" that required the concrete restriction in exercising the freedom to expression.

37. The Constitutional Court has already emphasized that the facts can be proved while the accuracy of the value-judgments cannot be proved. The appellants' expressions contain a number of allegations as to the facts such as: the plaintiff used two apartments at the same time, one of them is owned by the Government of the Federation of BiH, *the other one is in a house the surface of which exceeds 500 square meters, located in a fancy residential settlement of Sarajevo and owned by the plaintiff's former „Political Party" colleague Edhem Bičakčić,* then *she illegally moved into a third apartment which she*

tried to have registered as her ownership then *she was evicted twice.* The appellants even explicitly alleged that „due to lack of time" they could not verify whether the alleged facts were accurate.

38. The Constitutional Court notes that the plaintiff requested the appellants to publish a correction of the articles in question and only then brought a lawsuit. Therefore, she met the requirements provided for in Article 8 of the Law on Defamation. Moreover, the restriction imposed on the appellants' freedom of expression is based on the findings that the allegations made by the appellants as to the facts were incorrect and not on the findings as to the „value-judgments" which barely exist in the disputable texts and which the courts did not deal with at all. Moreover, the courts took into account the fact that the plaintiff was a public official at the time when the articles were published and, in this respect, her obligation of tolerance. Taking into account all the circumstances of the case, the courts concluded that the appellants exceeded the allowed limits of tolerance demanded from the plaintiff as a public official by alleging incorrect facts about her and that therefore they committed the act of defamation and caused damage to the plaintiff's reputation.

39. The Constitutional Court considers that despite the fact that informing the general public about possible abuse by the public officials is a legitimate aim of the journalists and media in a democratic society, there was no honest intent of the appellants in the instant case. Moreover, the appellants failed to make any reasonable effort to confirm the accuracy of facts they alleged or to mitigate detrimental consequences caused, all the more so since they reacted to the plaintiff's request for correction. Therefore, the Constitutional Court holds that the courts justifiably concluded that the appellants were to be held responsible for making and disseminating incorrect allegations. In the instant case, the general interest which allows the issue concerning possible illegal acts committed by the public officials to be raised may not be defended by making incontestably incorrect facts which constitute the attack on their reputation and which may not be considered as criticism to be tolerated by the public officials because of the office they hold. Moreover, the Constitutional Court may not accept the appellant's allegations that they used satire in the disputable text because the satire is a literary form intended to critically deride individuals, groups, state authorities or power. That form allows exaggerations and provocations but only as long as it does not provide the public with incorrect facts. In the instant case, the Constitutional Court holds that the appellants' allegations set forth in the disputable articles do not contain any expression of satiric or humorous criticism leveled against the plaintiff but exclusively the facts which the appellants did not make reasonable efforts to verify them due to, as they say themselves, „the shortness of time" and which were not substantiated by evidence in the proceedings before the court.

40. Taking into account the principle of proportionality, the Constitutional Court holds that the challenged judgments strike a fair balance between the freedom of expression by media and the rights of public officials within the legislative authority to reputation. Given the circumstances of the case, the Constitutional Court concludes that the courts correctly found that there was a „pressing social need" which required a limitation to be imposed on enjoyment of freedom of expression. The Constitutional Court does not hold that the regular courts exceeded the allowed scope of margin of appreciation.

41. Consequently, the Constitutional Court concludes that in the instant case there is no violation of the rights to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention.

VIII. Conclusion

42. The Constitutional Court found that there was no violation of the right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention when the appellants were ordered, by a judgment rendered in civil proceedings, to pay compensation for damages caused to the plaintiff's reputation by making and disseminating incorrect facts, as the „interference" was in accordance with the law, its aim was the protection of others and was necessary in a democratic society.

43. Having regard to Articles 60 and 61(1) and (3) of the Constitutional Court's Rules, the Constitutional Court decided as set out in the enacting clause.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. AP 2653/05

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. Živko Tanasić lodged for the failure to execute the enforcement permitted by the Ruling of the Municipal Court in Sarajevo no. I-1062/05 of 14 March 2005 and 29 June 2005

Decision of 12 September 2006

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 64(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), in the Grand Chamber and composed of the following Judges:

Ms. Hatidža Hadžiosmanović, President

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Mato Tadić,

Mr. Jovo Rosić

Having deliberated on the appeal of **Mr. Živko Tanasić** in case no. **AP 2653/05**, at its session held on 12 September 2006 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Živko Tanasić is hereby granted.

A violation of 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 is established.

This decision shall be communicated to the Government of the Federation of Bosnia and Herzegovina to secure constitutional rights in accordance with this decision.

The Government of the Federation of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 3 months from the date of delivery of this Decision, about the measures taken, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 27 December 2005, Mr. Živko Tanasić („the appellant"), from Banja Luka, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for the failure to execute the enforcement permitted by the Ruling of the Municipal Court in Sarajevo („the Municipal Court") no. I-1062/05 of 14 March 2005 and 29 June 2005.

II. Procedure before the Constitutional Court

2. The replies to the appeal were not requested separately from the Municipal Court and the Federation of Bosnia and Herzegovina – the Ministry of Defense of the Federation of BiH represented by the Public Attorney's Office („the debtor") in this decision because the replies on the same matter were requested and obtained in the cases nos. *AP 905/05* and *AP 703/04* (decision of 23 March 2005, published in the *Official Gazette of BiH* no. 32/05 of 24 May 2005). Since this decision refers to the mentioned decisions in its reasoning of admissibility and merits, as it concerns identical legal and factual grounds, it was not necessary to obtain the replies of the parties to the proceedings related to the allegations stated in the appeal.

III. Facts of the Case

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

4. Regarding the appellant's lawsuit against the Federation of Bosnia and Herzegovina – the Ministry of Defense of the Federation of BiH represented by the Public Attorney's Office („the debtor") for the compensation of damage, the Municipal Court I Sarajevo („the Municipal Court") adopted a Judgment no. P-81/97 of 8 April 2003, which was upheld by the Judgment of the Cantonal Court in Sarajevo („the Cantonal Court") no. Gž-246/04 of 13 May 2004, thereby obliging the debtor to pay to the appellant the total amount of KM 52,399.15 in respect of the seized motor vehicles type „Audi 80 TD" and „Mercedes 207 D".

5. Given that the debtor failed to voluntarily fulfill the obligation determined by the legally binding judgment, the appellant submitted a proposal on 10 March 2005 for the enforcement of the legally binding judgment. Proceedings on the appellant's proposal, the

Municipal Court adopted a Ruling no. I-1062/05 of 14 March 2005 granting the proposed enforcement. On 17 March 2005, the debtor lodged a complaint, in a timely fashion, against the mentioned ruling, stating that the present case concerns a claim which was declared a public debt of the Federation of Bosnia and Herzegovina, that the interest is not applied to such claims and that such claims shall not be paid pending the enactment of the regulations under Article 7 of the Law on Determination and Settlement of Claims arising from the State of War and Immediate Threat of War. The debtor also stated that the court, on the basis of the Decree on the Manner of Determination and Settlement of Public Debt of FBiH arising from the State of War and Imminent Threat of War, is not competent to proceed in the present legal matter, but that, in accordance with the mentioned regulations, the enforcement decision ought to be forwarded to the Commission for determination and settlement of claims arising from the state of war. The debtor stated in the complaint that the Law on Temporary Postponement of Enforcement of Claims on the basis of Enforceable Decisions against the Budget of FBiH postponed the enforcement in the present case, and proposed that the court grants the complaint, renders the ruling on enforcement ineffective and quashes all the implemented enforcement actions.

6. While deliberating on the complaint of the debtor, the Municipal Court adopted a Ruling no. I-1062/05 of 29 June 2005, dismissing the complaint as ill-founded and leaving the Ruling on Enforcement of 14 March 2005 in force. In its reasoning of the ruling, the court stated that the complaint of the debtor was ill-founded, as the ruling on enforcement was adopted on the basis of the enforcement document – the Judgment of the Municipal Court no. P-81/97 of 8 July 2004, which was upheld by the Judgment of the Cantonal Court no. Gž-246/04 of 13 May 2004, which obligated the debtor to pay out to the appellant the damages in the amount of KM 52,399.15 along with the costs of the proceedings. Since the enforcement was determined on the basis of the enforceable document, the allegations of the debtor that this was related to the public debt, according to the court, are ill-founded as the claim was established by a court decision dated 8 July 2003, when the Law on Determination and Settlement of Claims arising from the State of War and the State of Imminent Threat of War was in force.

7. The Municipal Court concluded that the appellant’s claim falls in the category of claims covered by the Law on Amendments to the Law on Temporary Postponement of Enforcement of Claims on the basis of the Enforceable Decisions against the Budget of FBiH, which prescribes that the enforcement on the basis of enforcement decisions against the Budget of the Federation of BiH is temporarily postponed pending the enactment of the law to regulate the manner of settlement of obligations arising from enforcement decisions, which went into force on 1 June 2004. The court stated that the Law on Determination and

Manner of Settlement of Internal Debts of the Federation of Bosnia and Herzegovina went into force on 28 November 2004, in which its Article 3 paragraph 5 explicitly stipulates that the provisions of that law are applied to the enforcement acts regulated by the Law on Temporary Postponement of Enforcement of Claims on the basis of Enforceable Decisions against the Budget of the Federation of Bosnia and Herzegovina, which was taken into account during the adoption of this ruling. Thus, the mentioned laws, regarding the appellant's claim at issue, stipulate in a different manner the procedure with respect to the law adopted earlier which qualified identical claims as public debt.

IV. Appeal

a) Statements from the appeal

8. The appellant holds that the postponement of the enforcement of the legally binding judgment is in direct infringement of the provisions of the Constitution of Bosnia and Herzegovina and the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that, as a result thereof, there was a violation of his right to a fair trial and the right to property, which are protected by Article II (3)(e) and (k) 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 Article 1 of Protocol No. 1 to the European Convention. In the appellant's opinion, the state cannot enact regulations to stop the enforcement of legally binding court decisions, as that would be inconsistent with the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina, and of the right to a fair trial under Article II (3)(e) of the Constitution of Bosnia and Herzegovina.

b) Reply to the appeal

9. Replies to the appeal were not requested separately, as they were requested and received in the cases nos. *AP 905/05* and *AP 703/04*, relating to identical factual and legal grounds, in the same matter (Decision of 23 March 2005, published in the *Official Gazette of BiH* no. 32/05 of 24 May 2005).

V. Relevant Law

10. The **Law on Temporary Postponement of Enforcement of Claims arising from the State of War or Imminent Threat of War** (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 39/98), its relevant provisions read as follows:

Article 1

This law temporarily postpones the enforcements of claims of legal and natural persons against the Federation of Bosnia and Herzegovina arising from the defense during the state of war and imminent threat of war in the territory of the Federation of Bosnia and Herzegovina.

The enforcement of judgments and administrative acts related to claims referred to in paragraph 1 of this article, unless the settlement has been reached before, shall commence upon the expiry of the deadline of three years from the day of entry into force of this law.

11. The **Law on Determination and Settlement of Claims arising from the State of War and Imminent Threat of War** (*Official Gazette of the Federation of BiH* no. 43/01), its relevant provisions read as follows:

Article 3

The claims, which are determined and settled by this law, shall be claims of legal and natural persons on the following basis:

- *mobilized or allocated material and technical instruments and equipment,*
- *delivery of materials, products and goods and services rendered for defense purposes,*
- *allocated funds in accordance with the Law, other regulations or general acts and*
- *other grounds for defense purposes.*

[…]

Article 6

Claims referred to in Article 3 of this Law shall be declared public debt of the Federation and no interest shall be applied to them for the period starting from the date of their arising to the settlement thereof.

Claims referred to in paragraph 1 of this Article shall not be paid pending the adoption of the regulation referred to in Article 7 of this law.

Article 7

The Government of the Federation of Bosnia and Herzegovina shall prescribe, upon the proposal of the Ministry of Finance, the manner for determination and settlement of the public debt referred to in Article 6 of this law within 30 days from the day of entry into force of this law.

12. The **Decree on the Manner for Determination and Settlement of Public Debt of the Federation of Bosnia and Herzegovina arising from the State of War and Imminent Threat of War (***Official Gazette of the Federation of BiH* nos. 17/02, 34/02 and 34/02), its relevant provisions read as follows:

Article 2

The public debt of the Federation of BiH, within the meaning of this decree, shall be claims referred to in Article 3 of the Law on Determination and Settlement of Claims arising from the State of War and Imminent Threat of War […] („the Law") given rise to in the period from 8 April 1992 to 23 December 1996, as follows:

- *mobilized or allocated material and technical instruments and equipment,*
- *delivery of materials, products and goods and services rendered for defense purposes,*
- *allocated funds in accordance with the Law, other regulations or general acts and*
- *other grounds for defense purposes.*

Article 3

Legal and physical persons who have claims against the Federation of BiH on the basis of Article 2 of the Law can report their claims with the Commission for the Determination and Settlement of Claims arising from the State of War and Imminent Threat of War („the Commission").

[…]

Article 6

The commission shall coordinate activities related to the implementation of this decree, establish the total amount of claims and report to the Government of the Federation of Bosnia and Herzegovina, in order to determine the final amount of the public debt. […]

[…]

Article 12

In the event of instituting an enforcement procedure following the legally binding judgments of the competent court or the final rulings of the Ministry of Defense and the MoI and the competent administrative authorities, relating to the public debt referred to in Article 3 of the Law, the court shall forward enforceable judgment to the Commission.

The legal person who receives the enforceable decision for claims on the grounds of the public debt in accordance with Article 3 of the Law shall be obliged to communicate

the decision forthwith to the Commission, which shall proceed in accordance with the provisions of this decree.

The opinion of the Commission shall be binding on the courts and legal persons referred to in paragraphs 1 and 2 of this article.

13. The **Law on Temporary Postponement of Enforcement of Claims on the basis of Enforceable Decisions against the Budget of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH* no. 9/04), its relevant provisions read as follows:

Article 1

This law shall temporarily postpone the enforcement of claims on the basis of enforceable decisions against the Budget of the Federation of Bosnia and Herzegovina, Cantons and municipalities.

Article 2

The enforceable decisions are enforceable documents adopted in judicial and administrative proceedings, related to claims arising from:

- *the old foreign currency savings;*
- *various pecuniary and non-pecuniary damages;*
- *claims arising from the state of war and imminent threat of war;*
- *pending unsettled debts to the beneficiaries of the Budget.*

Article 3

This law shall be applied pending the enactment of the law to regulate the manner of settlement of debts referred to in enforceable decisions under article of this law, no later than 31 May 2004.

Article 8

The Law on Temporary Postponement of Enforcement of Claims arising from the State of War or Imminent Threat of War (Official Gazette of the Federation of BiH no. 39/98) shall cease to be in effect on the day of the entry into force of this Law.

14. **The Law on Amendments to the Law on Temporary Postponement of Enforcement of Claims on the Basis of Enforceable Decisions against the Budget of the Federation of Bosnia and Herzegovina** (Official Gazette of the Federation of BiH no. 30/04), its relevant provisions read as follows:

Article 1

In the Law on Temporary Postponement of Enforcement of Claims on the basis of Enforceable Decisions against the Budget of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH no. 9/04), a digit „2" shall be added in Article 3, the second line after the word „Article", a full stop shall be inserted in the third line after the word „law", and the remainder of the text shall be deleted.

[...]

15. The **Law on Determination and Manner of Settlement of Internal Debts of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH n*o. 66/04), its relevant provisions read as follows:

Article 3

The internal debt of the Federation of BiH amounts to [...], and is made up of:

[...] obligations related to claims arising from the war or during the imminent threat of war („war claims"), as pecuniary and non-pecuniary damage [...]

[...]

The internal debt, which is settled through the issuance of bonds, represents the total payment of any claim in respect of which bonds have been issued.

[...]

The provisions of this law shall apply to the enforceable acts which are regulated by the Law on Temporary Postponement of Enforcement of Claims on the basis of Enforceable Decisions against the Budget of the Federation of Bosnia and Herzegovina [...].

[...]

Article 16

War claims referred to in Article 3 of this law are obligations, which had arisen in the period from 18 September 1991 to 23 December 1996, regarding which physical and legal persons have duly reported claims, under the Law on Determination and Settlement of Claims arising from the State of War and Imminent Threat of War [...] and the Decree on the Manner for Determination and Settlement of Public Debt of the Federation of Bosnia and Herzegovina arising from the State of War and Imminent Threat of War [...].

Article 17

The obligation related to war claims shall be settled by the issuance of bonds.

The interest on war claims shall be written off.

[...]

Article 20

Bonds for settling obligations related to war claims shall be issued for the amount of the principle not exceeding KM 900 million, shall not accumulate the interest, shall have the maturity date not exceeding 50 years and shall be paid in ten annual installments starting not later than nine years before the final maturity date.

16. The **Law on Enforcement Proceedings** (*Official Gazette of SFRY nos. 20/78, 6/82, 74/87, 57/89, 20/90, 27/90 and 35/91, and Official Gazette of RBiH nos. 16/92 and 13/94),* its relevant provisions read as follows:

Article 8

[…] A debtor may lodge a complaint against the ruling on enforcement (Article 48). […]

An appeal may be lodged against the ruling adopted on the complaint.

Appeal and complaint shall not defer the enforcement, unless provided otherwise by this law.

A decision adopted on the appeal shall be final and binding. […]

Article 10

The court has the responsibility to proceed urgently in the process of enforcement and security. […]

Article 39

[…] The ruling on enforcement regarding the monetary claim shall be delivered to the debtor's debtor, and the ruling on enforcement regarding the funds in the debtor's account shall be delivered to the unit of the Social Bookkeeping Service with which the said funds are registered.

The ruling on enforcement, adopted on the basis of an authentic document, shall be delivered to the competent unit of the Social Bookkeeping Service only once it becomes legally binding. […]

17. **The Law on Enforcement Proceedings** (*Official Gazette of the Federation of BiH* no. 32/03), its relevant provisions read as follows:

Article 5

The court has the responsibility to proceed urgently in the enforcement proceedings. […]

[…]

Article 166

The enforcement aimed at settling the monetary claim against the debtor may be undertaken against all funds in the debtor's bank accounts, unless otherwise provided for by law. […]

[…]

Article 170

(1) If a bank holds that there are legal or other hindrances to the enforcement under the provisions of the Chapter XII of this law, it shall hold onto the ruling on enforcement, confiscate the debtor's funds and inform the court of hindrances.

(2) If hindrances are permanent in nature, the court shall suspend the proceedings, and in case of other reasons it shall inform the claimant and the bank of further proceeding.

[…]

Article 226

The enforcement proceedings, which have begun before the date of the commencement of the application of this law, shall be finalized under the provision of this law.

[…]

Article 228

The provisions of other laws relating to the request for deferral and termination of enforcement shall not be applied in the enforcement proceedings regulated by this law.

Article 229

The application of the laws regulating the enforcement proceedings, which had been applied in the territory of the Federation of BiH until the day of the commencement of the application of this law, shall cease on the day of the commencement of the application of this law.

Article 230

This law shall enter into force on the day after the day of the publication in the Official Gazette of the Federation of BiH, and the application thereof shall start upon the expiry of 60 days after the entry into force thereof.

VI. Admissibility

18. 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.

19. 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 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.

20. Within the context of the appellate jurisdiction of the Constitutional Court under Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the notion „judgment" has to have a broad interpretation. That notion needs not only include all types of decisions and rulings but also the failure to adopt a decision, when such failure is found to be unconstitutional (see, the Constitutional Court, Decision no. *U 23/00* of 2 February 2001, published in the *Official Gazette of Bosnia and Herzegovina* no. 10/0). The Constitutional Court emphasizes that, in accordance with Article II(1) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina and both Entities ought to ensure the highest level of human rights and fundamental freedoms, and that, in accordance with Article II(2) of the Constitution of Bosnia and Herzegovina, rights and freedoms laid down by the European Convention and the Protocols thereto shall be directly applied in Bosnia and Herzegovina.

21. Therefore, the Constitutional Court interprets the appeal in such a way as if the appellant referred to his right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention, which contains the right of access to a court.

22. Invoking the case-law of the European Court of Human Rights regarding the exhaustion of legal remedies, the Constitutional Court notes that while applying the provisions of Article 16 (1) of the Rules of the Constitutional Court, this rule has to be applied with a certain degree of flexibility and without exaggerated formalism (see ECHR, *Cardot vs. France*, judgment of 19 March 1991, Series A, no. 200, paragraph 34). The Constitutional Court notes that the rule related to the exhaustion of legal remedies available under the law is not absolute, nor can it be applied automatically, and when examining whether it has been complied with, it is important to take into account certain circumstances of each case individually (see ECHR, *Van Osterwijek vs. Belgium*,

judgment of 6 December 1980, Series A, no. 40, paragraph 35). This, among other things, means that one has to realistically take into account not only the existence of formal legal instruments in a legal system, but an overall legal and political context, as well as the appellant's personal circumstances.

23. Bearing in mind the mentioned circumstances, the Constitutional Court holds that there is no effective legal remedy in Bosnia and Herzegovina, namely in the Federation of BiH in the present case, which would enable the appellants to complain over the failure to enforce the legally binding judgments. The Constitutional Court holds that shortcomings in the organization of the judicial systems of the Entities, or the state for that matter, must not affect the respect for individual rights and freedoms laid down by the Constitution of Bosnia and Herzegovina, as well as requirements and guarantees under Article 6 of the European Convention.

24. The Constitutional Court notes that an excessive burden cannot be placed on an individual while identifying the most efficient way to exercise his or her rights. Also, the Constitutional Court observes that one of the fundamental postulates of the European Convention is that the legal instruments, which are available to an individual, ought to be easily accessible and comprehensible, and that the omission in the organization of the legal and judicial system of the state, which threatens the protection of individual rights, cannot be attributed to an individual. Moreover, it is the responsibility of the state to organize its legal system in such a way so as to allow the courts to comply with the terms and conditions set by the European Convention (see ECHR, *Zanghi vs. Italy*, judgment of 19 February 1991, Series A, no. 194, paragraph 21).

25. In the present case, the Constitutional Court holds that this is a failure to enforce a legally binding ruling on the enforcement of a court judgment and that the appellant at his disposal has an effective legal remedy by means of which he can obtain the execution of the ruling on enforcement.

26. In view of the aforementioned, the Constitutional Court concludes that the appeal is admissible.

VII. Merits

27. The appellant holds that the failure to enforce the legally binding ruling on enforcement of the court judgment amounted to a violation of his right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6, paragraph 1 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.

Article II(3)(e) of the Constitution of Bosnia and Herzegovina reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

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

Article 6(1) of the European Convention, in its relevant part, reads:

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.

[...]

28. In essence, the appellant complains about the failure to enforce the legally binding court decision awarding him a certain monetary amount for the confiscated vehicles, for the damage incurred during the wartime. With respect to these allegations of the appellant, the Constitutional Court refers to the case-law of the European Court of Human Rights, according to which, Article 6 paragraph 1 of the European Convention ensures everyone's right to bring a request related to their respective civil rights and obligations before a court or tribunal (see ECtHR, *Hornsby vs. Greece*, judgment of 27 August 1991, Series A-209, p. 20, paragraph 59). However, that right would be illusory if the national legal system of the Contracting States allowed for the final enforceable court decisions to remain unenforced to the detriment of one of the parties. It would be unacceptable if Article 6 of the European Convention prescribed in detail the procedural guarantees bestowed upon the parties – the procedure which is fair, public and expedient – without providing protection for the enforcement of court decisions. To interpret Article 6 of the European Convention as if exclusively dealing with the conduct of the proceedings would certainly lead to situations incompatible with the principles of the rule of law which the Contracting States took over when ratifying the European Convention. Therefore, the enforcement of a judgment adopted by any court must be viewed as an integral part of „a trial" within the meaning of Article 6 of the European Convention (see ECHR, *Golder vs. The United Kingdom,* judgment of 7 May 1974, Series A-18, pp. 16-18, paragraphs 34-36).

29. Apart from the mentioned case-law of the European Court of Human Rights, there are a series of decisions adopted by the institutions founded in accordance with Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina, the Human Rights Chamber (see, Case no. CH/96/17, *Blentić vs. Republika Srpska*,

Decision on Admissibility and Merits delivered on 3 December 1997) and the Human Rights Ombudsmen for Bosnia and Herzegovina (see, Case no. (B) 746/97, *B.D. vs. the Federation of Bosnia and Herzegovina*, Reports dated 24 March 1999) where violation of Article 6 of the European Convention was found as the result of a failure to enforce legally binding court decisions. Also, the Constitutional Court already concluded in its jurisprudence that the authorities are obliged to secure the enforcement of legally binding court decisions, and that the application of the law, which renders it impossible, violates the appellant's right to a fair trial (see the Constitutional Court, Decision no. *AP 288/03* of 17 December 2004). It follows from the aforementioned that there is the case-law regarding the position that the failure to enforce legally binding court decisions constitutes a violation of the right to a fair trial.

30. The Constitutional Court holds that the mentioned positions can be applied to the present case given that the appellant precisely complained about the failure to enforce legally binding decisions. In the present case the enforcement of the legally binding judgment was allowed on 14 March 2005. The Municipal Court notes in the reasoning of the ruling by which it dismissed the complaint of the debtor and left in force the ruling on enforcement dated 14 March 2005 that the appellant's claim falls into the category of claims covered by the Law on Amendments to the Law on Temporary Postponement of Enforcement of Claims on the Basis of Enforceable Decisions against the Budget of the Federation of Bosnia and Herzegovina, which prescribes that the enforcement on the basis of enforceable court decisions shall be temporarily postponed pending the enactment of the law to regulate the manner of fulfillment of obligations arising from enforceable decisions. The provision of Article 3 paragraph 5 of the Law on Determination and Manner of Settlement of Internal Debts of FBiH (went into force on 28 November 2004) explicitly stipulates that the provisions of that law shall apply to enforceable acts regulated by the Law on Temporary Postponement of Enforcement of Claims on the Basis of Enforceable Decisions against the Budget of the Federation of BiH (*Official Gazette of the Federation of BiH* no. 9/04). Article 3 of the mentioned law prescribes that this law shall be applied „pending the enactment of the law to regulate the manner of fulfillment of obligations arising from enforceable decisions, no later than 31 May 2004".

31. Such a regulation had not been enacted by the mentioned deadline, but the Law on Amendments to the Law on Temporary Postponement of Enforcement of Claims on the Basis of Enforceable Decisions against the Budget of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH* no. 30/04) went into force on 1 June 2004, thereby deleting the deadline of 31 May 2004. Thus, it follows that, after the enactment of these amendments, the Law on Temporary Postponement of Enforcement of Claims on the Basis of Enforceable Decisions against the Budget of the Federation of

Bosnia and Herzegovina shall be applied pending „the enactment of laws to regulate the manner of fulfillment of obligations arising from enforceable decisions". However, the deadline for enacting such a regulation has not been detailed.

32. Also, the Law on Determination and Settlement of Claims arising from the State of War and Imminent Threat of War from 2001 declared the claims of legal and physical persons from that period, listed in Article 3 of that Law, as public debt. After that the Decree on the Manner for Determination and Settlement of Public Debt of the Federation of Bosnia and Herzegovina arising from the State of War and Imminent Threat of War from 2002 stipulated that such claims shall be reported to the Commission for Determination and Settlement of Claims arising from the State of War and Imminent Threat of War („the Commission"). The mentioned decree also prescribed that „in the event of instituting the enforcement proceedings following legally binding judgments of the competent court […] related to the public debt […], the court shall communicate the enforceable decision to the Commission", and that „the opinion of the Commission shall be binding on the courts". Next, the Federation of BiH enacted in 2004 the Law on Determination and Manner of Settlement of Internal Obligations of the Federation of BiH, thereby defining war claims as internal debt, and regulated the manner of settlement of the said debt. This law is obviously the regulation which regulates the manner of settlement of obligations on the basis of enforceable decisions referred to by the Law on Determination and Manner of Settlement of Internal Obligations of the Federation of BiH.

33. The Constitutional Court emphasizes that there is an obligation for everyone to respect the legally binding court judgments. Also, the Constitutional Court notes that the state, in principle, cannot enact laws which would render impossible the enforcement of legally binding court decisions, as that would be inconsistent with the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina and to the 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.

34. Certainly, one cannot deny the right of the state to enact laws which deprive or restrict certain human rights, only in cases though when such restriction is provided for by the European Convention, according to which certain rights, such as, for instance, the right to property, can be restricted under certain conditions. However, the European Convention does not give the right to the Contracting States to enact laws which would prevent the enforcement of legally binding court decisions, adopted in accordance with Article 6 of the European Convention. In the present case, it were the laws that prevented the enforcement of a legally binding court decision, which was related to the determined claims to be paid out of the budget of a Municipality or a Canton. However, with respect

to enacting the mentioned laws, the Constitutional Court holds that there are no reasons listed in Article 15 of the European Convention for such derogation from obligations assumed upon the ratification of the European Convention (see the already cited decision of the Constitutional Court no. *AP 288/03*).

35. The Constitutional Court emphasizes that in all cases of restricting human rights and fundamental freedoms, within the meaning of the European Convention, one must be mindful of striking a fair proportion between the requirement of general interest of the community and the need to protect fundamental rights of an individual. That means that there must be a reasonable proportion between the means used and the goal sought to be achieved. The necessary balance, i.e. proportionality between the public interest of the community and fundamental rights of individuals, shall not be established if „certain persons have to bear an excessive burden" (see ECHR, *Sporrong and Lönnroth vs. Sweden,* judgment of 23 September 1982, Series A-52, pp. 26-28, paragraphs 70-73).

36. When we relate the mentioned positions to the relevant regulations in the present case, one reaches a conclusion that such laws, apart from their enactment being questionable within the meaning of the European Convention, violate the principle of proportionality with respect to the fundamental rights of individuals. Namely, despite the evident public interest of the state to enact the mentioned laws, due to the enormous debt which was incurred in respect of the pecuniary and non-pecuniary damage incurred during the wartime operations, and on other grounds as well, the Constitutional Court holds that the enactment of such laws placed „an excessive burden on individuals". Therefore, the requirement of proportionality between the public interest of the community and the fundamental rights of individuals has not been met.

37. The main reason for finding that there is an excessive burden on individuals is the fact that the Law on Determination and Manner of Settlement of Internal Obligations of the Federation of BiH (*Official Gazette of the Federation of BiH* no. 66/04) regulates that such obligations shall be settled by issuing bonds and the interests to such claims shale be written off. Further, Article 20 of the same Law prescribes that these bonds shall have „the maturity date not exceeding 50 years and shall be paid in ten annual installments, starting not later than nine years before the final maturity date". In a situation like this there is a reasonable question as to whether any of the citizens in possession of such type of bonds will live to get paid for bonds and thereby effectively exercise their respective rights. In addition, the mentioned law provides that the obligations arising from war claims shall be settled without interests, which, when taking into account the mentioned period of possible deferment, certainly means effective decrease of the amount to be paid to individuals. The Constitutional Court concluded in the previously cited decision no. *AP 288/03* that

the application of such provisions, essentially, renders impossible the enforcement of the legally binding court decisions in a manner and to a degree laid down in such decisions, which is inconsistent with the right of access to court which makes an integral element of the right to a fair trial.

38. Also, the Constitutional Court holds that preventing the enforcement of the legally binding court decisions, as well as prescribing that the opinions of the executive authority bodies „were binding on the courts", as done by the legislator in the Decree on the Manner for Determination and Settlement of Public Debt of the Federation of BiH arising from the State of War and Imminent Threat of War (*Official Gazette of the Federation of BiH* nos. 17/02, 34/02 and 34/02), are inconsistent with right to „independent tribunal" referred to in Article 6 paragraph 1 of the European Convention. Namely, this right contains also the principle that no one outside the judicial authority may modify or suspend the enforcement of a binding court decision to the detriment of an individual. The Constitutional Court refers to the case-law of the European Court of Human Rights according to which the power to give a binding decisions is inherent in the very notion of „a tribunal" within the meaning of Article 6 paragraph 1 of the European Convention, and can also be seen as component of the „independence" (see ECHR*, Benthem vs. the Netherlands*, judgment of 23 October 1995, series A, no. 97, paragraph 40 and *Van de Hurk vs. the Netherlands*, judgment of 19 April 1994, series A, no. 288, paragraph 45). In addition, the „tribunal" within meaning of Article 6 paragraph 1 of the European Convention shall not be considered an „independent" if seeking and accepting binding opinion of executive being that in that manner „the judicial is made inferior to the executive" (see ECHR, *Beaumartin vs. France,* judgment of 24 November 1994, Series A, no. 296 B, paragraph 38). In view of the aforementioned the Constitutional Court holds that the regulations at hand are inconsistent with the right to „an independent tribunal", which is an inseparable element of the right to a fair trial under Article 6 paragraph 1 of the European Convention.

39. Having regard to the aforesaid, and taking into account its hitherto jurisprudence, the Constitutional Court holds that it has jurisdiction to examine constitutionality in the proceedings within the appellate jurisdiction, within the meaning of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, if necessary. Otherwise, the Constitutional Court would deprive itself of its function of „the court" (see Decision of the Constitutional Court no. *U 106/03* of 26 October 2004).

40. Accordingly, the Constitutional Court holds that the mentioned legal regulations lack a necessary legal quality in so far as they fail to comply with the requirements of Article 6 paragraph 1 of the European Convention. The Constitution of Bosnia and Herzegovina is the highest form of a general act of a state and has priority over all other law which is

not in compliance with it. Also, the European Convention, which is being applied directly pursuant to Article II(2) of the Constitution of Bosnia and Herzegovina, has „priority". The Constitutional Court concludes that the Government of the Federation of BiH, with the aim to uphold the Constitution of Bosnia and Herzegovina, is obliged to secure the enforcement of the legally binding decision for the appellant.

41. In view of the aforesaid, the Constitutional Court concludes that there was a violation of the 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 in the present case.

Other allegations

42. Pursuant to the conclusion referring to the violation of the right under Article II (3)(e) of the Constitution of Bosnia and Herzegovina and Article 6, paragraph 1 of the European Convention, the Constitutional Court considers that it is not necessary to separately examine the alleged violation of the right to property under Article 1 of the Protocol No. 1 to the European Convention, and other rights that the appellant refers to.

VIII. Conclusion

43. The Constitutional Court concludes that there is a violation of the right of access to court, as an element of the right to a fair trial, if a law or any other act of the authority renders impossible the enforcement of a legally binding court judgment, when such law or other act places „an excessive burden on individuals", thereby not meeting the requirement of proportionality between the public interest of a community and fundamental rights of individuals. Also, there is a violation of the right to „an independent tribunal", which is an inseparable element of the right to a fair trial under Article 6 paragraph 1 of the European Convention, if acts of legislative or executive authority modify or suspend the enforcement of a binding court decision or when prescribing that opinions of executive authority are binding on the courts.

44. Having regard to Article 61(1) and (2) and Article 64(2) of the Rules of Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. AP 2238/05

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Milenko Tomić against the Judgment of the District Court in Bijeljina no. Kž-112/03 of 17 June 2005 and the Judgment of the Basic Court in Bijeljina no. K-685/02 of 31 January 2003

Decision of 17 November 2006

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2), and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), in plenary and composed of the following judges:

Ms. Hatidža Hadžiosmanović, President,

Mr. David Feldman, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. Jovo Rosić

Ms. Constance Grewe

Ms. Seada Palavrić

Having deliberated on the appeal of **Mr. Milenko Tomić** in case no. **AP 2238/05**, at its session held on 17 November 2006 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Milenko Tomić is hereby granted.

A violation of the right to a fair hearing under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Judgment of the District Court in Bijeljina, no. Kž-112/03 of 17 June 2005 and the Judgment of the Basic Court in Bijeljina, no. K-685/02 of 31 January 2003, are hereby quashed.

The case shall be referred back to the Basic Court in Bijeljina which is to follow the expedited procedure and take a new decision in accordance

with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Basic Court in Bijeljina is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months as from the date of delivery of this Decision, about the measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 28 October 2005, Mr. Milenko Tomić („the appellant") from Bijeljina, represented by Mr. Momir Radulović, a lawyer practicing in Bijeljina, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the District Court in Bijeljina no. Kž-112/03 of 17 June 2005 and the Judgment of the Basic Court in Bijeljina no. K-685/02 of 31 January 2003.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 5 June 2006, the District Court and the Basic Court were requested to submit their respective replies to the appeal.

3. The replies to the appeal were submitted on 19 June and 5 July 2006, respectively.

4. Having regard to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 4 September 2006.

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 of the Basic Court no. K-685/02 of 31 January 2003, which was upheld by the judgment of the District Court no. Kž-112/05 of 17 June 2005, the appellant was found guilty of having committed the criminal offence of trade in humans for the purpose of prostitution under Article 188(1) of the Criminal Code (*Official Gazette of the Republika Srpska* nos. 22/00, 33/00 and 37/02) in as much as he had brought N.M., a citizen of the Republic of Moldova, to his Night Club „Venera" in Doboj, where she had to provide sexual services against her will to a large number of male clients for money, which the appellant was taking for himself. The appellant was sentenced to a 7 (seven) month prison sentence.

7. In his defense presented at the main trial, the appellant stated that it is without any doubt that the injured party N.M. was brought from Belgrade to his night club in Doboj through his friend Dragan from Belgrade, but she came there willingly to work as a dancer. However, she did not get the work permit and therefore she could not work at all, let alone provide sexual services. In addition, the appellant stated that no one forced N.M. to provide sexual services and that she had her passport with her all the time. Having met a soldier from the SFOR Russian Battalion, N.M. finally decided to leave. According to the appellant's allegations, N.M. invented a whole story since she assumed that it was the easiest way for her to leave the country together with the mentioned soldier. Also, the appellant mentioned the injured party's history and her previous behavior given her earlier employment as a dancer in Turkey and Egypt.

8. The injured party N.M. reported the case to IPTF and gave a statement to an investigative judge in the course of the investigation. In her testimony, the injured party stated that she came to work as a dancer but did not want to provide sexual entertainment to the bar's clients, claiming she was forced to do so by the appellant and by the bar's staff who were threatening to beat her or to sell her. As a last resort, she reported the matter to the police. The ordinary courts have considered that the injured party's testimony was consistent and logical and the court gave credence to her testimony, and on these grounds the courts passed the convicting judgments, which have been contested by the appeal. At the main trial, the testimony given by N.M. in the course of the investigation was read out pursuant to Article 333 of the Criminal Procedure Code (*Official Gazette of SFRY* nos. 26/86, 74/87, 57/89, and 3/90; *Official Gazette of the Republika Srpska* nos. 26/93, 14/94, and 6/97), in view of the fact that in the interim, *i.e.* after the completion of investigation and upon the opening of the main trial, N.M. left Bosnia and Herzegovina and her address was unknown to the court; therefore, the court was unable to serve the court summons on her.

IV. Appeal

a) Allegations stated in the appeal

9. The appellant complains of a violation of his right to a fair hearing under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") relating to the right to examine the prosecution witnesses which he was deprived of in the present case, and he also complains that the courts passed the convicting judgments against him based exclusively on the injured party N.M.'s testimony, which was not given at the main trial.

b) Reply to appeal

10. The District Court and the Basic Court consider that the appeal is unfounded and that there has been no violation of the appellant's rights in the course of the relevant proceedings. The testimony given by the injured party N.M. was read out pursuant to Article 333(1) of the then applicable Criminal Procedure Code because N.M. was not available to the court at the relevant time. It is also mentioned that in the course of the investigation the two witnesses from Moldova had been heard but they left the country, same as the injured party, and were not available to the court at the main trial.

V. Relevant Law

11. **Criminal Procedure Code** (*Official Gazette of SFRY n*os. 26/86, 74/87, 57/89, and 3/90; *Official Gazette of the Republika Srpska* nos. 26/93, 14/94, and 6/97), in the relevant part, reads:

Article 333(1)(1)

Aside from the cases specifically envisaged in this law the transcript or record of the testimony of witnesses, co-accused persons or participants already convicted of the crime and records or other documents concerning the finding and opinion of experts may be read by decision of the panel only in the following cases:

if the persons examined have died, have become mentally diseased or cannot be found, or if their appearance before the court is impossible or very difficult because of age, disease or other important causes;

VI. Admissibility

12. 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 court in Bosnia and Herzegovina.

13. According to Article 16(1) of the Rules of the Constitutional Court, the Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

14. In the present case, the subject matter of the appeal is the judgment of the County Court no. Kž-112/05 of 17 June 2005, against which there are no other effective remedies available under the law. Furthermore, the challenged judgment was delivered to the appellant on 31 August 2005 and the appeal was filed on 28 October 2005, that is, within the 60 days time-limit as provided for under Article 16(1) of the Rules of the Constitutional Court. In conclusion, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court as neither being manifestly (*prima facie*) ill-founded nor inadmissible for any formal reasons.

15. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the admissibility requirements have been met in the relevant appeal.

VII. Merits

16. The appellant challenges the aforementioned judgments of the District Court and the Basic Court and complains that his right to a fair hearing under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention have been violated by the challenged rulings.

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

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

Article 6(3)(d) of the European Convention, in its relevant part, reads:

(3) Everyone charged with a criminal offence has the following minimum rights:

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...]

18. The Constitutional Court highlights that Article 6(1) of the European Convention is applicable in the present case since it involves the criminal case in which the appellant has been found guilty of a criminal offence under the law and sentenced to imprisonment. Therefore, there are no doubts that the outcome of the relevant proceedings has been decisive for the determination of *any criminal charges against him*, as emphasized in the first line of Article 6 of the European Convention.

19. Taking into account the appellant's allegations that there has been a violation of his right to a fair hearing for he was unable to question directly the witness for the prosecution, the Constitutional Court underlines that according to its consistent practice as well as the practice of the European Court of Human Rights, the standards of Article 6 of the European Convention require that all evidence must be presented in the presence of the accused and the use of testimonies, which were given at an early stage before the trial as the evidentiary material, is not inconsistent with Article 6 of the European Convention provided that the accused is entitled to challenge the allegations by the prosecution. In addition, Article 333(1) of the Criminal Procedure Code stipulates that the testimony given during the investigation may be read out at the main trial provided that it is not possible to have the witness to attend the main trail because the witness's place of residence is unknown to the court.

20. However, in accordance with the case-law of the European Court of Human Rights, supported by the Constitutional Court as well, an accused must be allowed at least at one stage of the proceedings to question directly the witness concerned and, if it is not possible, the sentence cannot be based on such statement only. It follows from the case *Doorson vs. the Netherlands* (see Judgment of 20 February 1996) in which the Court made use of the statement given by the „anonymous witnesses" and the lawyer was given the opportunity to put questions to the witnesses but was not informed of their identity, the Court did not base its judgment expressly on the statement of these witnesses. Consequently, the European Court of Human Rights found no violation of right to a fair trial under Article 6(3) of the European Convention.

21. On the other hand, in the case *Kostovski vs. the Netherlands* (see Judgment of 20 November 1989), at the main trial on which the accused was convicted of conducting an armed robbery of a bank, the court read out the statements made by the two „anonymous witnesses". The European Court of Human Rights has underlined that the rights under Article 6 of the European Convention, as a rule, require that an accused, at some stage of the proceedings, should be given an adequate and proper opportunity to challenge and question a witness against him. Yet such an opportunity was not afforded to the accused at any stage of the proceedings in the relevant case and, accordingly, the European Court of Human Rights found a violation of Article 6 of the European Convention.

22. When the above case-law of the European Court of Human Rights is applied to the present case, the conclusion follows that there has been a violation of Article 6 of the European Convention given that N.M. could not be questioned directly by the appellant at any stage, and the challenged judgments, by which the appellant was sentenced to a 7 (seven) month prison sentence for the criminal offence of trade in humans for the purpose of prostitution, were based expressly on the statement made by N.M. whom the appellant had not had the opportunity to question at any stage of the proceedings. Moreover, the Constitutional Court observes that the ordinary courts did not produce any objective evidence in respect of which the testimony given by N.M. could be assessed as reliable but they simply stated in the relevant judgments that the courts fully accepted the statement made by N.M since she had no motive to charge the appellant unreasonably. In the Constitutional Court's opinion, this is just an assertion made by the ordinary courts and not the evidence on the basis of which the courts established, beyond a reasonable doubt, the credibility of the testimony made by the injured N.M.

23. In view of the above, the Constitutional Court holds that there has been a violation of the right to a fair hearing as guaranteed by Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention.

VIII. Conclusion

24. The Constitutional Court concludes that there has been a violation of the right to a fair hearing under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention for the reason that the challenged judgments by which the appellant was sentenced to a 7 (seven) month prison sentence for the criminal offence of trade in humans for the purpose of prostitution were based expressly on the statement made by N.M. whom the appellant had not had the opportunity to question at any stage of the proceedings.

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

26. 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

Case no. AP 2271/05

DECISION ON ADMISSIBILITY AND MERITS

Requests of Mr. Danijel Marinić and others to be released from the compulsory psychiatric treatment and custody in the Forensic Ward, to continue their medical treatment outside and to be placed under supervision of a competent social welfare center

Decision of 22 December 2006

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 64(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), in a Grand Chamber and composed of the following judges:

Ms. Hatidža Hadžiosmanović, President,

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Mato Tadić,

Ms. Seada Palavrić,

Having deliberated on the appeal of Mr. **Danijel Marinić et al**., in case no. **AP 2271/05**, at its session held on 21 December 2006, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Messrs. Danijel Marinić, Fikret Hadžić, Adis Hadžić, Sead Mehić, Muharem Bajramović, Ismet Kukrica and Rasim Odobašić is hereby granted.

A violation of Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1)(e) and (4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is established.

The Government of the Federation of Bosnia and Herzegovina is ordered to take action, within a time limit of three months as from the date of delivery of this Decision, to create a legal framework necessary for the protection of the constitutional rights of the appellants in accordance with this Decision.

The Government of the Federation of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months as from the date of delivery of this Decision, about the

measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 7 November 2005 Mr. Danijel Marinić, on 15 November 2005 Mr. Fikret Hadžić, on 23 January 2006 Mr. Adis Hadžić, on 9 March 2006 Mr. Sead Mehić and Mr. Muharem Bajramović and on 13 March 2006 Mr. Ismet Kukrica and Mr. Rasim Odobašić („the appellants") lodged their appeals with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court"). All appellants have been subject to security measure of compulsory psychiatric treatment and placement in a healthcare institution and therefore all of them have been placed in the Correctional Institution of Zenica („the Forensic Ward"). In their appeals the appellants stated that after the new Criminal Code of the Federation of Bosnia and Herzegovina („the F BIH Criminal Code") and the Criminal Procedure Code of the Federation of Bosnia and Herzegovina („the F BIH Criminal Procedure Code") entered into force their further confinement in the Forensic Ward is in violation of the mentioned laws and European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"). They therefore request to be released, to continue their medical treatment outside and to be placed under supervision of a competent social welfare center.

2. The appellants submitted the supplements to their appeals on several occasions requesting the Constitutional Court to deal with their appeals in an expedited procedure.

II. Procedure before the Constitutional Court

3. Pursuant to Article 31 of its Rules, the Constitutional Court decided to merge the following appeals: AP 2271/05, AP 2347/05, AP 125/06, AP 1250/06, AP 1251/06, AP 1252/06, AP 1253/06 and AP 1254/06 into one case numbered AP 2271/05, to conduct one set of proceedings and to take one decision since the appeals concern the same matter under the competence of the Constitutional Court.

4. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the Constitutional Court requested the Cantonal Court of Mostar and the Social Welfare Center of Mostar („the Social Welfare Center”) on 4 July 2005, the Government of the Federation of Bosnia and Herzegovina („the F BIH Government”) on 4 July 2005 and 27 September 2006, the Council of Ministers of Bosnia and Herzegovina („the BIH Council of Ministers”), the Ministry of Justice of Bosnia and Herzegovina („the BIH Ministry of Justice”) and the Ministry of Justice of the Federation of Bosnia and Herzegovina („the F BIH Ministry”) on 27 September 2006 to submit their responses to the appeal.

5. The Cantonal Court of Mostar submitted its response on 11 July 2005. The Social Welfare Center submitted its response on 28 July 2005, the F BIH Government on 5 October, the BIH Ministry of Justice on 11 October, and the F BIH Ministry of Justice on 26 October 2006.

6. Having regard to Article 26(2) of the Rules of Procedure of the Constitutional Court, the responses to the appeal were communicated to the appellants on 31 October 2006.

III. Facts of the Case

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

1. As to the appeal no. AP 2271/05 lodged by Mr. Danijel Marinić

8. By ruling no. K-1/99 of 9 November 1999, the Cantonal Court of Mostar imposed on the appellant a security measure of compulsory psychiatric treatment and placement in a healthcare institution in accordance with Article 63 of the then-applicable F BIH Criminal Code as the appellant had killed his parents while being in a state of mental incapacity as a consequence of mental illness (schizophrenia). For the purpose of implementing the above measure, the appellant was placed in the Forensic Ward and is still there.

9. On 19 April 2004 the appellant addressed the Cantonal Court of Mostar requesting that the court apply new criminal legislation and adopt a new ruling imposing his custody in the Forensic Ward for additional 30 days and then release him and place him under the supervision of the Social Welfare Center in accordance with Articles 220 and 410 of the new F BIH Criminal Procedure Code. By a writ of 22 April 2004, the Cantonal Court of Mostar informed the appellant that his case was forwarded to the Social Welfare Center for further action.

10. By a letter of 10 June 2004, the Social Welfare Center informed the appellant that the issue was related to a new practice and that they had addressed the Ministry of

Justice, Administration and Local Self-Government of the Hercegovina-Neretva Canton for information on further action on this case. Furthermore, they stated in the letter that the aforementioned Ministry informed them that they were to act in accordance with the previous procedure until a solution to the problem regarding the placement of perpetrators who had committed criminal offences in a state of mental incapacity was found.

11. The appellant addressed the Social Welfare Center once again on 13 May 2005. The Social Welfare Center responded that they had addressed the Psychiatric Department of the Clinic Hospital of Mostar and that the Department had informed them that it had not sufficient capacity to accommodate the perpetrators who had committed criminal offences in a state of mental incapacity. Furthermore, the Social Welfare Center responded that they had received an opinion of the Correctional Institution of Zenica whereby it stated that the appellant should continue being treated and held in a healthcare institution.

12. The appellant addressed the F BIH Ministry of Justice which, in a letter dated 21 November 2005, informed the appellant that his case was to be dealt with by the Social Welfare Center and that the F BIH Government, at its session held on 6 November 2005, had determined a proposal for establishment of social welfare/healthcare institution „Misoča" in Ilijaš. By another letter dated 9 December 2005, the F BIH Ministry of Justice informed the appellant that he may address the Ombudsman of the Federation of Bosnia and Herzegovina if he claims that his rights were violated and that the F BIH Ministry of Justice was not competent to deal with his case.

2. As to the appeals no. AP 2347/05 and no. AP 1254/06 lodged by Mr. Fikret Hadžić

13. By a judgment of 23 September 2002, the Cantonal Court of Tuzla imposed on the appellant a security measure of compulsory psychiatric treatment and placement in a healthcare institution in accordance with Article 63 of the then applicable the F BIH Criminal Code as the appellant, being in a state of mental incapacity as a consequence of a mental illness, committed a triple-murder. For the purpose of implementing the above measure, the appellant was placed in the Forensic Ward and is still there.

14. On an unidentified date, the appellant addressed the Cantonal Court of Tuzla requesting it to release him from the compulsory psychiatric treatment and custody in the Forensic Ward. On 26 March 2004 the Cantonal Court dismissed the appellant's request, following a specialist examination of the appellant conducted on 15 March 2003, which found that the appellant suffered from paranoia and that he was still dangerous. The Supreme Court of the Federation of Bosnia and Herzegovina upheld the above decision on 18 May 2004.

15. The appellant addressed the F BIH Ministry of Justice complaining about the conditions under which the security measure was implemented. He alleged that the medical treatment he underwent was not adequate. On 3 August 2004 the F BIH Ministry of Justice informed him that it was not competent to deal with his complaint and referred the complaint to the competent authority. The appellant addressed the FBIH and BiH Human Rights Ombudsmen complaining about the conditions at the Forensic Ward.

16. On 17 March 2006 the appellant filed an application with the European Court of Human Rights. He complained about the conditions at the Forensic Ward and his medical treatment. By Decision no. 11123/04 of 11 October 2005 the European Court of Human Rights decided to strike the application out of its list of cases as the appellant and Bosnia and Herzegovina had reached a friendly settlement. In particular, Bosnia and Herzegovina undertook to move all patients held in the Forensic Ward to an adequate facility „as soon as possible but no later than 31 December 2005", to pay him *ex gratia* the sum of EUR 9,000 in KM at currency exchange rate valid on the date of reimbursement within a time limit of three months and to pay him interest in case of delay.

17. The appellant alleges that the sum of EUR 9000 in KM was paid on 2 March 2006 but that he has not been moved to another facility yet.

18. On 22 June 2006, in accordance with the Decision of the European Court of Human Rights and under the auspices of the BIH Ministry, a Memorandum of Understanding regarding legal assistance and official cooperation in enforcement of security measures of compulsory psychiatric treatment pronounced in criminal proceedings was concluded between Bosnia and Herzegovina, Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District („the Memorandum"). The parties to the Memorandum undertook, *inter alia*, that all security measures of compulsory psychiatric treatment pronounced by any court of Bosnia and Herzegovina should be implemented in the Psychiatric Hospital „Podromanija" in Sokolac. However, the appellant has not been moved to that hospital yet.

3. As to the appeal no. AP 125/06 lodged by Mr. Adis Hadžić

19. By judgment no. K-30/03 of 9 April 2003, the Cantonal Court of Sarajevo imposed on the appellant a security measure of compulsory psychiatric treatment and placement in a healthcare institution in accordance with Article 63 of the then applicable the F BIH Criminal Code as the appellant, being in a state of mental incapacity, murdered one person and inflicted serious bodily injuries to another person. For the purpose of implementing the above measure, the appellant was placed in the Forensic Ward and is still being held there.

20. The Cantonal Court extended the security measures on several occasions by issuing the following rulings: no. K-30/03 of 29 May 2003, no. K-435/03 of 28 November 2003, no. Kv-214/04 of 9 June 2004 and no. Kv-92/05 of 11 March 2005 which was upheld in a ruling issued by the Supreme Court of the Federation of Bosnia and Herzegovina, no. Kz-205/05 of 17 May 2005. Prior to issuing those rulings, the Court took into account opinions of two neuropsychiatrists who recommended the security measure to be extended.

21. The appellant addressed the Cantonal Court on several occasions requesting that „the imposed criminal sanctions be brought into line with Article 420 of the F BIH Criminal Code" which, in the meantime, had entered into force. By writs no. K-30/03 dated 22 January 2004, 4 March 2004 and 11 October 2004, the Cantonal Court informed the appellant that the F BIH Ministry of Justice, in its act no. 03-02-3132/02 of 22 December 2003, „found constant deficiencies in the closed type correctional institutions on the territory of the Federation of BiH relating to the accommodation of persons in terms of the provisions of the F BIH Criminal Procedure Code and proposed that such persons be placed in the existing healthcare institutions in accordance with the previous procedure until the establishment of an adequate closed type institution on the territory of the Federation of BiH". The Cantonal Court therefore concluded that the harmonization the appellant requested was not possible „taking into account the new legal arrangement provided for in Articles 409, 410 and 411 of the applicable F BIH Criminal Procedure Code regarding the competence of the Social Welfare Center".

4. As to the appeal no. AP 1250/06 lodged by Mr. Sead Mehić

22. By legally binding ruling no. K-243/94 of 9 January 1995, the then Higher Court of Zenica imposed on the appellant a security measure of compulsory psychiatric treatment and placement in a healthcare institution as he committed an attempted murder. For the purpose of implementing the above measure, the appellant was placed in the Forensic Ward and is still there.

23. By rulings no. Kv-25/03 of 13 March, no. Kv-172/03 of 15 December 2003 and no. KV-123/05 of 7 November 2005, the Cantonal Court of Zenica, having provided the findings of medical experts, extended the security measure by applying the provisions of the then applicable FBIH Criminal Procedure Code.

5. As to the appeal no. AP 1251/06 lodged by Mr. Muharem Bajramović

24. By legally binding ruling no. K-55/90 of 21 November 1999, the Cantonal Court of Zenica imposed on the appellant a security measure of compulsory psychiatric treatment

and placement in a healthcare institution as he committed a criminal offence in a state of full mental incapacity. The measure is implemented in the Forensic Ward.

25. By rulings no. Kv-26/03 of 28 February 2003, no. Kv-49/04 of 25 February 2004, no. Kv-135/04 of 1 November 2005, no. Kv-186/04 of 24 December 2004, Kv-135/04 of 1 November 2004, Kv-186/04 of 24 December 2004 and Kv-80/05 of 14 March 2006, the Cantonal Court of Zenica, having provided medical findings from competent medical experts, extended the security measure imposed on the appellant.

26. On 22 December 2004 the appellant requested the Cantonal Court of Zenica to decline jurisdiction to deal further with the security measure of psychiatric treatment and placement in a healthcare institution and to refer the case-file to the competent social welfare center in accordance with the new FBiH Criminal Procedure Code. By ruling no. Kv-186/04 of 24 December 2004, the Cantonal Court dismissed the appellant's request. The Cantonal Court stated in the reasoning of its ruling that the authorities competent to deal with the issue in question failed to regulate that matter and that the F BIH Ministry of Justice, in its opinion no. 03-02-3113 of 22 December 2003, stated that *such persons will be held in the institutions in accordance with the previous procedure until an adequate closed type institution on the territory of the Federation of Bosnia and Herzegovina is provided*.

27. The appellant addressed the Public Institution „Social Welfare Center of the Municipality of Zenica" requesting the termination of the security measure imposed on him. By a letter dated 17 May 2005, the Social Welfare Center informed the appellant that it was not competent to deal with the issue nor was it competent to modify court decisions, as provided for by the provisions of the FBIH Criminal Procedure Code and that such request should be addressed to the competent court. The Social Welfare Center referred to the aforementioned opinion given by the F BIH Ministry of Justice which *suggests to the courts that, in the meantime, until the conditions for application of the new F BIH Criminal Procedure Code are provided, such persons should be placed in the existing healthcare institutions in the current manner [...]. Therefore, all cases covered by the 1998 FBiH Criminal Procedure Code will be dealt with in accordance with that Criminal Procedure Code, not the new Criminal Procedure Code, whose provisions will apply to new cases.*

6. As to the appeal no. AP 1252/06 lodged by Mr. Ismet Kukrica

28. By legally binding ruling no. K-21/01 of 12 February 2001, the Municipal Court of Mostar imposed on the appellant a security measure of compulsory psychiatric treatment

and placement in a healthcare institution as he committed an attempted murder in a state of full mental incapacity. For the purpose of implementing the above measure, the appellant was placed in the Forensic Ward and is still being held there. There is no information found in the case-file as to whether the imposed security measure has ever been reviewed.

7. As to the appeal no. AP 1253/06 lodged by Mr. Rasim Odobašić

29. By legally binding ruling no. K-8/03 of 12 March 2003, the Cantonal Court of Travnik imposed on the appellant a security measure of compulsory psychiatric treatment and placement in a healthcare institution as he committed a murder in a state of full mental incapacity. For the purpose of implementing the above measure, the appellant was placed in the Forensic Ward and is still being held there.

30. Following the entry into force of the new FBiH Criminal Code and FBiH Criminal Procedure Code, the Cantonal Court of Travnik issued ruling no. Kv-88/03 of 10 October 2003 whereby it referred the case to „the competent authority for social affairs of the Municipality of Žepče for the purpose of instituting a procedure in accordance with Article 410 paragraph 1 of the F BIH Criminal Code". The Cantonal Court has argued in the reasoning of the ruling that the new F BIH Criminal Code does not provide for application of the former law in respect of security measures so „that law does not provide for the security measure of compulsory psychiatric treatment and placement in a healthcare institution". Taking into account the provisions of Article 420 of the F BIH Criminal Code, the Cantonal Court proceeded with the harmonization of the legally binding decision in terms of legal name of the criminal offence, i.e. the security measure, with the legal names defined in the new F BIH Criminal Code. Furthermore, the Cantonal Court has noted that it also based such decision on the provision of Article 410 of the new F BIH Criminal Procedure Code which provides that the case will be referred to the body responsible for social care if the court has established that the accused committed a criminal offense in a state of mental incapacity.

31. The appellant repeatedly addressed the Cantonal Court in respect of his further placement in the Forensic Ward. By writs dated 21 June 2004, 28 September 2004 and 1 June 2005, the Cantonal Court responded that it was not competent to deal with the issue after the legally binding ruling was issued on 10 October 2003 which *became legally binding and enforceable, with which all authorities, institutions and individuals has to comply and that the authority which is exclusively competent to deal with the appellant's case is the Social Welfare Center of the Municipality of Žepče*.

IV. Appeal

a) Allegations stated in the appeal

32. Although the appellants have not complained of any specific constitutional right, the Constitutional Court holds that the appeal raises the issue relating to their right to liberty and security provided for in Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1)(e) and (4) of the European Convention. The appellants allege that the requirements necessary to set them free have been met by the adoption of new criminal legislation, that they can undergo medical treatment at liberty and that there is no provision in the FBiH Criminal Procedure Code, which entered into force in 2003, which could justify further extension of their confinement in the healthcare institution. Furthermore, the appellants allege that the Forensic Ward is not an appropriate institution in which such measure could be implemented.

33. In that respect, the appellants refer to the Special Report of the Human Rights Ombudsmen for Bosnia and Herzegovina („the BIH Ombudsmen") relating to complaints of a certain number of persons that committed criminal offences in a state of mental incapacity or significantly diminished mental capacity. The BiH Ombudsmen have established in the Special Report that the accommodation of the complainants in the special ward of the correctional institution is not appropriate in respect of the human rights as „those persons should be regarded as patients and placed in a hospital or an appropriate institution". The BIH Ombudsmen recommended the F BIH Government to take all necessary actions to adopt a law or to amend the existing legislation so as to specify the status of those persons in compliance with the principles enumerated in Article 5 of the European Convention.

34. As to the application filed with the European Court of Human Rights, appellant Mr. Fikret Hadžić alleges that he reached a friendly settlement with Bosnia and Herzegovina. The appellant further alleges that Bosnia and Herzegovina undertook to move all patients held in the Forensic Ward to an adequate facility no later than 31 December 2005 and to pay him the sum of EUR 9,000 in KM at currency exchange rate valid on the date of reimbursement within a time limit of three months from the date on which his case was stricken out of the list of cases in accordance with Article 37 of the European Convention. Moreover, the appellant alleges that Bosnia and Herzegovina paid him the sum of KM 17,684.62 in March 2006 but that no measure relating to moving from the Forensic Ward to an appropriate facility was taken.

b) Reply to the appeal

35. In its response to the appeal lodged by Mr. Danijel Martinić, the Cantonal Court of Mostar („the Cantonal Court") alleges that it is not competent any more to further deal with the imposed security measure as of the date of entry into force of the new Criminal Procedure Code and that the Social Welfare Center Mostar undertook the responsibility in that respect. The Cantonal Court further alleges that it instructed the appellant to refer to the provisions of the new law and to address the Social Welfare Center but „it appears that the appellant does not understand the changes in the legislation, which is the reason why he persistently addresses this Court and the F BIH Supreme Court which have no competence to deal with the case relating to his further medical treatment". In response to the appellant's allegations, the Social Welfare Center alleges that following the receipt of the case in question they addressed the Ministry of Justice, Administration and Local Self-Government of the Hercegovina-Neretva Canton which, in a letter dated 26 April 2004, responded that the case in question should be dealt with in accordance with the previous procedure until the F BIH Ministry of Justice finds a solution to the problem relating to the perpetrators who committed criminal acts in a state of mental incapacity. Furthermore, the Social Welfare Center alleges that they addressed the Clinic Hospital in Mostar - Neuropsychiatric Department which responded that they had no closed type ward at their disposal and therefore could not find an accommodation for the appellant or any other such patient. The Social Welfare Center alleges that it received reports from the competent neuropsychiatrists who were of opinion that the security measure should be extended but that they had no possibility of moving the appellant to another appropriate facility.

36. In response to all appeals, the BIH Ministry of Justice alleges that on 22 June 2006, on the initiative of the BIH Ministry of Justice, the Memorandum (the Memorandum was published in *Official Gazette of BiH* no. 44/06) was concluded between Bosnia and Herzegovina, Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District whereupon the Council of Ministers, at its session held on 15 July 2006, rendered the following decisions: Decision Accepting the Memorandum (*Official Gazette of Bosnia and Herzegovina*, no. 55/06), Decision on the Appointment of a Supervising Board in charge of control of the funds invested in the reconstruction of the Psychiatric Clinic „Podromanija" – Sokolac, Decision on the Appointment of a Coordinator for the Implementation of the Project for Reconstruction of the Psychiatric Clinic Podromanija – Sokolac (*Official Gazette of Bosnia and Herzegovina* no. 72/06). Furthermore, the BIH Ministry of Justice alleges that, in order to speed up the enforcement of the decision of the European Court of Human Rights in case of Mr. Fikret Hadžić, it sent information to the BIH Ministry of Human Rights and Refugees, whereby it proposed that it should be established who the owner of the building under reconstruction was, that it should

be decided whether Bosnia and Herzegovina would be the title holder of that property and that a procedure for adoption of the Law on the Establishment of Psychiatric Clinic in Sokolac as an institution of special interest for Bosnia and Herzegovina should be initiated in order to find a final solution to the problem relating to the accommodation for the persons subject to security measure of compulsory psychiatric treatment imposed by the courts of Bosnia and Herzegovina. The Ministry of Justice further alleges that in the meantime, on 8 June 2006, the Contract on the compensation for the costs of enforcement of the security measures of compulsory psychiatric treatment, which were imposed in criminal proceedings by the BiH Court, FBiH Courts, RS Courts and Brčko District Courts, was concluded. The BiH Ministry of Justice holds that by the aforesaid actions „the necessary legal regulations have been provided and the appropriate proposals have been put forward to the BiH Council of Ministers for the purpose of adopting decisions. Taking into account all the aforesaid, the Ministry of Justice considers that the Supervising Board should effectuate control of expenditures, project documentation, procurement of equipment, material costs and project implementation ward operation expenses. The Ministry therefore proposes that the Constitutional Court should request the Supervising Board to submit a report on the current activities relating to the building and „other activities which are the responsibility of the aforementioned authorities".

37. In response to the appeals the FBiH Ministry of Justice alleges that the Law on the Execution of Criminal Sanctions in the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH* nos. 44/98 and 42/99) regulates the competence of the authorities to execute the security measures of compulsory psychiatric treatment. The FBiH Ministry of Justice further alleges that due to the lack of appropriate healthcare institution in the Federation of Bosnia and Herzegovina such measures have been still implemented in the Forensic Ward owing to „the force of circumstances" which followed even after the entry into force of the new FBiH Criminal Code and FBiH Criminal Procedure Code. In support of its allegations, the FBiH Ministry of Justice submitted the information of the Correction Institution of Zenica relating to all persons who were placed and released from the Forensic Ward as of the date of entry into force of the new FBiH Criminal Code and Criminal Procedure Code, including information relating to the appellants. The FBiH Ministry of Justice further alleges that the placement and release of the persons on whom such security measures were imposed are carried out in accordance with the order of the competent court and social welfare center. The problem of absence of an appropriate heath-service institution before and, particularly, after the entry into force of the new criminal legislation was the subject of consideration by the courts, Federal and Cantonal Ministries of Labor and Social Policy, Cantonal and Municipal Social Welfare Centers, Federal Ministry of Health and the F BIH Ministry of Justice. The F BIH Ministry

of Justice further alleges that it submitted its opinion no. 03-02-3132/03 of 22 December 2003 and 26 January 2004 whereby it gave instructions that „such persons should be placed in the Forensic Ward in accordance with the previous procedure and that the ruling of the social welfare center has the legal force of enforcement document." Furthermore, the F BIH Ministry proposed to the BIH Council of Ministers that the Psychiatric Clinic Sokolac – Forensic Psychiatry should acquire the status as a closed type healthcare institution at the level of Bosnia and Herzegovina, as it was before the war.

38. Furthermore, the F BIH Ministry of Justice alleges that the F BIH Government took a decision whereby it gave for use the barracks „Misoča" in Ilijaš with the accompanied plot of land to the closed type healthcare institution and that the F BIH Government approved the Bill relating to the establishment of the Healthcare Institution „Mioča" Ilijaš. The Bill was submitted to the Parliament. However, upon the opposition of local residents of the Municipality of Ilijaš and different standpoint of the representatives of the F BIH Parliament, that Bill was stricken out of the agenda and has not been reconsidered since then. As Mr. Fikret Hadžić filed an application with the European Court of Human Rights, the F BIH Government, through its attorney, informed the European Court of Human Rights of the taken activities and proposed a friendly settlement. However, as the above Bill has not been adopted, the obligations arising from the decision of the European Court of Human Rights, i.e. the settlement, were not fulfilled within the given time-limit. The European Court of Human Rights was informed of those problems whereupon it gave a new time-limit for enforcement of the decision (deadline was 1 September 2006). The F BIH Ministry of Justice alleges that the Memorandum has been signed, that a Law relating to the establishment of a psychiatric institution for implementing the security measure of compulsory psychiatric treatment at the level of Bosnia and Herzegovina has been drafted and referred to the BIH Ministry of Justice which was supposed to submit it to the BIH Council of Ministers for the purpose of forwarding it to the parliamentary procedure. However, the BIH Ministry of Justice has never referred the Draft Law for further procedure and, instead of establishing a new healthcare institution at the state level, proposed to the BIH Council of Ministers that the aforementioned building be reconstructed for the purpose of activities of the Psychiatric Clinic Podromanija – Sokolac within the Clinic Center Istočno Sarajevo.

39. As to the appeals in the instant case, the F BIH Ministry of Justice alleges that the appellants and other persons on whom security measures of compulsory psychiatric treatment and placement in healthcare institution have been imposed are still held in the Forensic Ward and that „their further confinement is not fully in accordance with the regulations but it is nonetheless acceptable as an indispensable alternative" as the medical

findings given by the medical experts and rulings issued by the competent court show that there is a risk of them committing new criminal offences.

40. In their response to the appeals, both Ministries allege that the Psychiatric Clinic has no conditions to implement the security measures in question. The BIH Ministry of Justice alleges that on 17 April 2006 the aforementioned Clinic submitted a report alleging that a fire broke out in the premises of the Closed Type Forensic Ward so that a part of the building was not in use, which was the reason why they could not accept the persons from the Forensic Ward in compliance with the Memorandum. The above Ministry also alleges that to the date of delivery of this information, i.e. 14 September 2006, the building has not been reconstructed yet. The F BIH Ministry of Justice alleges that the conditions in that institutions are even worse than those in the Forensic Ward and that it was generally known that there is a facility close to that institution designed for the accommodation of such persons from the territory of the whole Bosnia and Herzegovina.

V. Relevant Law

41. The **Criminal Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of Federation of Bosnia and Herzegovina* nos. 43/98, 2/99, 15/99 and 29/00)

Article 61

The following security measures may be pronounced on perpetrators of criminal offenses:

1) compulsory psychiatric treatment and placement in a healthcare institution;…

Article 63

The court shall impose compulsory psychiatric treatment and placement in a healthcare institution on a perpetrator who has committed a criminal offense while in a state of full mental incapacity or substantially diminished mental capacity when it establishes that the perpetrator might commit grave criminal offenses against life or limb, sexual integrity or property if he/she was set free, and that his/her treatment and custody in such an institution are necessary to avert such danger.

42. The **Criminal Procedure Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina* nos. 43/98 and 23/99).

Article 475

(1) If the accused has committed a crime in a state of mental incapacity, the competent prosecutor shall file with the court a recommendation that it pronounce the

security measure of compulsory psychiatric treatment and deprivation of liberty of that perpetrator in healthcare (...) if there are conditions for pronouncement of such measure as envisaged in Articles 63 and 64 of the Criminal Code of the Federation.

Article 476

(1) Enforcement of the security measures of compulsory psychiatric treatment (...) in a healthcare institution or compulsory psychiatric treatment at liberty shall be decided after the main trial is held by the court which has original jurisdiction to try the cause.

(3) If on the basis of the evidence presented the court finds that the accused committed the particular crime and that at the time of committing the crime was in a state of mental incapacity, it shall decide on the basis of a questioning of the persons summoned and of the findings and opinions of the experts whether to pronounce upon the accused the security measure of compulsory psychiatric treatment and deprivation of liberty in a healthcare institution (...).

Article 480

(1) The court which in the first instance pronounced the security measure of compulsory psychiatric treatment and deprivation of liberty in a healthcare institution must every six months upon a previously obtained opinion from the healthcare institution in which the perpetrator is treated and confined decide on the need of further duration of that security measure.

(2) Automatically or on the recommendation of the healthcare institution or public welfare agency, but after hearing the competent prosecutor and defense counsel, the court which in the first instance pronounced the security measure of compulsory psychiatric treatment and deprivation of liberty in a healthcare institution shall terminate that measure and order the perpetrator released from the healthcare institution if on the basis of the opinions of the physicians it finds that it is no longer necessary to treat and confine the perpetrator in that institution, but it may order his compulsory psychiatric treatment at liberty.

43. The **Criminal Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina* nos. 36/03, 37/03, 21/04 and 18/05), in its relevant part, reads as follows:

Article 71

The following security measures may be imposed on perpetrators of criminal offences:

a) compulsory psychiatric treatment;

Article 74

(1) The security measure of compulsory psychiatric treatment shall be imposed on a perpetrator who has committed a criminal offence in a state of considerably diminished mental capacity or diminished mental capacity, if there is a danger that the causes of such a state may in the future also induce the perpetrator to commit another criminal offence.

(...).

Article 420

(1) The execution of criminal sanctions imposed by a final decision in accordance with the provisions of the Criminal Code referred to in Article 419 (Cessation of the Application of the Previous Code) of this Code, whose execution has not yet commenced or is ongoing, shall in the legal name of criminal offence or of security measure be brought into accord with the provisions of this Code as of the day of its entering into force.

(2) The harmonization of the final decision referred to in paragraph 1 of this Article shall be carried out by the court which issued the decision in question in the first instance. The harmonization shall be carried out ex officio within 30 days from the day of entering into force of this Code.

44. The **Criminal Procedure Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina* nos. 35/03, 37/03, 56/03 and 28/05), in its relevant part, reads as follows:

Article 410

(1) If the suspect committed a criminal offense in the state of mental incapacity, the prosecutor shall propose in the indictment that the court should establish whether the accused committed a criminal offense in a state of mental incapacity and that the case be referred to the body responsible for social care, for the purpose of commencing the appropriate procedure. (...)

(3) In the case referred to in paragraph 1 of this Article, the suspect or the accused in detention or in a psychiatric institution, shall not be released. Instead, the court shall, at the proposal of the prosecutor, issue a decision on a temporary custody of up to thirty (30) days from the issuance of the decision. The decision may not be appealed.

Article 427

(1) A motion for termination of the security measures prescribed in the Criminal Code and other measures prescribed by the law shall be submitted to the court.

(2) A judge assigned for such purpose shall conduct a preliminary inquiry as to whether the required period of time provided for by the law has expired, and shall then schedule and conduct hearings in order to establish facts to which the applicant referred. The judge shall summon the prosecutor and applicant.

(3) The judge referred to in paragraph 2 of this Article may also request from the police authority or facility where the convicted person served his sentence a report as to the conduct of the convicted person.

(4) If the motion has been rejected, no new motion may be submitted before the expiry of one (1) year as of the day when the decision rejecting the previous motion became legally binding.

45. The **Law on the Execution of Criminal Sanctions in the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina* nos. 44/98 and 42/99).

Article 2

The rights and freedoms of the persons to whom sanctions are applied may be restricted only insofar as it is necessary to achieve the purpose for which sanctions have been imposed, in pursuance of law.

Article 22

A convicted person shall be sent to serve his prison term by the court in whose jurisdiction the person resides permanently or temporarily.

Article 167

The measure of compulsory psychiatric treatment and placement in a mental institution shall be executed in a special healthcare institution established exclusively for that purpose or in a separate ward of a healthcare institution (hereinafter: the separate ward).

Article 168

The special healthcare institution referred to in Article 167 of this law shall be established and dissolved in pursuance of the law of the Federation. The Ministry of Health of the Federation shall determine in which healthcare institutions the separate wards for the execution of obligatory psychiatric treatment and placement in a mental institution shall be established.

Article 169

As an exception to Article 167 of this law, the measure of compulsory placement and psychiatric treatment in a healthcare institution may be implemented in a special ward of a prison (hereinafter „separate prison ward").

Article 170

The Court referred to in Article 22 shall send persons for compulsory psychiatric treatment and placement in a mental institution.

Article 172

The healthcare institution to which a person was sent for compulsory psychiatric treatment and placement in a mental institution shall inform the court having ordered the measure about the health condition of the person at least once a year.

When the psychiatric treatment of a person who was sent for compulsory psychiatric treatment and placement in a mental institution has been completed, the healthcare institution shall inform the court having ordered the measure about it and it may propose release on parole, if his prison term has not expired yet, in pursuance of the Criminal Code of the Federation.

If the court finds that further placement of the person who was sent for compulsory psychiatric treatment and placement in a mental institution is not necessary, it shall issue a decision on the termination of the measure (...).

Article 176

Supervision over the execution of the security measure of compulsory psychiatric treatment and placement in a mental institution, as well as over the special ward of the institution, shall be conducted by the Ministry of Health of Federation BiH.

Supervision over the legality and lawfulness of the treatment of persons referred to in paragraph 1 of this Article shall be conducted by the court that pronounced the measure and on whose territory the health institution, i.e. the special ward is located wherein the security measure of compulsory psychiatric treatment and placement in a mental institution is implemented.

Article 232

All measures of obligatory psychiatric treatment and placement in a mental institution passed in the territory of the Federation shall be executed in a separate ward of Zenica Prison until the Federal Ministry and the Federal Ministry of Health designate a healthcare institution where this measure will be executed.

The measure of obligatory psychiatric treatment and placement in a mental institution shall be executed in a separate ward under paragraph 2 of this article for three years at the longest counting from the effective day of this law until when the execution shall have been organized in the institution under article 167 of this law.

46. The **Law on the Protection of Persons with Mental Disabilities** (Official Gazette of the Federation of Bosnia and Herzegovina no. 37/01), in its relevant part, reads as follows:

Article 43

A security measure of compulsory psychiatric treatment and placement in a healthcare institution, or a measure of compulsory psychiatric treatment at liberty shall be imposed on the perpetrator who has committed criminal in a state of mental incapacity in accordance with Articles 63 and 64 of the Criminal Procedure Code of the Federation of Bosnia and Herzegovina and Articles 475 and 480 of the Criminal Procedure Code (Official Gazette of the Federation of Bosnia and Herzegovina no. 43/98).

Article 44

The enforcement of the security measure referred to in Article 43 of this Law shall be carried out in accordance with Article 167 to 182 of the Law on the Execution of Criminal Sanctions in the Federation of Bosnia and Herzegovina no. 44/98).

VI. Admissibility

47. 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 court in Bosnia and Herzegovina.

48. According to Article 16(3) of the Rules of the Constitutional Court, the Constitutional Court may exceptionally examine an appeal when there is no decision of a competent court if the appeal indicates a grave violation of the rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina or by the international documents applied in Bosnia and Herzegovina.

49. The legal remedies exhaustion rule requires that the appellant reaches a so-called final decision. A final decision represents a response to the last legal remedy used which is effective and adequate to examine a lower instance decision in both factual and legal aspects. The rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential

to have regard to the particular circumstances of the individual case (see European Court of Human Rights, *Van Oosterwijck vs. Belgium,* judgment of 6 November 1980, Series A no. 40, paragraph 35). This, *inter alia,* means that not only the formal legal requirements existing within the legal system must be taken into account but also the political and legal system in its entirety and the appellant's personal situation.

50. Taking into account the aforesaid, the Constitutional Court shall consider whether there have been effective legal remedies available and, if so, whether the appellants have exhausted them, whether they have submitted evidence proving that the appeals were submitted within a time limit of 60 days from the date of adoption of the final decision.

51. The Constitutional Court notes first that in applying the legal remedies exhaustion rule it is necessary to examine in each individual case whether the legal remedy has been effective or not according to the relevant laws of the state. Furthermore, the Constitutional Court has already noted in its case-law that an individual must not be overburdened in determining the most effective way of realizing his rights (see Constitutional Court of BiH, *Decision no. 18/0*0 of 10 May 2002, item 40 published in *Official Gazette of Bosnia and Herzegovina* no. 30/02). The effectiveness of the legal remedy is not only reflected in the fact that it is formally provided by the law but also in fact that it should be effective in practice. The fundamental human rights protected by the European Convention and by the Constitution of Bosnia and Herzegovina must be real and effective both in law and practice and not illusory or theoretical. Specifically, the remedies provided for the protection of the rights must be physically accessible, must not be hindered by acts, omissions, delay, or disregarded by governmental authorities and must be able to protect the rights in question (see Constitutional Court of Bosnia and Herzegovina no. *U 36/02* of 30 January 2004, item 25 published in *the Official Gazette of Bosnia and Herzegovina* no. 9/04).

52. In this respect, the Constitutional Court recalls that according to the established practice in Bosnia and Herzegovina, the appellants may directly address the Constitutional Court in case when there are no other effective legal remedies with regard to a constitutional right or rights provided for by the European Convention. As regards the cases disclosing an unreasonable length of the proceedings, it has been concluded that there was not an effective legal remedy against allegations that the right to have a decision adopted within the reasonable time limit has been violated. This is the reasons why the appellant did not have to address any other domestic body but directly the Constitutional Court or, previously the Human Rights Chamber, i.e. now Commission for Human Rights with the Constitutional Court in order to claim the violation of a constitutional right (see Constitutional Court of Bosnia and Herzegovina no. *AP 769/04* of 30 November 2004, item 23 with further reference to the case-law of the European Court of Human Rights).

In view of the aforesaid, the Constitutional Court has already noted that one of the fundamental postulates of the European Convention is that the legal remedies available to individuals must be easily accessible and understandable and that the omissions relating to the organization of legal and judicial system of a state, which jeopardize the protection of individual rights, may not be attributable to individuals. Moreover, the states have the obligation to organize their legal systems so as to allow the courts and public authorities to comply with the requirements of the European Convention (see European Court of Human Rights, the *Zanghi vs. Italy* judgment of 19 February 1991, Series A no. 194, paragraph 21).

53. The Constitutional Court notes that the first indication of ineffectiveness of the legal system regarding the right which the appellants deem have been violated is the fact the they have been denied the protection of the rights they sought as of the date of entry of the new criminal legislation, since the courts instructed them to address the social welfare centers, while the social welfare centers have argued that they have not necessary conditions for accommodation of the appellants. Furthermore, the Constitutional Court notes that so far the competent authorities have not fulfilled their obligations relating to the case dealt with by the European Court of Human Rights and completed by the friendly settlement between the competent authorities and one of the appellants in the manner so as to place all persons that committed criminal offences in a state of mental incapacity in an appropriate facility.

54. Taking into account the aforesaid, the Constitutional Court holds that there have not been effective legal remedies of which the appellant could avail themselves. Under the circumstances, the Constitutional Court holds that there are no obstacles to consider the appeal.

55. Pursuant to Article 16(3) of the Rules of the Constitutional Court, the Constitutional Court concludes that the appeals at hand meet the admissibility requirements under the aforementioned Article.

VII. Merits

56. With reference to the appellants who, by the court decisions, were subjected to a security measure of compulsory medical treatment and placement in a healthcare institution for the reason that they had committed the criminal offenses in a state of mental incapacity, they complain that after coming into force of a new criminal legislation their rights to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention were violated by their

further detention in the Forensic Ward. The appellants consider that by application of new regulations they have to be released in order to continue undergoing their medical treatment at liberty.

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

d) The rights to liberty and security of person.

58. Article 5 of the European Convention as relevant reads:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (...)

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

a) Article 5 paragraph 1 (e) of the European Convention

59. The Constitutional Court recalls that the rights under Article 5 of the European Convention, as to their contents, are considered to be the basic rights safeguarded by the European Convention and they come immediately after the right to life. Article 5 of the European Convention guarantees the protection of rights to liberty and prohibits the arbitrary attitude towards limitation of that right. The exceptions to the rule „prohibition against deprivation of liberty" are given in Article 5 paragraph 1 of the European Convention where the cases of permitted deprivation of liberty are listed. That is an extensive list that should be closely interpreted (see the European Court of Human Rights, *Ireland vs. the United Kingdom,* judgment of 18 January 1978, series A-25). Only such kind of approach is consistent with Article 5 of the European Convention which is aimed at ensuring that no one shall be arbitrarily deprived of his/her liberty (see the European Court of Human Rights, *Quinn,* judgment of 22 March 1995, series A-311 and *Winterwerp vs. The Netherlands*, judgment of 24 October 1979, series A-33). Moreover, by its nature the deprivation of liberty shall be imposed in accordance with substantive procedural regulations and proper application of domestic law. Failure to comply with some substantive procedural requirements of domestic law or failure to fulfill some procedural

aspects, even if in the court's opinion it is not of crucial importance, may lead to violation of Article 5, paragraph 1 (see the European Court of Human Rights, *Bozano,* judgment of 8 December 1986, series A-111 and *Van der Leer*, judgment of 21 February 1990, series A-170).

60. In connection with the aforesaid, the Constitutional Court points out that the European Court of Human Rights, in its case-law, determined the criteria that must be met in order for detention of mentally disturbed person to be considered „a non-arbitrary detention", i.e. so that the requirement of „lawfulness" is satisfied within the meaning of Article 5 paragraph 1 (e) of the European Convention. Firstly, except in emergency cases, no individual may be deprived of his liberty unless he has been reliably shown to be of „unsound mind". The very nature of what has to be established before the competent national authority - that is, a true mental disorder - calls for objective medical expertise. Further, the „unsound mind" must be of a kind or degree warranting compulsory confinement. Moreover, the validity of continued placement depends upon the persistence of such a disorder, (see the European Court of Human Rights, the already cited Decision *Winterwerp,* paragraph 39). Furthermore, in cases of possibly unlimited detention a review of its lawfulness must be available at reasonable intervals before „the court" that is competent to order the release of a person concerned, and the placement must be in a hospital, clinic or other appropriate institution that is authorized to keep mentally ill persons in custody (see the European Court of Human Rights, *X vs. United Kingdom*, judgment of 5 November 1981, series A, number 46, paragraph 43 and *Ashingdane vs. United Kingdom*, judgment of 28 May 1985, series A, number 39, paragraph 44).

61. At the outset, the Constitutional Court observes that according to the competent courts' decisions, the measure of compulsory medical treatment and placement in healthcare institution was imposed on the appellants, which existed according to the former F BiH Criminal Procedure Code, on the grounds that they had committed various criminal offenses in a state of mental incapacity. Furthermore, prior to the pronouncement of the said measure it was established, through a proper medical expertise and findings, that all of them were suffering from serious mental disorders posing a threat to public safety, and therefore they had to be medically treated and confined in a medical facility. However, upon the pronouncement of this measure, the new FBiH Criminal Code entered into force in 2003 which adopted another approach. Namely, the new FBiH Criminal Code stipulates that a measure of compulsory psychiatric treatment may be pronounced only on a person who committed the criminal offense in a state of substantially diminished mental capacity or in a state of diminished mental capacity if there is a threat that the causes of such mental state could eventually have influence on the perpetrator to commit another criminal offense

in the future. Hence, the new FBiH Criminal Code no longer includes pronouncement of the said security measure on a person who committed a criminal offence in a state of mental incapacity. It is exactly the aforesaid fact on which the appellants have based their request for release in order to be given a chance to continue their medical treatment at liberty believing that such legal provisions require their release and medical treatment under supervision of competent social welfare centers. The appellants also reckon that the Forensic Ward is not an appropriate health institution within the meaning of European Convention and they referred to the Special Report of Ombudsman for BiH. Bearing in mind the aforementioned, the Constitutional Court holds that, in fact, the appellants have been challenging the lawfulness of their further deprivation of liberty within the meaning of Article 5 paragraph 1 item (e) of the European Convention.

62. As to the cases at hand, the issue is about the legality of continuing to execute the imposed measures. In this regard, the Constitutional Court points out that it is obvious that upon the adoption of new legislation, the case-law regarding extension of such measure has been differently viewed in the Federation of BiH. Namely, some courts hold that after the enactment of new F BIH Criminal Code and FBiH Criminal Procedure Code the aforementioned persons are not within their jurisdiction any more, but rather within the jurisdiction of the social welfare centers. Therefore, the courts usually adopt decisions ordering detention of the said persons for up to 30 days in custody, as referred to in Article 410 paragraph 2 of the recently adopted FBiH Criminal Procedure Code, and then they forward the case to a relevant social welfare center. However, the social welfare centers lack adequate space and necessary conditions to receive those persons. There is no appropriate procedure prescribed. All of this is the reason for detention of mentally ill persons in the Forensic Ward without a decision of any relevant public authority legitimating this. On the other hand, some courts do adopt decisions on extension of security measures already imposed but they do that in accordance with the former FBiH Criminal Procedure Code and the Law on Protection of Persons with Mental Disabilities and the Law on Execution of Criminal Sanctions, in which case they entirely comply with the procedures used to be prescribed by those laws (FBiH Criminal Procedure Code) or with the procedures prescribed by the Law on Protection of Persons with Mental Disabilities or the Law on Execution of Criminal Sanctions: review at regular intervals, obtaining medical findings and physician’s opinion, providing that the right to appeal is fully respected, etc.

63. The Constitutional Court holds that vague laws leave ample room for arbitrariness, which is manifestly confirmed through different case-law of courts in similar cases. In the first case, where the courts consider that they have no jurisdiction and where the social welfare centers are not able to receive mentally ill persons nor do they have any prescribed

procedures in place, room is left for ordering the extension of detention measure against the mentally ill persons who committed criminal offences in a state of mental incapacity without a previously issued decision by the relevant state authority. This is inconsistent with the requirements that must be satisfied for the deprivation of liberty to be „in accordance with the law" as referred to in Article 5 paragraph 1 e) of the European Convention. This is so, in particular because the other relevant provisions, i.e. the Law on Protection of Persons with Mental Disabilities and Law on Execution of Criminal Sanctions have not been brought into accord with the new criminal legislation and they only refer to application of the former FBiH Criminal Procedure Code which ceased to be in effect.

64. On the other hand, the Constitutional Court points out that the case-law of the courts deciding on extension of detention according to the FBiH Criminal Procedure Code that ceased to be in effect also raises issues since an invalid law is applied. In the Constitutional Court's opinion, this case law, unlike the previous one, is based on a law requiring a proper procedure which allows for extension of a security measure imposed on the mentally ill persons through court's decision. However, the mentioned case-law is based on the invalid Criminal Procedure Code and provisions of the Law on Protection of Persons with Mental Disabilities and Law on Execution of Criminal Sanctions, which have not been yet harmonized with the newly enacted Criminal Code and FBiH Criminal Procedure Code, which rather refer to the application of former regulations. That is indicative of a violation of „rule of law" principle under Article I (2) of the Constitution of Bosnia and Herzegovina and the principle of legal certainty thereof. Therefore, the Constitutional Court holds that such case-law and decisions adopted under the related procedures cannot satisfy the requirement of „lawfulness" under Article 5 paragraph 1 e) of the European Convention.

65. Furthermore, the appellants have stated, by invoking the Special Report of the Ombudsman for BiH, that the institution where they have been placed, which is a special ward of the Zenica Prison, is not a proper healthcare institution. In connection with that, the Constitutional Court points out that the European Court of Human Rights, in its case-law, has concluded that the „lawfulness" of any deprivation of liberty is required in respect of both the ordering and the execution of that measure in relation to the person concerned. The said „lawfulness" presupposes conformity with the domestic law as well as conformity with the requirements listed under Article 5 paragraph 1 of the European Convention. The European Court of Human Rights also concluded that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the „detention of a person as a mental health patient will only be „lawful" for the purposes of Article 5 paragraph 1 e) of the

European Convention if effected in a hospital, clinic or other appropriate institution" (see the European Court of Human Rights, judgment *Ashingdane vs. the United Kingdom*, already cited).

66. The Constitutional Court notes that, as a rule, security measures imposed on persons who committed criminal acts in a state of mental incapacity have been given effect in the Forensic Ward both at the time when the former Criminal Code and Criminal Procedure Code was in force and since the time when the new criminal legislation entered into force. Those persons were placed in the prison ward although even at the time when the security measure of compulsory medical treatment and placement in a healthcare institution was imposed on the appellants the Law on Execution of Criminal Sanctions was in effect, which requires execution of the related measure „in a healthcare institution established to serve that purpose only or in a special ward of the healthcare institution", and only in exceptional cases „in a special ward of a correctional institution". However, the Constitutional Court notes that the institution prescribed by the Law on Execution of Criminal Sanctions has never been established, and the said persons were placed in a special ward of the prison in Zenica as a rule and not as an exception.

67. Bearing in mind the case-law of the European Court of Human Rights, the Constitutional Court holds that, although placing of mentally ill persons in a special ward is, to a certain extent, in accordance with the domestic law which provides for such a possibility - but only as an exception - it is not, nevertheless, in compliance with the European Convention which requires mentally ill persons to be placed in a hospital, clinic or other appropriate institution serving that purpose. Given the aforesaid, the Constitutional Court maintains that the requirement of „lawfulness" of deprivation of liberty within the meaning of Article 5 paragraph 1 e) of the European Convention has not been met, even in relation to the institution where this measure is executed.

68. Furthermore, the Constitutional Court notes that the BiH Ministry of Justice and FBiH Ministry of Justice referred to a series of substantial activities aimed at resolving the issue of „proper institution", but this issue has not been completely resolved at the time of adoption of this decision of the Constitutional Court even though the European Court of Human Rights was given assurances by the local state authorities in this regard. The Constitutional Court shall refrain from assessing whether this kind of institution should be established at the State or Entity level since that is an issue to be resolved by the domestic executive and legislative authorities. However, the Constitutional Court deems that it is necessary to point out that this issue should be urgently resolved in order to conform with the requirements under Article 5 paragraph 1 e) of the European Convention with the purpose of protecting the appellants' human rights. This includes adoption of relevant

regulations on establishing an appropriate institution, as well as its actual formation and usage. However, it does not require the immediate and unconditional release of the appellants if it is undoubtedly confirmed by medical findings and doctor's opinion that the health condition of the appellants does not allow for such a decision to be made.

69. In this regard, the Constitutional Court refers to the case-law of the European Court of Human Rights according to which the termination of the placement of an individual who has previously been found by a court to be of unsound mind to present a danger to society is a matter that concerns not only that individual but also the society and community in which he/she will live if released. Given the seriousness of this public interest, in particular the seriousness of the criminal offences committed in a state of mental incapacity, the European Court of Human Rights, in case *Luberti vs. Italy,* concluded that the competent state authority justifiably acted with caution when it adopted the decision on release of the appellant even when the medical findings indicated that he had recovered (judgment of 23 February 1984, Series A, no. 85).

70. Given the aforesaid and regardless of the activities of the competent authorities in resolving this issue, the Constitutional Court holds that due to the lack of prompt action by the competent authorities the appellants' right under Article 5 paragraph 1 e) of the European Convention was violated because the deprivation of liberty was not „in accordance with law" as required by the European Convention.

b) Article 5, paragraph 4 of the European Convention

71. The Constitutional Court considers that all the appeals also raise an issue on whether the appellants were given a chance to have the extension of detention be decided by „a court" at regular intervals as envisaged by Article 5 paragraph 4 of the European Convention, in which case a particular attention should be given to the case-law of the courts in the Federation of BiH (see paragraph 60 of this Decision).

72. The Constitutional Court points out that according to the case-law of European Court of Human Rights, Article 5 paragraph 4 of the European Convention does not guarantee the right to court control over the legality of all aspects or details of deprivation of liberty, but it offers crucial guarantees against the arbitrariness in deciding on „deprivation of liberty". The obligation under Article 5 paragraph 4 of the European Convention is to be fulfilled irrespective of the ground on which a person concerned was deprived of liberty, i.e. even when it is about the reasons under Article 5 paragraph 1e) of the European Convention. A thorough analysis of Article 5 paragraph 4 of the European Convention indicates that when it comes to deprivation of liberty the concept of „lawfulness" must

have the same meaning in paragraph 1 e) and paragraph 4 of Article 5. Therefore, the domestic legal remedy that has to be available under Article 5 paragraph 4 of the European Convention must provide for a review of the conditions which, according to Article 5 paragraph 1 e), are essential not only for the lawfulness of initial deprivation of liberty on the ground of mental disorder, but also for the unlawfulness of extension of that measure through periodical review (see the European Court of Human Rights, *X vs. the United Kingdom*, judgment of 5 November 1981, series A, number 46, paragraph 58 and *Kolanis vs. the United Kingdom*, judgment of 21 June 2005, application no. 517/02, paragraph 80).

73. Accordingly, Article 5 paragraph 4 of the European Convention guarantees that a person deprived of liberty shall have access to „a court" in order for the lawfulness of both the initial deprivation of liberty and extension of security measure to be reviewed. According to the case-law of the European Court of Human Rights, a key element of this obligation is that the lawfulness of a deprivation of liberty must be supervised by the court. However, it does not necessarily have to be *a court of law of the classic kind integrated within the standard judicial machinery of the country* (see the European Court of Human Rights, *Weeks vs. the United Kingdom*, judgment of 2 March 1987, series A, no. 114, paragraph 61). Nevertheless, it must be a body that has „a judicial character". In order to have *a judicial character,* that body must be *independent both of the executive and of the parties to the case* (see the European Court of Human Rights, *De Wilde, Ooms and Versyp vs. Belgium*, judgment of 18 November 1971, series A, no. 12, paragraphs 76 and 77), and must be competent to adopt a binding decision which may lead to the release of a person concerned. This body must also provide for the *procedural guarantees that are appropriate for the specific kind of deprivation of liberty*, which are not *markedly inferior* to those existing in a criminal matter when the result of deprivation of liberty is a long lasting detention. In particular, these guarantees require the following: an oral hearing accompanied by legal assistance in the proceedings attended by both parties; a review of the lawfulness of the detention in the broadest sense; and a decision that is adopted promptly.

74. Having regard to the aforesaid, the Constitutional Court observes that the former FBiH Criminal Procedure Code provided for the obligation of the court that pronounced the security measure of compulsory medical treatment and placement in a healthcare institution to conduct a review of the need for further enforcement of the security measure and the relevant court used to do that every six months upon a previously obtained opinion from the healthcare institution in which the perpetrator was treated and confined. Furthermore, either *ex officio* or upon the request of healthcare institution or social welfare agency, the said court was under an obligation to terminate this measure and order the

release if it was confirmed that there was no need for further enforcement of security measure. However, the recently adopted FBiH Criminal Procedure Code does not contain any procedural provisions that concern the persons who committed the criminal offences in a state of mental incapacity, but it only provides for the related cases to be forwarded to a body in charge of social welfare issues for the purpose of initiating the relevant proceedings, whereas the expression „relevant proceedings" has not been defined at all. In connection with the aforesaid, the Constitutional Court considers that the proceedings envisaged by the Law on Protection of Persons with Mental Disabilities, Article 42 and Article 43, cannot be „relevant proceedings" referred to by the new FBiH Criminal Procedure Code since this law, as already stated, has never been updated or harmonized with the amendments to the FBiH Criminal Procedure Code, but its provisions only refer to the procedure prescribed by the former FBiH Criminal Procedure Code which ceased to be in effect and thus the circle is closed. A presumption could be made that the procedural rules of administrative proceedings can be applied to the said persons since the rules of administrative proceedings are applied in cases dealt by the social welfare agencies, or the procedural rules of non-contentious proceedings could be applied as it is in cases of forcible detention of mentally ill persons who did not commit a criminal offense as prescribed by the Law on Protection of Persons with Mental Disabilities. However, none of the valid legal provisions provide for the explicit definition of the following terms: which „court" the appellants are supposed to address; what proceedings should be conducted to have „the lawfulness of extended detention" reviewed; what is the time interval within which they can request the review of extension of the pronounced measure; which procedural guarantees are at their disposal; and within what time frame a decision must be adopted regarding that issue.

75. The Constitutional Court considers that in this manner the appellants' rights under Article 5 paragraph 4 of the European Convention were violated.

76. Moreover, in its earlier jurisprudence the Constitutional Court has concluded that if necessary it shall have appellate jurisdiction to conduct a review of constitutionality within the meaning of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, otherwise it would be deprived of its „judicial function" (see the Constitutional Court, decision no. *U 106/03* of 26 October 2004). The Constitutional Court recalls that the Constitution of Bosnia and Herzegovina is the highest general act of the state and that it has priority over any other law which is not in accordance with it and that the European Convention, as referred to in Article II(2) of the Constitution of BiH, shall have priority over any domestic law.

77. Having regard to the aforementioned, the Constitutional Court, first of all, emphasizes that the manner in which the competent authorities will ensure „the lawfulness" of detention of persons who committed the criminal offence in a state of mental incapacity under Article 5 paragraph 1 e) and their access to the „court" for the purpose of reviewing the „lawfulness" of pronouncement or duration of detention measure from Article 5 paragraph 4 of the European Convention constitutes an issue that comes under a margin of appreciation of the state. However, the undertaken measures must meet the criteria of the European Convention. Accordingly, the fact that this matter is not within the jurisdiction of criminal courts is not inconsistent with the European Convention, but the state is obliged to set up the requirements and the procedure for ordering, extending and terminating the detention measure in an appropriate healthcare institution when it comes to the persons who committed the criminal offense in a state of mental incapacity, which also includes the possibility to have access to a „court".

78. In the present case the Constitutional Court firstly recalls that by the new FBiH Criminal Code, Article 420 paragraph 2, it is stipulated that a criminal sanction, whose execution has not yet commenced or is ongoing, *shall under the legal name of a criminal offence or of a security measure be brought into accord with the provisions of this Code.* However, the Constitutional Court notes that the FBiH Criminal Code does not provide for the pronouncing of any measure on persons who committed the criminal act in a state of mental incapacity; nor does it provide for the jurisdiction of the court in criminal proceedings to conduct a trial against those persons, but rather requires that those persons must be handed over to the competent social welfare agency. The Constitutional Court is of the opinion that, as a matter of fact, this means that the previously ordered security measure under Article 63 of the former FBiH Criminal Code can in no way be brought in line with any new measure envisaged by Article 74 of the valid FBiH Criminal Code in accordance with which the security measure can be pronounced only to persons who committed the criminal offence in a state of substantially diminished mental capacity or in a state of diminished mental capacity. Concurrently, as already stated, the F BiH Criminal Code refers to application of „appropriate procedure", but it fails to determine precisely which procedure is to be applied. Furthermore, the Constitutional Court observes that some courts, by application of provisions of Article 410 paragraph 2 of the FBiH Criminal Procedure Code, adopted decisions on temporary placement of some appellants. However, this Article requires that the court, upon the prosecutor's proposal, shall adopt a decision on temporary placement of the suspect or accused who committed the criminal act in a state of mental incapacity and is currently confined, in other words placed in a psychiatric institution, and that the longest period of this placement will be up to 30 days. It is obvious

that this regulation relates to the future cases only and is not applicable to the appellants' current situation since they have neither the status of „suspect" nor the status of „accused" and they are persons on whom security measures have already been pronounced. The Constitutional Court considers that this kind of vagueness and ambiguity in the provisions of criminal law, both in the substantive and procedural law, leads to a conclusion that these law provisions do not meet the necessary legal quality requirements to an extent to ensure the compliance with Article 5 paragraphs 1 e) and 4 of the European Convention, and thus they leave an ample room for arbitrary application.

79. Furthermore, the Constitutional Court points out that the Law on Protection of Persons with Mental Disabilities does not provide for any procedure of pronouncing, extending or terminating the measure of compulsory medical treatment and placement in healthcare institution when it comes to the persons who committed the criminal act in a sate of mental incapacity. Namely, this law has not been amended since the adoption of the new Criminal Code and FBiH Criminal Procedure Code and therefore it cannot contain relevant provisions on the following: what body, under which conditions and in which procedure can pronounce, extend or terminate this measure. It also fails to ensure the right of appeal against the decision on pronouncing, extending or terminating this measure. Neither does it prescribe an effective right of access to a court within the meaning of Article 5 paragraph 4 of the European Convention. Bearing in mind the aforesaid, and the fact that even three years after the amendments to the criminal law provisions this law still refers to application of the former law which ceased to be in effect, the Constitutional Court holds that the Law on Protection of Persons with Mental Disabilities fails to meet the legal requirements to an extent to comply with Article 5 paragraphs 1 e) and 4 of the European Convention.

80. Further, the Constitutional Court notes that the Law on Execution of Criminal Sanctions was not updated and conformed to new solutions from the Criminal Code and FBiH Criminal Procedure Code and requirements under Article 5 paragraphs 1 e) and 4 of the European Convention. This Law, in particular, provides for enforcement of the measure of compulsory medical treatment and placement in healthcare institution in the special prison ward, and, as already stated, that is inconsistent with the standards of Article 5 paragraph 1 e) of the European Convention. Moreover, this law also refers to the procedure prescribed by the former FBiH Criminal Procedure Code, which has not been in effect for more than three years, and thus, it leaves the following issues unresolved: what „court" will supervise the execution of this measure and decide on extension or termination of the pronounced measure, what procedure will be applied and what timeframe is to be complied with. In this regard, the Constitutional Court holds that the Law on Execution

of Criminal Sanctions fails to meet the law quality requirements to an extent set forth in Article 5 paragraph 1 e) and paragraph 4 of the European Convention.

81. The Constitutional Court holds that it is not its task to establish whether the competent legislator will launch the procedure of amending the existing or adopting new regulations to ensure the respect for the appellants' rights and rights of other persons who committed a criminal offense in a state of mental incapacity. That is exclusively the task of the competent legislator and relevant executive authorities. However, the Constitutional Court notes that the competent authorities are obliged to undertake the relevant legislative and other measures to ensure that the deprivation of liberty of persons who committed criminal acts in a state of mental incapacity is in accordance with law as required under Article 5 paragraph 1 e) of the European Convention, which includes placing appellants in an appropriate healthcare institution, as well as measures to provide those persons with the right of access to a „court" within the meaning of Article 5 paragraph 4 of the European Convention.

82. In view of the aforesaid, the Constitutional Court concludes that in the present case the appellants' rights to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraph 1 e) and paragraph 4 of the European Convention have been violated.

VIII. Conclusion

83. The Constitutional Court concludes that there is a violation of rights under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraph 1 (e) and paragraph 4 of the European Convention in cases where the act of deprivation of liberty with regards to persons who committed the criminal offense in a state of mental incapacity fails to meet the requirement of „lawfulness" within the meaning of the European Convention and where the valid laws lack the precise definition of the following terms: possibility, conditions, manner and procedure of pronouncing, extending and/or terminating the measure of compulsory medical treatment and placement in an appropriate healthcare institution including the access to a „court" for the purpose of reviewing the lawfulness of detention, which leaves ample room for the arbitrary application of law. Moreover, placing those persons in a special prison ward also fails to meet the requirement of „lawfulness" under Article 5 paragraph 1 e) of the European Convention. Furthermore, the violation of this right is established as the valid laws fail to meet the legal quality requirements to such an extent that they violate the rights under Article 5 paragraph 1 e) and paragraph 4 of the European Convention.

84. In view of Article 61(1) and (2) and Article 64(2) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. AP 2275/05

DECISION
ON ADMISSIBILITY
AND MERITS

Appeal of Mr. Midhat Lagumdžija against the Judgment of the Supreme Court of Republika Srpska no. U-431/03 of 5 October 2005, the Ruling of the Ministry for Refugees and Displaced Persons of Republika Srpska, no. 05-050-01-171/03 of 12 March 2003 the Ruling of the Ministry for Refugees and Displaced Persons of Republika Srpska - Foča Department, no. 05-050-44-248 of 4 October 2002, as well as against the Judgment of County Court in Trebinje no. Gž. 54/05 of 14 September 2005 and Judgment of the Basic Court in Foča no. P-355/03 of 3 January 2005

Decision of 26 January 2007

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1) and 4(11) and (15), Article 59(2)(1 and 2), Article 61(1) and (2) and Article 64 (1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), in Plenary and composed of the following judges:

Ms. Hatidža Hadžiosmanović, 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. Midhat Lagumdžija** in case no. **AP 2275/05**, at its session held on 26 January 2007 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Midhat Lagumdžija is partially granted.

A violation of right to return to his home of origin under Article II(5) of the Constitution of Bosnia and Herzegovina is hereby established.

The following are quashed:

- Judgment of the Supreme Court of Republika Srpska no. U 431/03 of 5 October 2005;

- Ruling of the Ministry for Refugees and Displaced Persons of Republika Srpska, no. 05-050-01-171/03 of 12 March 2003 and

- Ruling of the Ministry for Refugees and Displaced Persons of Republika Srpska -Foča Department, no. 05-050-44-248 of 4 October 2002.

The case shall be referred back to the to the Ministry for Refugees and Displaced Persons of Republika Srpska - Foča Department which is obligated to employ an expedited procedure and take a new decision in line with Article II(5) of the Constitution of Bosnia and Herzegovina.

The Ministry for Refugees and Displaced Persons of Republika Srpska – Foča Department is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 90 days as from the date of delivery of this Decision, about the measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal of Mr. Midhat Lagumdžija lodged against the Judgment of the Supreme Court of Republika Srpska no. U 431/03 of 5 October 2005, Ruling of the Ministry for Refugees and Displaced Persons of Republika Srpska, no. 05-050-01-171/03 of 12 March 2003 and Ruling of the Ministry for Refugees and Displaced Persons of Republika Srpska - Foča Department, no. 05-050-44-248 of 4 October 2002, with respect to right to a home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms and 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 for the Protection of Human Rights and Fundamental Freedoms is rejected as inadmissible as it is *ratione temporis* incompatible with the Constitution of Bosnia and Herzegovina.

The appeal of Mr. Midhat Lagumdžija lodged against the judgment of County Court in Trebinje no. Gž-54/05 of 14 September 2005 and judgment of Basic Court in Foča no. P 355/03 of 3 January 2005 is rejected as inadmissible due to failure to exhaust the legal remedies available under law.

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 8 November 2005, Mr. Midhat Lagumdžija from Sarajevo („the appellant") represented by his attorney Mr. Safet Pilav, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Judgment of the Supreme Court of Republika Srpska („the Supreme Court") no. U 431/03 of 5 October 2005, the Ruling of the Ministry for Refugees and Displaced Persons of Republika Srpska („the Ministry"), no. 05-050-01-171/03 of 12 March 2003 the Ruling of the Ministry for Refugees and Displaced Persons of Republika Srpska -Foča Department, no. 05-050-44-248 of 4 October 2002, as well as against the Judgment of County Court in Trebinje („the County Court") no. Gž. 54/05 of 14 September 2005 and Judgment of the Basic Court in Foča ("the Basic Court") no. P-355/03 of 3 January 2005. The appellant supplemented his appeal on 21 November 2005.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Supreme Court, Ministry for Refugees and Displaced Persons of Republika Srpska and Foča Department were requested on 11 September 2006 to submit their respective replies to the appeal.

3. The Supreme Court submitted its reply to the appeal on 19 September 2006. The Foča Department submitted its reply on 22 September 2006. The Ministry failed to submit its reply within the specified time limit.

4. Having regard to Article 26(2) of the Rules of Procedure of the Constitutional Court, the reply of the Supreme Court and the reply of the Foča Department were delivered to the appellant on 2 October 2006.

III. Facts of the Case

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

6. According to the Ruling of the Ministry – Foča Department, no. 05-050-44-248 of 4 October 2002, the appellant's request for repossession of apartment (located in Foča, Šantićeva Street no. 4, former Ive Lole Ribara Street no.4, which is more specifically described in the enacting clause of the ruling) was dismissed as ill-founded. The said

request was filed by the appellant in his capacity as a son of the last occupancy right holder, J.L. and dismissed as ill-founded since the appellant was not a member of the family household of the occupancy right holder on the day of 30 April 1991 as required by Article 6 of the Law on Housing Relations. In the reasoning of the ruling it is stated that the last occupancy right holder over the apartment in question was J.L. whose permanent residence was cancelled from the Record on Permanent and Temporary Residence of Foča citizens on 11 January 1973 and that, as per certificate of „Sarajevostan" (Sarajevo apartments company), he was a user of the two-rooms apartment at Azize Šaćirbegović Street no. 128, that he died on 7 March 2000 and that the appellant is a son of J.L. and that on 30 April 1991 and on 1 April 1992 he had his permanent residence registered in Foča, at Ribarska Street, currently „Petra Bojovića Street". It is furthermore stated that on 31 May 1990 he cancelled his residence from the address at Šantićeva Street no. 4, which means that he cancelled his permanent residence prior to the relevant date defined by the Law on Cessation of Application of the Law on the Use of Abandoned Property („the Law on Cessation"), that the appellant did not submit a request was for the enforcement of the CRPC decision no. 201-269-1/1 of 28 October 1999, whereby it was confirmed that the appellant's father was the occupancy right holder over the apartment in question and that the occupancy right holder or the members of the family household holding such a status according to the Law on Housing Relations could have submitted the said request within 18 months from the date of adoption of decision. The Foča Department adopted its decision by application of Article 6 of the Law on Housing Relations in conjunction with Articles 14 and 17 of the Law on Cessation.

7. By its ruling no. 05-050-01-171-03 of 12 March 2003 the Ministry dismissed the appellant's complaint against the Ruling of the Foča Department with a reasoning that the first instance body, in course of adoption of the said ruling, properly established the facts of the case and properly applied the substantive law. They reasoned that since the request for enforcement of CRPC decision, whereby it was confirmed that the appellant's father was the occupancy right holder over the apartment in question, was not submitted within 18 months and that it is evident from the certificate of the Foča Public Security Station that the appellant and his wife lived at Ribarska Street (currently „Petra Bojovića Street") which means that they were not living at the address of the apartment in question.

8. The appellant filed a claim against the ruling of the Ministry by which he initiated the administrative dispute and the Supreme Court, by its judgment no. U 431/03 of 5 October 2005, dismissed the appellant's claims as ill-founded. The Supreme Court concluded that the appellant was challenging the said rulings of administrative bodies for the reasons of the relevant evidences not being taken into consideration (certified copies of ID cards

for him and his wife including the data from the vehicle registration document issued in the appellant's name on 26 August 1991), as well as because the statement was not accepted that the appellant was the possessor of the disputed apartment on 30 April 1991. This, according to the appellant, also follows from the acts of the Federal Ministry of Interior. These acts acknowledged that he has had his permanent residence registered in Foča at the address of the disputed apartment since 25 July 1986 and that on 13 November 1981 his wife had cancelled her permanent residence from Sarajevo and registered it in Foča although the registration of her residence in Foča was not updated. The Supreme Court stated that it is undisputable the relevant provisions of Article 14 of the Law on Cessation (*Official Gazette of Republika Srpska* no. 38/98, 23/99, 31/99, 65/01 and 13/02) have envisaged that the occupancy right holder is entitled to return to the apartment in accordance with Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina and that the provisions of the mentioned law are applied to all apartments that their users abandoned during the period between 30 April 1991 and 19 December 1998, but it also follows from the mentioned legal provisions that in the procedure of repossession of apartment it is necessary to establish whether the appellant, as a user of the disputed apartment, was in the possession of that apartment on 30 April 1991 or whether he was the member of the family household of the occupancy right holder as required by Article 6 of the Law on Housing Relations (*Official Gazette of SR BiH* no. 14/84, 12/87 and 36/89 and *Official Gazette of RS* no. 19/93, 22/93 and 12/99) and whether he, as a user of that apartment, is entitled to use the apartment permanently and without interference as referred to in Article 21 of the said Law. The Court furthermore stated that the appellant failed to submit the evidence which would undoubtedly indicate that he was in the possession of the disputed apartment prior to 30 April 1991, in other words that he continued using the apartment together with his family after his father had moved out and that he submitted the request for the transfer of occupancy right after his father had moved out in 1980 as required by Article 21 paragraph 2 of the Law on Housing Relations, which is in connection with the allegations of the claim relating to the registration of permanent residence, in which case the Sarajevo Department of Federal Ministry of Interior and Foča Public Security Station issued the different data. The Court accepted the record of Foča Public Security Station as valid since the said body is in charge of issuing certificates of residence to the citizens of BiH living in the Republika Srpska, as referred to in Article 5 of the Law on Permanent and Temporary Residence of Citizens of BiH (*Official Gazette of RS* no. 32/01). The Court concluded that by CRPC decision of 4 June 2002 the former CRPC decision no. 201-269-1/1 of 28 October 1999 was annulled and the request of the appellant's father for the repossession of apartment was rejected with an explanation that he was not in the possession of the apartment in question on 1 April 1992 since he

had abandoned the apartment prior to the commencement of the war and that he had his permanent residence registered in Sarajevo, at Azize Šaćirbegović Street. The appellant's request for review of that decision was rejected with an explanation that such a request may be filed by a person that decision refers to, by a current user of the apartment or by a relevant housing authority. Given the fact that the appellant does not belong to that circle of persons he is not authorized to submit the request for review of decision. Having regard to the aforesaid, the Supreme Court concluded that the challenged act has not produced the reasons for its annulment within the meaning of Article 10 of the Law on Administrative Disputes. Therefore, by application of Article 41, paragraphs 1 and 2 of the said Law, the Court dismissed the appellant's claim as ill-founded.

9. In addition to initiating the procedure for repossession of apartment, the appellant has also filed the claim before the competent administrative bodies, which means that on 20 September 2002 he filed the claim with the Basic Court against the accused Public Enterprise „Telekom Srpske", Work Unit „Regional Telecom Foča, with the participation of Z.S. as intervener on the side of the defendant for the purpose of establishing the occupancy right over the apartment in question.

10. By its judgment no. P-355/03 of 3 January 2005, the Basic Court stated that it is lacking the subject jurisdiction to act in the present legal matter and rejected the appellant's claim. The appellant is obliged to pay the expenses of the court proceeding to the intervener in the amount of 269.50 KM. In its reasoning the Court stated that there is no dispute among the parties to the proceedings that the apartment in question falls under the category of abandoned apartments, but that there is a dispute among them whether the court is competent to take a decision in that legal matter. The Court established that the appellant initiated an administrative proceeding before the Foča Department for the purpose of establishing his occupancy right over the disputed apartment and repossessing the apartment and that the administrative proceedings before the Supreme Court is pending with regards to that issue and that the appellant was obliged to present the evidence in course of the said proceedings in order for the facts to be established whether he acquired the occupancy right over the apartment after his father had moved out in 1973, in other words that he had continued using the apartment all the time until the commencement of war and that he abandoned the apartment due to the outbreak of war. The Court based its decision on Article 17 of the Law on Civil Proceedings which provides that the court should take care of its subject jurisdiction throughout the proceedings, which is in conjunction with Article 14, paragraph 3 and Articles 15 and 23 of the Law on Cessation and in pursuance of which an occupancy right holder and the members of his family household should submit the request for repossession of the apartment to the competent administrative body

or to the CRPC in the event the competent body refuses to deal with or rejects the request, in which case the procedure for repossession of apartment is conducted in accordance with the provisions of the Law on General Administrative Proceedings.

11. By its judgment no. Gž-54/05 of 14 September 2005 the County Court dismissed the appellant's complaint as ill-founded and confirmed the first instance judgment stating that, given the established facts, the Basic Court has properly invoked Article 17 of the Law on Civil Proceedings and provisions of the Law on Cessation. The Court dismissed the allegations as ill-founded where it is stated that the substantive law was erroneously applied since the administrative bodies are competent to take decisions on repossession of apartments according to the aforesaid law and that those bodies, in the course of repossession of apartment procedure, should establish as a decisive fact whether a person was an occupancy right holder over some apartment or a member of family household of the occupancy right holder on 30 April 1991 and therefore the court is not competent to establish the existence of the occupancy right as a previous issue. The County Court stated that by the decision of the first instance court the appellant was not deprived of his right to have access to the court within the meaning of Article 6 paragraphs 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") since when it comes to his request for repossession of apartment where he requested establishing of facts that he is the occupancy right holder or the member of family household of the occupancy right holder, the decisions on the merits of his case were taken by the competent administrative bodies whose decisions, given the initiated administrative dispute, will be re-examined by the Supreme Court. In the opinion of the County Court, even if there were no reasons for rejecting the claim as per Law on Cessation, the claim would have to be rejected anyway, as required by Article 28 in conjunction with Articles 21 and 22 of the Law on Housing Relations. According to the aforesaid provision, in the event that the occupancy right holder ceases to use the apartment permanently for other reasons, the member of the family household who has the right to continue using the apartment is obliged to address the housing authority in charge of allocating apartments for use in order to conclude the contract on use of the apartment. In the event the housing authority refuses to do so or if it fails to reply to the request within 30 days, the respective member of the family household shall address the relevant housing body with the request for adoption of ruling which replaces the contract on use of the apartment and only after this ruling becomes legally binding he will be granted the occupancy right. Finally, the County Court concluded that the appellant failed to use the mentioned option of addressing the administrative body as required by Article 28 of the Law on Housing Relations and that the appellant's claim could have been also rejected for the above reasons, as well as for the reasons that the Basic Court was led by.

12. Pursuant to Article 33 of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court requested the Federal Statistical Institute to submit the excerpt from the Census 1991 data base. The requested data were submitted under number 04-32.9-952/06 of 11 September 2006. According to the said data, in course of conducting the Census from 1 to 15 April 1991, it was recorded that the appellant, his wife and their three children lived in Foča at the address of Ive Lole Ribara Street no. 4B.

IV. Appeal

a) Allegations stated in the appeal

13. It is stated in the appeal that the appellant's constitutional right to home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention was violated by the challenged decision, as well as his 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 extensively elaborated on his view of the chronology of events. However, he failed to explicitly state the violation of the mentioned constitutional rights. A conclusion could be drawn from the appeal that the appeal concerns the allegedly erroneous and incomplete establishing of facts and erroneous application of the substantive law being that it claims that „he has never used any other apartment for occupancy purposes in Foča, and therefore it is incomprehensible that the department of the Ministry of Interior in Foča could issue a certificate on the change of his address", that „it was about a premeditated obstruction of evidences to facilitate accepting the decisive fact that the appellant was not a user of the apartment together with his family", that Supreme Court „failed to take into consideration the fact that the case at hand deals with the data on registration of residence and cancellation of residence relating to the applicant and his family which were valid at the time of the unified BiH when all the data were recorded in the Republic Secretariat of Internal Affairs and where no cancellation or registration of residence on behalf of the applicant and his wife was recorded proving they changed the address of permanent residence." The Constitutional Court also regards the right to home as engaging Article II(5) of the Constitution of Bosnia and Herzegovina, which provides that refugees and displaced persons are to have the following rights: (a) freely to return to their homes of origin; and (b) to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. The Constitutional Court therefore interprets the appellant's reference to an occupancy right as invoking the protection of Article II(5) of the Constitution.

b) Reply to the appeal

14. The Supreme Court deems the appeal as ill-founded and therefore it stands by the reasons given in the judgment. The Supreme Court has also stated that during the administrative proceedings the appellant failed to prove that the apartment in question is his home, in other words that he had used that apartment on 30 April 1991. Therefore, in the court's opinion, the disputed apartment cannot be considered the appellant's home since he failed to prove the fact that he was using the apartment in question together with his father and that he continued using the apartment together with his family after his father had moved out.

15. The Foča Department has pointed out that the appeal is ill-founded for the reasons contained in the challenged ruling of first instance, that the appellant repeated the allegations he was stating throughout the proceedings and that he did not manage to prove that on 30 April 1991 he was a user of the disputed apartment since he had his permanent residence registered at the address of Ribarska Street (currently named Petra Bojovića Street).

V. Relevant law

16. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property (*Official Gazette of Republika Srpska* nos. 38/98, 41/98, 12/99, 31/99, 38/99, 65/01, 13/02, 64/02, 39/03 and 96/03):

Article 14, paragraphs 1 and 2

The occupancy right holder of an abandoned apartment or a member of his/her family household defined in Article 6 of the Law on Housing Relations (hereinafter: the occupancy right holder) shall have the right to return to the apartment in accordance with Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina. The provisions of this Law shall apply to all apartments abandoned by their users in the period between 30 April 1991 and 19 December 1998 regardless of whether the apartment is declared abandoner or not, in other words regardless of whether the apartment was used for business related purposes or not after 30 April 1991.

Persons who left their apartments during the period from 30 April 1991 until 19 December 1998 are presumed to be refugees and displaced persons under Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina and they are entitled to return to their apartments regardless of the circumstances under which they abandoned them.

Law on Housing Relations (Official *Gazette of SR BiH n*os. 14/84, 12/87 and 36/89 and *Official Gazette of RS n*os. 19/93, 22/93, 12/99 and 31/99)

Article 6

For the purpose of this law the user of apartment shall be understood as: the occupancy right holder and his family members that live together with him permanently as well as other persons that ceased to be the members of that household and remained to live in the same apartment.

Members of the family household shall be understood as: a spouse, children (born in or out of wedlock, adopted, foster children), spouses of children, parents (father, mother,step father, step mother, foster parent), brothers and sisters, grand children (without parents) as well as persons that should be supported by the occupancy right holder or vice versa and who live with them including persons living in an economic union with the occupancy right holder more than ten years or more than five years if they moved into the apartment on the basis of the agreement of life sustenance of the occupancy right holder.

Article 21

The apartment users (Article 6, paragraph 1) who live together with the holder of occupancy right have the right to permanent and free use of the apartment, under the conditions stipulated by this law.

The family household members (Article 6, paragraph 2) shall also acquire the right from the preceding paragraph after death of occupancy right holder, as well in cases when the occupancy right holder stops using the apartment permanently for some other reasons, unless he or she stopped using the apartment based on the cancellation of the contract on the apartment use or on the basis of the contract on the apartment exchange, as well as in the case when he or she acquired the occupancy right over another apartment allocated to him/her and to his/her members of the family household and in the cases specified in Article 13 of the said law.

Article 22

If a holder of occupancy right dies or permanently stops using the apartment for some other reasons, and the members of his or her family household continue using the apartment, and if a spouse did not stay in the apartment as the holder of occupancy right, the members of the family household shall appoint, by an agreement between themselves, a person to be the holder of occupancy right and shall notify the owner accordingly.

VI. Admissibility

17. In examining the admissibility of the appeal in the part relating to challenging the judgment of the County Court no. Gž-54/05 of 14 September 2005 and judgment of the Basic Court no. P-355/03 of 3 January 2005, the Constitutional Court referred to the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(1) and (4(15) of the Rules of the Constitutional Court.

Article VI(3)(b) of the Constitution of Bosnia and Herzegovina reads as follows:

The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina.

Article 16(1) and (4)(15) of the Rules of the Constitutional Court reads as follows:

The Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

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

(11) the appeal is ratione temporis incompatible with the Constitution;

(15) The appellant did not exhaust all remedies available under the law.

18. The appellant complains that the challenged decisions are in violation of his right to respect for his home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and his 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.

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

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

Article 8 of the European Convention, in its relevant part, reads:

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

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

20. Under the case-law of the European Court of Human Rights, the notion of „home" entails both leased home and privately owned home (see European Court of Human Rights, *Gillow vs. the United Kingdom*, Judgment of 24 November 1986, Series A, no. 109, paragraph 46 f, *Kroon vs. Holland*, Judgment of 27 October 1994, Series A no. 297-C, paragraph 31). In accordance with this interpretation, the Constitutional Court has extended the scope of Article 8 of the European Convention to the apartments occupied on the basis of an occupancy right (see Constitutional Court, Decision no. *U 8/99* of 11 May 1999, published in the *Official Gazette of Bosnia and Herzegovina* no. 24/99). The Constitutional Court has also decided that the question whether a place is a person's „home" is a factual matter and does not require the existence of a legal right to occupy the place (see the Decision of Constitutional Court no. *AP 323/04*, *Official Gazette of Bosnia and Herzegovina* no. 34/05).

21. With reference to the aforesaid case-law, the Constitutional Court holds that the fact that the appellant failed to transfer the occupancy right to his name after his parents moved out of the apartment, which was one of the reasons for which the administrative bodies and the court dismissed his request for repossession of apartment in question, does not necessarily represent an obstacle for considering the disputed apartment as his „home" within the meaning of Article 8 of the European Convention.

22. However, the apartment ceased to be the appellant's home before the present Constitution of Bosnia and Herzegovina came into force in December 1995. At the time when the right to respect for a person's home became a constitutional right under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention which took effect in Bosnia and Herzegovina only by virtue of the Constitution of Bosnia and Herzegovina (since at that time Bosnia and Herzegovina was not one of the High Contracting Parties to the European Convention) the appellant's home was not in the apartment which is the subject of these proceedings. Nor has the appellant been in possession of the apartment so as to make it his home once again at any time since December 1995.

23. It follows that the appellant has had no right since the entry into force of the Constitution of Bosnia and Herzegovina which could fall within the protection of Article II(3)(f) of the Constitution or Article 8 of the European Convention. The Constitutional Court therefore rejects this part of the appeal as being *ratione temporis* incompatible with the Constitution, pursuant to Article 16 (4)(11) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

24. The appellant also complains that the challenged decisions violated his right to quiet enjoyment of property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. Article II(3)(k) of the Constitution of Bosnia and Herzegovina reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

k) The right to property.

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

Every natural and 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.

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.

25. In its case-law, the Constitutional Court has consistently regarded an occupancy right as a form of property falling within the protection of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. However, the same considerations apply to this argument as applied to the appellant's argument based on Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention: see paragraph 33 above. The Constitutional Court accordingly rejects this part of the appeal as being *ratione temporis* incompatible with the Constitution, pursuant to Article 16(4)(11) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

26. In relation to other aspects of the appeal of Mr. Midhat Lagumdžija lodged against the judgment of County Court in Trebinje no. Gž-54/05 of 14 September 2005 and judgment of Basic Court in Foča no. P 355/03 of 3 January 2005, the legal remedies exhaustion rule

requires that the appellant reaches a so-called final decision. A final decision represents a response to the last legal remedy used which is effective and adequate to examine a lower instance decision in both factual and legal aspects. Thereby, the legal remedy must depend on the appellant, regardless of whether it is an ordinary or an extraordinary legal remedy. A decision rejecting the legal remedy due to the lack of fulfillment of the formal requirements of the legal remedy by the appellant (time-limit, tax payment, form or fulfillment of other legal conditions) cannot be considered as a final decision. Such a remedy does not restart the running of the 60 days time period referred to in Article 16(1) of the Rules of the Constitutional Court (see the decisions of the Constitutional Court nos. *AP 283/03* of 14 October 2004 and *AP 106/04* of 18 January 2005).

27. In the case at hand, the ordinary court refrained from entering into the merits of the case concerning the justification of the appellant's claim, but it rather rejected the claim for formal reasons. In the reasoning of the judgment, the courts stated that the ordinary courts have no subject –matter jurisdiction to settle the appellant's claim since according to the provisions of the Law on Cessation the administrative bodies are in charge of taking decisions on repossession of apartments and that the said courts, in the course of apartment related repossession procedure, should establish a decisive fact whether a person was the occupancy right holder of the apartment or a member of the family household of the occupancy right holder on 30 April 1991. Moreover, the County Court stated that even according to the provisions of Article 28 of the Law on Housing Relations the competence of the housing administrative body is prescribed for resolving the issue relating to the right of the member of family household to continue using the apartment within the meaning of Articles 21 and 22 of the said law.

28. Consequently, the appellant should have submitted the request to the body having subject-matter jurisdiction, i.e. to the competent administrative body or to justify the impossibility of submitting the request to the competent body having subject jurisdiction, in other words the appellant should have justified failure to exhaust legal remedies (see *mutatis mutandis* the Constitutional Court, Decision no. *U 22/00* of 22 and 23 June 2001, paragraph 20, published in the *Official Gazette of Bosnia and Herzegovina* no. 25/01 and Decision no. *AP 844/04* of 13 September 2005). Accordingly, the requirement of exhaustion of all legal remedies available under the law has not been met for considering the appeal with regards to the merits of the case.

29. Having regard to Article 16(4) (11) and (15) of the Rules of Constitutional Court stipulating that an appeal shall be rejected as inadmissible if the appellant failed to exhaust all remedies available under the law, the Constitutional Court decided as set out in the penultimate paragraph of the enacting clause of the decision.

30. With reference to the admissibility of the remaining part of the appeal (the appeal against the judgment of the Supreme Court of Republika Srpska no. U 431/03 of 5 October 2005, the ruling of the Ministry for Refugees and Displaced Persons of Republika Srpska, no. 05-050-01-171/03 of 12 March 2003, and the ruling of the Ministry for Refugees and Displaced Persons of Republika Srpska -Foča Department, no. 05-050-44-248 of 4 October 2002 on the grounds that they violated the right to the home as protected by Article II.5 of the Constitution of Bosnia and Herzegovina: see paragraph 13 above), the Constitutional Court recalls that according to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court has appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. The rights of refugees and displaced persons under Article II(5) of the Constitution (*inter alia*, to return to their homes of origin and to have restored to them property of which they were deprived in the course of hostilities since 1991) clearly applies to homes left before the entry into force of the Constitution in December 1995. This part of the claim is therefore not *ratione tempore* incompatible with the Constitution considering that the facts and arguments from the appeal clearly point to violation of the right to home under Article II(5) of the Constitution of Bosnia and Herzegovina.

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

32. In the present case, the subject challenged by the appeal is the judgment of the Supreme Court no. U 431/03 of 5 October 2005, against which there are no other effective remedies available under the law. Furthermore, the challenged judgment was rendered on 5 October 2005 and the appeal was filed on 8 November 2005, that is, within the 60 days time-limit as provided for under Article 16(1) of the Rules of the Constitutional Court. In conclusion, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court as neither being manifestly (*prima facie*) ill-founded nor inadmissible for any formal reasons.

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

VII. Merits

34. As noted in the paragraphs 13 and 30 of this decision, the Constitutional Court treats the appellant's reliance on constitutional provisions relating to an occupancy right to be a reference, in the circumstances of the present case, to the right of refugees and displaced persons to return freely to their homes of origin and to repossess property taken from them due to the hostilities which commenced on 30 April 1991. This right of refugees and displaced persons is a constitutional right by virtue of Article II(5) of the Constitution of Bosnia and Herzegovina, which expressly applies to acts of dispossession occurring before the entry into force of that Constitution.

Article II(5) reads:

All refugees and displaced person have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.

35. Article II(4) of the Constitution of Bosnia and Herzegovina provides that this right shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground (see the Decision of the Constitutional Court of Bosnia and Herzegovina no. *U 14/00* of 4 May 2001, *Official Gazette of Bosnia and Herzegovina* no. 33/01). The Constitutional Court recalls that these provisions of the Constitution of Bosnia and Herzegovina give effect to Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina, which treats the return of refugees and displaced persons as an important objective of the General Framework Agreement for Peace in eliminating the negative consequences of the war in Bosnia and Herzegovina. Additionally, the Constitutional Court, in its decision no. *U 14/00*, took the position that the state of facts found on 30 April 1991 should be a starting point for considering all legal disputes arising from the measures taken by competent bodies of both the Entities and the bodies of Bosnia and Herzegovina (within their respective jurisdictions) with the purpose of returning the properties to their pre-war users. Therefore, the bodies in charge of returning the refugees and displaced persons to their places of permanent residence of 30 April 1991 must demonstrate a high level of professionalism and responsibility in order to make the right real and effective.

36. The Constitutional Court recalls that is not called upon to review the establishment of facts or the interpretation and application of ordinary laws by the lower courts, unless the

lower courts' decisions are in violation of rights under the Constitution. This is the case if in an ordinary court's decision constitutional rights have been disregarded or wrongly applied, including cases where the application of a law was obviously arbitrary, where the applicable law was in itself unconstitutional or where fundamental procedural rights (fair trial, access to court, effective remedies etc.) were violated or when the established facts indicate to the violation of Constitution of Bosnia and Herzegovina (see the decision of Constitutional Court, Decision no. U *62/01* published in the *Official Gazette of Bosnia and Herzegovina* no. 24/02). Furthermore, the Constitutional Court recalls its own special obligations to act with a high degree of professionalism and responsibility in cases concerning rights under Article II(5) of the Constitution of Bosnia and Herzegovina.

37. Article 14 of the Law on the Cessation of the Law on the Use of Abandoned Apartments of the Republika Srpska is designed to give effect in the legal system of the Republika Srpska to the requirements of Article II(5) of the Constitution of Bosnia and Herzegovina and Annex 7 to the General Framework Agreement for Peace. Article 14 of the Law on the Cessation and Article 6 of the Law on Housing Relations of the Republika Srpska give a wide definition to the term „occupancy right holder", in accordance with the purpose and spirit of the Constitution and the General Framework Agreement for Peace, and should be applied in that spirit.

38. In the present case, the CPRC, the administrative authorities of the Republika Srpska and the courts have decided that the appellant was not an occupancy right holder of the apartment in question on 30 April 1991. The Constitutional Court has no jurisdiction to evaluate the decision of the CPRC, which was made under Annex 7 to the General Framework Agreement for Peace. However, having regard to the special obligations of the Constitutional Court in relation to claims arising under Article II(5) of the Constitution of Bosnia and Herzegovina, the Constitutional Court considers that it must together with other courts and administrative authorities within Bosnia and Herzegovina carefully mind all relevant evidence when deciding on the claim of a person to be entitled to the benefit of Article 14 of the Law on the Cessation.

39. In the present case, the Supreme Court and administrative bodies stated in the reasoning of their decisions that it was established that on 30 April 1991 or 1 April 1992 the appellant had his permanent residence registered in Foča, at Ribarska Street, currently named „Petra Bojovića Street" and that he cancelled his residence from the address at I.L. Ribara Street, currently named „Šantićeva Street" on 31 May 1990, which is prior to the relevant date specified in the Law on Cessation. However, the appellant has pointed out that the state of facts has been erroneously and incompletely established in the case at hand. Namely, the appellant attached the copy of his ID card issued on 31 May 1990 to his

appeal, from which it is evident that he had his permanent residence registered at the address of apartment in question, which is located at I.L. Ribara Street no. 4B. According to the facts established by both the Supreme Court and administrative bodies, the appellant was registered at the address of Ribarska Street. The appellant attached the copy of his driving license issued on 26 August 1991 by the Foča Public Security Station where the address of disputed apartment was indicated. Bearing in mind that even according to the document issued by the Sarajevo Department of Federal Ministry of Interior of 29 October 2002 the appellant had his permanent residence registered at the address of apartment in dispute, the administrative bodies were obliged, given the conflicting evidence with evidences of Foča Public Security Station of 2 and 19 August 2002, to request the opinion of the Foča Public Security Station since it is undisputable that both the ID card and driving license were issued by that authority. This kind of action of the aforesaid administrative bodies would be in accordance with the principle of material truth proclaimed in Article 8 of the Law on General Administrative Proceedings (*Official Gazette of the Republika Srpska n*o. 13/02). Regardless of the mentioned conflicting presented evidence, the decisions are entirely based on the certificate of the Foča Public Security Station. The decision of the Supreme Court itself indicates that the state of facts remained unclear, in particular because there was no other evidence in the file except for the mentioned certificate of Foča PSS, and neither the Supreme Court nor any other body invoked any other evidence that the appellant was residing at the address of Ribarska Street rather than at the address of the apartment in dispute.

40. The appellant's request for repossession of apartment was not rejected as untimely, from which it follows that the appellant filed his request within the time limits specified in the Law on Cessation. The Constitutional Court recognizes that the CRPC annulled the Decision no. 201-269-1/1 of 28 October 1999 by its Decision dated 4 June 2003 (because the appellant had failed to submit a request for enforcement of the initial CRPC decision) and that the request of appellant's father for repossession of the apartment was rejected with an explanation that he was not in the possession of the apartment in question on 1 April 1992. However, public decision-makers in Bosnia and Herzegovina, including the Constitutional Court, still have an obligation to establish all legally relevant facts relating to the usage of the apartment in question by the appellant and take a decision on the appellant's request for repossession of the apartment in accordance with law.

41. In a situation where the appellant claims that he has lived in the disputed apartment since 1968 and offers a series of pieces of evidence to support that statement, the administrative bodies should have presented additional evidence (for example, excerpts from the voter register, proof of payment of utilities' expenses, and interrogation of witnesses), which was lacking in the instant case. Having regard to the difference between

information issued by the Sarajevo department of Federal Ministry of Interior and that provided by the Foča Public Security Station, and to the excerpt from the Census conducted between 1 and 15 April 1991 (nearly a year after 31 May 1991 when, according to the findings of the administrative bodies, the appellant moved out of the disputed apartment) indicating that the appellant's registered address was at Ive Lole Ribara Street no.4, the Constitutional Court has concluded that making findings of fact entirely in reliance on the certificate issued by the Foča Public Security Station would not be in accordance with the obligations of the Constitutional Court and other public decision-makers within Bosnia and Herzegovina in cases involving Article II(5) of the Constitution.

42. The Constitutional Court therefore finds a violation of Article II(5) of the Constitution of Bosnia and Herzegovina because, although during the proceedings before the administrative authorities and courts the appellant had the opportunity to present the evidence aimed at establishing decisive facts, the administrative bodies and Supreme Court failed to give any weight to the evidence that the appellant had lived at the address of the disputed apartment until 1992 and that he abandoned the apartment in question due to the war in Bosnia and Herzegovina. In consequence, there has been insufficient judicial or administrative protection for the right asserted by the appellant to return to what he claims was his home of origin.

VIII. Conclusion

43. For the reasons given above, the Constitutional Court has concluded that there was a violation of Article II(5) of the Constitution of Bosnia and Herzegovina. The case will be remitted to the Ministry for Refugees and Displaced Persons of Republika Srpska - Foča Department which is obligated to employ an expedited procedure and to make an assessment of all the relevant evidence and in the light of that assessment to take any necessary step to protect any right which the appellant may be shown to have under Article II(5) of the Constitution of Bosnia and Herzegovina.

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

45. 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

Case no. AP 1070/06

**DECISION
ON ADMISSIBILITY
AND MERITS**

Appeal of Ms. Milica Mirković-Kalinić against the Judgment of the Cantonal Court in Sarajevo no. Gž-1733/04 of 17 September 2004 and Judgment of Municipal Court in Sarajevo no. Pr-377/02 of 5 March 2004

Decision of 30 March 2007

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1) and (4)(15), Article 59(2)(2) and Article 61(1), (2) and (3) and Article 64(1) 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 Hadžiosmanović, President,

Mr. Miodrag Simović, Vice-President

Mr. David Feldman, 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 **Ms. Milica Mirković-Kalinić** in case no. **AP 1070/06**, at its session held on 30 March 2007, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Ms. Milica Mirković-Kalinić is partially granted.

The violation is established in relation to the right of access to court within the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedom.

The judgment of Supreme Court of the Federation of Bosnia and Herzegovina no. Rev-969/04 of 2 June 2005, judgment of Cantonal Court in Sarajevo no. Gž-1733/04 of 17 September 2004 and judgment of Municipal Court in Sarajevo no. Pr-377/02 of 5 March 2004 are partially quashed in the parts where the courts declared themselves incompetent to take a decision upon the request for payment of pension, disability and health care insurance contributions.

The case shall be referred back to the Municipal Court in Sarajevo which is obligated to employ an expedited procedure and take a new decision in line with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Municipal Court in Sarajevo is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 90 days as from the date of delivery of this Decision, about the measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal of Ms. Milica Mirković-Kalinić lodged against the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. Rev-969/04 of 2 June 2005, Judgment of Cantonal Court in Sarajevo no. Gž-1733/04 of 17 September 2004 and judgment of Municipal Court in Sarajevo no. Pr-377/02 of 5 March 2004 in relation to other allegations of a violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as in relation to guaranteeing right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is dismissed as being ill-founded.

The appeal of Ms. Milica Mirković-Kalinić lodged against the judgment of Cantonal Court in Sarajevo no. Gž-2742/05 of 2 March 2006 is rejected as inadmissible for non-exhaustion of legal remedies available under law.

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 2 November 2004, Ms. Milica Mirković-Kalinić („the appellant"), represented by her husband Mr. Dragan Kalinić, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the Cantonal Court in Sarajevo („the Cantonal Court") no. Gz-1733/04 of 17 September 2004 and judgment of Municipal Court in Sarajevo („the Municipal Court") no. Pr-377/02 of 5 March 2004. This appeal was registered in the Constitutional Court under no. AP 942/04. The Constitutional Court rejected this appeal by its judgment no. AP 924/04 of 15 June 2005 as being premature since the revision proceedings were pending before the Supreme Court of the Federation of Bosnia and Herzegovina („the Supreme Court"). Upon the completion of revision proceedings before the Supreme Court and renewed proceedings before the Cantonal Court, the appellant lodged two additional appeals against the following judgments: the judgment of Supreme Court no. Rev-969/04 of 2 June 2005, judgment of Cantonal Court no. Gz-1733/04 of 17 September 2004, judgment of Cantonal Court no. Gz-2742/05 of 2 March 2006 and judgment of Municipal Court no. Pr-377/02 of 5 March 2004. The aforesaid appeals have been registered in the Constitutional Court under nos. AP 1070/06 and AP 1174/06.

II. Procedure before the Constitutional Court

2. Given that two appeals were submitted to the Constitutional Court by the same appellant concerning the same legal and factual issue, the Constitutional Court adopted a decision, in accordance with Article 31(1) of the Rules of the Constitutional Court, on merging these two cases in order to conduct a single proceeding and adopt a single decision no. AP 1070/06. The appeals nos. AP 1070/06 and AP 1174/04 were merged.

3. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Supreme Court, the Cantonal Court, the Municipal Court and „Energoinvest" – Institute for Materials and Quality IMQ Sarajevo, as parties to the proceedings, were requested on 28 April 2006 to submit their respective replies to the appeal.

4. The Municipal Court submitted its reply to the appeal on 10 May 2006, and the Supreme Court on 23 May 2006 and Cantonal Court on 25 May 2006, while „Energoinvest" - Institute for Materials and Quality IMQ failed to submit its reply to the appeal within a given time frame.

5. In order to examine the entire case file more clearly, on 10 September 2006 the Constitutional Court requested the Cantonal Court to transfer the case file no. Gz-2742/05 for its examination by the Constitutional Court. On 20 September 2006, the Cantonal Court did so and, on 1 November 2006, the said case file was returned to the Cantonal Court.

III. Facts of the Case

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

7. On 2 September 2002, the appellant filed a claim before the Municipal Court against „Energoinvest" – Institute for Materials and Quality („the defendant") for the annulment of the Decision on termination of employment dated 1 October 1992, whereby her employment was terminated, then for the recognition of her legally determined employment, her return to work and assignment to a new work position, as well as for the settlement of obligations from employment status (payment of contributions relating to pension, disability and health care insurance), payment of outstanding salaries in amount of 86,010.00 KM covering the period from 1 April 1992 until the completion of dispute in January 2004, which includes the overdue interest rates with effect from the day of the claim filing until the claim is settled and payment of the amount of 35,000 KM for inflicted pain and suffering.

8. In the proceedings before the Municipal Court it was established that the appellant's employment status with the defendant was terminated on 1 October 1992 and that the Decision on termination of employment was delivered to her on 12 June 1996. The defendant failed to reply to the complaint of the appellant lodged against this decision. After the entry into force of the Labour Law (*Official Gazette of the Federation BiH* nos. 43/99 and 32/00), the appellant addressed the Commission for Implementation of Article 143 of the Labour Law of the Sarajevo Canton („the Cantonal Commission") which, by its Decision no 13-04-34-z-430/00 of 17 July 2001, ordered the defendant to reinstate the appellant and grant her a status of laid-off employee until 5 May 2000, to determine the amount of severance package and conclude the contract on the severance package with the appellant in accordance with Article 143 of the Labour Law. Following the complaint of the appellant this Decision was confirmed by the Federal Commission for Implementation of Article 143 of the Labour Law („Federal Commission"), which, by its Decision no. UP-03-34-234/02 of 9 July 2002 dismissed the complaint of the appellant who was displeased with the fact that her request for reinstatement of employment status was still unresolved. The defendant acted in accordance with the decisions of both the Cantonal and Federal Commission.

9. According to the established facts, the Municipal Court delivered judgment no. Pr-377/02 of 5 March 2004, whereby it was determined that the appellant's employment was terminated on 5 May 2000 because she was not called by the defendant to come to work for a second time, and it was also established that during that period of time the appellant was granted a status of a laid-off employee and her severance package was determined as stipulated by decisions of both the Cantonal and Federal Commission, which is in compliance with the provisions of Article 143 of the Labour Law. Furthermore, the Municipal Court established that the appellant was not entitled to receive the salaries while being laid-off since she did not specify her request in this regard nor did she propose the presentation of evidence. Therefore, in the aforesaid judgment the Municipal Court dismissed the claims of the appellant as being ill-founded. As to the request for placing an obligation on the defendant to pay the pension, disability and health care insurance contributions, the Court declared itself incompetent with an explanation that the matter in this case concerns the relationship between the insurer (employer) and insurance fund and that this dispute should be resolved in an administrative proceedings.

10. In course of resolving the appellant's complaint against the said judgment, the Cantonal Court dismissed the complaint by its judgment no. Gž-1733/04 of 17 September 2004 as ill-founded and confirmed the first instance judgment in full. Taking into account the appellant's allegations about erroneous application of the substantive law and procedural errors, the Cantonal Court did not find any of the violations alleged by the appellant, which was explained by the Court in its judgment.

11. When deciding on the appellant's revision-appeal, the Supreme Court, in its judgment no. Rev-969/04 of 2 June 2005, partially granted the appellant's revision-appeal, annulled the second instance judgment in the part upholding the first instance judgment and dismissed the appellant's request for reimbursement of compensation in the amount of 86,010.00 KM for unpaid salaries while laid-off and referred the case back to the second instance court for retrial relating to that part. The Supreme Court dismissed the remainder of the revision-appeal.

12. While acting in accordance with the aforesaid judgment of the Supreme Court, the Cantonal Court delivered judgment no. Gž-2742/05 of 2 March 2006, whereby it was established that the defendant has been obligated to pay the appellant the amount of 45 KM including the interest rates with effect from 2 September 1999 until the payment in full, taking into account that the defendant made an objection relating to the statute of limitations with regards to Article 106 of the Labour Law, which provides that employment related claims shall expire within a time limit of three years. The amount of compensation is determined according to the decision of employer establishing the amount of compensation for employees in laid-off status.

13. With regard to the aforementioned judgment, the appellant submitted to the Supreme Court „a complaint relating to the appellant's appeal lodged against the first instance judgment – a request for retrial in non-contentious proceedings". In addition to its letter no. 070-0-Gr1-06-000115 of 14 April 2006, the Supreme Court transmitted the said complaint and attachments thereto to the Cantonal Court for its action because of the appellant's mistake in submitting this complaint to the Supreme Court. The Municipal Court rejected the appellant's complaint by its Ruling no. Pr-377/02 of 23 May 2006 and its reasoning was that the complaint was incomplete in terms of Article 240 of the Civil Procedure Code and that the appellant failed to remove the shortcomings within a given time limit and in compliance with an order given in the Ruling no. Pr-377/02 of 18 April 2006. Therefore, the appellant did not file the revision-appeal against the Cantonal Court's judgment no. Gz-2742/05 of 2 March 2006 although in the present case, according to the law, she had a possibility to avail herself of this legal remedy.

IV. Appeal

a) Statements from the appeal

14. The appellant considers that the court unlawfully dismissed her request for adoption of a decision by which the employer would oblige itself to pay the contributions in her favour, that they were judging in favour of the defendant, which she supports by an allegation that the judge of first instance court „received the material in an envelope from the legal representative of the defendant and put it in her drawer and upon the objection of the appellant's legal representative, she said that it was a reply to the claim and while she was receiving the envelope she was obviously grateful for this gesture of the defendant's legal representative", that they refused to resolve her request for reinstatement of her employment without any explanation although she was explicitly requesting that during the whole proceedings, especially in relation to the fact that her employment was terminated in an unlawful manner by retroactive delivery of the decision on termination of employment due to which, as to her case, the decision should have been taken on unlawful termination, whereas Article 143 of the Labour Law should not have been applied. The appellant has also alleged that it was a long-lasting trial and that all the aforesaid taken together was the consequence of discrimination against her, as a member of minority and a female, which was carried out by both the defendant and the courts. Therefore, the appellant is of the opinion that because of the lack of impartiality of the court, unreasonably long trial and erroneous application of substantive laws her 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 for the Protection of Human Rights and Fundamental

Freedoms („the European Convention") has been violated, as well as her right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention.

b) Reply to the appeal

15. The Municipal Court in its reply points out that the appeal is ill-founded in its entirety, whereas the Court enumerates the actions undertaken during the entire proceedings.

16. In its reply the Supreme Court suggests that the appeal be dismissed as ill-founded.

17. The Cantonal Court in its reply supports the delivered judgments deeming them accurate and suggests that the appeal be dismissed as ill-founded.

V. Relevant Law

18. **Law on Pension and Disability Insurance** (*Official Gazette of the Federation of BiH* nos. 29/98, 49/00, 32/01 and 61/02), in the relevant part, reads:

Article 117

The funds necessary to provide pension and disability insurance rights and obligations are secured from contributions, income from voluntary insurance premiums, income which the insurance carrier receives from its activities and other revenues.

The lowest amount of resources necessary for activities of insurance carriers shall be determined by the Federation Government.

Article 118

The pension and disability insurance contributions are:

1. *contributions from wages and other income of the insured;*
2. *employer's contributions for paid wages;*
3. *additional contributions for the insurance period with increased duration.*

The insurance carriers shall determine equal contribution rates in Section 1 of this Article. The Federation Government shall approve the contribution rates.

Article 119

The contributors of the pension and disability insurance mentioned in Article 118, Section 1, Point 1 are the policy holders mentioned in Articles 8 to 12, Article 13, Section 1, Point 1, Article 14, Section 1, Point 4 and Article 17 of this law.

The contributors of the pension and disability insurance mentioned in Article 118, Section 1, Point 2 of this law are the employers who have the responsibility to pay wages and compensations.

The contributors of the pension and disability insurance mentioned in Article 118, Section 1, Point 3 of this law are the employers of the employees who work in positions for which insurance contribution period is calculated with increased duration.

The contributor of the pension and disability insurance mentioned in Article 118, Section, Points 1 and 2 of this law, for the policy holders who receive wage compensation during the time when they are unable to work, according to procedures for health insurance, shall be an appropriate health insurance organization.

The contributor of the pension and disability insurance mentioned in Article 118, Section 1, Points 1 and 2 of this law, for the policy holders in Article 13, Section 1, Point 2 of this law, is the employment bureau.

Article 128

In order to control the correctness of account settlement and contribution payments for the pension and disability insurance, the insurance carrier shall conduct financial supervision and economic and financial audits of the contribution payments of the persons responsible for them, and inspection of the records of payments and disposition of the paid contributions with the payment System Bureau

During the administrative procedure for determining the limit and the amount of the contribution payment, the insurance carrier and the person responsible for contribution payments shall have the right to decide to settle the account, completely or in special disputed points of which the adjustment shall be recorded.

The insurance carrier shall have the right to reduce the debt, based on the interest, and agree to an extension for the settlement and payment of debt, which shall not be longer than six months.

The record of the determined settlement mentioned in paragraph 2 of this Article shall have the same effect as a decision brought in a legal procedure.

Article 129

Determined arrears for which the record on settlement mentioned in Article 128, paragraph 4 has not been made, shall be collected on the basis of a decision by which the party responsible for contribution shall be ordered to pay the contribution within certain deadline.

A complaint lodged against the decision for execution of contribution payment does not defer the execution of the decision, and the decision constitutes an enforceable document during enforcement of contribution payment.

19. **Labour Law (***Official Gazette of the Federation of BiH* nos. 43/99 and 32/00)

Article 102

In exercising individual rights arising from employment, an employee may request exercise of such rights from the employer before the competent court or other authorities, in accordance with this law.

Article 143

An employee who has the status of a laid off employee on the effective date of this law shall retain that status no longer than six months from the effective date of this law, unless the employer invites the employee to work before the expiry of this deadline.

An employee who was employed on 31 December 1991 and who, within three months from the effective date of this law, addressed in written form or directly the employer for the purpose of establishing the legal and working status - and had not accepted employment from another employer during this period, shall also be considered a laid off employee.

While laid off, the employee shall be entitled to compensation in the amount specified by the employer.

If a laid off employee referred to in paragraphs 1 and 2 of this Article is not invited to work within the deadline referred to in Paragraph 1 of this Article, his or her employment shall be terminated with a right to a severance pay which shall not be lower than three average salaries paid at the level of the Federation within the three previous months, as published by the Federal Statistics Bureau.

VI. Admissibility

20. As to the appellant's allegations of a violation of the right to a fair trial with regard to the Cantonal Court's judgment no. Gz-2742/05 of 2 March 2006, the Constitutional Court invokes the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(1) and (4)(15) of the Rules of the Constitutional Court.

Article VI(3)(b) of the Constitution of Bosnia and Herzegovina reads:

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.

Article 16(1) and (4)(15) of the Rules of the Constitutional Court reads:

The Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last effective remedy used by the appellant was served on him/her.

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

15. the appellant did not exhaust all remedies available under the law.

21. According to the rules on exhaustion of legal remedies, the appellant is required to obtain a final decision. The final decision constitutes a reply to final legal remedy, which is effective and adequate to examine the challenged decision with regard to both facts and legal issues. In so doing, the appellant decides whether she will avail herself of legal remedies irrespective of whether those are ordinary or extraordinary. The decision rejecting the legal remedy because the appellant has failed to comply with the formal requirements of legal remedy (a deadline or a payment of fee or because of a form or other legal requirements) cannot be deemed to be final. The use of legal remedy does not terminate a time limit of 60 days provided for under Article 16(1) of the Rules of the Constitutional Court (see Constitutional Court, Decisions no. *AP 283/03* of 14 September 2004 and *AP 106/04* of 18 January 2005).

22. In the present case, pursuant to the provision of Article 237 of the Civil Procedure Code (*Official Gazette of FBiH* nos. 53/03 and 73/05) and given that in the judgment no. Gz-2742/05 of 2 March 2006, passed upon the order given in the Supreme Court's decision taken on revision-appeal, the Cantonal Court decided only on one part of the appellant's claim that concerned a payment for unpaid salaries to the amount of 86,010 KM and compensation for non-pecuniary damages to the amount of 35,000 KM, the appellant, if dissatisfied with the awarded sum, could have filed the revision-appeal with the Supreme Court within 30 days from the date on which she received the mentioned judgment. The revision is an effective legal remedy that is suitable for examination of the challenged decision with regard to procedural errors in the civil proceedings or an erroneous application of the substantive law, and it is allowed in all cases where the value of the dispute exceeds 10,000 KM. However, according to the documents attached to the appeal, the appellant did not file the revision-appeal against the challenged judgment that she had received on 29 March 2006 but, on 31 March 2006, she filed a submission to the Supreme Court, *i.e.* „a complaint relating to the appellant's appeal lodged against the first instance judgment – a request for retrial in non-contentious proceedings", which the Supreme Court forwarded

on 10 April 2006 to the Cantonal Court for its further action. In the said complaint, the appellant did not contest the sum awarded to her, which was the only subject matter of the decision in question. Actually, the appellant requested that the Supreme Court reconsider the subject matter of her original claim in whole and stated that „the new decision passed by the second instance court was not related to the subject matter of complaint which was lodged against the judgment of first instance court of 5 March 2004", and that „the said judgment was unlawful and contradictory since the appellant had no right to be paid the said award at a particular time - there were no legal grounds for such payment because she was subject to the controversial dismissal". The Municipal Court rejected the appellant's complaint by its Ruling no. Pr-377/02 of 23 May 2006 and its reasoning was that the complaint was incomplete in terms of Article 240 of the Civil Procedure Code and that the appellant failed to remove the shortcomings within a given time limit and in compliance with an order given in the Ruling no. Pr-377/02 of 18 April 2006.

23. Consequently, given that the appellant failed to file the revision-appeal as an effective legal remedy against the Cantonal Court's judgment no. Gž-2742/05 of 2 March 2006 and taking into account the provision of Article 16(4)(15) of the Rules of the Constitutional Court, which stipulates that an appeal shall also be inadmissible if the appellant fails to exhaust all remedies available under the law, the Constitutional Court has decided, with regard to the mentioned judgment of the Cantonal Court, as stated in the enacting clause of the present decision.

24. As to the admissibility of the remainder of the appeal, the Constitutional Court notes that in the present case, the subject challenged by the appeal is the judgment of the Supreme Court no. Rev-969/04 of 2 June 2005 in part upholding the second instance decision against which there are no other effective legal remedies available under law. The appellant received the challenged judgment on 27 July 2005 and the appeal was lodged on 2 September 2005, *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 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.

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

VII. Merits

26. The appellant has challenged the aforesaid judgments claiming that they violated her 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 and a right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention.

a) The right to a fair trial

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

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

28. Article 6 (1) of the European Convention, in the relevant part, reads:

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

As to the right of access to court

29. The appellant considers that by refusal of the court to take a decision on her request according to which the defendant will be obligated to pay the contributions to pension, disability and health care insurance, in which case an explanation is given that the point of the matter is the relationship between the employer and the fund to be resolved in a an administrative proceedings, her right to a fair trial has been violated since the issue deals with her personal right, *i.e.* the rights she may exercise after the employer pays the employment related contributions.

30. According to the case-law of the European Court of Human Rights, Article 6(1) of the European Convention guarantees to everyone the right to have his/her civil rights and obligations related claims being considered by an independent court or tribunal. This implies the „right to court", *i.e.* the „right of access to court" which includes the right of an individual to initiate proceedings in civil matters. It means that everyone is guaranteed the right to initiate proceedings before the court in relation to civil matters. The right of access to court is not absolute and by its very nature it calls for regulation by the State. However,

the limitations applied must not restrict or reduce the access to court left to the individual in such a way or to such an extent that the very essence of the right is impaired (see the judgment of the European Court *Philis vs. Greece* of 27 August 1991, A Series, no. 209, page 20, paragraph 59). In the aforesaid judgment the European Court of Human Rights concluded that the applicant's right of access to court was violated since he was not able to directly and independently initiate a civil proceedings in order to collect the payment for the services he had provided under the relevant contract, in which case the proceedings could have been initiated by third parties only.

31. In the case at hand, the appellant requested the Municipal Court to obligate the defendant to pay the employment related contributions. However, her request has been dismissed with an explanation that the appellant is not authorized to make such a request in the civil proceedings since, as per system of compulsory insurance, that is not an obligatory-legal relationship between the appellant and defendant, but between the defendant, as an employer, and a relevant pension and disability fund, which is defined by the rules of administrative proceedings. Both Cantonal Court and Supreme Court have accepted this interpretation.

32. In connection with the aforesaid, pursuant to Articles 128 and 129 of the Law on Pension and Disability Insurance it is regulated that the obligations of a party responsible to pay contributions to insurance carrier, *i.e.* to an authorized pension fund, shall be established in course of the administrative proceedings. In paragraph 2 of Article 128 of the said Law it is stated that in the administrative proceedings a settlement may be reached of which the record shall be made. The determined arrears, for which the record on settlement mentioned in Article 128, paragraph 4 has not been made, shall be collected upon the initiative of relevant fund, which, by its decision, shall order the party responsible to pay the contribution within a certain deadline. The relevant court has failed to invoke these provisions explicitly in the proceedings conducted upon the appellant's claim, but it follows from the reasoning that those provisions of the Law on Pension and Disability Insurance are the obstruction to the court's action upon the appellant's claim.

33. The Constitutional Court holds that in the present case the matter is indeed related to the obligatory relationship between the party responsible to pay contributions, in this case the defendant, and the relevant fund, as stated in the challenged judgments. However, the interpretation of courts cannot be accepted where they have stated that the appellant has no right of action, *i.e.* that she is not authorized to request the court to obligate the defendant to pay the related contributions. Namely, an obligatory relationship between an employer and employee is created by conclusion of contract on employment. According to

such kind of contract the employer is obligated, *inter alia*, to pay contributions for pension and health care insurance. Pursuant to Article 102 of the Labour Law, an employee, in exercising individual rights arising from employment, may also request the protection before the competent court. If the interpretation of regular courts would be accepted that the appellant has no right of action to request, before the court and in the civil proceedings, the employer to be obligated to pay contributions, the exercise of the aforesaid rights would fully depend on the initiative of relevant fund. In connection with the aforesaid, in case the relevant fund fails to conduct an appropriate economic-financial audit relating to payment of contributions and in case it fails to initiate the proceedings for the purpose of collection of contributions, the employees would be deprived of any possibility to exercise this specific employment related right. Even in case the employees are given the possibility to take part in an administrative proceeding initiated for the purpose of collection of contributions the situation would be the same given the fact that only the relevant fund is entitled to initiate the relevant proceedings. Accordingly, in this specific situation, the appellant would be fully dependant on the will and initiative of the relevant fund concerning the initiation of an appropriate administrative proceedings aimed at collection of contributions. The Constitutional Court has already taken a position that the appellant has right of action and she may request the employer to pay the employment related contributions (see the decision of Constitutional Court *AP 311/04*, *Official Gazette of BiH*, no. 60/05). Therefore, the Constitutional Court deems that the act of dismissing the claim of the appellant in the part relating to the defendant's obligation to pay the contributions had prevented the appellant to exercise the very essence of her „right of access to court" under Article 6(1) of the European Convention.

34. Taking into account the aforesaid, the Constitutional Court has concluded that the challenged judgments violated the appellant's right to a fair trial safeguarded by Article II(3) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention in the part where the courts declared themselves incompetent to take a decision upon the request of the appellant for the employer to be ordered to pay the employment related contributions.

As to the facts and application of substantive provisions

35. The appellant holds that the courts have also violated her right to a fair trial so that they fully „ignored" her request for the decision to be taken on the unlawful termination of her employment by retroactive delivery of the notice of termination and return to work, *i.e.* her request for reinstatement to the position with her employer.

36. In connection with the aforesaid, the Constitutional Court has pointed out that it is beyond its jurisdiction to assess the quality of conclusions made by the courts with respect to presentation and assessment of evidence and application of substantive provisions unless this assessment or application is deemed to be manifestly arbitrary (see the Constitutional Court, Decision no. *U 62/01* of 5 April 2002). The Constitutional Court shall not interfere into the manner in which regular courts presented and accepted the evidence nor shall it interfere with the manner in which they applied the substantive provisions. The task of the Constitutional Court is to examine whether the proceedings was entirely fair as required by Article 6(1) of the European Convention and whether the decisions of regular courts violated the constitutional rights (see the Constitutional Court, Decision no. *AP 20/05* of 18 May 2005).

37. In the present case, the regular courts have confirmed in three instances that the employment of the appellant was terminated on 5 May 2002 as it is stated in the decision that the employer had to issue in order to enforce the decisions of both Cantonal Commission and Federal Commission. Article 143 of the Labour Law is a special substantive provision enacted by the legislator with purpose of equal resolving the employment-legal status of all employees who were employed at the outbreak of war and whose employment was terminated during the war for different reasons where the cause of termination was related to the war events. Accordingly, although the appellant stated that her employment with the defendant was terminated by issuance of an unlawful decision in 1992, which was delivered to her retroactively in 1996, it clearly follows from the court decisions that, as per decisions of the Cantonal Commission and Federal Commission which acted in accordance with Article 143, 143a, and 143c of the Labour Law, her employment was terminated on 5 May 2002 upon a new decision of the employer. Furthermore, pursuant to the aforesaid commissions' decisions and court decisions, the appellant was granted the status of laid-off employee including the salary related compensations which were determined for that period of time. In addition, in its judgment no. Rev-969/04 of 2 June 2005, the Supreme Court ordered the renewed proceedings before the Cantonal Court in part relating to determination of compensation for unpaid salaries and the Cantonal Court decided on this issue in its judgment no. Gž-2742/05 of 2 March 2006. The appellant was entitled to file a revision against the said judgment of the Cantonal Court but she failed to do so, as clarified in paragraph 21 of the present decision.

38. The Court cannot draw a conclusion from the aforesaid that the courts arbitrarily applied the substantive law to the detriment of the appellant. Therefore, as to the appellant's allegation of a violation of her right to a fair trial, the court deems it unfounded.

As to partiality of the Court

39. By conducting a subjective test on the impartiality of the court in the proceedings, the Constitutional Court cannot establish whether the behavior of the judge in the first instance proceedings was of the nature alleged by the appellant in her appeal, where the following was stated: „the judge received the material in an envelope from the legal representative of the defendant and put it in her drawer and after the objection of the appellant's legal representative, she said that it was a reply to the claim and while she was receiving the envelope she was obviously grateful for this gesture of the defendant's legal representative". Namely, in conducting a subjective test a conclusion cannot be made that the judge of first instance was biased in this case, for which the appellant's right to a fair trial was violated, because that would mean that the court places its faith with the statement of one side by disregarding the context of the whole trial being conducted in three instances and disregarding the results of an objective observation of all conducted proceedings.

40. Taking into account the objective criterion and starting from the case-law of the European Court of Human Rights, from which the following standpoint is excerpted: *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* (see Judgment *Fay vs. Austria*, paragraph 30, 24 February 1993), the Constitutional Court could not establish no facts, with exception of the alleged conduct of the first instance judge, which would indicate any kind of partiality during the civil proceedings in question. Furthermore, this proceeding was conducted in three instances in which the court was sitting in a panel, which, in the opinion of the Constitutional Court, enabled the re-examination of the whole proceedings and all actions undertaken by different courts, where the composition of judges was completely different. In the appellant's opinion, the confirmation of significant part of the judgments of Municipal Court by the Cantonal Court and Supreme Court means only another violation of her right to a fair trial in the whole case before the courts, whereas she again failed to specify the violation she referred to nor did she offer any evidence to prove the aforesaid allegation.

41. Therefore, taking into account the whole proceedings, the Constitutional Court deems that this appellant's allegation on a violation of the right to a fair trial due to partiality of the court is unjustified.

As to a trial within a reasonable time

42. With reference to the appellant's allegation that the entire proceedings relating to her claim took unreasonable period of time, the Constitutional Court shall examine the length

of trial, the complexity of the case, the conduct of the appellant and conduct of the court in this case.

43. In the present case the proceedings commenced on 2 September 2002, when the appellant filed her claim and lasted until 2 March 2006, when the Cantonal Court delivered the judgment after the judgment of the Supreme Court, which partially granted the revision appeal, which means that the proceedings in question lasted three years and five months. Thereafter, the appellant filed „a complaint against the judgment of the Cantonal Court", which the Supreme Court, by its letter of 10 April 2006, transmitted to the Cantonal Court for its action because of the appellant's mistake in submitting this complaint to the Supreme Court. Finally, the Municipal Court rejected the appellant's complaint by its Ruling no. Pr-377/02 of 23 May 2006.

44. Given that this is an employment related dispute where it was necessary to establish the facts about the termination of employment status during the war and, upon the request of the appellant, the facts concerning her right to return to work post, payment of outstanding salaries and compensation of damage, in which case there was no need to conduct complex evidence related actions, the Constitutional Court does not find that case a particularly complex one.

45. Taking into consideration the court decisions, minutes of the hearings, as well as the replies of the participants to the proceedings in question, the Constitutional Court does not find any elements leading to a conclusion that the appellant, by her conduct, influenced the delays in the proceeding in any way.

46. Following the claim of the appellant filed on 2 September 2002, the Municipal Court delivered its judgment of 5 March 2004 after several hearings. The Cantonal Court, upon the filed complaint of the appellant against this judgment, adopted a decision on 17 September 2004. Upon the revision-appeal filed against the decision of the Cantonal Court, the Supreme Court adopted its decision on 2 June 2005. Upon the adoption of the Supreme Court's decision, the Cantonal Court adopted its final decision on 2 March 2005 after the held hearing.

47. Taking into consideration the documents submitted in the present case, the Constitutional Court has not found any elements indicating that the courts were unjustifiably postponing any actions or adoption of their decisions.

48. Given the aforesaid and the fact that the issue involves the proceedings which were conducted in three court instances and that a renewed deliberation was conducted in the second instance proceedings, the Constitutional Court is of the opinion that three years

and five months is not an unreasonable length of time concerning the trial in question. Therefore, the Constitutional Court has also found this allegation of the appellant unfounded.

49. In view of the above, the Constitutional Court concludes that the challenged judgments, in their relevant parts, have not resulted in a violation of the appellant's right to a fair hearing as guaranteed by Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

As to the right to non-discrimination

50. 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.

51. 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.

52. First of all, it should be recalled that Article 14 of the European Convention is of dependant nature. It cannot be applied if not taken together with another article of the European Convention. The European Court of Human Rights, in case *Rasmussen vs. Denmark* (28 November 1984, Series A, no. 87, page 12, paragraph 29) has clearly stated that Article 14 complements other essential provisions of the European Convention and its Protocols. The said article is not independent since it is effective only with respect to „the enjoyment of rights and freedoms" guaranteed by those provisions (…). It cannot be applied if the facts in question do not fall under the scope of one or more of these provisions (see, *inter alia*, Judgment of the European Court of Human Rights *Van der Mussele* of 23 November 1983, Series A, no. 70, page 22, paragraph 43). However, in case the reference is made to Article 14 taken together with one of the provisions of the European Convention it can be applied even if there was no violation required by that provision. The European Court of Human Rights has already pointed to the aforesaid in the *Belgian Linguistic Case*.

53. According to the case-law of the European Court of Human Rights, the discrimination exists if a person or group of persons being in the same situation are treated differently, in which case there is no any objective or reasonable justification for this differential treatment (see the European Court of Human Rights, the *Belgian Linguistic Case*, judgment of 23 July 1968, Series A, no. 6, page 86, paragraph 4, line 42). And it is of no importance whether the discrimination is the result of differential treatment or the application of the very law (see the European Court of Human Rights, *Ireland vs. Great Britain*, judgment of 18 January 1978, Series A, no. 25, paragraph 226). The same may be applied, *mutatis mutandis*, to Article II(4) of the Constitution of Bosnia and Herzegovina which prohibits discrimination with regards to the rights guaranteed by the European Convention and international agreements listed in Annex I to the Constitution of Bosnia and Herzegovina.

54. Therefore, the Constitutional Court must establish whether the appellant was treated differently when compared to other persons in the same situation. Any differential treatment shall be considered discrimination unless there is a reasonable and objective justification for such treatment, in other words unless a legitimate goal is pursued, or unless there is a reasonable proportionally between the means used and the aim sought to be achieved.

55. In concrete terms, the appellant has associated her allegation of the violation of her right to non-discrimination with her ethnical affiliation and the fact that she is a female, whereas she offers no evidence to justify or support the said allegation - she gives no explanation to the question by which means and in relation to whom was she discriminated against in the proceedings at hand. Given that the presented facts of the entire case do not indicate the possible existence of discrimination and that the appellant failed to make her allegations ascertainable, but just referred to that violation in an arbitrary manner, the Constitutional Court deems that the appellant's allegation on the violation of the right under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention is also ill-founded.

VIII. Conclusion

56. When an individual is deprived of exercising his/her rights before the court as stipulated by legal norms that a certain state institution is obligated to protect his/her rights, in case this respective institution fails to undertake legally prescribed measures aimed at providing the said protection, there is a violation of the right of access to court within the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention. On the other hand, the Constitutional Court

concludes that there is no violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention in the part where the appellant complains that the facts were erroneously and incompletely established and that the substantive law was erroneously applied in the court proceedings since the procedure conducted in compliance with legal norms established for the purpose of equal regulation of a large number of cases relating to termination of employment during the war does not constitute a violation of the right of an individual but rather represents a lawfully established procedure aimed at equal resolving of a large number of disputed employment relations in the territory of the Federation of Bosnia and Herzegovina, which were to be resolved upon the completion of war.

57. Having regard to Article 16(4)(4) and Article 61(1)(2) and (3) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as set out in the enacting clause.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. AP 1785/06

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Abduladhim Maktouf against the Verdict of the Court of Bosnia and Herzegovina, no. KPŽ-32/05 of 4 April 2006

Decision of 30 March 2007

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 Hadžiosmanović, 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 Brčko 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).

<u>Principle of Legality</u>

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.

<u>Time Constraints Regarding Applicability</u>

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 Brčko District. However, the Entity Criminal Codes and the Criminal Code of the Brčko 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 conclude 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, 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 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 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 *Krstić, Galić*, *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 paragraph 2 of some Article.

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

SEPARATE DISSENTING OPINION OF JUDGE TADIĆ

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.

Case no. AP 2587/05

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Emin Halilčević against the judgment of Cantonal Court in Tuzla no. Gž-124/05 of 19 October 2005

Decision of 23 May 2007

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3)(b) of the Constitution of BiH, Article 59(2)(2), Article 61(1) and (2), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), as Plenary and composed of the following judges:

Ms. Hatidža Hadžiosmanović, President

Mr. Miodrag Simović, Vice-President

Mr. David Feldman, Vice-President

Ms. Valerija Galić,

Mr. Mato Tadić

Ms. Constance Grewe

Ms. Seada Palavrić

Having deliberated on the appeal of **Mr. Emin Halilčević**, in case no. **AP 2587/05,** at its session held on 23 May 2007, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Emin Halilčević is hereby granted.

A violation of the right to a fair trial under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention for the Protection of Human Rights and Freedoms is hereby established.

The judgment of Cantonal Court in Tuzla no. Gž-124/05 of 19 October 2005 is hereby quashed.

The case shall be referred back to the Cantonal Court in Tuzla which is to follow the expedited procedure and take a new decision in accordance with Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention for the Protection of Human Rights.

The Cantonal Court in Tuzla is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 90 days as from the date of delivery of this Decision, about the measures taken to execute this Decision

as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 20 December 2005, Mr. Emin Halilčević („the appellant"), from Tuzla, represented by Ms. Edina Jahić, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of Cantonal Court in Tuzla („the Cantonal Court") no. Gž-124/05 of 19 October 2005.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Cantonal Court, the Municipal Court in Tuzla (the „Municipal Court"), and the Tuzla Canton, as a party to the proceedings, were requested on 6 April 2006 to submit their replies to the appeal. The Cantonal Court submitted its reply to the appeal on 12 April 2006 and the Municipal Court submitted its reply on 17 April 2006. The Tuzla Canton failed to submit its reply to appeal.

3. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply to the appeal was submitted to the appellant on 19 September 2006.

III. Facts of the Case

4. The facts of the case as they appear from the appellants' allegations and the documents submitted to the Constitutional Court can be summarized as follows:

5. On 18 December 2003, the appellant filed a lawsuit before the Municipal Court against the Tuzla Canton („the defendant"), whereby he claimed the payment of holiday allowance amounting to 8,128.00 KM. In his claim the appellant stated that he was employed as a judge of the Cantonal Court and that he had taken his annual leaves in 2000, 2001, 2002 and 2003 based on the Law on Judicial and Prosecutorial Service in the

Federation of Bosnia and Herzegovina („FBiH"). However, contrary to Article 41 of the said Law, he was not paid the holiday allowance for any of the mentioned four years as a compensation for some special expenses.

6. After acting upon the claim, the Municipal Court delivered judgment no. P-2951/03 of 26 October 2004, whereby it obliged the defendant to pay to the appellant the amount of 2,044.50 KM as holiday allowance for 2001, the amount of 2,218.80 KM as holiday allowance for 2002 and the amount of 2,848.80 KM as holiday allowance for 2003 including the legally prescribed default interest and expenses of the proceedings. Part of the appellant's claim relating to the payment of holiday allowance for 2000 in the amount of 1,380.00 KM was dismissed due to the objection made by the defendant where the statute of limitations was invoked concerning the filed claim. After the probative proceedings, the Municipal Court found that the appellant was not paid the holiday allowance for his annual leaves taken in 2001, 2002 and 2003 to which he was entitled in accordance with Article 41 of the Law on Judicial and Prosecutorial Service in the F BiH. Given that the legislator, *i.e.* the Government of the Tuzla Canton has never passed the regulation on the amount of holiday allowance to which judges are entitled in accordance with Article 41 of the Law on Judicial and Prosecutorial Service in the F BiH, the Municipal Court filled the observed legal gap relating to the amount of holiday allowance by applying the Collective Agreement for Employees of Administrative Bodies and Judicial Authorities in the F BiH and based on the confirmation note of 18 September 2003 by the Accounting Department of the Cantonal Court which states that the appellant was not paid the holiday allowance for the years 2000, 2001, 2002 and 2003 and that the total amount of non-paid holiday allowance for the mentioned years is 8,128.70 KM.

7. In the reasoning of the first instance judgment, whereby the most part of the appellant's claim was granted, the Municipal Court pointed to the documents and regulations, which were inspected during the probative proceedings upon the proposal of the parties to the proceedings, and the Court took the position that for the adoption of decision in this matter both Agreement on Application of the Collective Contract for Civil Servants and Employees in the Administration Bodies and Decision of the Government of Tuzla Canton of 27 March 2002, by which the text of agreement is accepted, are irrelevant because the Law on Judicial and Prosecutorial Service in the FBiH is a *lex specialis* in relation to the Decree on the Manner and Procedure of Determining Salaries, Compensations and Other Material Rights of Civil Servants and Employees in Administration Bodies, as well as in relation to both Agreement on Application of the Collective Contract and Decision of Tuzla Canton Government no. 02/1-34-1723/02 of 27 March 2002, whereby the text of the agreement is accepted. Namely, it follows from Article 1 of the aforesaid Collective Contract that it regulates the issues of enforcement and implementation of the

Collective Agreement for Employees of Administrative Bodies and Judicial Authorities in the FBiH and Article 4 provides that the payment of holiday allowance to employees shall be regulated in the same manner as it is regulated for other budget beneficiaries in accordance with the budgetary resources of Tuzla Canton planned for the current year. As the appellant succeeded in the dispute, he did not lodge an appeal against the first instance judgment.

8. However, in deliberating on the appeal of the defendant, the Cantonal Court delivered judgment no. Gž-124/05 of 19 October 2005, whereby the appeal of the defendant was granted and, by applying item 4) of Article 229 of the Civil Procedure Code (*Official Gazette of FBiH* no. 53/03, 73/05 and 19/06), the Cantonal Court modified the first instance judgment in the part awarding the claimed amounts and thus dismissed the appellant's claim. As for the part of judgment dismissing the claim, the Cantonal Court decided to leave it the same by applying Article 221 of the Civil Procedure Code since that part of judgment was not challenged by the appeal.

9. In the reasoning of the second-instance judgment, the Cantonal Court acknowledged that the following facts were correctly established by the first instance court: that in 2001, 2002 and 2003 the appellant was serving as a judge of the Cantonal Court in Tuzla, that he used his annual leaves during the mentioned years and that he was not financially compensated in the form of holiday allowance for the annual leaves taken during the mentioned years. Furthermore, the Cantonal Court concluded that the Cantonal Court in Tuzla failed to adopt a decision on the payment of holiday allowance neither to judges nor to civil servants or employees. The Court also concluded that the defendant neither adopted a decision on the payment of holiday allowance to the budget beneficiaries for the period in dispute nor was a leave allowance paid to any budget beneficiary during the disputed period of time.

10. Taking into account the established facts, the Cantonal Court holds that the conclusion of the first instance court is wrong where it is stated that the appellant is entitled to the holiday allowance for the years 2001, 2002 and 2003 in terms of Article 41 of the Law on Judicial and Prosecutorial Service in the FBiH and Article 2 of the Budget Law of the Tuzla Canton, as stated in the enacting clause of the challenged judgment. In fact, according to the Cantonal Court, the provision of Article 41 of the Law on Judicial and Prosecutorial Service in the FBiH stipulates that Judges and Prosecutors shall be entitled to compensation for certain special expenses, and holiday allowance is mentioned under item 3 of the said Article. However, this Law does not provide for the manner in which the amount of holiday allowance for Judges and Prosecutors shall be determined nor is

it determined by any other law of the defendant relating to the Tuzla Canton Judicial Authorities, as the budget's beneficiaries in terms of Article 2 of the defendant's Budget Law (*Official Gazette of the Tuzla-Podrinje Canton* no. 6/96). The Cantonal Court holds that the first instance court incorrectly concluded that, in the situation where the amount of holiday allowance is not determined for those who serve as judicial officials, as it is the case of the appellant, the appellant is entitled to 70% of his salary received during the disputable period of time, which is to be paid in the form of holiday allowance, and that Article 32 of the Collective Agreement for Employees of Administrative Bodies and Judicial Authorities in the F BiH and the Decision of the Tuzla Canton Government dated 27 March 2002 are to be applied. In the view of the Cantonal Court, the Collective Agreement might possibly apply only to the employees of the Cantonal Court in Tuzla and not to the judges given that no other judges of the Cantonal Court in Tuzla were paid holiday allowance during the period in dispute; therefore, neither in this manner the gap in the legal regulation could be overcome. The gap in the legal regulations as to the amount of holiday allowance may be overcome by the defendant's acts relating to other civil servants and employees when it comes to the holiday allowance. Those acts, according to the said Court, are decrees. Actually, the Decree on the Manner and Procedure of Determining the Value of Tasks and Duties of Employees in Cantonal Administration Bodies (*Official Gazette of the Tuzla-Podrinje Canton* no. 10/97), which was in force at the time of enactment of the Law on Judicial and Prosecutorial Service in the F BiH, did not provide for the holiday allowance, so there are no parameters to fill the legal gap and justify the payment of holiday allowance to the appellant for the year 2001. In 2002, the Decree on the Manner and Procedure of Determining the Salaries, compensation and other material rights of civil servants and employees in the administration bodies (*Official Gazette of the Tuzla-Podrinje Canton* no. 6/02) was enacted and it stipulated that a civil servant or administrative staff member was entitled to holiday allowance in accordance with budgetary funds available for the current year.

11. Taking into account that the defendant is a separate legal entity as to the bodies of F BiH, that it has its Cantonal Law on the Budget and that during the disputed period of time it did not pass the decision on the payment and amount of holiday allowance to the budget beneficiaries in Tuzla Canton, the Cantonal Court holds that when it comes to the amount of holiday allowance granted to the judges and prosecutors the legal gap in the instant case cannot be filled by application of Article 11 of the Decree on Compensations and other Material Rights of Officials of the Executive Authorities of the F BiH and Civil Servants in the Federal Ministries and other Bodies of Federal Administration (*Official Gazette of FBiH* nos. 44/98 and 49/00).

IV. Appeal

a) Allegations of the appeal

12. The appellant holds that by decision of Cantonal Court his constitutional right was violated with respect to direct application of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") under Article II(2) of the Constitution of BiH („Constitution of BiH"), as well as his right to a fair trial in civil and criminal matters as an integral part of the right to a fair trial under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention and the right to property under Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention. The appellant points out that the Cantonal Court refers to the existence of legal gap in the legislation, *i.e.* lack of regulation defining the amount of holiday allowance as a major reason for dismissing the claim, but at the same time the Court is trying to prove that none of the existing regulations passed by the defendant or the F BiH is adequate to fill the evident legal gap. At the same time, the appellant is insisting on the fact that by Article 41 of the Law on Judicial and Prosecutorial Service in the FBIH his right to holiday allowance is defined as a right and not as a possibility and that it is prescribed by Article 82 of the said Law that *taking into account the conditions set therein as minimal, all federal and cantonal laws regulating the issue of judicial and prosecutorial authority shall be harmonized with this law and until this harmonization is completed the provisions of this law shall be applied.* According to the appellant, the cited law provision represents a situation which imposes a positive obligation on the federal and cantonal legislative authorities to pass regulations by which the amount of holiday allowance would be determined that remained pending under Article 41 of the Law on Judicial and Prosecutorial Service. The appellant is also aware that passing of regulation by which the calculation of the amount of holiday allowance would be provided for, might lead to a situation where the execution of the defendant's budget would become more difficult or it would lead to the budget unfeasibility as on the day of entering into force of the Law on Judicial and Prosecutorial Service in the F BiH the budget for the current year has been already approved. However, the appellant recalls that in such kind of situations a revision of budget is approved for the related fiscal year. Nevertheless, the fact is that during the years of the disputed period to come, the defendant neither passed a general act that would provide for the calculation of the amount of holiday allowance granted to judges and prosecutors of the Tuzla Canton, nor did it have the budgetary funds planned for that purpose. Therefore, the appellant holds that the Cantonal Court actually awarded the public authorities by the challenged judgment, *i.e.* it awarded the defendant for its total inactivity to find a solution to the problem. The appellant has invoked the decision of the

Constitutional Court no. *AP 301/04*, where the Constitutional Court defines the similar situation „as absurd". The absurdity of the situation *in concreto* is reflected in the fact that a public authority responsible for fulfilling its legal obligation and passing a regulation that would determine the amount of compensation (holiday allowance) is actually referring to the lack of the relevant regulation as a reason for dismissing the claim. The appellant has stated that by the mentioned decision the Constitutional Court recalls the principle *nemo censetur propriam turpitudinem allegans* (no one should allege his/her own negligence in defense of his/her rights).

13. The appellant sees the violation of his right to a fair trial in the fact that the Cantonal Court arbitrarily interpreted Article 82 of the Law on Judicial and Prosecutorial Service and in the fact that there is also a positive obligation of the defendant to pass appropriate regulations on the amount of holiday allowance, which has not been done in the instant case.

14. In the appellant's opinion, the violation of the right to property is reflected in depriving him from receiving his holiday allowance, which does not constitute a possibility but rather a right, and therefore his expectations that he would receive that money were justified, which represents a basis for application of Article 1 of Protocol No. 1 to the European Convention. In the appellant's opinion, the State interfered with the appellant's right to property and such kind of interference has no basis in the law. To the contrary, as per appellant, the State was legally obliged to pass a law by which it would be prescribed which amount he was supposed to receive and since the requirement „interference in accordance with law" was not satisfied it means that his right to property was *prima facie* violated. The State by no means managed to justify such kind of interference with the appellant's right to property, in other words it failed to point to the existence of some general interest that would satisfy the requirement „interference in the public interest." Even if such requirements had been met, the public authority failed to indicate that there is proportionality, *i.e.* a reasonable relationship between the general interests and the objectives and interests of an individual.

15. The appellant has explicitly challenged the judgment of the Cantonal Court in his appeal. However, throughout the entire appeal he challenges the judgment of the Municipal Court against which he lodged no appeal, so at the end he suggests the Constitutional Court quash both the first instance judgment and second instance judgment by granting his appeal and he also suggests the case be referred back for renewed trial along with concrete instructions. Furthermore, he requested the Constitutional Court to award to the attorney's fees paid in the trial before the Constitutional Court.

b) Reply to the appeal

16. In its reply to the appeal, the Cantonal Court pointed out that the allegations of the appeal are ill-founded and that the appellant was entitled to the right to a fair trial, as well as to the right of access to the court in two instances. As for the violation of the right to property, the Cantonal Court points out that the said rights were not violated since it was not established during the proceedings that there are the relevant law provisions regulating the amount of holiday allowance for 2001, 2002 and 2003 on the cantonal level nor was this amount of holiday allowance determined by the Law on Judicial and Prosecutorial Service in the F BiH and, therefore, there is no justification for application of the European Convention.

17. In its reply to the appeal, the Municipal Court stated that the appeal was ill-founded since the appellant considers that his rights were violated by an erroneous interpretation of Article 41 of the Law on Judicial and Prosecutorial Service in the F BiH and Article 32 of the Collective Agreement for Employees of Administrative Bodies and Judicial Authorities in the F BiH. In the opinion of this Court, the parties to the proceedings had an opportunity to propose and present the evidence on the basis of which the Court adopted its decision by invoking the applicable law provisions.

V. Relevant Law

18. The **Law on Judicial and Prosecutorial Service in the Federation of Bosnia and Herzegovina** (*Official Gazette of FBiH* nos. 20/01 and 57/01), as relevant, reads:

Article 34

(1)...

(2) The provisions of Article 35 through 46 of this law constitute a minimal structure for the salaries of judges and prosecutors serving at the Federation level. As for the judies and prosecutors serving at the cantonal and municipal level, the following provisions shall constitute general principles regulating this issue in the whole territory of Federation. These general principles shall not prevent the competent cantonal legislative bodies to adopt laws by which a different structure of salaries may be determined as long as the salaries do not fall below the levels defined by the provisions of Article 35 through 46 of this Law.

Article 41

Judges and Prosecutors shall be entitled to compensations for some special expenses such as:

3. holiday allowance.

Article 82

Taking into account the conditions set therein as minimal, all federal and cantonal laws regulating the issue of judicial and prosecutorial authority shall be brought in harmony with this law and until this harmonization is completed the provisions of this law shall be applied.

19. The **Law on Changes and Amendments to the Law on Judicial and Prosecutorial Service in the Federation of Bosnia and Herzegovina** (*Official Gazette of F BiH n*o. 63/03), as relevant, reads:

Article 1

In the Law on Judicial and Prosecutorial Service in the Federation of Bosnia and Herzegovina…, Article 38 shall be erased.

Article 2

Article 41 is amended to read:

Judges and Prosecutors shall be entitled to the following compensations:

1. *severance package*
2. *holiday allowance*
3. *jubilee awards*

Article 3

Article 41a) shall be added after Article 41 to read as follows:

Article 41a)

With reference to the issues under Article 1 and 2 of this Law relating to judges of cantonal and municipal courts and cantonal and municipal prosecutors, the cantons shall harmonize their laws and other legal provisions with the provisions of this law within 30 days upon entering into force of this Law.

20. The **Law on Civil Service in the Federation of Bosnia and Herzegovina** (*Official Gazette of F BiH* nos. 29/03, 23/04, 39/04, 54/04, 67/05 and 8/06), as relevant, reads:

Article 5

(1)…

(2) Members of cantonal governments, members of cantonal assemblies, judges of cantonal courts and cantonal prosecutors shall not be considered civil servants and their employment status shall be regulated by other laws.

21. The **Collective Agreement for Employees of Administrative Bodies and Judicial Authorities in the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH n*o. 23/00), in the relevant part, reads:

Article 32

An employee shall be entitled to receive, by way of compensation of salary for annual leave (holiday allowance,) at least 70% of his/her salary or at least the average salary paid in the Federation during the previous three months prior to the issuance of a decision on holiday allowance, if it is more favorable to the employee.

22. The **Civil Procedure Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina* nos. 53/03, 73/05 and 19/06), in the relevant part, reads:

Article 7

(1) Parties shall be obliged to present all facts on which they base their claims and present evidence proving those facts.

Article 8

The court shall decide which facts shall be considered as proved, on the basis of free evaluation of evidence. The court shall conscientiously and meticulously evaluate each individual piece of evidence and all evidence in their entirety.

Article 123

(1) Each party shall be obliged to prove the facts on which s/he bases his claim.

(2) The court shall determine the facts upon which the case shall be decided on the basis of free evaluation of evidence.

Article 210

(1) Erroneously or incompletely determined statement of the facts shall exist when the court has erroneously established or failed to determine the decisive fact.

Article 211

(1) Misapplication of substantive law shall exist when the court failed to apply the provision of the substantive law, which should have been applied or when such provision has not been properly applied.

Article 217

(1) The second instance court shall decide on the appeal in a panel session or at the hearing.

(2) The second instance court shall set a hearing when it assesses that, in order to properly determine the state of the facts, it is necessary to determine new facts or to hear new evidence or to re-hear already presented evidence before the second instance court, and when it assesses that a hearing needs to be held before the second-instance court due to Procedural Errors in the first instance proceedings.

Article 224

The second instance court may, at the panel session or on the basis of a hearing:

2. Dismiss the appeal as unjustified and confirm the first instance judgment,

5. Overrule the first instance judgment

Article 226

The court of second instance shall dismiss the appeal as groundless and confirm the first instance court judgment if it finds that neither the reasons for which the judgment has been contested, nor the reasons to which the court is obliged to have due regard ex officio exist.

Article 229

(1) In the judgment, the second instance court shall, at the session of the panel or on the basis of a hearing, overrule the first instance judgment if it finds that one of the following reasons stated in the appeal exists:

(....)

4) if it holds that the state of facts in the first instance judgment was correctly determined, but the first instance court misapplied the substantive law.

VI. Admissibility

23. Pursuant to Article VI(3)(b) of the Constitution of BiH, 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.

24. 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 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.

25. In the case at hand the subject of appeal is the judgment of the Cantonal Court no. Gž-124/05 of 19 October 2005, against which there are no effective legal remedies available

under law. Furthermore, the appellant received the challenged judgment on 14 November 2005 and the appeal was lodged on 20 December 2005, *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 there is any other formal reason that would render the appeal inadmissible.

26. In view of the provisions of Article VI(3)(b) of the Constitution of BiH and Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court finds that the present appeal meets the admissibility requirements with respect to the judgment of Cantonal Court no. Gž-124/05 of 19 October 2005.

VII. Merits

27. The appellant challenges the judgment of the Cantonal Court claiming that the right to direct application of rights and freedoms set forth in the European Convention under Article II(2) of the Constitution of BiH has been violated, as well as the right to a fair hearing in civil and criminal matters as an integral part of the right to a fair trial under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention and the right to property under Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention.

Right to a fair hearing

28. Article II(3)(e) of the Constitution of BiH, in the relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

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

29. Article 6 paragraph 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.

30. In the instant case, the proceedings before ordinary courts are related to a determination of compensation in a form of holiday allowance to which the appellant is entitled both by

his employment status and judicial duty he performs, as referred to in the Law on Judicial and Prosecutorial Service in the F BiH.

31. When giving an answer to the question whether Article 6 of the European Convention is applicable to the instant case, we should bear in mind the present practice of institutions which, in Bosnia and Herzegovina, were deciding on the protection of fundamental rights and freedoms set forth in the European Convention and then draw an categorical conclusion that employment related disputes imply „civil rights and obligations" and that Article 6 of the European Convention applies to the procedures relating to employment relations (CH/99209 *Rakita vs. Federation of Bosnia and Herzegovina*, Decision on Admissibility and Merits of 31 March 2003, paragraph 51; CH/99/3015, *Sulejman Ahmetašević vs. Federation of Bosnia and Herzegovina*, Decision on Admissibility of 7 March 2005, paragraph 15. *et sequ.).* Therefore, the Constitutional Court is competent to examine whether the proceedings were in accordance with the standards under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention.

32. In the present case, the appellant complains of a violation of his right to a fair hearing in civil matters as one of the essential elements of the concept of a fair trial under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention. In the appellant's opinion, the ordinary courts arbitrarily construed the provision of Article 82 of the Law on Judicial and Prosecutorial Service in the F BiH and the defendant failed in the present case to comply with its positive obligation to enact appropriate regulation on the amount of compensation (holiday allowance). Actually, the lack of general acts regulating the issue of determining the amount of holiday allowance resulted in the conclusion of the Cantonal Court according to which the appellant is not entitled to the holiday allowance as there are no parameters to fill the legal gap save for the acts of defendant, which have never been enacted. Hence, irrespective of the fact that this right is stipulated under Articles 40 and 41 of the Law on Judicial and Prosecutorial Service in the F BiH as well as notwithstanding the obligation under Article 82 of the said Law that all federal and cantonal laws shall be brought into line with this law, the Cantonal Court, while deciding on the appellant's appeal, decides that the appellant's request is ill-founded due to the lack of general acts regulating the issue of determining the amount of holiday allowance for judges and prosecutors. In the appellant's opinion, the Cantonal Court's decision as such actually awards the public authorities for the legislative inactivity although, pursuant to Article 82 of the Law on Judicial and Prosecutorial Service in the FBiH, all federal and cantonal legislative bodies have a positive obligation to enact appropriate regulations.

33. In this context, the Constitutional Court underlines that according to its own jurisprudence it is not called upon to review the establishment of facts or interpretation

and application of ordinary laws by the lower courts, unless the lower courts' decisions are in violation of rights under the Constitution. This is the case if in an ordinary court's decision constitutional rights have been disregarded or wrongly applied, including cases where the application of a law was obviously arbitrary, where the applicable law was in itself unconstitutional or where fundamental procedural rights (fair trial, access to court, effective remedies, *etc*.) were violated or where the established facts indicate to the violation of the Constitution of BiH (see, Constitutional Court, Decision no. *U 39/01* of 5 April 2002 published in *Official Gazette of Bosnia and Herzegovina n*o. 25/02; Decision no. *U 29/02* of 27 June 2003 published in *Official Gazette of Bosnia and Herzegovina n*o. 31/03). Furthermore, the Constitutional Court points out that it is beyond its competence to examine the quality of the conclusions of ordinary courts relating to the assessment of evidence unless such an assessment is deemed to be arbitrary (see, Constitutional Court, Decision no. *AP 661/04* of 22 April 2005).

34. In many of its decisions the European Court of Human Rights pointed out that Article 6 of the European Convention has a „prominent place in democratic society" (see, the European Court of Human Rights, *De Cubber vs. Belgium*, judgment of 26 October 1984, Series A, no. 86, paragraph 30). The consequence is that Article 6 of the European Convention cannot be interpreted restrictively (see the European Court of Human Rights, *Moreira de Azevedo vs. Portugal*, judgment of 23 October 1990, Series A, no. 189, paragraph 66). Article 6(1) of the European Convention enumerates a series of elements inherent in the fair execution of justice, so should any of the elements contained in this right be violated, it will mean that Article 6(1) of the European Convention was also violated as well (see the Constitutional Court, Decision no. *U 25/01* of 26 September 2003 published in *Official Gazette of Bosnia and Herzegovina n*o. 3/04, paragraph 25).

35. Although the Constitutional Court imposed limitations on itself concerning the examination of factual background and assessment of evidence made by ordinary courts, it did not completely exclude that possibility, but it rather limited its competence to the extent of granting the examination of factual background in case of „the proceedings containing a violation of the right to a fair trial within the meaning of Article 6 of the European Convention", in other words if the established factual background points to violation of the Constitution" or if the assessment of evidence „seems to be manifestly arbitrary". In that sense there are numerous examples of court case-law when the Constitutional Court dealt with assessment of factual background and evidence established by regular courts (see Constitutional Court, the above cited Decision no. *U 661/04*; Decision no. *U 15/99* of 15 December 2000, *Official Gazette of Bosnia and Herzegovina* no. 13/01; Decision no. *U 14/00* of 4 May 2001, *Official Gazette of Bosnia and Herzegovina* no. 33/01; Decision no.

AP 301/04 of 23 September 2005, *Official Gazette of Bosnia and Herzegovina* no. 80/05). The same applies to the cases where the positive legal provisions were misinterpreted or misapplied by ordinary courts in a way that indicates a violation of fundamental rights and freedoms guaranteed by the Constitution of BiH and Article 6(1) of the European Convention. Therefore, should there be arbitrariness of courts, the Constitutional Court shall indulge in considering the manner in which the ordinary courts established the facts or applied the relevant substantive and procedural law provisions.

36. The Constitutional Court recalls that there is an obligation of ordinary courts to directly apply the rights and freedoms set forth in the European Convention and its Protocols that should be considered as constitutional provisions which are above any law. In support of this position the Constitutional Court refers to Article II(6) of the Constitution of BiH according to which: *Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in Article II(2) of the Constitution of BiH.*

37. In the present case, the task of the Constitutional Court with regard to the right to a fair trial under Article 6(1) of the European Convention is to assess whether or not the Cantonal Court acted in an arbitrary manner when applying the law in the appellate proceedings. In this context, the Constitutional Court finds that the Cantonal Court underlined, when deciding on the appeal, that the Municipal Court had correctly established the facts but misapplied the substantive law, *i.e.* the Law on Judicial and Prosecutorial Service in the F BiH, although the said Law actually provides for the right to holiday allowance. However, given that the defendant neither adopted a decision on the payment of holiday allowance nor was a leave allowance paid to any budget beneficiary, the appellant's request, in the view of that Court, has been unfounded. Therefore, the Cantonal Court holds that in the situation when there is no regulation which would regulate the payment and amount of holiday allowance, the provisions of Articles 40 and 41 of the Law on Judicial and Prosecutorial Service in the F BiH, which stipulate the right to holiday allowance, cannot be applied.

38. The Constitutional Court notes that it is true that the Law on Judicial and Prosecutorial Service in the F BiH does not stipulate the manner of determining compensation for holiday allowance, but it determines the mentioned right under Article 41 of the said Law. In addition, Article 82 of the same Law stipulates that all laws regulating the issue of judicial and prosecutorial authority shall be brought into line with this law and the conditions set therein as minimal and it determines its nature of the *lex specialis* law in relation to

all other laws in this field. Moreover, Article 2 of the Law on Changes and Amendments to the Law on Judicial and Prosecutorial Service in the F BiH expressly prescribes the obligation of the relevant Canton to bring into line its provisions regulating, *inter alia*, the issue of holiday allowance for judges and prosecutors of cantonal and municipal courts with the provisions of this law within 30 days from the day of entry into force of this Law, *i.e.* by 16 January 2004.

39. In the present case, the Cantonal Court refers to the lack of regulation defining the amount of holiday allowance for judges and prosecutors, as a major reason for dismissing the appellant's claim, and it fills this legal gap by the defendant's acts, *i.e.* Decrees, which provide for this right only as a possibility and not as an obligation. In addition, the Cantonal Court explains that the conclusion of the first instance court is wrong where it is stated that the plaintiff is entitled to 70% of his salary received during the disputable period of time, which is to be paid in the form of holiday allowance based on Article 32 of the Collective Agreement for Employees of Administrative Bodies and Judicial Authorities in the F BiH and the Law on Judicial and Prosecutorial Service in the FBiH. Considering that the Law on Judicial and Prosecutorial Service in the FBiH was enacted in 2001 and that the defendant did not act in accordance with the instructions stipulated under Article 82 of the said Law to bring into line with this law all laws regulating the issue of judicial and prosecutorial authority, and taking into account that the first instance court correctly concluded that the appellant was entitled to holiday allowance based on the Law on Judicial and Prosecutorial Service as the *lex specialis* law in relation to all the subsequent decrees and agreements as well as that the amount was determined based on the Collective Agreement, as the general act enacted in 2000 at the level of the F BiH, it undisputedly follows that the Cantonal Court, in the appellate proceedings, should not have dismissed the appellant's request on the mere grounds that there were no regulations determining the amount of holiday allowance, in accordance with the obligation under Article 82 of the Law on Judicial and Prosecutorial Service in the FBiH. In so doing, the Cantonal Court justifies the failure of the defendant as public authority to meet its legal obligation. Moreover, the Cantonal Court states the aforementioned as the reason to dismiss the appellant's request and this conclusion, in the view of the Constitutional Court, is entirely arbitrary, in other words is an arbitrary application of law.

40. The Constitutional Court notes that the situation in the case at hand concerning the existence of legal gap is very similar to the situation referred to in the case no. *AP 301/04* because it is really accurate that the Law on Judicial and Prosecutorial Service in the F BiH failed to regulate the manner of determining the compensation in form of holiday allowance, which is defined by Article 41 of this Law as the appellant's right. The said law,

however, under Article 34, envisages the possibility for the competent cantonal legislative bodies to enact laws by which it will be possible to determine a different structure of salaries as long as the related compensations do not fall below the levels defined by the provisions of Articles from 35 through 46, which is also applicable when it comes to the rights under Article 41 of the said law. Moreover, under Article 82 of the Law on Judicial and Prosecutorial Service in the F BiH it is prescribed that all laws regulating the issue of judicial and prosecutorial authority shall be brought into line with this law and the conditions set therein as minimal, whereas is also prescribed its nature of the *lex specialis* law in relation to all other laws in this field. Moreover, Article 2 of the Law on Changes and Amendments to the Law on Judicial and Prosecutorial Service in the F BiH explicitly prescribes the obligation of the relevant Canton to bring in line its provisions regulating, *inter alia*, the issue of holiday allowance for judges and prosecutors of cantonal and municipal courts with the provisions of this law within 30 days from the day of entry into force of this Law, *i.e.* by 16 January 2004.

41. In the aforementioned context, the Constitutional Court holds that the appellant's right to a fair trial under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention has been violated by the challenged judgment of the Cantonal Court on the grounds that the Cantonal Court arbitrarily construes that the lack of general acts regulating the issue of determining the amount of holiday allowance for judges and prosecutors, by analogous application of the defendant's acts, is contrary to Article 82 of the Law on Judicial and Prosecutorial Service, which imposes the obligation on the federal and cantonal legislative authorities that all laws regulating the issue of judicial and prosecutorial authority and, accordingly, the right to receive payment for holiday allowance, shall be brought into line with the mentioned law and, until then, the provisions of the Law on Judicial and Prosecutorial Service shall be applied. Moreover, the Constitutional Court deems that the legislator, when adopting any law as well as the relevant Law, has had a financial framework for implementation of that law. Also, the Law has been enacted to be enforced so as to achieve the rule of law. In addition, the enactment of the necessary regulations in accordance with Article 82 of the Law on Judicial and Prosecutorial Service is a precondition for consistent implementation of the Law. The fact that the state authority failed to meet its obligations has given rise to the absurd situation where the Cantonal Court took the position that the appellant should bear the consequences of the authorities' inactivity and its failure to meet its obligations. In addition, the Constitutional Court cannot accept the lack of funds as the second reason referred to by the Cantonal Court and such argument has never been accepted in the case-law of the European Court of Human Rights. Finally, the fact that holiday allowance was not paid to any budget beneficiaries during the disputed period of time, offered by

the Cantonal Court as one of the reasons to support its position that the appellant is not entitled to holiday allowance, cannot be interpreted differently than as the arbitrariness of the Cantonal Court with a direct detrimental effect on the appellant's exercise of his rights.

42. In view of the above, the Constitutional Court concludes that the Cantonal Court arbitrarily applied the law when it construed that the right to holiday allowance ceased because of the lack of general acts regulating the issue of determining the amount of holiday allowance notwithstanding the fact that the basis for this kind of compensation is provided for under the Law on Judicial and Prosecutorial Service in the F BiH. Consequently, there has been a violation of the right to a fair trial under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention.

Right to property

43. Taking into account the conclusion of the Constitutional Court in relation to Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention, the Constitutional Court holds that it is not necessary to separately consider the appellant's allegations about the violation of his right to property under Article II(3)(k) of the Constitution of BiH and Article 1 of the Protocol No. 1 to the European Convention.

VIII. Conclusion

44. The Constitutional Court concludes that there has been a violation of the right to a fair hearing under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention due to arbitrary application of law by ordinary court in which case the lack of accompanying regulations was interpreted as a loss of right provided for by law.

45. Pursuant to Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court decides as set out in the enacting clause of this decision.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. AP 2281/05

DECISION
ON ADMISSIBILITY
AND MERITS

Appeal of Mr. Tihomir Gligorić and Ms. Stamenka Kozomara against the Verdict of the Court of Bosnia and Herzegovina, no. KžK-03/05 of 13 October 2005 and the Ruling of the Court of BiH no. KžK-03/05 of 22 November 2005

Decision of 6 July 2007

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)(2) and (3) 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 Hadžiosmanović, President

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Ms. Seada Palavrić,

Mr. Krstan Simić

Having deliberated on the appeal of **Mr. Tihomir Gligorić and Ms. Stamenka Kozomara** in case no. **AP 2281/05** at its session held on 6 July 2007, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. Tihomir Gligorić is hereby granted.

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

The Verdict of the Court of Bosnia and Herzegovina, no. KžK-03/05 of 13 October 2005 in relation to Mr. Tihomir Gligorić is hereby quashed.

The case in relation to Mr. Tihomir Gligorić shall be referred back to the Court of Bosnia and Herzegovina, which shall be obligated to take a new decision in an expedited procedure pursuant to Article 7 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina on the measures taken to enforce Decision within 60 days from the receipt of this Decision as pursuant to Article 74(5) of the Rules of the Constitutional Court.

The appeal of Ms. Stamenka Kozomora lodged against the Ruling of the Court of Bosnia and Herzegovina no. KžK-03/05 of 22 November 2005 and the Verdict of the Court of Bosnia and Herzegovina no. KžK-03/05 of 13 October 2005 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 9 November 2005 and on 2 December 2005, Mr. Tihomir Gligorić („the first appellant") from Banja Luka, represented by Mr. Miroslav Mikeš, a lawyer practicing in Banja Luka, and Ms. Stamenka Kozomara („the second appellant") from Banja Luka, represented by Goran and Zoran Bubić, lawyers practicing in Banja Luka, lodged the appeals with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") respectively. In the appeal registered with the Constitutional Court under no. AP 2281/05, the first appellant has challenged the verdict of the Court of Bosnia and Herzegovina („the Court of BiH"), no. KžK-03/05 of 13 October 2005. The ruling of the Court of BiH no. KžK-03/05 of 22 November 2005, and the verdict of the Court of BiH no. KžK-03/05 of 13 October 2005, have been challenged by the second appellant in the appeal registered with the Constitutional Court under no. AP 2465/05.

II. Proceedings before the Constitutional Court

2. As the Constitutional Court received two appeals within its competence concerning the same matter, it decided, pursuant to Article 31(1) of the Rules of the Constitutional Court, to join the cases, to conduct one set of proceedings, and to take a single decision in case no. AP 2281/05.

3. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 20 July 2006, the Prosecutor's Office of Bosnia and Herzegovina („the BiH Prosecutor's Office) and the Court of BiH were requested to submit replies to appeal no. AP 2465/05. As the case concerns the same factual and legal background, the Constitutional Court did not request to submit replies to the appeal no. AP 2281/05.

4. On 15 August 2005, the BiH Prosecutor's Office and the Court of BiH submitted their replies.

5. On 18 August 2006, the replies to the appeal were forwarded to the second appellant.

III. Facts of the case

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

7. By the verdict of the Court of BiH, no. K-112/04 of 7 February 2005, the appellants were acquitted of the charges for having committed a criminal offence of failure to enforce the decision of the Constitutional Court of Bosnia and Herzegovina, Court of Bosnia and Herzegovina, and Human Rights Chamber, referred to in Article 239 of the Criminal Code of Bosnia and Herzegovina („Criminal Code of BiH") in conjunction with Article 29 of the Criminal Code of BiH. The Court of BiH argued in its verdict on acquittal that the Ruling of the Constitutional Court no. *U 47/01* of 2 November 2001 was not an „enforceable and final decision", as required by Article 239 of the Criminal Code of BiH, but an interim measure subject to time limits and certain conditions, which was the reason why the instant case did not disclose appearances of the main elements of the criminal offence in question. The Prosecutor's Office of BiH filed an appeal against this verdict with the Panel within the Appellate Division of the Court of BiH.

8. By its verdict no. KžK-03/05 of 13 October 2005, the appellants were pronounced guilty for having committed a criminal offence – a failure to enforce the decision of the Constitutional Court of Bosnia and Herzegovina referred to in Article 239 and in conjunction with Article 29 of the Criminal Code of BiH and they were imposed suspended sentences of imprisonment. Thus, the first appellant was imposed a suspended sentence of imprisonment for a term of 10 months and the second appellant was imposed a suspended sentence of imprisonment for a term of 6 months, provided that they did not commit a new criminal offence during a period of two years. The first appellant was pronounced guilty for the actions he committed as the Head of the Regional Office of Town Planning and Legal Property Affairs of the Republika Srpska to prevent enforcement of the ruling

of the Constitutional Court, no. *U 47/01* of 2 November 2001. More precisely, he „sent a notice signed by his deputy Mr. Milorad Elez no. 01-377/01 of 23 November 2001 to the Regional Unit Laktaši in which he requested that in case of „Domet" (relating to the aforementioned ruling of the Constitutional Court) no changes be made without his knowledge and without prior submission of information to the Office. On the account of this, it was not acted in accordance with the ruling of the Constitutional Court […]". The second appellant was pronounced guilty and sentenced „as she first adopted and signed the ruling no. 26-952-1542/01 of 15 April 2003 preventing the entry of suspension of enforcement of the judgment of the Basic Court in Banja Luka no. P-1657/98 of 29 December 1998, based on the ruling of the Constitutional Court of BiH no. *U 47/01* of 2 November 2001. Having annulled the very same ruling she adopted, she adopted the decision – conclusion no. 26-952-142/01 of 26 June 2003 terminating the procedure of entry of the ruling of the Constitutional Court of BiH no. *U 47/01* of 2 November 2001 in the Real Estate Cadastre Office although the very procedure of entry of this ruling never even commenced".

9. In its verdict, the Court of BiH substantiated its position that the ruling of the Constitutional Court is considered a final decision. It was stated, *inter alia*, that the Court of BiH finds it definite that the ruling on interim measure, within the meaning of the provisions of the then valid Rules of Procedure of the Constitutional Court, is indeed a relevant act by which it is decided on the merits of the case in question, at the certain stage of proceedings. Thus, the ruling represents a final act for that particular stage of proceedings. It was concluded that „if the interim measure was not regarded as having legal force of the ruling on enforcement, it would be deprived of any sense and purpose of its existence entailing detrimental irreparable consequences. The purpose of Article 75(1) of the aforementioned Rules of Procedure is to prevent it". Upon a complaint by the defence counsel, the Court of Bosnia and Herzegovina considered the issue of retrospective application of the provisions of the Criminal Code of BiH and concluded that the criminal offence in question was stipulated under Article 359 the Criminal Code of the Republika Srpska, which entered into force on 1 October 2000, which means at the material time; the aforementioned Article stipulated that an official or responsible person who knowingly fails to enforce a decision of the Constitutional Court, not a specified Constitutional Court, shall be fined or punished. The Appellate Panel within the Court of BiH has held that by the entry into force of the Criminal Code of BiH „the aforesaid criminal act referred to in the Criminal Code of the Republika Srpska was encompassed by Article 239 of the Criminal Code of BiH and that at any rate the offence in question was considered as criminal by the criminal regulations applicable at the time of its commission". The second appellant filed the appeal against this verdict alleging a violation of Article 6 of

the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") in conjunction with Article 2 paragraph 1 of Protocol No. 7 to the European Convention.

10. The Court of BiH took a Decision no. KžK-03/05 of 22 November 2005 rejecting the appeal as inadmissible. In its reasoning, the Court referred to the Criminal Procedure Code of BiH which did not provide for possibility to file an appeal against a verdict of the Panel within the Appellate Division of the Court of BiH, as it complied with Article 2 paragraph 2 of Protocol No. 7 to the European Convention which provides for exceptions in cases in which the person concerned was tried in the first instance by the higher tribunal.

IV. Appeal

11. The appellants claim that the principle of prohibiting the retrospective application of the criminal code was violated in a most direct manner being that the events referred to in the charges included the actions were committed in November 2001. However, the Criminal Code of BiH applied in their case entered into force on 1 March 2003. Obviously, that law did not exist at the time of commission of the criminal offence they were charged with. The appellants therefore claim that the legal norm, which did not exist at that time of commission of criminal charge, was applied in their case. They claim a violation of the right to an effective legal remedy under Article 13 of the European Convention as well as the right to an appeal in criminal matters under Article 2 paragraph 1 of Protocol No. 7 to the European Convention, considering that there was no legal remedy available to them against the convicting verdict of the Court of BiH.

12. Furthermore, the appellants allege that the Court of BiH interpreted the main element constituting criminal offence - failure to enforce the Constitutional Court's decision, which must be final and enforceable - too liberally, since the instant case involved a ruling of the Constitutional Court, which has a provisional and not a final character. Furthermore, the appellants allege that they find the conclusion of the Court of BiH that they were accomplices in committing the criminal offences, as unlawful being that they met for the first time in the courtroom, that the premeditation of joint action by agreement or in any other manner which leads to conclusion on them being accomplices was never established. They point out that the intention to commit the criminal offence in question was never established in the course of the proceedings conducted by the Court of BiH. Finally, they are of the opinion that the proceedings as a whole have been unfair, that the challenged verdict have violated their right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

b) Reply to the appeal

13. In reply to the appeal, the Prosecutor's Office of BiH holds that the allegations of the second appellant's are unfounded as a whole and that the verdict of the Court of BiH is correct and lawful. The Prosecutor's Office of BiH proposed that the appeal should be rejected as manifestly ill-founded.

14. In reply to the appeal, the Court of BiH gave the reasons behind its verdict and upheld them in its reply. The Court of BiH proposed that the appeal should be dismissed as ill-founded.

V. Relevant Law

15. The **Criminal Code of the Republika Srpska** (*Official Gazette of the Republika Srpska* no. 22/00).

Non-Execution of Court's Decision

Article 359 paragraphs 1 and 2

(1)An official or responsible person who knowingly fails to act upon final and binding decision of court shall be fined or punished by imprisonment term not exceeding three years.

(2) The punishment defined under paragraph 1 of this article shall also be imposed onto an official or responsible person who refuses to execute decision of the Constitutional Court he is liable to execute.

16. The **Criminal Code of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* nos. 37/03, 54/04 and 61/04)

Accomplices

Article 29

If several persons who, by participating in the perpetration of a criminal offence or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offence, shall each be punished as prescribed for the criminal offence.

Failure to Enforce Decisions of the Constitutional Court of Bosnia and Herzegovina, Court of Bosnia and Herzegovina and Human Rights Chamber

Article 239

An official person in the institutions of Bosnia and Herzegovina, institutions of the entities and institutions of the Brčko District of Bosnia and Herzegovina, who refuses to enforce the final and enforceable decision of the Constitutional Court of Bosnia and Herzegovina or Court of Bosnia and Herzegovina or Human Rights Chamber of Bosnia and Herzegovina, or if he prevents enforcement of such a decision, or if he prevents the enforcement of the decision in some other way, shall be punished by imprisonment for a term between six months and five years.

17. The **Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* no. 24/99)

Article 54

The Court shall adopt decisions and rulings.

Decisions shall be taken when the Court decides on the merits of a case brought before it under Article VI(3) of the Constitution and in cases referred to in Article IV(3)(f) of the Constitution.

On all other issues, the Court shall decided by rulings.

Article 75

The Court may, until the final decision has been made, fully or partially suspend the execution of decisions, laws (acts) or individual act (temporary measures), if their execution may have detrimental consequences that cannot be overcome.

The Court shall revoke an interim measure when it has ascertained that the reasons for which it was taken have ceased to exist.

VI. Admissibility

18. 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.

19. 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.

20. In the instant case, the subject challenged by the appeal is the verdict of the Court of BiH, no. KžK-03/15 of 22 November 2005, rejecting as inadmissible an appeal lodged by the second appellant against that verdict of the Court of BiH no. KžK-03/05 of 13 October 2005. Considering that this was ineffective legal remedy, the final decision in the appellants' case is the judgment of the Court of BiH, no. Kžk-03/05 of 13 October 2005. As the challenged verdict was adopted on 13 October 2005 and the appeals were lodged on 9 November 2005 and 2 December 2005, it follows that the appeals were filed 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 they are not manifestly (*prima facie*) ill-founded. Nor is there any other formal reason that would render the appeals inadmissible.

21. 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 appeals meet the admissibility requirements.

VII. Merits

22. The appellants challenge the convicting verdict of the Court of BiH claiming that the Criminal Code was applied retrospectively to their case *i.e.* the norm which did not exist at the time of commission of criminal offence was applied. They also complain of a violation of their 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 well as their right to an effective legal remedy under Article 13 of the European Convention and Article 2 of Protocol No. 7 to the European Convention.

23. The Constitutional Court will examine appellants' allegations as to a violation of the principle of prohibiting the retrospective application of the provisions of the criminal code in conjunction with Article 7 paragraph 1 of the European Convention.

24. Article 7 paragraph 1 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.

25. First paragraph of Article 7 of the European Convention enshrines two separate principles which are the essential elements of the rule of law (see, ECtHR, the *S.W.*

vs. the United Kingdom judgment of 22 December 1995, A 335-B and the *C.R. vs. the United Kingdom,* A 335-C): (1) a criminal judgment can solely be based on the regulation applicable at the time of commission of the criminal act or failure (*nullum crimen sone lege*); (2) as to the violation of that regulation, a more severe penalty cannot be imposed on the accused than that applicable at the time of commission of criminal act (*nulla poena sine lege)*. The aim of Article 7 of the European Convention is to secure the individual adequate protection against arbitrary prosecution and conviction. In this respect, the European Court established the third principle according to which the national legislation must clearly formulate the criminal-law provision (see ECHR, the *Kokkinakis* judgment of 25 May 1993, 260-A). Its provisions must be sufficiently foreseeable and accessible (see ECHR, the *G. vs. France* judgment of 27 September 1995, A 325-B). The purpose of this requirement is to avoid the situation in which the criminal judgment would rest on a legal provision of which the person concerned could not be or did not have to be *a priori* aware. This requirement is met if the wording of the provision clearly informs the individual of the conduct entailing criminal prosecution. The third principle is not unconnected but it is enshrined in the interpretation of the principle *nullum crimen nulla poena sine lege.* Therefore, the aim of the protection referred to in Article 7 of the European Convention is to protect the individuals from criminal prosecution on account of a conduct, the punishable character of which those persons were not aware of, and could not be expected to have been aware, when they practised that conduct.

The retrospective application of criminal code in relation to the first appellant

26. The first appellant was convicted for having committed the criminal offence – failure to enforce the ruling of the Constitutional Court – under Article 239 of Criminal Code of BiH as the Head of the Regional Office of Town Planning and Legal Property Affairs of the Republika Srpska. More precisely, he prevented the enforcement of the ruling of the Constitutional Court by „sending a notice signed by his deputy Mr. Milorad Elez, no. 01-377/01 of 23 November 2001, to the Regional Unit Laktaši in which he requested that in the case of „Domet" (relating to the aforementioned ruling of the Constitutional Court) no changes be made without his knowledge and without prior submission of the information to the Office. On the account of this, it was not acted in compliance with the ruling of the Constitutional Court of BiH".

27. In regard to the retrospective application of the law concerning the first appellant, the Constitutional Court established that the Criminal Code of BiH entered into force on 1 March 2003. It is then indisputable that this law was not in force at the time when the first appellant committed the actions he was convicted of. The reasoning of the Court of BiH in the challenged verdict that there was criminal offence that corresponds to the description

of the criminal offence the first appellant was convicted of is therefore unacceptable. At the time when the first appellant committed these actions, he was convicted on the basis of non-existent norm. He therefore could not have been aware that the actions he committed represent criminal offence for which he was convicted in accordance with the principle set forth in Article 7 of the European Convention cited earlier in this decision.

28. Considering the above, the Constitutional Court finds a violation of Article 7 paragraph 1 of the European Convention relating to the first appellant.

Other allegations by the first appellant

29. In view of the conclusion of the Constitutional Court in respect to Article 7 paragraph 1 of the European Convention, the Constitutional Court holds that it is not necessary to consider separately other allegations stated by the first appellant.

The retroactive application of the Criminal Code in relation to the second appellant

30. The Constitutional Court will now examine the allegations stated by the second appellant as to the retroactive application of the Criminal code and a violation of the right to a fair hearing under Article II(3)(e) of the Constitution of Bosnia and Herzegovina, the right to effective legal remedy under Article 13 of the European Convention and Article 2 of Protocol no. 7 to the European Convention.

31. The second appellant was convicted of a criminal offence of failure to enforce a decision of the Constitutional Court of BiH under Article 239 of the Criminal Code of BiH as she adopted and signed the ruling no. 26-952-142/01 of 15 April 2003 and the conclusion no. 26-952-142/01 of 26 June 2003. The aforementioned prevented the actions compliant with the ruling of the Constitutional Court of 2 November 2001.

32. In that regard, the Constitutional Court recalls that the position of the European Court of Human Rights provides that „it is not its task to rule on the applicants' individual criminal responsibility, that being primarily a matter for the assessment of the domestic courts, but to consider, from the standpoint of Article 7 paragraph 1 of the Convention, whether the applicants' acts, at the time when they were committed, constituted offences defined with sufficient accessibility and foreseeability by the law of the GDR or international law" (see judgment of the European Court of Human Rights in case *Streletz, Kessler and Krenz vs. Germany [GC] no*s. 34044/96, 35532/97 and 44801/98, paragraph 51, ECHR 2001-II),

33. Under the principle presented in the previous paragraph, the Constitutional Court will exclusively limit itself to an issue as to whether the criminal offence the second

appellant was convicted of existed at the time of the incriminated actions undertaken by the second appellant. It is certain that the Criminal Code of BiH has already entered into force at the time when the second appellant undertook the actions relating to the criminal offence. Article 239 of this Law, as referred to in paragraph 16 of this Decision, clearly defines the responsible persons and actions considered as actions constituting the commission of the criminal offence of failure to enforce a decision of the Constitutional Court of BiH, Court of BiH and Human Rights Chamber. Therefore, the second appellant could and should have, at the time of the commission of these criminal offence, adjusted her behaviour to these norms and could have been aware that that those actions would be subject to a criminal prosecution.

34. Considering the above, the Constitutional Court concludes that there was no violation of Article 7 paragraph 1 of the European Convention relating to the second appellant.

The second appellant's statements as to a violation of the right to a fair hearing under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention

35. 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:

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

36. Article 6 paragraph 1 of the European Convention reads as follows:

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.

(...)

37. The second appellant's complaints allege a violation of right to a fair hearing with regard to the establishment of the facts and the application of the substantive law. The second appellant finds that the Court of BiH erroneously evaluated the character of the decision of the Constitutional Court of BiH, finding that it is the final decision. In her opinion, this decision only had provisional character and, therefore, her actions did not constitute the criminal offence she was convicted of. The second appellant finds the violation of her right to a fair hearing in the fact that she and the first appellant were

convicted of being accomplices. In her opinion there was no joint action in the sense of previous agreement or joint premeditation. She also holds that there was no premeditation in her case.

38. In this regard, the Constitutional Court reiterates that, according to its consistent practice, the Constitutional Court is not called upon to review the establishment of facts as well as the interpretation and application of ordinary law by the lower courts, unless the lower courts' decisions are in violation of constitutional rights (the right to a fair trial, the right of access to court, the right to effective remedy, *etc*. (see Constitutional Court, Decision no. *U 29/02* of 27 June 2003, published in *Official Gazette of Bosnia and Herzegovina* no. 31/03, European Court of Human Rights, *Pronina vs. Russia*, Decision on Admissibility of 30 June 2005, application no. 65167/01). Constitutional Court is not called upon to generally substitute its own appraisal of the facts or evidence for that of the domestic courts (see European Court, *Thomas vs. United Kingdom*, decision of 10 May 2005, application no. 19354/02). The task of the Constitutional Court is to examine whether the procedure as a whole was fair as required by Article 6 paragraph 1 of the European Convention and whether the decisions of the regular courts are in violation of the constitutional rights (see already referred decision of the Constitutional Court no. *U 29/02* of 27 June 2003).

39. The Court of BiH thoroughly substantiated its conclusion that the Constitutional Court's ruling on interim measure is a „final act". The Constitutional Court does not consider that the reasoning offered by the Court of BiH as arbitrary. The Constitutional Court therefore finds invalid the second appellant's claim that the case involves an arbitrary application of the law. The Constitutional Court finds it particularly necessary to emphasize the position of the Court of BiH that if the interim measure was not regarded as having legal force of the ruling on enforcement, it would be deprived of any sense and purpose of its existence entailing detrimental irreparable consequences. In terms of the second appellant's allegations that it is not established that the appellants acted as accomplices, the Constitutional Court finds that, regardless of the conclusion that the Court of BiH erroneously qualified them as accomplices, the second appellant failed to submit any argument substantiating claims that such qualification influenced her right to a fair hearing. These allegations are ill-founded. The Constitutional Court also did not establish any arbitrariness in the conclusion of Court of BiH on the premeditation on the appellant's side, particularly taking into account the thorough evidentiary proceedings and conclusions in that regard.

40. In view of the aforesaid, the Constitutional Court holds that the there is no violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

The allegations stated by the second appellant as to a violation of the right to appeal in criminal matters and the right to an effective legal remedy

41. The second appellant alleges that she should have been given an opportunity to lodge an appeal against the verdict of the Court of BiH since it was a convicting verdict revoking a verdict on acquittal. She alleges that the deprival of possibility of lodging an appeal violated the right to an effective legal remedy under Article 2 paragraph 1 of Protocol No.7 to the European Convention and Article 13 of the European Convention.

Article 2 of Protocol No. 7 to the European Convention reads as follows:

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

42. Article 2 paragraph 2 of Protocol No. 7 to the European Convention provides for exceptions to the rule referred to in paragraph 1 of the same Article which stipulates that everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal as the exception if provided for in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal. Taking into account the fact that the instant case concerns a convicting verdict whereby a verdict on acquittal was revoked upon an appeal lodged by the BiH Prosecutor's Office, and that the verdict was rendered by the Court of BiH as the Supreme Court of Bosnia and Herzegovina, the Constitutional Court concludes that the fact that the second appellant was not given an opportunity to pursue further legal remedies is not in violation of the principle of the European Convention given the exception referred to in Article 2 paragraph 2 of Protocol No. 7 to the European Convention. Considering that Article 13 of the European Convention offers even stricter guarantees than those provided by the previous Article, which does not provide the right to appeal, it follows that there is no violation of Article 13 of the European Convention.

43. Constitutional Court concludes that there is no violation of Article 13 of the European Convention and Article 2 of Protocol No. 7 to the European Convention relating to the second appellant.

VIII. Conclusion

44. The appeals have raised the issue of retroactive application of the Criminal Code of BiH in terms of Article 7 paragraph 1 of the European Convention and Article 239 of the Criminal Code regulating a criminal offence – a failure to enforce the decision of the Constitutional Court of BiH in the appellants' cases. The Constitutional Court has concluded that, when the first appellant committed these actions, there was no legal norm based on which the first appellant was convicted and, therefore, he could not have been aware that the actions he committed indeed represent the criminal offence which he was convicted of. In his case there is a violation of Article 7 paragraph 1 of the European Convention. With regard to the second appellant, the Constitutional Court has found no violation of Article 7 paragraph 1 of the European Convention considering that the incriminating actions were committed at the time when the Criminal Code of BiH was already in force. The Constitutional Court has concluded that, as to the second appellant, there is no violation of the right to a fair hearing under Article II(3)(e) of the Constitution of BiH and Article 6 paragraph 1 of European Convention as there was no arbitrariness in the course of establishing the facts and applying the substantive law by the Court of BiH. In addition, there is no violation of the right to an effective legal remedy under Article 13 of the European Convention and the right to appeal in the criminal matters under Article 2 of Protocol No. 7 to the European Convention. Namely, the present case involves the exception under Article 2 paragraph 2 of Protocol No. 7 to the European Convention, which provides for the exceptions in cases where the person concerned was tried by the highest tribunal at first instance, *i.e.* by the Court of BiH.

45. Having regard to Article 61(1), (2) and (3) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as set out in the enacting clause.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. AP 2313/05

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Mugdin Herceg against the Judgment of the Cantonal Court in Zenica, no. Kž-118/05 of 29 July 2005 and the Judgment of the Municipal Court in Zavidovići, no. K-4/04 of 7 January 2005

Decision of 6 July 2007

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and 2 and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), in Plenary and composed of the following judges:

Ms. Hatidža Hadžiosmanović, President,

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Ms. Seada Palavrić,

Mr. Krstan Simić,

Having deliberated on the appeal of **Mr. Mugdin Herceg**, in case no. **AP 2313/05,** at its session held on 6 July 2007, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Mugdin Herceg is hereby granted.

A violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraphs 1 and 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Judgment of the Cantonal Court in Zenica, no. Kž-118/05 of 29 July 2005 and the Judgment of the Municipal Court in Zavidovići no. K-4/04 of 7 January 2005 are hereby quashed.

In accordance with Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the case is referred back to the Municipal Court in Zavidovići, which is obligated to adopt a new decision in an expedited procedure in accordance with Article II(3)(e) of the Constitution of Bosnia

and Herzegovina and Article 6 paragraphs 1 and 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Municipal Court in Zavidovići is ordered to inform the Constitutional Court of Bosnia and Herzegovina on the measures taken with the aim to enforce this decision, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, within 90 days from the day of delivery of this Decision.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 11 November 2005, Mr. Mugdin Herceg („the appellant") from Maglaj lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the Cantonal Court in Zenica („the Cantonal Court"), no. Kž-118/05 of 29 July 2005, and the judgment of the Municipal Court in Zavidovići („the Municipal Court"), no. K-4/04 of 7 January 2005.

II. Procedure before the Constitutional Court

2. On 16 November 2005, pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Cantonal and Municipal Courts, and the party to the proceedings, the Cantonal Prosecutor's Office in Zenica („the Prosecutor's Office"), were asked to submit their respective replies to the appeal.

3. The Municipal Court submitted a reply to the appeal on 23 November 2005. The Prosecutor's Office submitted its reply on 8 December 2005. The Cantonal Court failed to submit its reply.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies of the Municipal Court and of the Prosecutor's Office were delivered to the appellant on 20 February 2006 respectively.

III. Facts of the Case

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

6. By the judgment of the Municipal Court, no. K-4/04 of 7 January 2005, which was upheld by the challenged judgment of the Cantonal Court no. Kž-118/05 of 29 July 2005, the appellant was foun guilty. The appellant, as the President of the Zenica-Doboj Canton, acting as an official, intended to inflict damage to Mr. Zahid Kovač on 31 May 2001 for no reason and without valid legal grounds, exceeding his office, abused the instrument of suspension from office stipulated by the Law on the Prosecutor's Office of the Zenica-Doboj Canton („the Law on the Prosecutor's Office") by taking and signing a decision on the suspension from office of the Cantonal Prosecutor Zahid Kovač, no. 01-34-8622/01 dated 31 May 2001, without having previously taken the statement from Zahid Kovač about the circumstances that led to his suspension from office. He also publicly announced the decision through the media at the press conference convened solely for that purpose. He therefore exceeded his powers failing to comply with the procedure prescribed by the Law on the Prosecutor's Office and committing a criminal offense of abuse of office or powers under Article 383 paragraph 1 of the F BiH Criminal Code. Pursuant to the mentioned article and Article 62 of the F BiH Criminal Code, the first instance court pronounced a suspended sentence on him, by which it determined an imprisonment of six months not to be enforced unless the sentenced person commits new criminal offence within two years from the date when this judgment became legally binding. The same judgment referred the injured party to initiate a pecuniary claim lawsuit.

7. The reasoning of the first instance judgment clearly states that it is disputable in the present case whether the appellant, in discharging duty of the President of the Canton, acted with premeditation, i.e. took a decision on the suspension of the Cantonal Prosecutor from his office with an intent to inflict damage on the injured party, exceeding his office, and whether damage occurred. Additionally, it was disputable whether the appellant had based the decision on the suspension and the request for removal of the Cantonal Prosecutor on valid legal grounds, whether he had acted lawfully and allowed the injured party to state his opinion about the reasons for removal i.e. suspension from office. The first instance court holds that the appellant had an obligation to allow the injured party to state his opinion about the reasons for suspension, i.e. to personally inform the injured party and not to address the letter of inquiry to the Cantonal Commission for Appointment of Cantonal Prosecutors, which the appellant had done by the letter of 17 April 2001. The court refers to Article 27 of the Law on Judicial and Prosecutorial Service which stipulates that an official in charge of making a decision on suspension of a judge or prosecutor

from office is obligated, immediately upon making a decision on initiating procedure, to notify the Cantonal i.e. the Federal Commission for Appointment of Prosecutors for giving its opinion. The court did not grant the letter of the appellant no. 01-34-5154/01 of 10 April 2001, which was delivered to the Cantonal Commission for Appointment of Cantonal Prosecutors, as a decision on initiating a procedure of the suspension of the injured party from office. Rather, in the opinion of that court, and as stated in the letter, it was an initiative for suspension and removal and not a final decision. The first instance court finds that the opinion, given in the present case by the Cantonal and the Federal Commission for Appointment of Prosecutors, according to which there were no legal grounds for the removal of the injured party, is not binding. The injured party was not allowed to present his opinion about the reasons for removal prior to or after receiving the decision on suspension. The first instance court stated that the suspension from office was a consequence of the initiation of procedure for removal. This leads to a conclusion that the appellant ought to have first initiated the procedure for removal of the injured party before the Cantonal Assembly, allowed the injured party to state his opinion about the reasons for removal, and just then possibly make a decision on suspension. To that end the appellant was warned by the then Federal Prosecutor Marinko Jurčević, by letter no. A-157/01 of 21 May 2001.

8. The first instance court concludes from the statements of the interrogated witnesses that there was resolve on the part of the appellant to remove the injured party from the office of Cantonal Prosecutor. The witness, who was, at that time, the President of the Cantonal Commission for Appointment of Prosecutors, to whose statement the court gave credence, is exclusive in his assertions that on 17 April 2001 he had a conversation with the then Minister of Justice and Administration of the Canton. Through hours-long conversation he got an impression that the injured party must be removed from office of Cantonal Prosecutor at any cost. The Court inspected the official record of that made by the said witness. On 31 May 2001, the appellant took a decision on the removal of the injured party from office, although he was aware that the injured party's term was due to end on 3/4 June 2001. On the very same day he forwarded the proposal to the Cantonal Assembly to remove the injured party from office. Both decisions were taken on the same day - Friday, 31 May 2001.

9. The first instance court furthermore found that the appellant exerted pressure on the secretary of the injured party to receive the decision on the suspension of the injured party from office at the end of the working day. On the same day the appellant convened a press conference, at which he informed the public of the suspension of the injured party from office of cantonal prosecutor. The court furthermore finds that the injured party was not appointed Federal Prosecutor and the Deputy Cantonal Prosecutor because he was

suspended, although the competent commissions for appointment did propose the injured party to be appointed Deputy Federal that is Cantonal Prosecutor. In the opinion of the Municipal Court the appellant inflicted moral damage on the injured party by ruining his reputation, both professional and private. After all the presented evidence which the court assessed separately and in mutual correlation and with regards to the appellant's defense, based on the margin of appreciation principle, the court established that the appellant had committed a criminal offense of abuse of office or powers and based his criminal responsibility both on subjective and objective evidence. The Court in particular believed the statement made by the witnesses and other objective evidence.

10. Upholding the first instance judgment, the Cantonal Court stated in the reasoning that it concluded, having in mind the appellant's reasons set forth in the claim and the facts of the case established by the first instance court, and following the analysis and assessment of all the presented evidence, that the appellant's allegations were unfounded, that the first instance judgment did not include relevant violations of the provisions of the criminal proceedings, and that it was based on correctly and completely established facts. It also concluded that the first instance court had offered clear and convincing reasoning substantiating its views.

IV. Appeal

a) Statements from the appeal

11. The appellant complains that the Municipal and Cantonal Court have violated his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraphs 1 and 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") for the following reasons: the facts of the case presented in the criminal proceedings were incompletely and erroneously established, the criminal code was erroneously applied, the enacting clause of the judgment is contradictory to itself and to the reasoning, the indictment was exceeded, the judgment contains no reasons on decisive facts while the principles of presumption of innocence and that the burden of proof rests with the prosecution were violated. The appellant furthermore alleges that the court failed to prove existence of any single element of the criminal act he is charged with. He also alleges that powers were not exceeded, since he acted as President of the Zenica-Doboj Canton, who, within the meaning of Article 40 of the Law on Prosecutor's Office, is in charge of submitting a proposal for the removal of a Cantonal Prosecutor to the Cantonal Assembly, as well as to make a decision on his suspension from office, if the procedure for his removal was initiated. On the other hand, the appellant holds that if he had failed to act as he did, only then

would he had committed a criminal act of failing to discharge official duty. This being so as the report on the work of the cantonal prosecutor was not adopted by the Cantonal Assembly. Regardless of that fact, the prosecutor failed to give his resignation, which was his moral obligation. In addition, the appellant alleges that it was not proven that this act had been completed. It was not proven that damage was indeed inflicted nor was that fact stated in the indictment. In his opinion, the court concluded, without presenting evidence or establishing facts that the injured party was not elected to position he applied for only because he was suspended from office by the disputed decision, thereby suffering damage. In doing so the court failed to consider the fact that the injured party, after his suspension, was elected a member of the High Judicial and Prosecutorial Council, rather it unjustifiably concluded that due to the appellant's actions the reputation of the injured party was ruined etc. Also, the appellant holds that the court failed to prove the existence of premeditation of the appellant, which constitutes element of the present criminal act. Also he points out that it is wrongly maintained through the challenged judgments that the appellant had conducted the procedure of removal from office of the injured party and that the injured party ought to have been allowed to state his opinion about the reasons given for his removal. The appellant holds that he did not conduct the procedure of removal, as this falls within the competence of the Cantonal Assembly. He only made a decision on the suspension from office, as he only initiated and did not conduct the procedure for removal in accordance with his powers. An obligation to allow the statement of opinion exists only in the procedure for removal. The appellant concludes that the basic claim of the court is that the injured party was not allowed to state his opinion prior to adoption of decision on the suspension from office. The appellant claims that this is incorrect, since the appellant had never had that obligation.

b) Reply to the appeal

12. In its reply to the appeal, the Municipal Court stated that constitutional rights of the appellant were not violated in the present criminal case. The first instance court adopted a decision based on evidence and established that the appellant's actions constituted all relevant elements of the criminal act of abuse of office or powers.

13. In its reply to the appeal, the Prosecutor's Office stated that, according to the assessment of the Prosecutor's Office, all appellant's allegations on the alleged violation of the right to a fair trial were unfounded and that they therefore propose that the Constitutional Court should dismiss the appeal as ill-founded. In the opinion of the Prosecutor's Office the appellant reiterated the allegations from the previous criminal proceeding, which was conducted thoroughly in compliance with the law. The Prosecutor's Office also stated

that, in deliberating on the appeal, the second instance court took into account all appeal reasons, including those stated in the appeal by the appellant and the ones that the second instance court is mindful of *ex officio*. In the course of the present proceedings all evidence were assessed, which were duly assessed as part of the established facts of the case. The facts of the case were thoroughly clarified. Additionally, in the opinion of the Prosecutor's Office the substantive law was applied correctly.

V. Relevant Laws

14. The relevant provisions of the **Criminal Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of FBiH* no. 36/03) read:

Article 383 paragraph 1
Abuse of Office or Official Authority

(1) An official or responsible person in the Federation who, by taking advantage of his office or official authority and by exceeding the limits of his official authority or by failing to perform his official duty, acquires a benefit to himself or to another person or causes damage to another person or seriously violates the rights of another, shall be punished by imprisonment for a term between six months and five years.

15. The **Law on Judicial and Prosecutorial Service in the Federation of Bosnia and Herzegovina** *(Official Gazette of F BiH no. 22/00):*

Article 22 paragraphs 1 and 2

The authority authorized by the relevant law to initiate dismissal proceedings against a judge or prosecutor shall request an opinion from the Federal Commission or competent cantonal commission whether the proceedings are well-founded prior to initiating such proceeding against a judge or prosecutor.

The authority requesting an opinion pursuant to this article shall forward to the Federal Commission or competent cantonal commission the allegation(s) forming the basis of the suspension and attach all evidence, including documents and witness statements, in support of the allegation(s).

Article 27

The authority empowered by the relevant law to suspend a judge or prosecutor from official duty shall inform the Federal Commission or competent cantonal commission immediately upon adoption of decision on initiating such proceedings. Federal Commission or competent cantonal commission must be informed to conduct its own investigation on

that issue and pursuant to its tasks according to provisions of this law, to give its opinion to the authority in charge of adoption of such decision as to whether there is a sufficient basis to warrant the suspension.

The authority empowered by the relevant law to suspend a judge or prosecutor from official duty shall inform the Federal Commission or competent cantonal commission without delay on initiating such proceedings on reasons for its adoption while the Federal Commission or competent cantonal commission may submit its opinion as to basis of such decision within three days from receipt of decision.

16. The **Criminal Procedure Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of F BiH* no. 35/03):

Article 3

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

(2) In case of any doubt as to the very existence of the facts constituting features of criminal offense or on which the application of some provision of criminal legislation depends, the courts shall resolve by a verdict in a manner most favorable for the accused.

Article 15

The court, the competent prosecutor and the law enforcement agency participating in criminal proceedings have a duty to study and establish with equal attention both those facts which are against the suspect or the accused and those facts which are in his favor.

Article 16

The right of the courts, competent prosecutors and law enforcement agencies to participate in criminal proceedings in evaluating the existence or nonexistence of facts shall not be bound nor restricted by the special formal rules of evidence.

Article 296

The court has a duty to conscientiously evaluate each piece of evidence individually and to frame a conclusion as to whether the fact has been proved in connection with the other evidence and on the basis of that assessment.

Article 312

The following constitute an essential violation of the provisions of criminal procedure:

(...)

j) if the charge has been exceeded;

k) if pronouncement of the verdict was incomprehensible, internally inconsistent or inconsistent with the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive fact (...)

Article 313

It shall constitute a violation of the criminal code if the criminal code has been violated on the following points:

a) as to whether the act for which the accused is being prosecuted constitutes a crime;

b) as to whether the circumstances exist which preclude criminal responsibility;

(...)

d) if a law which could not be applied has been applied to the crime which is the subject matter of the charge; (...)

17. The **Law on the Prosecutor's Office of the Zenica-Doboj Canton** (*Official Gazette of Zenica-Doboj Canton* no. 4/97)

Article 39

The Prosecutor, that is his deputy, shall be removed from office if pronounced a legally binding sentence of imprisonment for a term exceeding six months – on the day the judgment becomes legally binding, if established that he/she had committed grave violation of official duty, that is of the standing of official duty, if established that he is not in qualified to perform official duty, if not performing official duty satisfactorily for a long period of time, if not achieving satisfactory results at work or if established, based on the opinion of a relevant healthcare institution, that he had lost permanently a capacity to perform official duty.

Article 40

The decision on removal of the prosecutor, i.e. his deputy, from office for the reasons mentioned in the previous article is adopted by the Cantonal Assembly on the proposal of the President of the Canton with the opinion of the Cantonal Minister of Justice.

Article 41

In the procedure of removal, the prosecutor, that is his deputy, shall be allowed to state his/her opinion about the reasons for removal.

Article 42

The prosecutor and his/her deputy may be suspended from office if criminal proceedings have been initiated against him/her due to a criminal act which makes him unfit to hold office of prosecutor or while being in custody.

The prosecutor and his/her deputy may be suspended form office if a procedure for his/her removal has been initiated.

The decision on removal from office in cases from the above paragraph shall be adopted by the President of the Canton.

VI. Admissibility

18. In accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court also has an appellate jurisdiction over issues contained in this Constitution, when they become a subject of dispute arising out of any judgment of any court in Bosnia and Herzegovina.

19. In accordance with Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may consider the appeal only if all effective legal remedies available under the law were exhausted against the judgment, i.e. decision, being quashed, and if submitted within 60 days from the day the appellant received the decision on the last legal remedy he had used.

20. In the present case, the subject challenged by the appeal is the judgment of the Cantonal Court no. KžGž-118/05 of 29 July 2005, against which there are no other effective legal remedies available under the law. The appellant received the challenged judgment on 16 September 2005, and the appeal was submitted on 11 November 2005, i.e. within 60 days, as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal meets the requirements under Article 16(1), (2) and (4) of the Rules of the Constitutional Court, for it is not manifestly (*prima facie*) ill-founded, nor is there any other formal reason which makes the appeal inadmissible.

21. Bearing in mind the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the respective appeal met the admissibility requirements.

VII. Merits

22. The appellant challenges the stated judgment claiming that they are in violation of his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraphs 1 and 2 of the European Convention.

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and 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.

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

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

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. [...]

25. The Constitutional Court outlines that the subject of the proceedings in the present case was the establishing whether the criminal charges against the appellant were well-founded. The Constitutional Court finds that Article 6 paragraph 1 of the European Convention is applicable to the present case. Therefore, the Constitutional Court must review whether the proceedings before the courts were fair, as required by Article 6 paragraph 1 of the European Convention.

26. The appellant complains that his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraphs 1 and 2 of the European Convention has been violated for the following reasons: the facts of the case were incompletely and wrongly established, the criminal code was erroneously applied, the enacting clause was contradictory in itself and to the reasoning, the scope of the indictment was exceeded, the judgment did not contain the reasons about crucial facts, the principle of presumption of innocence and the principle of burden of proof that rests with the prosecution were violated.

27. According to its jurisprudence, the Constitutional Court, in general, is not called upon to review the establishment of facts and ways in which ordinary courts interpreted

positive legal regulations unless the decisions of those courts violate constitutional rights. That will be the case when a decision of an ordinary court violates constitutional rights, that is in case when an ordinary court erroneously interpreted or applied some constitutional right, or disregarded that right, if the application of law was arbitrary or discriminatory, if a violation of procedural rights had occurred (fair trial, access to court, effective legal remedies and in other cases), or if the established facts point to the violation of the Constitution of Bosnia and Herzegovina (see Constitutional Court, Decision *no. U 39/01* of 5 April 2002, published in the *Official Gazette of Bosnia and Herzegovina* no. 25/02; and decision no. *U 29/02* of 27 June 2003, published in the *Official Gazette of Bosnia and Herzegovina* no. 31/03). Also, the Constitutional Court emphasizes that it is out of its jurisdiction to assess the quality of conclusions of the ordinary courts concerning the assessment of evidence, unless this assessment is manifestly arbitrary. This was the practice of the former Human Rights Chamber, holding that „it was not the jurisdiction of the Chamber to replace the assessment of local courts with its own assessment of facts, unless such conclusions look inadmissible or arbitrary" (see former Human Rights Chamber, *„Trgosirovina Sarajevo (DDT)" vs. the Federation of BiH*, case no. *CH/01/4128*, Decision on Admissibility of 6 September 2000).

28. As the European Court of Human Rights pointed out in numerous decisions, Article 6 of the European Convention has a „prominent place in a democratic society" (see ECHR, the *De Cubber vs. Belgium* judgment of 26 October 1984, Series A no. 86, paragraph 30). Its effect is that Article 6 of the European Convention may not be interpreted restrictively (see ECHR, the *Moreira de Azevedo vs. Portugal* judgment of 23 October 1990, Series A no. 189, paragraph 66). Article 6 paragraph 1 of the European Convention enumerates a series of elements inherent to a fair exercise of justice, so in case a violation of any element contained in that right occurs, there is a violation of Article 6 paragraph 1 of the European Convention (see Constitutional Court, Decision *no. U 25/01* of 26 September 2003, published in the *Official Gazette of Bosnia and Herzegovina* no. 3/04, paragraph 25).

29. Hence, even though it did impose restrictions on itself with regards to the examination of the facts and the assessment of evidence by ordinary courts, the Constitutional Court did not rule out that option completely, rather it restricted its competence to the event that the examination of the facts be conducted if the *procedure contained the violation of the right to a fair trial within the meaning of Article 6 of the European Convention* that is *if the established facts of the case point to the violation of the Constitution*, or if the assessment of evidence *seems manifestly arbitrary*. To that end there are numerous examples of the case-law when the Constitutional Court embarked on the assessment of the facts and the assessment of evidence by the ordinary courts (see the Constitutional Court, Decision *no.*

U 15/99 of 15 December 2000, *Official Gazette of Bosnia and Herzegovina* no. 13/01; Decisio no. *AP 661/04* of 22 April 2005; Decision no. AP 5/05 of 12 April 2006, etc.).

30. These positions can be applied in the present case, all the more so because the appeal points out that the enacting clause is contradictory in itself and to the reasoning, the judgment contains no reasons about crucial facts, the principle of presumption of innocence was violated. In order to answer the question as to whether the appellant's right to a fair trial was violated, it is necessary to consider the present criminal proceedings in its entirety and, *inter alia*, in the light of the applied criminal and legal regulations.

31. To that end, the Constitutional Court points out that one of the basic principles of the Criminal Procedure Code in the F BiH is that the court and other prosecution bodies are obliged to truly and thoroughly establish both the facts incriminating the suspect, i.e. the defendant, and the facts that are to his advantage. Also, the law asserts the principle of presumption of innocence, for which reason the defendant was acquitted of the burden of proof. The presumption of innocence does not refer only to the guilt, but to other elements as well which are interconnected in the term of a criminal act (act of commission, unlawfulness or culpability). According to the case-law of the European Court of Human Rights, the presumption of innocence means that the defendant is not obligated to defend her/himself although he/she has the right to defense, is not obligated to prove his/her innocence and the burden of proof rests with the prosecutor. In accordance with it, the court must adopt a judgment of acquittal, not only when convinced in the innocence of the defendant, but also when not convinced in his/her guilt or his/her innocence. Thus, the court must apply the principle *in dubio pro reo*, which is an important element of the right to a fair trial under Article 6 of the European Convention (see ECHR, the *Barbera, Masseque and Jabardo vs. Spain* judgment of 6 December 1988, Series A no. 146, paragraph 77).

32. In view of the aforementioned, the Constitutional Court points out that the first instance court rendered a judgment of conviction against the appellant after having conducted the proceedings in the present case. As the court stated, it was disputable in the proceedings whether the appellant, in performing his duty as the President of the Canton acted with premeditation, i.e. took a decision on the suspension of the Cantonal Prosecutor from office with the intent to cause damage to the injured party, exceeding the limits of his official duty, and whether damage had occurred. Apart from that, the first instance court found it disputable whether the appellant had based the decision on suspension and the request for removal of the Cantonal Prosecutor on a valid legal basis, and whether he had acted legally and allowed the injured party to state his opinion about the reasons for removal, i.e. suspension, from office.

33. It follows from the enacting clause of the first instance judgment that the appellant had exceeded the limits of his official duty, i.e. he abused the mechanism of suspension from office by taking and signing a decision on suspension of the Cantonal Prosecutor from office, without having previously taken a statement of opinion from the prosecutor on the circumstances of the reasons for suspension from office. He made that decision public, failing to comply with the procedure envisaged by the Law on Prosecutor's Office. According to the description of the act in the first instance judgment, the excess of the limits of official duty is constituted in the adoption and signing of the decision on suspension without having previously taken a statement of opinion from the injured party, thereof it follows that the legal requirement for the adoption of a decision on suspension is a previous statement of opinion of the plaintiff (the injured party). However, that is inconsistent with the provisions of Article 42 paragraphs 2 and 3 of the Law on Prosecutor's Office (the present criminal act is determined as an act with a blanket norm, so the elements of the act are contained in the regulations to which the description refers). The Constitutional Court points out that, according to those legal provisions, the only requirement for the adoption of a decision on suspension is to have a procedure for removal initiated against the plaintiff. Pursuant to Article 41 of the said Law, in the procedure of removal, the plaintiff shall be allowed to state his opinion about the reasons for his removal. The adoption of the decision on removal and the conduct of the procedure are within the jurisdiction of the Cantonal Assembly. The procedure is to be initiated on the proposal of the President of the Canton within the meaning of Article 40 of the Law on Prosecutor's Office. The appellant submitted such a proposal to the Cantonal Assembly on 31 May 2001. It follows from the correct interpretation of the quoted provisions of the Law on Prosecutor's Office that it does not stipulate that the statement of opinion must be allowed in the procedure of suspension from office, but rather in the procedure of removal from office, nor does it stipulate that the statement of opinion must be allowed by the President of the Canton, and especially not before adopting the decision on suspension. Since the adoption of a decision on removal of a prosecutor is within the jurisdiction of the Cantonal Assembly, it follows logically that the Cantonal Assembly is obligated to allow the prosecutor in that procedure to state his opinion about the reasons for removal. Therefore, the appellant, prior to adopting a decision on suspension, though he did seek the statement of opinion from the injured party about the reasons for removal, was not obligated to do it. Thus, in adopting a decision on suspension, he lawfully used his authority under Article 42 paragraph 3 of the Law on Prosecutor's Office. Therefore, the enacting clause of the challenged judgment (act description) is inconsistent with the provisions, and in itself, which constitutes a significant violation of the provisions of the criminal procedure under Article 312 paragraph 1 item k of the Criminal Procedure Code of the F BiH.

34. Misinterpreting the provisions under Article 41 and 42 paragraphs 2 and 3 of the Law on Prosecutor's Office, the first instance court erroneously established that the appellant, prior to taking a decision on suspension, failed to allow the injured party to state his opinion about the reasons for removal, that the adoption of the decision on suspension was a consequence of initiating the procedure for removal. Thus, the appellant had to first initiate the procedure for removal with the Cantonal Assembly, and consequently take a decision on suspension of the injured party. The opinion of the first instance court on the relation between the adoption of the decision on suspension and the initiation of the procedure for removal is contrary to the provisions of Article 42 paragraphs 1 and 2 of the Law on Prosecutor's Office. The reason being that in both cases prescribing those provisions (the initiation of a criminal procedure and the initiation of the procedure for removal) the adoption of the decision on suspension was facultative („the prosecutor may be suspended…"), and not compulsory, as following from the opinion of the first instance court. Following that, the finding of the first instance court that the appellant could not have on the same day first initiated the procedure for removal with the Cantonal Assembly, and then adopted a decision on suspension is also wrong, given that, according to the provision of Article 42 paragraph 2 of the said Law, the requirement for the adoption of the decision was „if a procedure for removal has been initiated. On the same day, on 31 May 2001, the appellant submitted a proposal for the initiation of proceedings to the Cantonal Assembly, by means of which the procedure was initiated and thereby the legal requirement for the adoption of Decision on suspension was met. For these reasons, the opinion of the first instance court that the appellant, prior to taking a decision on suspension, had to have allowed the injured party to state his opinion about the reasons for removal, is contrary to the provisions of Article 41 and 42 paragraphs 2 and 3 of the Law on Prosecutor's Office.

35. The Constitutional Court further notes that conclusion arrived at by the first instance court does not follow from the provisions of the Law on Prosecutor's Office, stating that the appellant did not have a legal basis to make the disputed decisions. In this regard, the Constitutional Court points out that, according to the provision of Article 39 of the Law on Prosecutor's Office, „a prosecutor… shall be removed from office… if failing to achieve satisfactory results at work…". The report on the work of the Cantonal Prosecutor's Office for 2000 was not upheld by the Cantonal Assembly on 29 March 2001. Following this, the legal obligation of the President of the Canton, i.e. the appellant, was in fact to address a proposal to the Cantonal Assembly for the initiation of the procedure for removal of the Cantonal Prosecutor. In that procedure, the Assembly was to make a final decision on whether to remove the Cantonal Prosecutor. With regards to the press conference, by which, in the opinion of the first instance court, the appellant exceeded the limits of official authority, and the only contents of which were that the appellant informed the

public about the decisions he had made within the scope of his legal powers, in the opinion of the Constitutional Court, this fact is not a legal or logical reason for the conclusion of the first instance court on the excess of the limits of official duty, but rather it is to the contrary, whereby the public is a feature of the exercise of public authorities.

36. The case-file contains requests of the appellant for the statement of opinion on the adoption of the disputed decisions (official letters no. 01-34-5154/01 of 10 April 2001 and no. 01-34-5154-2/01 of 17 April 2001), which he addressed to the Cantonal Commission for Appointment of Prosecutors. Thereby he referred to the provisions of Articles 39, 40 and 42 of the Law on Prosecutor's Office, in conjunction with Article 22 and 27 of the Law on Judicial and Prosecutorial Service in FBiH. The appellant explained the reasons in the said requests why he decided to employ his legal authorities, attaching appropriate documentation. The Constitutional Court concludes that this obligation of the appellant does not arise from the Law on Prosecutor's Office to which the prosecution and the first instance court refer in the enacting cause of the judgment. The first instance court concluded that the opinion that the appellant obtained from the competent commissions was not binding. However, the first instance court concluded that the appellant had an obligation to personally allow the injured party to state his opinion about the reasons for removal, i.e. suspension from office, which is an erroneous conclusion, as earlier stated by the Constitutional Court.

37. Furthermore, the Constitutional Court notes that, although the appellant was not obliged to allow the injured party to state his opinion prior to making a decision on suspension, the appellant did seek that statement of opinion through the Cantonal Commission for Appointment of Prosecutors. By the said official letter no. 01-34-5154-2/01 of 17 April 2001, addressed to the President of the Commission Mr. Idriz Katkić, he, *inter alia*, sought a reply on whether the injured party was allowed to state his opinion about the reasons for removal. With regard to this, the appellant, in his appeal against the first instance judgment, specifically pointed out that Mr. Idriz Katkić, in his witness statement, had stated that the injured party, prior to stating his opinion to the Commission about the reasons for removal, had done so in writing. However, the first instance court failed to assess that part of the statement. Regardless of that evidence, the first instance court assessed that the injured party had not been allowed to state his opinion about the reasons for removal. The Constitutional Court points out that the first instance court, misinterpreting the law, had requested from the appellant to also do what does not fall under his legal obligation, and that is to seek from the injured party his personal opinion, instead of doing so through the Commission. This is contrary to the provision of Article 41 of the Law on Prosecutor's Office, as it does not prescribe the manner and the form in which a

prosecutor should state his opinion. The appellant holds that in such a situation, the most correct way of seeking a statement of opinion legally-wise, would have been through the then Commission for Appointment of Prosecutors, which was one of the reasons why it was established. In addition, the case file contains official letter no. 01-34-51543/01 of 25 May 2001, addressed „for the attention of the Cantonal Prosecutor Mr. Zahid Kovač", by which the appellant sought from the injured party to personally state his opinion about the reasons for removal. Regarding this piece of evidence, the appellant specifically pointed out in the appeal against the first instance judgment that the first instance court, contrary to the principles of criminal procedure under Article 3 paragraph 2 and Article 15 of the Criminal Procedure Code of the FBiH („suspicion in favor of the defendant" and „equality in the treatment"), assessed in a way that „the defense failed to produce any evidence whatsoever proving that the injured party had received that request", which led the first instance court to make a conclusion regarding the truthfulness of the claims of the injured party that he had not been allowed to state his opinion. The appellant stated that the first instance court drew a conclusion on the truthfulness of the claims of the injured party from the refutation of the principle of criminal procedure, and by being silent about the statement of the witness Mr. Idriz Katkić that the injured party had stated his opinion in writing about the reasons for removal.

38. The legal element of a criminal act under Article 383 paragraph 1 of the Criminal Code of FBiH, for which the appellant was pronounced guilty, is in that damage was caused to another. So it concerns a tangible property-related or property-unrelated damage as a prerequisite for incrimination. The description of the act in the enacting clause of the first instance judgment does not contain that legal element, but the intention of the appellant to cause damage to the injured party. Therefore, the act that the appellant is criminally prosecuted for does not contain a legal element of a criminal act. That is, with regard to that act, the law, which could not have been applied, was applied. Thus, the first instance court, in pronouncing the appellant guilty for the criminal act under Article 383 paragraph 1 of the Criminal Code of FBiH, violated the Criminal Code under Article 313 items a) and d) of the Criminal Procedure Code of FBiH to the detriment of the appellant. Furthermore, the first instance court refers to Article 27 of the Law on Judiciary and Prosecutorial Service in the reasoning of the judgment. In doing so, contrary to the indictment (and the enacting clause of the judgment) whereby the stipulating norms were those from the Law on Prosecutor's Office, the first instance court exceeded the scope of the indictment (the court is always bound by the facts description of the act from the indictment, and not by the legal classification of the act), for it incriminated the appellant to a degree higher than is the case in the indictment, which constitutes a significant violation under Article 312 paragraph 1 item j. The first instance court, in the reasoning of the first

instance judgment, articulated the opinion that the appellant had caused to the injured party moral damage, in the form of ruining his professional reputation, disqualifying him, his suffering mental pain and „such like". In this manner, the first instance court determined the nature and contents of the tangible damage as a legal element of the present criminal act. Contrary to that, in the indictment (and the enacting clause of the judgment) only the intention of inflicting damage has incriminating character, whereas the damage did not materialize. Thereby, the first instance court, also in this matter, exceeded the scope of the indictment and committed a significant violation of the provisions of a criminal procedure under Article 312 paragraph 1 item j of the Criminal Procedure Code of the FBiH. Furthermore, although the first instance court defined the premeditation of the appellant as one of the disputed issues, no reasons were provided for it in the reasoning of the judgment, which means that no reasons exist about the crucial facts. This violation is all the more pronounced when bearing in mind that a direct premeditation was being sought in the present criminal act – awareness of the act and its effect. The first instance court articulated its opinion (and not a conclusion based on established facts) about the damage, which was not corroborated with a single piece of evidence. Stating the fact that the appellant had not been selected for the positions he had applied for, which was, in the opinion of the first instance court, a consequence of the decisions on the suspension from office, was not a logical and convincing reason for the conclusion reached by the first instance court. Therefore, no reasons were given about that crucial facts either as a legal element of the present criminal act. (In fact, that was not possible, because the prosecutor and the court did not present a single piece of evidence about that fact). It follows from the aforementioned that several significant violations of the provisions of the criminal procedure, under Article 312 paragraph 1 items j) and k), were committed in the challenged first instance judgment.

39. A wrong approach of the first instance court to the establishment of the facts of the case is indicative of its position regarding the Opinion of the Ministry of Justice and Administration of the Zenica-Doboj Canton (which was the evidence for the defense in the first instance procedure) which was provided on the request of the appellant, according to which, the failure to adopt the Report on the work of the Zenica Canton Prosecutor's Office by the Cantonal Assembly represents improper discharge of office of the prosecutor and a compulsory reason for removal under Article 39 of the Law on Prosecutor's Office. Instead of accepting that opinion, because, in this procedure, the court is not authorized to go into the assessment of the documents of administrative authorities, the first instance court presented the opinion of the competent ministry as the opinion of the then minister and noted that the minister offered that opinion without any arguments whatsoever.

40. In the appeal against the first instance judgment, the appellant specifically stated that in the course of the court proceedings, by seeking the opinion from the competent and relevant institutions, he demonstrated that he had used the legal authorities of a President of the Canton regarding the injured party, the then Cantonal Prosecutor, whom he did not know personally, without intention implied by the prosecution and the challenged judgment. Not only in the present case, but also in the case of removal of four ministers of the Government of the Zenica-Doboj Canton, at the proposal of the then President of the Government, the appellant had used lawfully his official authorities, which attests that he did not have nor could have had any unlawful intentions toward the injured party. Therefore, linking the appellant with the contents of an Official record drafted by Mr. Idriz Katkić, the President of the Commission for Appointment of Prosecutors, regarding the conversation with the minister, that he had gotten the impression that the injured party ought to be removed, is wrong and unfounded. This is supported by the statement of the minister in direct examination by the prosecutor, that the appellant did not ask him to take any action regarding the removal of the injured party, which, as the appellant stated in the appeal, the first instance court failed to assess as the evidence of the defense.

41. The Constitutional Court also notes that the Cantonal Court did not consider in detail serious allegations of the appeal about the violation of the Criminal Code, about the significant violations of the provisions of criminal procedure and about erroneously and incompletely established facts of the case, and in that regard, the court did not assess the evidence of the first instance court which is primarily the task of that court, not only from the aspect of criminal and legal regulations, but from the aspect of the European Convention also. Namely, pursuant to Article II(2) of the Constitution of Bosnia and Herzegovina, the European Convention and its protocols shall directly apply in Bosnia and Herzegovina and shall have priority over all other law. And pursuant to Article II(6) of the Constitution of Bosnia and Herzegovina *Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above*. Based on these provisions of the Constitution of BiH, the Cantonal Court should have, in the present case, examined in more detail whether the reasoning of the first instance judgment and the reached conclusion met the requirements of the Criminal Procedure Code and Article 6 of the European Convention, instead of stating that the allegations of the appellant are unfounded and that it shall not discuss them given the established facts of the case before the first instance court.

42. In addition, the Constitutional Court observes that it arises from the case file that the ruling of the Zenica Municipal Prosecutor's Office no. Kt-541/01 of 25 May 2002

(which was the evidence for the defense in the present proceedings), rejected the criminal charges filed by Mr. Zahid Kovač against the appellant for the same criminal act. It follows from the reasoning that the Deputy Prosecutor handling the case gathered detailed notifications, and, based on that, assessed that the appellant had acted in accordance with his authorities under Article 42 paragraphs 2 and 3 of the Law on Prosecutor's Office of the Zenica-Doboj Canton. His actions did not satisfy objective condition for incrimination of this criminal act because detrimental consequences did not take place nor was the right of another violated. The decision on suspension of the injured party from office did not produce legal effect, since his tenure as a Cantonal Prosecutor expired on 4 June 2001, in accordance with the Law. After the injured party (according to provisions of the then applicable Criminal Procedure Code) continued with criminal prosecution, and the authority was transferred to the Municipal Court of Zavidovići, the then Prosecutor of the then Municipal Prosecutor's Office of Zavidovići, shortly before the appointment of the Prosecutors of the Zenica Cantonal Prosecutor's Office, issued an indictment against the appellant for the same criminal act. Thus, two contradictory prosecution decisions were adopted on the same issue in the same Prosecutor's Office – the Zenica Cantonal Prosecutor's Office. The appellant pointed out that probably this best reflects the motives and reasons for the adoption of the challenged judgments.

43. The Constitutional Court notes that ordinary courts acted in the challenged judgments contrary to commitments which represent a guarantee of a fair trial. To that end, the Constitutional Court points out that the courts are not obliged to offer detailed replies to every issue. However, if the issue is of crucial importance for the outcome of the proceedings, in that case the court has to give special attention to it in its judgment (see ECHR, the *Van de Hurk vs. The Netherlands* judgment of 19 April 1994, Series A, no. 288, p. 20). The court decision must carry the reasons on which it was based and these reasons have to appear convincing. Otherwise, there is a violation of Article 6 of the European Convention. The case-law mainly comes down to the court having to give the reasoning in its decision, but it does not have to give a detailed reply to every argument. According to the legal regulations in BiH, a violation of criminal proceedings exists if the enacting clause of the judgment is incomprehensible, contradictory, if the judgment carries no reasons or they are unclear, contradictory.

44. The Constitutional Court concludes that ordinary courts established the facts of the case erroneously and incompletely. They failed to present evidence about crucial facts. They assessed manifestly arbitrarily the presented evidence. They arbitrarily applied the substantive and procedural criminal law, wherefrom it follows that the challenged judgments seriously violated the appellant's 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.

Principle of presumption of innocence and *in dubio pro reo*

45. The Constitutional Court emphasizes that Article 6 paragraph 2 of the European Convention prescribes that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. This fundamental legal principle is elaborated in the provisions of the Criminal Procedure Code, which was applied in the present case. The European Court has concluded that the principle of presumption of innocence *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 already quoted, the ECHR, *Barbera, Messegue and Jabardo vs. Spain*). To that end, the Constitutional Court reminds of the Decision of the Constitutional Court no. *AP 661/04*. In this decision the Constitutional Court emphasized that, *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 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, so as 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 individual pieces of evidence in isolation and in connection with other evidence [...], so it appears as inseparable element of the right to a fair trial* (see Decision of the Constitutional Court, no. *AP 661/04* of 21 April 2005). Additionally, the prosecutor and other authorities have an obligation under the Criminal Procedure Code to establish all facts – those the defendant was charged with and those which are in his favor. Because of the application of the principle *in dubio pro reo*, the facts that the defendant was charged with must be established with certainty, unlike the facts which are in favor of the accused, and which are considered as established even when they are only probable, i.e. when there is suspicion about their existence.

46. The Constitutional Court, considering its already articulated position that the presumption of innocence does not refer only to the culpability but also to all other elements which are interrelated regarding the term of a criminal act, such as the action of commission, unlawfulness etc., holds that this principle was violated in the challenged judgments, since it found that the actions of the appellant did not constitute illicit

elements. Additionally, the ordinary courts offered no reasons on the crucial facts. Next, ordinary courts failed to assess with equal attention the evidence for the defense and the evidence for the prosecution. The first instance court gave full credence to the witness, who had uncertain knowledge about the crucial fact, despite the rule that even the slightest suspicion about the truthfulness of some piece of evidence must be considered in favor of the defendant. Facts assessed by the first instance court as evidence, were not assessed through conscientious and thorough assessment of evidence, as required by law.

47. The Constitutional Court holds that allegations from the appeal on the violation of the principle of presumption of innocence, and in conjunction with it, the violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 2 of the European Convention are well-founded.

VIII. Conclusion

48. The Constitutional Court concludes that there is a violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraphs 1 and 2 of the European Convention, when the judgment of conviction establishes the facts of the case wrongly and incompletely, when the substantive law and the procedural criminal law are arbitrarily applied, when the judgment does not contain reasons about the crucial facts, from which it is possible to conclude that the appellant committed a criminal act he was charged with, and when the court fails to give an objective, logical and convincing reasoning for its conclusion about the guilt of the appellant, whereby its assessment of evidence appears arbitrary.

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

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. AP 286/06

DECISION ON ADMISSIBILITY AND MERITS

Appeal of the Parish of St. Ante Padovanski of Bugojno, the Franciscan Province of Bosna Srebrna, Sarajevo against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, no. Rev-464/03 of 26 July 2005

Decision of 29 September 2007

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(4)(9), 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 Herzegovin*a no. 60/05), in Plenary and composed of the following judges:

Ms. Hatidža Hadžiosmanović, 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,

Mr. Krstan Simić

Having deliberated on the appeal of **the Parish of St. Ante Padovanski of Bugojno, the Franciscan Province of Bosna Srebrna, Sarajevo,** in case no. **AP 286/06**, at its session held on 29 September 2007 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by the Parish of St. Ante Padovanski of Bugojno, the Franciscan Province of Bosna Srebrna, Sarajevo, against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, no. Rev-464/03 of 26 July 2005, in relation to Article II(3)(e) and (g) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 and Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, is hereby dismissed as ill-founded.

The appeal lodged by the Parish of St. Ante Padovanski of Bugojno, the Franciscan Province of Bosna Srebrna, Sarajevo, against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, no. Rev-464/03 of 26 July 2005, in relation to Article II(3)(k) of the Constitution

of Bosnia and Herzegovina and Article 1 of Protocol no. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, is rejected as inadmissible, for being *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 9 February 2006, the Parish of St. Ante Padovanski of Bugojno, the Franciscan Province of Bosna Srebrna, Sarajevo („the appellant"), represented by Mr. Stjepan Vukadin, a lawyer practising in Bugojno, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina („the Supreme Court"), no. Rev-464/03 of 26 July 2005.

II. Procedure before the Constitutional Court

2. On 5 January 2007, pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Supreme Court was requested to submit its reply to the appeal. On 31 May 2007, the parties to the proceedings, Mr. Vladimir Batinić, Ms. Janja Vujević, Ms, Kata Crnjak and Mr. Jozo Batinić („the defendants"), were asked to submit their respective replies to the appeal.

3. The Supreme Court submitted a reply to the appeal on 27 January 2007, and the defendants failed to submit their respective replies to the appeal.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply to the appeal was delivered to the appellant on 13 June 2007.

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 of the Municipal Court in Bugojno („the Municipal Court") no. P-312/01 of 7 January 2002, which was upheld by the judgment of the Cantonal Court in Travnik („the Cantonal Court") no. Gž-374/02 of 19 June 2003, it was held that the savings deposits referred to in the enacting clause of the first-instance judgment, as well as a VW Golf passenger vehicle, were the property of the Order of Manje Braće of St. Franjo. The defendants were obliged to transfer the savings deposits to the account of the appellant, and to register the above-mentioned passenger vehicle with the Bugojno Police Administration as the property of the appellant. The defendants were obliged to compensate the appellant for the proceedings costs amounting to KM 1,738.00.

7. The reasoning of these judgments read that, through assessment of the presented evidence, it was established that the late Father Bruno Batinić, the defendants' brother, who got killed in a traffic accident on 13 January 1999, was a BIH citizen. It was also established that he had citizenship of the Republic of Croatia, that he was a member of the Order of Manje Braće of St. Franjo and, as a member of the Franciscan Province of Bosna Srebrna, he was appointed a parish priest of the Parish of St. Ante Padovanski in Bugojno in 1991. He served in that capacity up until his death. It was also established that before taking oath he had made a statement before a superior on 13 April 1959 and decided to surrender himself to the Order of Manje Braće of St. Franjo, and to take on all obligations arising thereof. Thereafter he took a vow by which he bounded himself to observe provisions of „the Holy Canons". It was established that Father Bruno Batinić was registered as the owner of movable property stated in the enacting clause of the first-instance judgment at the time of his death and that he had not made a will during his lifetime.

8. The Municipal and the Cantonal Court fully granted the claim of the appellant, applying provisions of the Code of Canon Law and the Rules of the Order of Manje Braće of St. Franjo, of which the deceased was a member.

9. The judgment of the Supreme Court no. Rev-464/03 of 26 July 2005 granted the revision-appeal of the defendant Mr. Vladimir Batinić, modified the lower-instance judgments and dismissed the claim of the appellant against all the defendants.

10. The reasoning of the judgment of the Supreme Court reads that the lower-instance judgments were rendered on the grounds of misapplication of the substantive law. The Supreme Court concluded that the lower instance courts incorrectly found that they had grounds for their application of the Canon Law in the provisions of the Protocol on Conversations between the representatives of the Government of the former Yugoslavia and the representatives of the Holy Seat, enacted in 1966, because it was ratified on 25

June 1966 in Belgrade. The State of BiH did not take over the mentioned Protocol, nor was a bilateral agreement concluded between the State of BiH and the Holy Seat. This followed from the report of the Ministry of Foreign Affairs of BiH, no. 03-06-721/05 of 26 April 2005, which that court got a hold of through the Federation Ministry of Justice of BiH, thus making the Protocol not binding upon the State of BiH. Given the circumstances, the Supreme Court was of an opinion that the contents of the written statement given before the taking the solemn vow, and the text of the oath, by which Father Bruno Batinić bound himself to observe the provisions of „the Holy Canons", as stated in the text of the oath, were not relevant. For these reasons, the Supreme Court concluded that the claim of the appellant pursuant to Canon 668 of the Code of Canon Law (which prescribes that whatever a member of a religious institution acquires through personal effort or by reason of the institution is acquired for the institution, and that otherwise it would be an act contrary to the pledge of poverty) for the recognition of its ownership right over property which at the time of death of Father Bruno Batinić was registered as his property, was ill-founded.

11. Furthermore, the Supreme Court pointed out that the appellant had failed to ascertain, let alone prove, in the course of the proceedings, that it had acquired the disputed property, on one of the grounds for acquiring ownership right prescribed by Article 23 of the Law on Legal Ownership Relations *(Official Gazette of FBiH* no. 6/98), a positive legal regulation of the Federation of BiH. The Supreme Court, considering the established fact that the late Father Bruno Batinić had not made a will during his life, and granting the revision-appeal of the defendant Mr. Vladimir Batinić as well-founded, modified the lower-instance judgments and dismissed the claim of the appellant. In so doing, the Supreme Court stated that in deliberating on whether the revision-appeal was well-founded, it had also considered the provisions of the Law on the Legal Position of the Religious Communities (*Official Gazette of SR BiH* no. 36/76), and decided that the decision of that court did not violate the rights of the appellant as a religious community, safeguarded by that law.

IV. Appeal

a) Statements from the appeal

12. The appellant complains that the Supreme Court, by the challenged judgment, violated its right to a fair trial, freedom of thought, conscience and religion and the right to property under Article II(3)(e), (g) and (k) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 and Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") and Article 1 of Protocol No. 1 to the European Convention, by „modifying the judgments of the lower-

instance courts indiscriminately and without legal arguments". The appellant stated that the Supreme Court only noted in the challenged judgment that the claim of the appellant for the recognition of ownership over the disputed property pursuant to Canon 668 of the Canon Code Law was ill-founded, without corroborating the reasons for deciding it to be ill-founded. Furthermore, the appellant stated that the Supreme Court, by stating that the appellant as the plaintiff failed to ascertain, let alone prove, during the course of the proceedings, that it had acquired the property on one of the grounds prescribed by Article 23 of the Law on Legal Ownership Relations, completely „secularized" this case, and the relevant provisions of the Code of Canon Law and general constitutions of the Order of Manje Braće of St. Franjo, as the proper right of this ecclesiastical order, were denied the status and authority of a legal norm. The appellant argued that the Supreme Court failed to provide relevant reasons for its decisions, and that the challenged judgment was arbitrary.

b) Reply to the appeal

13. In its reply to the appeal, the Supreme Court stated that it stood by the statements given in the reasoning of the challenged judgment no. Rev-464/03 of 26 July 2005. Contrary to the position of the appellant it holds that the challenged judgment did not violate the constitutional rights of the appellant, as stated by the appellant. In that regard, the application of law in the decision on the revision-appeal was not arbitrary.

V. Relevant Law

14. The Constitution of Bosnia and Herzegovina

Article I(2)

Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law [...].

15. The **Law on Legal Ownership Relations** *(Official Gazette of Federation of BiH no. 6/98):*

Article 23

The ownership right shall be acquired by law, by reason of legal work, by decision of a competent body and by succession.

16. The **Law on the Legal Position of Religious Communities** (*SR BiH Official Gazette* no. 36/76):

Article 3

The state and religious communities shall be separate.

Article 4

Religious communities shall have equal legal positions. They shall be equal before the law.

Activities of religious communities must be in accordance with the Constitution and the law.

17. The **Law on the Freedom of Religion and the Legal Position of Churches and Religious Communities** (*BiH Official Gazette* no. 5/04)

Article 8 paragraph 1 and 2

1. Churches and religious communities in the territory of Bosnia and Herzegovina shall have the status of legal/juristic persons.

2. This law acknowledges the continuity of the legal personality of the historically based churches and religious communities in Bosnia and Herzegovina in accordance with religious regulations and internal organization within the Islamic Community in Bosnia and Herzegovina, the Serbian Orthodox Church, the Catholic Church and the Jewish Community of Bosnia and Herzegovina, as well as all other churches and religious communities whose legal personality has been recognized prior to the entry into force of this Law.

Article 11 paragraph 1

1. Churches and religious communities shall be self-managed from within in accordance with their own acts and doctrines, which shall not have any civil and legal effects and which shall not be forcibly enforced by the public authority, nor shall they apply to people who are not members.

Article 12 paragraph 1

Churches and religious communities may acquire property in accordance with the law.

Article 14

Churches and religious communities shall be separate from the state […].

Article 15 paragraph 1

Issues of shared interest for Bosnia and Herzegovina and some or more churches and religious communities may be governed by an agreement to be concluded between the

Presidency of BiH, the Council of Ministers, the entity governments and the church, that is the religious community.

VI. Admissibility

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

19. The Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him/her.

20. In the present case, the subject challenged by the appeal is the judgment of the Supreme Court no. Rev-464/03 of 26 July 2005, against which there are no other effective legal remedies available under the law. The appellant received the challenged judgment on 15 December 2005, and the appeal was submitted on 9 February 2006, i.e. within 60 days, as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, regarding Article II(3)(e) and (g) of the Constitution of Bosnia and Herzegovina, Article 6 paragraph 1 and Article 9 of the European Convention, the appeal meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court, for it is not manifestly (*prima facie*) ill-founded, nor is there any other formal reason which makes the appeal inadmissible.

21. However, in examining the admissibility of the appeal in the part relating to 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 Constitutional Court took into account the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(4)(9) of the Rules of the Constitutional Court.

As noted above, Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads:

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.

Article 16(4)(9) of the Rules of the Constitutional Court reads:

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

9. the appeal is ratione materiae incompatible with the Constitution;

22. The term „property", according to the case-law of the European Court of Human Rights, and of the Constitutional Court, encompasses a wide range of ownership interests which constitute economic value (see Constitutional Court, decision no. *U 14/00* of 4 April 2001). Article 1 of Protocol No. 1 to the European Convention protects only existing property or property which the appellant has a „justified expectation" of acquiring (see European Court of Human Rights, *Pine Valley Developments Ltd and others*, judgment of 29 November 1995, Series A, no. 332, paragraph 31). However, the term does not include a right to acquire or an expectation of acquiring property in the future, e.g. through inheritance (see Constitutional Court, decision no. *U 12/01* of 25 February 2002, published in *the Official Gazette of Bosnia and Herzegovina* no. 20/02). Thus, guarantees for the right to property may only be applied to proceedings which subject of dispute is „property" within the meaning of Article 1 of Protocol No. 1 to the European Convention, and not to the proceedings whereby an appellant is trying to obtain the right to acquire property. In the present case, the appellant requested that its ownership right over the disputed estate be established, but it failed to establish or prove that it had acquired the ownership right within the meaning of Article 23 of the Law on Legal Ownership Relations. Based on that, the Constitutional Court holds that the property that was the subject of the contentious proceedings in the present case was not already owned by the appellant, nor did the appellant have a „justified expectation" of acquiring it.

23. Bearing in mind the aforesaid, the Constitutional Court holds that the appeal in relation to 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 is inadmissible for being *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

VII. Merits

24. The appellant challenges the judgment of the Supreme Court maintaining that the respective judgment 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, and violated also his freedom of thought, conscience and religion under Article II(3)(g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention.

Right to a fair trial

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and 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 paragraph 1 of the European Convention, so far as relevant, 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. [...]

25. The Constitutional Court maintains that the subject of the appeal in the present case was the judgment which ended the contentious proceedings for the establishment of existence of ownership right. Thus the case undeniably relates to the determination of civil rights and obligations. Hence it follows that Article 6 paragraph 1 of the European Convention is applicable to the present case. Therefore the Constitutional Court will consider the appellant's allegations of violations of its right safeguarded by Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

26. The substance of the violation of the right to a fair trial, in the appellant's opinion, lies in arbitrary misapplication of the substantive law to the present legal situation. In that regard, the Constitutional Court refers to its principled position, according to which it is not competent to check the established facts and ways in which the ordinary courts interpreted positive legal regulations, unless the decisions of those courts violate constitutional rights. That will be the case when a decision of an ordinary court does not include or erroneously applies some constitutional right, when the application of positive legal regulations is manifestly arbitrary, when relevant law is unconstitutional in itself, or when a violation of basic procedural rights occurs, such as the right to a fair trial, the right of access to court, the right to effective legal remedy and in other cases (see Constitutional Court, Decision no. *U 29/02* of 27 June 2003, published in the *Official Gazette of Bosnia and Herzegovina* no. 31/03).

27. In the present case, the Supreme Court applied to the present legal situation the provisions of the Law on Legal Ownership Relations. The appellant argues that the Supreme Court, in doing so, disregarded the provisions of Canon Law which were applied by the lower instance ordinary courts, and which, in the appellant's opinion, are applicable to the present legal situation. The Constitutional Court notes that in assessing the appellant's constitutional and legal position, the Supreme Court referred to the provisions of the former Law on Legal Position of Religious Communities in the challenged

judgment. At the time of the adoption of the challenged judgment, a new Law on the Freedom of Religion and the Legal Position of Churches and Religious Communities was in force. However, in the opinion of the Constitutional Court, this circumstance in the present case is not crucial for the assessment of the application of the substantive law, since both former and new laws require in the same way that the legal framework within which religious communities must operate in compliance with the Constitution and law. Contrary to the allegations in the appeal, the Constitutional Court holds that the Supreme Court gave relevant and articulated reasons in the challenged judgment for concluding that the lower instance courts erroneously assessed that the Canon Law was applicable to the present case, referring to the relevant provisions of the substantive law and procedural law, applicable to the present legal situation. In that regard, the Constitutional Court specifically points to the reasoning of the Supreme Court that the State of BiH did not take over the Protocol on Conversations held between the representatives of the Government of SFRY and the representatives of the Holy Seat enacted in 1966, nor was a bilateral agreement concluded between the State of BiH and the Holy Seat.

28. The Constitutional Court also points to the provisions of the Constitution of BiH, the Law on the Legal Position of Religious Communities and the Law on the Freedom of Religion and the Legal Position of Churches and Religious Communities. According to Article 8 paragraph 1 of the Law on the Freedom of Religion and the Legal Position of Churches and Religious Communities, the appellant, as a religious community, has the status of a legal person. On the other hand, in compliance with the proclaimed principle of secular social system under Article 14 of the said Law, the state and religious communities shall be separate, and the appellant, as a religious community, has internal autonomy to apply its religious norms, which, under Article 11 paragraph 1 of the said Law, *has no civil and legal effects whatsoever*. In order for the Canon Law, as an internal legal norm of a religious community, that is of the appellant in the present case, to be introduced into the national legal system, it is necessary to regulate that issue, in accordance with Article 15 paragraph 1 of the said Law, by special agreement between the state and the religious community. It was established though that no such agreement existed in the present case. The Constitutional Court also points to the provision of Article 4 of the former Law on the Legal Position of Religious Communities, which binds the religious communities to operate in compliance with the Constitution and the law, that is the provision of Article 12 of the present Law, which governs the legal position of religious communities, according to which religious communities are allowed to acquire property in compliance with the law. Also the Constitutional Court recalls the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina, which binds ordinary courts to apply applicable legal norms and to adopt judgments accordingly.

29. Having in mind the mentioned constitutional and legal framework, the Supreme Court established that the provisions of the Canon Law were not applicable to the present legal situation. Deliberating on the revision-appeal of the defendants, the Supreme Court modified the lower-instance judgments, which had applied these provisions, and it applied Article 23 of the Law on Legal Ownership Relations, as a relevant provision of positive legal regulations, to the completely and correctly established facts. It also established that the appellant had failed to offer evidence to the court on the foundedness of its claim, that is that it had acquired ownership over the disputed property in either of the legal ways of acquiring ownership prescribed by this provision. Therefore the Supreme Court modified the lower-instance judgments and dismissed the appellant's claim.

30. The Constitutional Court holds that the Supreme Court clearly explained its decision within the meaning of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention, and that the allegation in the appeal that the Supreme Court, in the challenged judgment, had arbitrarily misapplied the substantive law without reasoning behind its decision is ill-founded.

31. Based on the aforementioned, the Constitutional Court concludes that there was no violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention in the present case.

Freedom of thought, conscience and religion

32. 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:

[...]

g) Freedom of thought, conscience, and religion.

33. Article 9 of the European Convention reads as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

34. The appellant challenges the judgment of the Supreme Curt claiming that that judgment violated its rights under Article II(3)(g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention, because the Supreme Court had denied the status of a legal norm to the canon law norms, thereby making the application of the Canon Law to the disputed legal situation impossible and thus restricting the appellant's freedom of religion.

35. The Constitutional Court bears in mind the conclusion of European Court for Human Rights that as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a „democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it (see European Court of Human Rights, *Kokkinakis vs. Greece*, judgment of 25 May 1993, Series A, no. 260-A, page 17, paragraph 31). The European Court has emphasized that the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate (see European Court of Human Rights, *Manoussakis vs. Greece*, judgment of 26 September 1996, Reports on Judgments and Decisions 1996-IV, paragraph 47). While freedom of religion, on one hand, is a matter of consciousness of an individual, it also includes, on the other hand, the freedom to express one's religion. Attestation through words and deeds is inseparably linked with religious beliefs.

36. The European Court of Human Rights, referring to its case-law concerning the place of religion in a democratic society and a democratic State (see European Court of Human Rights, *Refah Partisi (the Welfare Party) and Others vs. Turkey*, judgment of 13 February 2003, Reports on Judgments and Decisions 2003-II, items 90-94), has defined the role of a state as that of a neutral and impartial organizer of the exercise of various religions, faiths and beliefs and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. The Court also considered that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs and that it requires the State to ensure mutual tolerance between opposing groups.

37. In that judgment, the European Court referred to the case-law of the Convention institutions and expressed the view that the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not

necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention (see European Court of Human Rights, *Refah Partisi (the Welfare Party) and Others vs. Turkey*, judgment of 13 February 2003, Reports on Judgments and Decisions 2003-II, item 93).

38. Pursuing the relation between religious and civil law, the European Court reiterated that freedom of religion, including the freedom to manifest one's religion by worship and observance, is primarily a matter of individual conscience, and stressed that the sphere of individual conscience is quite different from the field of private law, which concerns the organisation and functioning of society as a whole. Article 9 of European Convention provides for everyone the right to freedom of religion to be manifested in private. On the other hand, the state may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy (see European Court of Human Rights, *Refah Partisi (the Welfare Party) and Others vs. Turkey*, judgment of 13 February 2003, Reports on Judgments and Decision 2003-II, item 128).

39. The freedom to manifest religion or beliefs does not constitute an exclusively individual right. It also constitutes a collective dimension recognized in Article 9 of the European Convention in the wording „in community with others". The Human Rights Chamber for Bosnia and Herzegovina, by upholding the case-law of the Convention institutions, also acknowledged that a religious community may be a right holder under Article 9 of the European Convention (see Human Rights Chamber, case no. CH/96/29, *the Islamic Community in Bosnia and Herzegovina vs. the Republika Srpska*, Decision on Admissibility and Merits delivered on 11 May 1999, paragraph 128). In that decision, the Human Rights Chamber for Bosnia and Herzegovina referred to the case-law of the European Commission of Human Rights, which also concluded that an ecclesiastical body or association with a religious and philosophical mission may have and exercise rights contained in Article 9 of the European Convention, and even act on behalf of its members (see *Chappell vs. the United Kingdom*, Decision of 14 July 1987, Decisions and Reports of the European Commission of Human Rights, no. 53, page 241, 246; *X. and the Church of Scientology vs. Sweden*, Decision of 5 May 1979, Decisions and Reports of the European Commission of Human Rights no. 16, page 68, 70).

40. Article 9 of the European Convention is structured so that the first paragraph defines the protected freedoms and the second paragraph contains the so-called restrictive clause. That is, it prescribes circumstances under which the public authority may restrict the enjoyment of protected freedoms. Article 9 paragraph 1 lists a number of forms which manifestation of one's religion or belief may take namely worship, teaching, practice and

observance. Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief (see European Court of Human Rights, *Kalaç vs. Turkey*, judgment of 1 July 1997, Reports on Judgments and Decisions, 1997-IV, paragraph 27).

41. Restrictions prescribed in Article 9 paragraph of the European Convention enable states to decide to restrict the scope of enjoyment of these rights and freedoms only in cases when such intervention by the state is in compliance with the law, that is when it is prescribed by law, and is necessary in a democratic society, for the sake of protecting fundamental values of every state, such as public security, protection of public order, health or moral, or the protection of rights and freedoms of other persons. Thus, the state is allowed to restrict the exercise of these rights in general and social interest, and not suspend them.

42. The Constitutional Court, bearing in mind the mentioned principles, will examine the well-foundedness of the appeal with regard to Article II(3)(g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention.

43. In determining whether the present case concerns the violation of Article 9 of the European Convention, first and foremost it is necessary to establish whether the appellant, as a religious community, is a holder of rights and freedoms safeguarded by Article 9 paragraph 1 of the European Convention, and whether the public authority, by the challenged judgment, „restricts" the appellant's freedom of manifesting religion. Second, for the „restriction" to be justified, it has to be „prescribed by law". Considering the principle of legality of the restriction of freedoms safeguarded by Article 9 of the European Convention, the European Court of Human Rights has referred to its case-law in connection with Articles 8 and 11 of the European Convention (see *Hasan and Chaush vs. Bulgaria*, judgment of 26 October 2000, application no. 30985/96, paragraph 84). In that sense the condition of legitimacy, in accordance with the meaning of a notion of the European Convention, consists of several elements: (a) any restriction must be based on domestic or international law; (b) the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case; and (c) the law must be formulated with sufficient precision to enable the individual to regulate his conduct (see the European Court of Human Rights, *Sunday Times vs. the United Kingdom*, judgment of 26 April 1979, series A, no. 30, paragraph 49).

44. In case it turns out that the „restriction" of protected freedoms is in accordance with the law, even then it can constitute a violation of Article 9 of the European Convention if not deemed „necessary" to achieve one of the legitimate aims referred to in Article 9 paragraph 2 of the European Convention. Necessary in this context means that the interference

corresponds to a „pressing social need" and is „proportionate to the legitimate aim pursued. The European Court of Human Rights has established principles regarding a requirement of necessity which has to affect the behavior of the member states in imposing restrictions on activities of various religious communities (see the European Court of Human Rights, *Metropolitan Church of Bessarabia and Others vs. Moldova*, judgment of 13 December 2001, application no. 45701/99, paragraphs 115-119). The Court has also said that, in a democratic society, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.

45. Generally speaking, the form of protection and restriction of freedom of religion in Bosnia and Herzegovina is defined by the Law on the Freedom of Religion and the Legal Position of Churches and Religious Communities (*Official Gazette of BiH* no. 5/04), which essentially adopts the principles of the secular social system established by the formerly applicable Law on the Legal Position of Religious Communities (*Official Gazette of SR BiH* no. 36/76). This law, in addition to incorporating the provision of Article 9 of the European Convention, also elaborates the legal position of religious communities in the democratic and secular social system of Bosnia and Herzegovina.

46. Applying the above principles to the present situation, the Constitutional Court will first establish whether the appellant is an entity enjoying the protection of the constitutional right to freedom of thought, conscience and religion. Bearing in mind the case-law of the Human Rights Chamber for Bosnia and Herzegovina, as well as case-law of the Convention institutions which already established that the religious communities enjoy the protection of the rights under Article 9 of the European Convention in its collective dimension, the Constitutional Court concludes that the appellant, as a religious community, is holder of a right under Article II(3) (g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention.

47. Now a question arises as to whether the challenged judgment of the Supreme Court restricted the freedom of the appellant, which is, as a religious community, a holder of the right to freedom of confession, and whether the possible restriction was justified within the meaning of Article 9 paragraph 2 of the European Convention. For the restriction to be justified, it has to be in accordance with the law and should be necessary in a democratic society to achieve one or more legitimate aims listed in Article 9 paragraph 2 of the European Convention.

48. The Constitutional Court indicates that the ordinary courts found that Mr. Bruno Batinić had had his own property at the moment of death and that he failed to make a will

to leave the property to the appellant. According to the norms of canon law, a member of a religious order is obliged to make a will, as a legal act disposing of his own property, which would be valid within the civil legal framework. The property of a physical person who is simultaneously a member of a religious order is not automatically the property of Church by operation of law, including the norms of canon law. The Supreme Court, taking into account the circumstances and the appellant's constitutional and legal status, concluded that the appellant did not submit evidence to prove that it had lawfully acquired the property within the meaning of Article 23 of the Law on Legal Ownership Relations. Taking into account the aforesaid, the Constitutional Court holds that judgment no. Rev-464/03 of 26 July 2005, whereby the Supreme Court dismissed the appellant's claim, did not place restrictions on freedom of the appellant as a religious community within the meaning of Article 9 of the European Convention. The Constitutional Court therefore holds that there is no need to consider other aspects of Article 9 of the European Convention.

49. The Constitutional Court concludes that the appellant's right to freedom to manifest his religion under Article II(3)(g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention has not been violated.

VIII. Conclusion

50. In the instant case, the Constitutional Court concluded that the challenged judgment did not violate Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention, because it is in compliance with the constitutional and legal framework which governs the legal position of religious communities, and the Supreme Court had clearly articulated the application of relevant legal regulations. Furthermore, the Constitutional Court concluded that there was no violation of Article II(3)(g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention, because the challenged judgment did not place restrictions on the appellant's freedom of religion.

51. Pursuant to Article 16(4)(9) and 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.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. AP 2195/06

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Božo Lukačević and Mr. Tunjo Krištić against the judgment of the Cantonal Court in Odžak no. Gž-109/05 of 12 May 2006

Decision of 18 October 2007

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 64(2) and Article 65(1)(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), as a Grand Chamber composed of the following judges:

Ms. Hatidža Hadžiosmanović, President,

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President,

Mr. Mato Tadić,

Mr. Krstan Simić,

Having deliberated on the appeals of Mr. **Božo Lukačević** and Mr. **Tunjo Krištić** in case no. **AP 2195/06**, at its session held on 18 October 2007, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Tunjo Krištić is hereby granted.

A violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Judgment of the Cantonal Court in Odžak no. Gž-109/05 of 12 May 2006 and Judgment of the Municipal Court in Orašje P-578/04 of 31 May 2005 are hereby quashed.

The Registry of Securities of the Federation of Bosnia and Herzegovina is ordered to carry out the transfer of 94 shares of the issuer „Polirond" d.d. from the account of Mr. Božo Lukačević from Donja Mahala to the account of Mr. Tunjo Krištić from Orašje within 60 days from the delivery of this decision.

This decision shall be submitted to the Registry of Securities of the Federation of Bosnia and Herzegovina for the purpose of securing the constitutional rights of the appellant which have been violated.

The Registry of Securities of the Federation of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 30 days as from the date of delivery of this Decision, about the measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The proceedings initiated by the appeal of Mr. Božo Lukačević is suspended for the reason that the Constitutional Court of Bosnia and Herzegovina established that, after the violation of Article II (3) (k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms with regard to appellant Mr. Tunjo Krištić was established, it would be irrelevant to further conduct the proceedings.

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 14 July 2006, Mr. Božo Lukačević („the appellant") from Donja Mahala, Sportska ulica 1, represented by Ms. Sanela Hidanović, a lawyer practicing in Orašje, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the Cantonal Court in Odžak („the Cantonal Court") no. Gž-109/05 of 12 May 2006.

2. On 17 July 2006, Mr. Tunjo Krištić, the other party to the proceedings before the ordinary courts also submitted appeal no. AP 2200/06 against the same judgment.

II. Procedure before the Constitutional Court

3. Given the fact that appeal no. AP 2195/06 and appeal no. AP 2200/06 indicate the same facts and that the issue concerns the same parties that participated in the proceeding

of ordinary courts, the Constitutional Court, pursuant to Article 31(1) of the Rules of the Constitutional Court, adopted a decision on merging the cases to conduct a single proceedings and adopt a single decision no. AP 2195/06.

4. Pursuant to Article 22 (1)(2) of the Rules of the Constitutional Court, on 25 July 2006, the Cantonal Court in Odžak was requested to submit its reply to appeal no. AP 2195/06. On 14 August 2006 the Cantonal Court in Odžak submitted its reply to the appeal. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply of the Cantonal Court in Odžak was communicated to the appellant on 31 August 2007.

5. Pursuant to Article 22 (1)(2) of the Rules of the Constitutional Court, on 25 July 2006, Mr. Tunjo Krištić was requested to submit his reply to appeal no. AP 2195/06. On 3 August 2006, Mr. Tunjo Krištić submitted his reply to the appeal. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply of Mr. Tunjo Krištić was communicated to the appellant on 31 August 2007.

6. Pursuant to Article 22 (1)(2) of the Rules of the Constitutional Court, on 25 July 2006, the Municipal Court in Orašje was requested to submit its reply to appeal no. AP 2195/06. On 14 August 2006, the Municipal Court in Orašje submitted its reply to the appeal. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply of the Municipal Court in Orašje was communicated to the appellant on 31 August 2007.

7. Pursuant to Article 22 (1)(2) of the Rules of the Constitutional Court, on 11 September 2006, the Cantonal Court in Odžak was requested to submit its reply to appeal no. AP 2220/06. On 22 September 2006 the Cantonal Court in Odžak submitted its reply to the appeal. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply of the Cantonal Court in Odžak was communicated to the appellant on 31 August 2007.

8. Pursuant to Article 22 (1)(2) of the Rules of the Constitutional Court, on 11 September 2006, the opposite party to the proceedings, Mr. Božo Lukačević, was requested to submit his reply to appeal no. AP 2220/06. On 21 September 2006, Mr. Božo Lukačević submitted his reply to the appeal. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply of Mr. Božo Lukačević was communicated to the appellant on 31 August 2007.

9. Pursuant to Article 22(1)(2) of the Rules of the Constitutional Court, on 11 September 2006, the Municipal Court in Orašje was requested to submit its reply to appeal no. AP 2200/06. On 9 October 2006, the Municipal Court in Orašje submitted its reply to the appeal. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply of the Municipal Court in Odžak was communicated to the appellant on 31 August 2007.

III. Facts of the Case

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

11. On 8 March 2000, the two appellants, Mr. Božo Lukačević and Mr. Tunjo Krištić concluded an agreement on purchase of shareholder rights over 34 shares which were owned by Bože Lukačević in „Polirond" d.d. Orašje. On the same day the endorsement of shares with nominal value 10,612 DEM was conducted. On 23 July 2003, the appellant Mr. Tunjo Krištić filed a lawsuit against appellant Mr. Božo Lukačević for the purpose of establishing that the sales contract was concluded on the purchase of shareholder rights over 34 shares and for the purpose of enforcement of the agreement, which means that he sought that the Registry of the Securities of the Federation of Bosnia and Herzegovina („the Registry") transfer the shareholder rights from the defendant to the plaintiff. As an alternative, the plaintiff sought that the contract is quashed and the invested money returned to him, including the legal default interest.

12. By the judgment of the Municipal Court in Orašje no. P-587/04 of 31 May 2005, appellant-defendant Mr. Božo Lukačević was, *inter alia*, ordered to pay the amount of 2,400.00 KM to other appellant-plaintiff Mr. Tunjo Krištić, which was to be increased by the legal default interest beginning 7 October 2002 until the payment in full and the defendant was also ordered to compensate the plaintiff for the costs of the proceedings in the amount of 664.00 KM. Moreover, the mentioned court ordered a measure of securing the claims for the defendant in a way that it prohibited appellant Mr. Božo Lukačević from alienating, hiding, burdening or disposing with 94 shares of the issuer „Polirond" d.d. Orašje (by the change of nominal value the agreed 34 shares subsequently became 94 shares). The Municipal Court in Orašje rejected the alternative request for determining that the sales contract was concluded on the purchase of shareholder rights over 34 shares and that the Registry of the Securities of the Federation of Bosnia and Herzegovina transfer the shareholder rights from the defendant to the plaintiff.

13. The opinion of the first-instance court was that the concluded legal business was absolutely null and void for it was inconsistent with Article 39 paragraph 2 of the Law on the Securities (*Official Gazette of Bosnia and Herzegovina* no. 39/98 and 36/99), which provides that „securities trading is subject to registering the securities with the Securities Commission („the Commission"). To be more precise, the Court established that „Polirond" d.d. Orašje was not a registered company with the Commission at the time of the conclusion of purchase and sale agreement. Namely, on 14 May 2001, the Privatization Agency of the Posavina Canton, by its Decision no. 01-99/2001, approved the registration

of the conducted privatization of the company and the company got registered with the Commission as late as on 6 February 2003 by Decision no. 03-19-671/02.

14. Taking into account that the issue is an agreement which is absolutely null and void and as regards the application of mechanism of obligatory and legal character - „unlawful enrichment" (Article 104 paragraph 1 in conjunction with Article 210 of the Law of Obligations, *Official Gazette of SFRY* no. 29/78 through 57/98; *Official Gazette of the Federation of Bosnia and Herzegovina* no. 2/92, 13/93 and 13/94), the Court ordered that each contracting party refund the amount received, in other words, the appellant-defendant Mr. Božo Lukačević was ordered to pay other appellant-plaintiff Mr. Tunjo Krištić the amount of 3,400.00 KM. Moreover, the Court ordered appellant Mr. Božo Lukačević to pay other appellant-plaintiff Mr. Tunjo Krištić the legal default interest beginning 7 October 2002, i.e. from the day when the Court established that Mr. Božo Lukačević became negligent. The Court established that on that day appellant Mr. Božo Lukačević attended the session of the Assembly of shareholders of MC „Polirond" d.d. Orašje, and thus showed that he does not accept the sales contract.

15. Both appellants filed the separate complaints against the judgment of the Municipal Court. The appellant Mr. Tunjo Krištić, *inter alia*, considered that the court erroneously applied the substantive law as the legal business was valid within the meaning of the Law on Obligations (securities trading though the purchase-sale agreement) and that Article 39 paragraph 2 of the Law on the Securities could have been applied only upon the company's registration with the Commission. That implies that the company should have first fulfilled its obligations under Article 383 of the Company Law (the harmonization with that Law was to be conducted within 60 days as of the day of issuance of the decision on the approval of the privatization registration in the Registry, which is, as claimed by the appellant, stipulated under Article 134 paragraph 2 of the Law on Securities). Finally, the plaintiff considered that if the position is taken that this legal business is absolutely null and void, the payment of the interest must begin as of 8 March 2000, i.e. from the day when the business was concluded and when he executed the agreement, i.e. when the sales price was paid. In his lawsuit, the appellant-defendant, Mr. Božo Lukačević stated, *inter alia*, that he was not negligent because he sold 34 shares since he is the owner of 94 shares, and therefore he was entitled to attend the Shareholders Assembly session. Further, he considered that a measure of security was unjustly pronounced, that he was not an equal party to the proceedings and that the costs of the proceedings should have not be awarded to his detriment. The Cantonal Court in Odžak, by its judgment no. Gž-109/05 of 12 May 2006 dismissed both appeals and upheld the judgment of the Municipal Court in Orašje no. P-578-04 of 13 May 2005.

IV. Appeal

a) Allegations stated in the appeal no. 2195/06

16. In his appeal, the appellant Mr. Božo Lukačević stated that he did not conclude the contract with the Company's director in person, i.e. with appellant Mr. Tunjo Krištić, but he concluded the contract with the company and he also stated that the proceedings are pending. For the aforementioned reason, the proceedings should have been terminated pending the outcome of other civil proceedings and criminal proceedings. The aim of these proceedings was to establish whether the privatisation of the company was lawfully conducted and whether there was any responsibility of the director, appellant Mr. Tunjo Krištić. Further, he repeated the statements given in the reply to the lawsuit and the complaint against the first instance judgment. He is of the opinion that those judgements amounted to a violation of his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina, the right to private and family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina, as well as his right to a fair trial under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), the right to private and family life under Article 8 of the European Convention and the right to property under Article 1 of the Protocol No. 1 to the European Convention.

b) Reply to appeal no. AP 2195/06

17. Appellant Mr. Tunjo Krištić, in his reply to the appeal of Mr. Božo Lukačević no. AP 2195/06, was challenging the presented opinions regarding the conduct of the proceedings for determining whether the privatisation of the company was conducted in a lawful manner and whether the aforementioned person should be held responsible finding that there is no violation of the rights of appellant Mr. Božo Lukačević because they entered into the agreement which is legally valid while there are no legal obstacles for the execution of the agreement.

18. The Municipal Court in Orašje, while explaining the course of the proceedings and some parts of the reasoning for the decision, finds that the proceeding was lawful and that the appellant's constitutional rights were not violated.

19. The Cantonal Court in Odžak is of the opinion that the appellant's constitutional rights were not violated since all the procedural rights were available and the regulations wee properly applied.

c) Allegations from the appeal no. AP 2200/06

20. In his appeal, the appellant Mr. Tunjo Krištić repeated the statements from the lawsuit and reply to the appeal no. AP 2195/06. Additionally, in his supplements to the appeal of 4 September 2006 and 17 May 2007, the appellant points to the lack of consistency of the courts regarding the same or similar legal and factual issues and he further refers to the case of „Automehanika" d.d. from Orašje representing the same case that concerns the purchase of shares prior to the registration of the company in the Commission's Registry, which were accepted by the competent authorities. He is of the opinion that his right to a fair trial under Article 6 of the European Convention was violated, as well as his right to property under Article 1 of Protocol No. 1 to the European Convention.

d) Reply to the appeal no. AP 2200/06

21. In his reply to the appeal no. AP 2200/06, the appellant Mr. Božo Lukačević refers to his appeal no. AP 2195/06 and his opinions presented therein.

22. While replying to the appeal no. AP 2200/06, the Municipal Court in Orašje and Cantonal Court in Odžak referred to the arguments presented in the judgments of the mentioned courts, which they consider constitutional and lawful.

V. Relevant Law

23. The **Rulebook on the Method of Registration and Keeping of the Register of the Securities' Issuers with the Securities Commission of the Federation of Bosnia and Herzegovina** (*Official Gazette of FBiH* nos. 49/99 and 4/05), in the relevant part, reads:

Article 1

All legal persons dealing with issuance of securities („the issuers") shall be registered in the Commission's Register in accordance with the Law on the Securities

Article 4

Applications and attachments shall be used for the purpose of registration of data in the Commission's Register in accordance with the Law and Commission's regulations.

Attachments shall be used for the purpose of registration of the following data:

1. *general data on the issuer*
2. *data on the members of the Supervisory Board and the members of the Management.*
3. *basic data on the issuers' securities.*

24. The **Law on the Securities** (*Official Gazette of FBiH* nos. 39/98 and 36/99)

Article 39, paragraph 2

Securities registered with the Commission may be traded.

Article 133

Securities issued before the coming into effect of this Law are considered as securities issued through a public offering.

An issuer is required to deposit materialized securities, issued before the coming into effect of this Law, in accordance with the provisions of Article 5 of this Law, at the latest one year from the coming into effect of this Law.

Article 134

Provisions of Articles 13 - 38 of this Law are not applied to shares that are issued in the privatization procedure in accordance with the Law on the Privatization of Enterprises („Official Gazette of the Federation of BiH" no. 27/97) and the Law on the Privatization of Banks („Official Gazette of the Federation of BiH" no. 12/98).

Upon the implementation of the procedure for the privatization of enterprises and banks, shares from paragraph 1 of this Article in private or state ownership, are considered as shares issued through a public offering and the provisions of this Law on the trade of securities apply to them.

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 court in Bosnia and Herzegovina.

26. According to Article 16(1) of the Rules of the Constitutional Court, the Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

27. In the present case, the subject matter of the appeal is the judgment of the Cantonal Court no. Gž-109/05 of 12 May 2006, against which there are no other effective remedies available under the law. Furthermore, appellant Mr. Božo Lukačević received the challenged judgment on 16 May 2006 and the appeal was filed on 14 July 2006, that is, within the 60 days time-limit as provided for under Article 16(1) of the Rules of the

Constitutional Court. In conclusion, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Procedure the Constitutional Court as neither being manifestly (*prima facie*) ill-founded nor inadmissible for any formal reasons. The second appellant, Mr. Tunjo Krištić received the challenged judgment on 17 May 2006 and the appeal was filed on 17 July 2006 that is, within the 60 days time-limit as provided for under 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 as neither being manifestly (*prima facie*) ill-founded nor inadmissible for any formal reasons.

28. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the admissibility requirements have been met in the relevant appeal.

VII. Merits

29. The appellant, Mr. Božo Lukačević is the owner of 34 shares of the company „Polirond" d.d. Orašje. On 8 March 2000, the appellant Mr. Božo Lukačević concluded the agreement of purchase of shareholders rights over 34 shares. On the same day, the endorsement of shares with nominal value 10,612.00 DEM was conducted. By the final judgment it was decided that this legal business is absolutely null and void and that the applicant must refund the money including the default interest commencing to be paid as of the day when he became negligent.

30. Mr. Božo Lukačević failed to complain against the decision of the courts on declaring the agreement null and void but complain the default interest and the costs of the proceedings considering that those costs were unjustly awarded to him. The other appellant, Mr. Tunjo Krištić, complains that the decision of the competent court is unlawful in which it is stated that the agreement is to be pronounced absolutely null and void, considering that the matter should have been adjudicated differently and that it should have been stated that he, by application of the substantive regulations, acquired the right of ownership over these shares and that those shares should be registered in his name. The appellants challenge the mentioned judgments claiming that by those judgment their rights were violated: the right a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina, i.e. the right under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), the right to private and family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina, i.e. the right under Article 8 of the European Convention and right to be free from discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina, and the right to property

under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of the Protocol No. 1 to the European Convention.

31. Given that the mentioned complaints contain different statements of two appellants, the Constitutional Court will first examine the complaints of appellant Mr. Tunjo Krištić as regards the issue whether the court was right when it declared the agreement absolutely null and void or this decision is arbitrary. In the event that the aforementioned is confirmed, the Constitutional Court will examine whether the proceedings of the restitution *in integrum* was conducted in accordance with the positive regulations and, finally, it will examine the complaints of other appellant, Mr. Božo Lukačević as regards the default interest and the costs of the proceedings.

A. Right to a fair trial

32. Appellant Mr. Tunjo Krištić challenges the mentioned judgments claiming that his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina, i.e. the right under Article 6 of the European Convention was violated by the mentioned judgments.

Article II(3)(e) of the Constitution of Bosnia and Herzegovina

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.

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

k) The right to property.

Article 6 of the European Convention, as relevant, 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.

A.1. Is the claim of appellant Mr. Tunjo Krištić of a „civil" nature?

33. Before dealing with the issue of violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina, i.e. a violation of the right under Article 6 of the European Convention, a conclusion should be made whether the case of appellant Mr. Tunjo

Krištić is of civil nature within the meaning of civil law. In order to give an answer to this question, the Constitutional Court must first examine whether the property interest which is safeguarded under Article 1 of Protocol No. 1 to the European Convention has been protected given that the principle of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of the Protocol No. 1 to the European Convention does not protect „the right to acquiring property" but only the existing property within the meaning of the non-conventional deprivation, supervision, i.e. jeopardizing the peaceful enjoyment of property. If it would turn out that the claim of appellant Mr. Tunjo Krištić is aimed at „acquiring the property", then this claim could not be considered as a civil claim, within the meaning of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention since that law also protects the existing „civil" rights and not those to be acquired in the future.

34. In its earlier case-law, the Constitutional Court took a position that the property expectations do not fall within the category of the protection of right to property (see, for example, *AP 814/04* of 27 October 2004). However, the European Court of Human Rights, in some cases, took a position that if the applicants could argue that they had a „legitimate expectation" that their claims deriving from the accidents in question would be determined in accordance with the general law of tort, then such claims would constitute the property within the meaning of Article 1 of Protocol No. 1 to the European Convention (see, the European Court of Human Rights, *Pressos Compania Naviera S.S. and others vs. Belgium*, judgment of 20 November 1995, Series a, no. 232, paragraph 31). If it would be so, then the issue would be about „the civil right" within the meaning of Article II(3)(e) of the Constitution of Bosnia and Herzegovina, i.e. Article 6 of the European Convention. In such cases the right to property, as a civil right, arises in a moment when the factual circumstances give rise to claims (*AP 1045/04* of 17 November 2005, paragraph 50). By applying this practice to the case at hand, which is of obligatory and legal character, the Constitutional Court infers that the appellant has a protected „civil right" only in the event that the law makes it possible for the appellant to unconditionally acquire certain property (legitimate expectations) through the conclusion of legal business. The Constitutional Court is entitled to examine whether the decisions of the courts are correct or not in this regard. If the Constitutional Court accepts an opposite interpretation according to which the demands for the protection of the rights under the law of obligations would be considered as *rationa materiae* inadmissible within the meaning of Article 1 of Protocol No. 1 to the European Convention as they are directed at acquiring property and not at protecting the existing property, the Constitutional Court would significantly and unjustifiably reduce the margin of appreciation of Article 1 of Protocol No. 1 to the European Convention since in that case a single „turnover of property and property rights" through obligatory-legal

relationship would not be protected. Consequently, Article II(3)(e) of the Constitution of Bosnia and Herzegovina, i.e. Article 6 of the European Convention would not be *ratione materiae* applicable. That is not the meaning of the right to protection of property or right to a fair trial.

35. Nevertheless, the Constitutional Court reiterates that in such cases a border line requiring application of Article 1 of Protocol No. 1 to the European Convention is the moment when one side may ascertain that legal regulations make it possible for the property to be acquired. Finally, while examining the „lawfulness", the Constitutional Court is limited to correct application of law rather than interpretation. The Constitutional Court is not called upon to review the establishment of facts or interpretation and application of law by the lower courts, unless it was done in an arbitrary manner, in other words if some of the appellant's constitutional rights were violated in that manner (see the Decision of the Constitutional Court no. *U 29/02* of 27 June 2003 published in the *Official Gazette of Bosnia and Herzegovina* no. 31/03).

36. While applying the results of the examination to the instant case, the Constitutional Court infers that appellant Mr. Tunjo Krištić is protected by Article 1 of Protocol No. 1 to the European Convention in connection with the issue whether he was entitled to execute the agreement on purchase and sale of shares (i.e. whether he acquired the property,) which was challenged by the courts. In view of the aforesaid, the issue is about the assertion that the courts challenged his „civil right" acquired under the law within the meaning of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention.

A.2. Arbitrariness in decision-making

37. The Constitutional Court reiterates that, in general terms, it is not called upon to review the establishment of facts or interpretation and application of the law by the lower courts, unless the lower courts' decisions are in violation of the constitutional rights. This is the case if in an ordinary court's decision disregarded or wrongly applied the constitutional rights of the individual, including the cases where the application of the law was obviously arbitrary, where the applicable law was in itself unconstitutional or where fundamental procedural rights (fair trial, access to court, effective remedies etc.) were violated (see the Decision of the Constitutional Court no. *U 29/02* of 27 June 2003, paragraph 23, published in the *Official Gazette of Bosnia and Herzegovina* no. 31/03).

38. Arbitrariness in application of relevant regulations can never result in a fair trial (see Decision of the Constitutional Court *AP 1293/05* of 12 September 2006, paragraph 25 *et*

seq). Accordingly, as to the instant case, the task of the Constitutional Court is to examine whether the ordinary courts applied the relevant law provisions in an arbitrary manner.

39. The arguments of ordinary courts are that the mentioned agreement was inconsistent with Article 39 paragraph 2 of the Law on Securities as the shares of „Polirond" d.d. Orašje were not registered with the Commission. The Constitutional Court reiterates that the company was registered with the Commission only on 6 February 2003. The Law on Securities that provided for this obligation entered into force as early as in 1998. Moreover, in order for the securities to be registered, the relevant data on the securities should be entered into the Register which was established by the Law on Register of Securities, which also entered into force in 1998 (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 39/98). The essential purpose of these provisions and public interest incorporated therein is to regulate the conditions and method of securities' issuance of and trading with securities, the supervision of securities' issuance and trading in accordance with law and protection of investors (Article 11 of the Law on the Securities Commission) (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 39/98 and 36/99). Before the Rulebook on the conditions and procedure of purchase and sale of securities of the Commission) (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 30/01, 67/02, 31/03 and 26/05) entered into force, it was also possible to transfer the securities outside the stock exchange based on the Law of Obligations although the securities had to be registered with the Commission. Since the time this Rulebook entered into force the trading with securities have been conducted through the stock exchange, which is a market specifically organized to serve this purpose. Further, pursuant to Article 133, before entering into force, the Law on Securities recognized the issued securities since the mentioned securities had been issued through public tender. Pursuant to Article 134, the Law on Securities also recognized the shares that had been issued in the procedure of privatization of companies given that those securities had been issued through public tender. Within a year of the date when the Law on Securities entered into force these securities had to be deposited with the Register in accordance with Article 5 of the Law on the Securities.

40. While applying these provisions to the instant case, the Constitutional Court considered that it concerned the securities, i.e. the shares of the company „Polirond" d.d, which were fully valid. Furthermore, applicant Mr. Tunjo Krištić concluded the legal business in accordance with the Law of Obligations at the time when the Law on Securities was formally and legally applicable. Given the fact that at that time the Rulebook on the Conditions and Procedure of Purchase and Sale of Securities of the Commission was not applicable, it is established that in the proceedings before the ordinary courts the manner

in which it was done was not disputable (purchase and sale agreement and endorsement), but rather that the subject of the agreement was disputable (the shares which should not have been traded given that the „Polirond" d.d was not registered with the Commission nor were the data of the securities entered into the Register).

41. However, the Constitutional Court observes that despite the fact that as early as 1998, the Law on the Securities Commission had established the commission formally and legally and that the Law on the Registry of Securities had established the Register, these two institutions were not *de facto* established until the mid of 2000 or 2001. The laws did not contain provisions which would regulate the manner of application of law until the creation of conditions, in other words until the creation of institutional-legal frame for its implementation. This practically means that the Law on Securities was supporting the trading in securities by the papers which were not registered with the Commission and no relevant data were entered in the Register since those institutions did not exist at that time. This further means that the State failed to provide the conditions for satisfying public interest under paragraph 34 of this decision as the laws were not enforceable. Given this interpretation, the Constitutional Court reached a conclusion that the Law on Securities „blocked" the trading in securities, including the possibility for acquiring them.

42. The obstruction in trading in securities during the period from 1998 to 2001 (until the time the conditions were created for the implementation of law and acting in accordance with law regulations) as a „consequence" of meeting the public interest that was sought to be achieved by the provisions stipulating an obligation for the issuers and owners of securities to be registered with the Commission, i.e. the Registry, should not be of higher importance than the public interest of State to get trading in securities conducted and regular functioning. Trading in securities constitutes an important element of the constitutional freedom relating to „capital turnover" (compare Attachment 1, Nomenclature for the Capital Turnover, Article 1 of the Council's Directive no. 88/361/EEC of 24 June 1988) within the meaning of Article I(4) of the Constitution of Bosnia and Herzegovina which must be „fully" respected by the State at all levels. The restriction of this freedom, such as previously mentioned „blockade of turnover" must be considered as of priority importance in order to be acceptable within the meaning of the „principle of public interest" and „principle of proportionality". However, when it comes to the case at hand, the Constitutional Court considers that the legal interest under paragraph 34 of this decision is indeed the public interest of the State but it is not proportional when compared with other public interest, which is at the same time the existing interest – functioning of securities trading. This is particularly true given that the former method of trading in securities was not lacking lawfulness, public supervision or full transparency regardless of the fact that a central institution has not been established yet.

43. *In conclusio,* the Constitutional Court finds that the ordinary courts were interpreting the law in an overly formal manner and that they failed to analyse it in a systematic and target-oriented manner and that they failed to take into their consideration the constitutional standards under the catalogue of human rights and freedoms. By failing to do so they placed an excessive burden on all physical and legal persons, including the State as an economic entity participating on a free market. Such formal approach to the interpretation may be defined as arbitrary which caused the proceedings to be unfair.

44. In view of the aforesaid, the Constitutional Court concludes that in the instant case the challenged judgments violated the right of appellant Mr. Tunjo Krištić to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention.

B. Right to property

45. However, the Constitutional Court considers that the instant case should also be examined in connection with 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, which reads:

Article II(3)(k) of the Constitution of Bosnia and Herzegovina:

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:

(...)

k) The right to property;

Article 1 of Protocol No. 1 to the European Convention:

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.

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.

46. As to the part of this decision concerning the determination of „civil right" of appellant Mr. Tunjo Krištić, the Constitutional Court has already noted that the appellant has a property interest which is safeguarded under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

47. The European Court of Human Rights considers that Article 1 of Protocol No. 1 to the European Convention „guarantees the right to property" and „contains three distinct rules". The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule, set out in the second paragraph recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose (see, the Constitutional Court of Bosnia and Herzegovina, Decision no. *U 3/99* of 17 March 2000, published in the *Official Gazette of Bosnia and Herzegovina* no. 21/00). The second and third rule are related to special instances of interference with the right to peaceful enjoyment of property (see, the European Court of Human Rights*, Scollo vs. Italy,* judgment from 1995, Series A, no. 315, paragraph 26). If a measure or a failure to undertake an adequate measure negatively affects ownership and if the relevant taking of action or failure to take an action are outside the scope of the second or third rule, it must be established whether the first rule was violated and for this reason it must be determined „whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, the European Court of Human Rights, *Sporrong and Lönnroth vs. Sweden*, judgment of 23 September 1982, Series A, no. 52, paragraph 69).

48. As to the instant case, the courts adopted a decision whereby the appellant was deprived of his right to have the agreement on purchase and sale of shareholders rights executed. Accordingly, taking into account the previous quote and following the meaning of the second sentence of the first paragraph, the courts deprived the appellant of his property.

49. Any interference with the right pursuant to either the second or third rule must be provided for by law, to serve a legitimate aim, and strike a fair balance between the right of the right holder and the public or general interest (principle of proportionality). In other words, an interference, to be justified, must not only be imposed by a legal provisions which meets the requirements of the rule of law and serves a legitimate aim in the public interest, but must also maintain a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The interference with the right to property must go no further than necessary to achieve the legitimate aim, and a holder of the right must not be subjected to arbitrary treatment, or be required to bear an excessive burden in pursuit of the legitimate aim. Interference is lawful only if the law that is the basis for the interference is (a) accessible to the citizens, (b) so precise to enable citizens

to determine their behaviour, (c) in accordance with the rule of law principle, meaning, the margin of appreciation given to the executive authorities must not be without any restrictions, i.e. the law must secure to the citizens the adequate protection against the arbitrary interference (see European Court of Human rights judgement, *Sunday Times,* of 26 April 1979, Series A, no. 30, paragraph 49; see, also, European Court of Human Rights, judgment *Malone,* of 2 August 1984, Series A, no. 82, p. 67 and 68).

50. In determining whether Article 1 of Protocol No. 1 to the European Convention was respected in the course of depriving the appellant of his property, the Constitutional Court will first examine whether the principle of lawfulness was complied with. However, the Constitutional Court considers that it is not necessary to conduct this examination and repeat the reasons which go in support of the fact that the challenged decisions were not lawful as they have been already stated in the part of the Decision dealing with the arbitrariness of application of the relevant provisions and fairness of trial (see paragraph 37 and ff). Accordingly, the Constitutional Court concludes that the competent courts „unlawfully" interfered with the appellant's right to acquire the right to shares in a way that they deprived him of that right and they did so by the arbitrary application of the relevant provisions. Therefore, the opinion of ordinary courts given in the challenged judgments cannot be accepted because, in such a case, appellant Mr. Tunjo Krištić would bear an excessive burden because he would not be able to exercise his right to shares which he had previously purchased.

51. Therefore, the Constitutional Court considered that by the challenged Judgment of the Municipal Court in Orašje no. P-578/04 of 31 May 2005, which was upheld by the Judgment of the Cantonal Court in Odžak no. Gž-109/05 of 12 May 2006, the right of appellant Mr. Tunjo Krištić 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 was violated.

C. Other allegations

52. Taking into consideration the conclusions in connection with Article II(3)(e) of the Constitution of Bosnia and Herzegovina, i.e. Article 6 to the European Convention and Article II(3)(k) of the Constitution of Bosnia and Herzegovina, i.e. Article 1 of Protocol No. 1 to the European Convention, the Constitutional Court is of the opinion that it is not necessary to consider the allegations about a violation of the appellant's right to private and family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina, i.e. Article 8 to the European Convention nor the allegations about a violation of the right to non-discrimination under Article II (4) of the Constitution of Bosnia and Herzegovina.

D. As to the appeal of Mr. Božo Lukačević

53. Taking into account the conclusions of the Decision as regards the appeal of Mr. Tunjo Krištić, the Constitutional Court considers that the legal interest of appellant Mr. Božo Lukačević is not valid and that it requires the examination of appeal no. AP 2195/06 since the examination of lawfulness and the constitutionality of removal of the consequences caused by the act of declaring the agreement null and void may no longer be the subject of discussion before the Constitutional Court. In view of Article 65(1) item 4 of the Constitutional Court's Rules according to which the Constitutional Court shall take a decision on terminating the proceedings when during the proceedings it establishes that it would be irrelevant to proceed with further procedure, the Constitutional Court decided as set out in the enacting clause of this decision.

VIII. Conclusion

54. *In conclusio,* the agreement on purchase and sale of the securities, i.e. the shares of the company „Polirond" d.d., which was validly concluded during the period when the laws on the securities, on the Securities Commission and Registry of Securities could not have been implemented as the State had failed to ensure the institutional conditions for their implementation, must be realized since regular trading in securities, as an expression of disposal with own property on the one hand and the investment on the other, is more important than the achievement of public interests incorporated in those laws through a full blockade of trading until the conditions are created for the enforcement of the mentioned laws.

55. Pursuant to Article 61 (1) and (2) and Article 64(2) of the Rules of the Constitutional Court, the Constitutional Court decided on the merits of the case as set out in the enacting clause of this decision. Namely, given that the facts of the case are indisputable and that the dispute is related to proper interpretation of relevant law regulations in accordance with the standards of human rights and freedoms, which the Constitutional Court had given in this decision and, in particular, taking into account the cost-effectiveness of the proceedings and principle of „reasonable length of the proceedings", the Constitutional Court shall not refer the case to the ordinary court for the renewal of the proceedings but it will enforce this decision directly. Accordingly, the case is hereby concluded.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. AP 1524/06

DECISION
ON ADMISSIBILITY
AND MERITS

Appeal of Mr. Dževad Turkanović against the judgment of the County Court in Banja Luka no. U-188/05 of 10 March 2006, the Ruling of the Ministry of Refugees and Displaced Persons of the Republika Srpska no. 05-050-01-31/05 of 4 January 2005 and the Conclusion of the Ministry of Refugees and Displaced Persons of the Republika Srpska, Department Banja Luka no. I-08-3426/01 of 26 November 2003

Decision of 8 November 2007

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 64(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), in Grand Chamber composed of the following judges:

Ms. Hatidža Hadžiosmanović, President

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Mato Tadić

Ms. Seada Palavrić

Having deliberated on the appeal of Mr. **Dževad Turkanović** in Case no. **AP 1524/06**, at its session held on 8 November 2007 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Dževad Turkanović is hereby granted.

A violation of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The judgment of the County Court in Banja Luka no. U-188/05 of 10 March 2006, the Ruling of the Ministry of Refugees and Displaced Persons of the Republika Srpska no. 05-050-01-31/05 of 4 January 2007 and the Conclusion of the Ministry of Refugees and Displaced Persons of the Republika Srpska, Department Banja Luka, no. I-08-3426 of 26 November 2003 are hereby quashed.

It is ordered to the first instance body, the Ministry of Refugees and Displaced Persons of the Republika Srpska, Department Banja Luka, to enforce the CRPC Decision no. 634-173-1/1 of 9 September 1999 and inform the Constitutional Court of Bosnia and Herzegovina of the measures taken in order to enforce this Decision, within 90 days from the date of

delivery of this Decision, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 25 May 2006, Mr. Dževad Turkanović („the appellant") from Karlshamn-Sweden, represented by Mr. Zlatan Ljubljanac, a lawyer practicing in Gradiška, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the County Court in Banja Luka („the County Court"), no. U-188/05 of 10 March 2006, the Ruling of the Ministry of Refugees and Displaced Persons of the Republika Srpska („the second instance administrative body") no. 05-050-01-31/05 of 4 January 2005 and the Conclusion of the Ministry of Refugees and Displaced Persons of the Republika Srpska, Department Banja Luka, („the first instance administrative body") no. I-08-3426/01 of 26 November 2003.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 1 June 2006, the County Court as well as the second instance and first instance administrative bodies were requested to submit their replies to the appeal.

3. The County Court submitted its reply on 19 June 2006 and the first instance administrative body submitted its reply on 22 June 2006. The second instance administrative body, however, did not submit its reply to the appeal.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal of the County Court and the first instance administrative body were communicated to the appellant on 31 March 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. The Decision of the Commission for Real Property Claims of Displaced Persons and Refugees („CRPC") no. 634-173-1/1 of 9 September 1999 confirmed the appellant's occupancy right over an apartment in Banja Luka, Ulica sestara i braće Kapor no. 17. According to the appellant's allegation and the submitted envelope in which the appellant received the decision, this decision was sent by CRPC to the appellant on 13 October 2000, while it was delivered to him on 17 July 2001.

7. Having received the decision, more specifically on 31 August 2001, the appellant filed a request for its enforcement to the first instance administrative body, which rejected the request as filed untimely by its Conclusion no. I-08-3426/01 of 26 November 2003. This body invoked Article 5(2) of the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees (*Official Gazette of RS* nos. 31/99, 39/00 and 65/01) determining that the request for enforcement of a decision confirming occupancy right may be submitted within 18 months from the date when the decision was taken, pursuant to which the appellant was five months overdue in submission of his request, counting from 9 September 1999, when CRPC took its decision recognizing the appellant's occupancy right.

8. The appellant filed complaint against the aforesaid conclusion, but the second instance administrative body dismissed his complaint as ill-founded by the Ruling no. 05-050-01-31/05 of 4 January 2005. This body upheld the position of the first instance administrative body, also invoking the provision of Article 5(2) of the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees („the Law").

9. Deciding about the appellant's action by which he initiated the administrative dispute to challenge the legality of issued acts, the County Court issued the Judgment no. U-188/05 of 10 March 2006 dismissing it, with the same reasoning as that offered by the administrative bodies in the two preliminary proceedings.

IV. Appeal

a) Statements from the appeal

10. The appellant considers that the administrative bodies as well as the County Court should have counted in their decisions the time-limit for submitting the request for implementation of the CRPC decision from the day he had received the decision in question because it was the day when he learned about it. Thus, he could not have reacted earlier. Appellant finds that in such a manner of deciding, without taking into account that

it was not his fault the decision had not been delivered within the time-limit specified by the Law, has 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 for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), his right to a home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and his 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.

b) Response to the appeal

11. The County Court upheld in its response the position taken in its decision that the only possible solution in this case was such decision, given the clearly specified legal provisions.

12. The second instance administrative body also pointed out in its reply that, in this case, the only possible solution was to reject the appellant's request, given the fact that the prescribed time-limit for filing the request for enforcement was 18 months from the date the CRPC decision had been issued.

V. Relevant Law

13. The **Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees** (*Official Gazette of RS* no. 31/99):

Article 5(2)

The request for enforcement of a decision of the Commission confirming occupancy rights must be submitted within one year from the date when the Commission decision was issued, or for decisions issued before this Law entered into force, within one year from the entry into force of this Law.

14. The **Law on Amendments to the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees** (*Official Gazette of RS* no. 65/01):

Article 5(2)

The request for enforcement of a decision of the Commission confirming occupancy rights must be submitted within eighteen months from the date when the Commission decision was issued.

VI. Admissibility

15. 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.

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

17. In the present case, the subject of the appeal is the Judgment of the County Court no. U-188/05 of 10 March 2006. This Judgment was issued in the proceedings to enforce the CRPC decision. The Constitutional Court has repeatedly reasoned that the rights and freedoms as guaranteed under the Constitution of Bosnia and Herzegovina do not, in principle, apply in the enforcement procedure, unless in that procedure „new" determination of constitutional rights and freedoms occurs (see the Constitutional Court, Decision no. *U 21/02* of 26 March 2004, item 40, *Official Gazette of Bosnia and Herzegovina* no. 18/04). Since the appellant's right to restitution of his property as established by the CRPC decision is being challenged in the enforcement proceedings by application of Article 5(2) of the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees, the Constitutional Court finds the appeal *ratione materiae* admissible.

18. Furthermore, there are no other effective remedies available under the law against the Judgment of the County Court no. U-188/05 of 10 March 2006. The appellant received the challenged judgment on 27 March 2006 and the appeal was filed on 25 May 2006, *i.e.* 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 of Article 16(2) and (4) of the Rules of the Constitutional Court since it is not manifestly (*prima facie*) ill-founded and there are no other formal reasons for which the appeal might be inadmissible.

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

VII. Merits

20. The appellant challenges the aforementioned judgment, ruling and conclusion, alleging that they violate his rights under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention, as well as Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

A. Right to property

21. Article II(3)(k) of the Constitution of Bosnia and Herzegovina reads:

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:

(...)

The right to property.

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

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

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.

23. First of all, the Constitutional Court reiterates that the case in question concerns non-enforceability of the CRPC decision confirming the appellant's occupancy right and his right to return of property. In view of that, the Constitutional Court notes its case-law according to which occupancy right constitutes proprietary interests *sui generis* which are an economic value (see the Constitutional Court, Decision no. *U 8/99* of 5 November 1999, published in the *Official Gazette of Bosnia and Herzegovina* no. 24/99), thereby constituting property in terms of Article 1 of Protocol No. 1 to the European Convention, thus making Article 1 of Protocol No. 1 to the European Convention applicable in this case.

24. The Constitutional Court, further, recalls that Article 1 of Protocol No. 1 to the European Convention contains three distinct rules. First rule, contained within the first

sentence of the first paragraph, is of general nature specifying the principle of the peaceful enjoyment of possession. Second rule, contained within the second sentence of the same paragraph, determines that deprivation of possessions may only occur under certain conditions. Third rule, contained within paragraph 2 of the same Article, specifies the right of a State to, *inter alia*, control the use of property in accordance with the general interest. All three rules are interconnected and not in contradiction amongst themselves, while the second and third rules relate to specific cases of interference by the state in the right to the peaceful enjoyment of possession (see the European Court of Human Rights, *Holy Monasteries vs. Greece*, judgment of 9 December 1994, Series A, no. 301-A, paragraph 51).

25. By applying these rules to the present case, the Constitutional Court concludes that the Supreme Court in its final decision did „interfere" with the appellant's right to property, in terms of „depriving" him of that right because the appellant, on account of expiration of the time-limit prescribed in Article 5(2) of the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees, lost his right to have the CRPC decision enforced. In view of that, the Constitutional Court is obliged to examine whether this interference pursuant to the second rule contained in Article 1 of Protocol No. 1 to the European Convention is provided by the law, serving a legitimate aim, it strikes a fair balance between the holder of the right and the public and general interest. In other words, justified interference may not only be imposed by a legal provision meeting the requirements of the rule of law and serving the legitimate aim in public interest but it also has to maintain a reasonable relationship of proportionality between the means employed and the aims sought to be realized. Interference must not go further than necessary in order to achieve the legitimate aim, while the holder of the right must not be subjected to arbitrary treatment or forced to bear excessive burden in pursuance of a legitimate aim (see the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits CH/00/3559, *Smajo Dizdar vs. the Federation of Bosnia and Herzegovina*, 8 and 9 March 2005, paragraph 50).

1. Legality of interference

26. Interference is only legitimate if the law serving as the basis for interference is (a) accessible to citizens, (b) formulated with sufficient precision to enable citizens to regulate their conduct, (c) in accordance with the principle of the rule of law, which means that the freedom to decide given by law to the executive authorities must not be unlimited, *i.e.* there must be a measure of legal protection against arbitrary interferences (see the European Court of Human Rights, *Sunday Times vs. The United Kingdom*, judgment of 26 April 1979, Series A, no. 30, paragraph 49; see, also, the European Court of Human Rights, *Malone*, judgment of 2 August 1984, Series A, no. 82, paragraphs 67 and 68).

27. Administration bodies, in deciding to reject the request for enforcement of the CRPC Decision, invoked Article 5(2) of the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees, which reads:

The request for enforcement of a decision of the Commission confirming occupancy rights must be submitted within eighteen months from the date when the Commission decision was issued.

28. The Constitutional Court notes that this Law has been published in the *Official Gazette of RS* and, as such, accessible to everyone. Furthermore, the linguistic meaning of this provision is clear and precise: the time-limit starts running from the date of the issuance of the decision and lasts for 18 months. This means that the Law imposes an obligation upon the parties with legal interest to initiate the procedure of enforcement of a CRPC decision within 18 months.

29. On the basis of the aforesaid, the Constitutional Court concludes that the interference has been lawful and that the law meets the formal requirements as stipulated by the principle of legality.

2. Existence of a public interest

30. The European Court of Human Rights established that the national authorities enjoy a wide margin of appreciation in taking decisions related to deprivation of property of individuals due to their direct knowledge of the society and its needs. The decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. Therefore, the legislature's judgment will be respected unless that judgment be manifestly without reasonable foundation (see the European Court of Human Rights, *James and others*, judgment of 21 February 1986, Series A, no. 98, paragraph 46).

31. Setting of legal time-limits within which citizens may realize their rights and obligations is, in principle, in public interest, primarily in respect of the protection and implementation of the principle of the rule of law and legal certainty. Namely, it is in the state's interest that legal relations are conducted within specific time-limits or maintained if there are no legal or factual changes within a certain period of time. In that respect, time-limits act as a kind of inherent limitation to realization of constitutional rights and obligations, *i.e.* freedoms (cf. the Constitutional Court, decisions nos. *AP 1/03* of 15 June 2004, item 26; *U 71/03* of 15 June 2004, item 29; *U 49/02* of 28 November 2003, item 38 ff.). In addition, given that those decisions are related to the return of property, the state has an interest to have those decisions enforced as soon as possible in order to comply with

the goals set in Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina and restore the situation as it was before the war in Bosnia and Herzegovina.

3. Principle of proportionality

32. The Constitutional Court has already highlighted that the disputable legal solution has to reflect a reasonable relationship of proportionality between the means employed and the aims sought to be achieved. Interference must not go further than necessary in order to achieve the legitimate aim, while the holder of the right must not be subjected to arbitrary treatment or forced to bear excessive burden in pursuance of a legitimate aim (see item 25 of this Decision). Accordingly, it is necessary, in the present Decision, to provide an answer to the question whether Article 5(2) of the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees is subjecting the appellant to such treatment as to impose upon him excessive burden in pursuance of a legitimate aim.

33. The Constitutional Court emphasizes that legal provisions regulating time-limits have to genuinely offer a possibility to a citizen to realize his or her specific right, while the expiry thereof means the loss of the possibility to realize that right. Such time-limit must be realistic.

34. This condition has been met in any case when on the day of issuance of the CRPC decision until the day of its delivery enough time remained for the appellant to be able to initiate the proceedings for enforcement. In this case, however, the decision was issued on 9 September 1999, while the CRPC sent it to the appellant on 13 October 2000; thus after the expiry of the 13-month time-limit from the day of its issuance. The appellant received it and actually learned about its existence on 17 July 2001; thus after the expiry of the 18-month time-limit from the day of its issuance. Accordingly, the appellant's right to request the enforcement of the decision recognizing his occupancy right, and given that he has received the decision, as he claims, after the expiry of the legal time-limit within which he could have realized his right, is illusory because the appellant could not have known when the decision had been issued if it had not been delivered to him, *i.e.* if he has not been given the opportunity to learn about the issuance of the decision deciding about his right in any other manner, guaranteed by legal provisions.

35. In the present case, the appellant has not learned about the issuance of the decision within the time-limit as specified by the Law. Although it remains unclear why did the CRPC send the issued decision only 13 months subsequent to its issuance or why was the decision being delivered during the next nine months, the fact is that the appellant,

due to the legal formulation of the time-limit for statute of limitation on account of other people's actions and failures to act of which he could not have been aware or in position to exert any influence over, lost the possibility to realize his property claim. Therefore, the appellant was, as any other citizen in such or similar situation, left to the arbitrary conduct of the officials of the bodies of administration and the post office, *i.e.* their rights depend upon the system of operation of those bodies and the disposition of those bodies in respect of taking actions necessary to deliver decisions to the interested persons in due time or, rather, they depend on *force majeure* and chance, which is all together incompatible with the principles of the rule of law, legal certainty and disposition to decide about one's own rights (whether to initiate or not the enforcement procedure for repossession of an apartment), which would in this case constitute the appellant's public interest.

36. In addition, the Constitutional Court notes that the formulation of the provision of Article 5(2) of the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees is quite unusual for the legal system in Bosnia and Herzegovina for a very simple reason. Namely, at the moment of issuance of a decision (or its pronouncement), the decision becomes relevant to the institution that issued it. However, by contrast to this institutional finalization of the concrete case, the „outwards" impact of an individual act, determining specific rights or duties of an individual, may not commence unless it has been delivered to the party concerned (for example, the time-limit for appeal is not running). If such decision is a final one, the formal legal validity of that act may not come into effect unless the delivery thereof takes place. Accordingly, such formulation of the provision is inconsistent with the institute of effect of a legal act on the parties, *i.e.* the institute of the formal validity of an act, depending on whether it is a final act or not.

37. On the basis of everything aforementioned, the Constitutional Court concludes that, in the present case, there has been a violation of 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.

B. Other allegations

38. In the light of the aforesaid and in relation to the violation of 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 Constitutional Court holds that it is not necessary to specifically consider the appellant's allegations in respect of the violation of 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, as well as Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

VIII. Conclusion

39. In the present case, there has been an interference with the appellant's right to property, in terms of his deprivation based upon Article 5(2) of the Law on Amendments to the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees (*Official Gazette of RS* no. 65/01), pursuant to which a request for the enforcement of a CRPC decision confirming occupancy right and allocating the right to restitution of an apartment must be submitted within the time-limit of 18 months from the day of issuance of the CRPC decision. The Constitutional Court considers that this legal provision does not meet the condition of the proportionality of public interest and the interest of a person finding him/herself in a situation like the applicant did; therefore there is a violation of 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.

40. Having regard to Article 61(1) and (2) and Article 64 (2) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this Decision.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. AP 840/06

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Z.K. against the Ruling of the Cantonal Court of Novi Travnik no. Gž-779/05 of 8 December 2005 and Ruling of the Municipal Court of Travnik no. P-63/03 of 24 August 2005

Decision of 25 January 2008

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(2), Article 59(2)(2), Article 61(1) and (2) and Article 64 (1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), in Plenary and composed of the following judges:

Ms Hatidža Hadžiosmanović, President,

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Mato Tadić,

Mr. Tudor Pantiru,

Ms. Constance Grewe,

Ms. Seada Palavrić,

Mr. Krstan Simić

Having deliberated on the appeal of **Z.K.** in case no. **AP 840/06**, at its session held on 25 January 2008 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Z. K. is partially granted.

A violation of Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Ruling of the Cantonal Court of Novi Travnik no. Gž-779/05 of 8 December 2005 and Ruling of the Municipal Court of Travnik no. P-63/03 of 24 August 2005 are hereby quashed.

The Municipal Court of Travnik is ordered to employ an expedited procedure and take a new decision in line with Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Municipal Court of Travnik is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 3 months as from the date of delivery of this Decision, about the measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal lodged by Z.K. against the Ruling of the Cantonal Court of Novi Travnik no. Gž-779/05 of 8 December 2005 and Ruling of the Municipal Court of Travnik no. P-63/03 of 24 August 2005 in relation to Article II(3)(g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is rejected as inadmissible for being manifestly (*prima facie*) 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 Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 16 March 2006, Z.K. („the appellant"), from Vitez, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Ruling of the Cantonal Court of Novi Travnik („the Cantonal Court") no. Gž-779/05 of 8 December 2005 and Ruling of the Municipal Court of Travnik („the Municipal Court") no. P-63/03 of 24 August 2005. The appellant also requested the Constitutional Court to impose an interim measure whereby it would prevent the enforcement of the Ruling of the Cantonal Court, no. Gž-779/05 of 8 December 2005 pending a decision on the merits by the Constitutional Court.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22 (1) and (2) of the Rules of the Constitutional Court, the Cantonal Court and the Municipal Court were requested on 16 March 2006 to submit their replies to the appeal.

3. The Municipal Court submitted its reply to the appeal on 9 July 2007. The Cantonal Court submitted its reply to the appeal on 16 July 2007.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 22 August 2007.

5. The Constitutional Court adopted Decision no. *AP 840/06* of 23 March 2006, whereby it dismissed the appellant's request for interim measure as ill-founded.

III. Facts of the Case

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

7. By the Ruling of the Municipal Court, no. 63/03 of 24 August 2005, which was upheld by the Ruling of the Cantonal Court, no. Gž-779/05 of 8 December 2005, the appellant was fined 200.00 KM for, as concluded by the court, insulting the court in his submission addressed to the Municipal Court on 16 August 2005, wherein he stated that *he has clear suspicions that Judge Milica Vukić and Prosecutor Meho Bradić were involved in corruption for which reason he filed criminal charges against them.* Moreover, in his submission the appellant stated that *given the fact that two of them work in the High Judicial and Prosecutorial Council, a person living under the conditions prevailing in our country may get sick, insane or even die until he starts exercising his legitimate rights*.

8. The ordinary courts found that this kind of communication with the court exceeded the limits of usual communication between the parties and the court and that it constituted disrespect for both the respective judge/prosecutor and the court as a whole. Therefore, the court found that it would be necessary to fine the appellant KM 200.00 as stipulated under Article 407 paragraph 1 of the Civil Procedure Code of the Federation of Bosnia and Herzegovina (*Official Gazette of Federation of BiH* no. 53/03).

IV. Appeal

a) Statements from the appeal

9. The appellant complains of a violation of his right to freedom of thought, conscience and religion under Article II(3)(g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), as well as his right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of

the European Convention. He claims that his rights were violated because he was fined for expressing doubt in objectivity of the court. He alleges that he had justified reason for expressing his doubt in „correct, legal, professional and effective work of the court" which was deliberating on his case, and he is wondering that „he was punished for having suspicions." It is incomprehensible, as further alleged in the appeal, that the enforcement proceedings, by which the appellant is to be reinstated upon a legally binding judgment, take such a long time, in which way his human rights have been jeopardized.

b) Reply to the appeal

10. In reply to the appeal, the Municipal Court alleges that there was no violation of the right the appellant refers to since the court acted in accordance with Article 407 of the Civil Procedure Code of F BiH.

11. In reply to the appeal the Cantonal Court alleges that the appellant's rights to the freedom of thought, conscience and religion and right to freedom of expression were not violated by the challenged rulings. In his submission of 12 August 2005, the appellant stated that he „has clear suspicions that Judge Milica Vukić is corrupt". The Cantonal Court considers that this kind of communication of the party with the court exceeds usual communication which should be in place between a party and a court and that it constitutes an act of disrespect for both the judges and the court as a whole. Therefore, the court is of the opinion that it would be necessary to impose a fine on the appellant as stipulated under Article 407 of the Civil Procedure Code of F BiH.

V. Relevant Law

12. The **Civil Procedure Code of Federation BiH** (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 53/03) so far as relevant, reads:

Article 407, paragraph 1

The court shall impose a fine in the amount ranging from 100 up to 1,000 KM on a person who insults the court, a party or other participants in the proceedings.

Article 412

If a person, fined under the provisions of this law, fails to pay the fine within the set time limit, the fine shall be replaced by prison sentence the duration of which the court shall determine in accordance with the amount of fine and pursuant to the provisions of the Criminal Code, but not longer than fifteen (15) days.

VI. Admissibility

13. 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.

14. 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 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.

15. In examining the admissibility of the appeal in relation to the allegations about violations of the right to freedom, conscience and religion under Article II(3)(g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention, the Constitutional Court invoked the provisions under Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(2) of the Rules of the Constitutional Court.

16. Article VI(3)(b) of the Constitution of Bosnia and Herzegovina reads in relevant part as follows:

The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution.

Article 16(2) of the Rules of the Constitutional Court reads in relevant part as follows:

The Constitutional Court shall reject an appeal as being manifestly (prima facie) ill-founded when it establishes that the request of the party to the proceedings is not justified or when the presented facts do not in any way justify the allegation of a violation of the constitutional rights and/or when the Constitutional Court establishes that the party to the proceedings is not a „victim" of a violation of the constitutional rights, so that the examination of the merits of the appeal is superfluous.

17. At the stage of examining the admissibility of the appeal, the Constitutional Court must establish, *inter alia*, whether the requirements that were enumerated in Article 16(2) of the Rules of the Constitutional Court are met for taking a decision on merits. In this regard, the Constitutional Court outlines that according to its jurisprudence and the case-law of the European Court of Human Rights („the European Court") the appellant must point to the 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 are 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 156/05* of 18 May 2005) and if the facts in which regard 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. 5503/02), as well as when it is established that the party to the proceedings is not a „victim" of a violation of the constitutional rights.

18. Article 9 of the European Convention guarantees the right to freedom of thought, conscience and religion and those are the most sensitive rights in a society as a whole since they tackle specific personal issues and thus make the basis for the concept of democratic freedoms. The manner in which an individual expresses himself/herself when addressing the court, which the court found to be allegedly insulting and that it is subject to a fine, cannot be associated with the rights safeguarded under the said Articles of the Constitution of Bosnia and Herzegovina and European Convention. Accordingly, as to the appellant's allegations that his right to freedom of thought, conscience and religion was violated, the Constitutional Court points out that from the allegations of the appeal a conclusion cannot be made that there is a justified request of the party to the proceedings in relation to the mentioned right, in other words that the presented facts in no way justify the statement that there is a violation of that right safeguarded by the Constitution and European Convention nor that the appellant is a „victim" of that violation. Therefore, the challenged rulings do not raise issues of violation of the mentioned right under Article II(3)(g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention due to which the allegations are manifestly *(prima facie)* unfounded.

19. In the case at hand, the subject challenged by the appeal is the ruling of the Cantonal Court no. Gž-779/05 of 8 December 2005, against which there are no other effective legal remedies available under the law. Furthermore, the appellant received the challenged ruling on 19 January 2006 and the appeal was lodged on 16 March 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 in relation to the allegations on violation of the right to freedom of expression under Article II3(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention because it is not manifestly (*prima facie*) ill-founded, nor is there any other formal reason that would render the appeal inadmissible.

20. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16 (1), (2) and (4) of the Rules of the Constitutional Court,

the Constitutional Court has established that the present appeal meets the admissibility requirements.

VII. Merits

21. The appellant contested the aforesaid rulings claiming that they violated his right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention.

The right to a freedom of expression

Article II(3)(h) 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:

(...)

h) freedom of expression

Article 10 of the European Conventions reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

22. The appeal at hand raises an issue whether the court, in the proceedings relating to the enforcement of legally binding judgment, justifiably fined the appellant for insulting the court by application of the provisions of Article 407 of the Civil Procedure Code of F BiH, in other words whether in this specific case the appellant's right to freedom of expression under Article 10 of the European Convention was violated.

23. Taking into account the case-law, the Constitutional Court considers that the regulations relating to this case represent criminal legislation by their nature. A clear

goal of this legislation is prevention of insult, slander, and undermining of reputation and dignity of the institution of court and holders of judicial functions, as well as the person of the participants to the court proceedings, which includes punishment of those who commit such an act. Establishing liability in this case is allegedly based on the fact that the appellant, in his submission to the court, gave a statement which the court found insulting to the person – as holders of judicial functions, for which reason a fine was imposed on him. Taking into account all relevant factors, the Constitutional Court concludes that the appellant is entitled to a full procedural protection guaranteed by the Constitution of Bosnia and Herzegovina, the European Convention and positive regulations.

24. The basic objection presented by the appellant in his appeal relates to the fact that his submission to the Municipal Court was unjustifiably considered as an insult and that it undermines the authority of the court. Therefore, according to Article 407 paragraph 1 of the Civil Procedure Code of F BiH, a fine was imposed on him due to insults directed against the court. After reading the case-file it becomes clear that the Municipal Court imposed a fine of 200 KM on the appellant making a conclusion that the letter sent by the appellant, whose content was presented in the facts of the case, is of an insulting nature and that it undermines the authority of the court. The Cantonal Court did not separately examine the appellant's allegations and the first instance court's findings relating to the insult since it accepted the reasons of the lower instance court as valid.

25. The Constitutional Court notes that the courts, while making conclusions and assessing the appellant's letter, failed to demonstrate a necessary level of impartially and objectivity considering it as an established fact that the appellant's text addressed to the court was of insulting in nature. The appellant stated that he had suspicions as to the impartiality of the court without pronouncing the explicit words having the meaning of insult. Furthermore, a mere suspicion cannot be taken as a legal fact sufficient to prove the intention of undermining the authority of the court. The jurisprudence of the European Court requires in similar situations the actions to be taken with extreme caution when assessing verbal statements and written submissions of the parties. The court shall not demonstrate any subjectivity based on personal opinion, neither shall it support any side or prejudice anything or express personal preconceptions of judges. That is the substance of the request for judicial impartiality, objectivity and lawful adjudication. The impartiality of the court is presumed unless it is proved otherwise. On the other hand, the court must be objectively impartial as to offering guarantees sufficient to exclude any legitimate doubt in this respect (see *Sander vs. United Kingdom*, Application no. 34129/96, paragraph 22, CEDEX 2000-V and *Piersack vs. Belgium*, Decision of 1 October 1982, Series A number 53, paragraph 30).

26. However, if all the allegations presented in the appellant's submission are taken into account, which were the reason for a fine being imposed on him, then it is obvious that the court disregarded the appellant's constitutional rights in the case at hand by applying the Civil Procedure Code to the facts which were neither objectively nor impartially established and which were based on *the expression of doubt* and not on the valid facts and evidence. By acting in this manner the court misapplied the law which is reflected in the fact that the appellants' allegations were assessed as an insult directed against the court, whereby the authority of the court was allegedly undermined. The Constitutional Court concludes that the words that the appellant addressed to the court in writing should not be taken as an insult since they were written with the aim of drawing the attention of the court to the fact that the procedure of decision's enforcement took too much time and, as such, these words do not undermine the authority of the court. Finally, the Constitutional Court notes that the proceedings at hand are specific for the fact that the court, which imposed the fine on the appellant, was the same court that had been allegedly insulted by the appellant's letter. That is a sufficient reason for expressing a justified doubt in the impartially of the court. The court shall not have any personal interests and reasons in adjudicating concrete facts nor is it authorized to assess whether certain words or text are offensive if those words or the relevant text are related to the said court. For these reasons, a court which has taken into account its personal feelings including a feeling of being offended, as well as an understanding in respect of whether the court itself was affected by the alleged insults addressed to the judges when assessing an insult, cannot be considered sufficiently impartial and objective (ECHR, *Kyprianou vs. Cyprus,* Decision of 27 January 2004, Application no. 73797/01, paragraphs 31-35). Moreover, it is obvious that the appellant was not given an opportunity to be heard before the second instance court with regards to the circumstances of the fined imposed in the first instance proceedings.

27. Hence, Article 10 paragraph 2 of the European Convention requires any violation of the right to freedom of expression to be „prescribed by law". The reason for this is that a person must have an opportunity to anticipate with certainty the consequences arising from his/her actions. This approach represents a protection against arbitrariness in imposing restrictions on the right to freedom of expression. The mentioned Article also provides that any restriction of the right to freedom of expression must be „necessary in a democratic society" for the purpose of protection of certain interests. These interests include, as referred to under Article 10 paragraph 2 of the European Convention, maintaining the authority and impartiality of the judiciary. Accordingly, even in situations where, for example, the goal is to protect the authority and impartiality of the judiciary, this restriction must be applied to the extent that is necessary in a democratic society. It means that the restriction

of a certain right must not exceed the limits of what is considered to be necessary in order to protect certain interest. A national legislation which would provide for unreasonably severe prison sentences or high amounts of fines for mild criticism of the court would not be probably considered by the court as a necessary measure in a democratic society and therefore it would not be allowed according to Article 10 paragraph 2 of the European Convention. It is substantially important that a certain goal is clear, which means that a State must be able to point to a reason of interference with a right and to explain in which way that interference contributed to achieving a certain goal, which, in this specific case, is „maintaining the authority and impartiality of the judiciary".

28. The Constitutional Court must consider the above interpretation and establish whether the appellant's constitutional right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention was violated. Taking into account that Article 10 of the European Convention has accepted the restrictions of freedom of expression in order to maintain dignity and the authority of the court, the Constitutional Court notes that the appellant's allegations in expressing the doubts about the impartiality of the judiciary should not be considered as an insult directed against the court since they were expressed within the limits of tolerance imposed by a democratic society.

29. The Constitutional Court notes that the ordinary courts failed to sufficiently analyze the content of the appellant's allegations. It is very difficult to establish, through linguistic or legal analysis, whether a specific text expressing a doubt about impartiality of the judiciary contains the allegations of insult whose aim is to undermine the authority of the court. Referring to speeding up the enforcement proceedings for it contains all elements necessary for legal action, even if given in the form of expressed doubt, does not offer a sufficient ground for making a conclusion that in the relevant text the appellant violated the right to freedom of expression and that he exceeded the limits set out under Article 10 paragraph 2 of the European Convention or that he insulted the court. Furthermore, imposing a fine on the appellant without giving him an opportunity to be heard means that he was deprived not only of the opportunity to present the facts and evidence in his favor, but it also means a disproportional interference with the protected freedom of expression which is guaranteed by the Constitution of Bosnia and Herzegovina and European Convention. Therefore, the Constitutional Court considers that in the case at hand the appellant's right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention was violated.

VIII. Conclusion

30. The appellant's right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention was violated in that the appellant's expression of doubt as to the impartiality of the court was considered as an insult against the court and undermining of its authority.

31. Having regard to Article 61(1) and (2) and Article 64(1) of the Rules of Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this Decision.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. AP 1107/06

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Radovan Milanović and Smilja Milanović against the failure to prosecute the violent death of their son Mr.Vladimir Milanović and torture they were exposed to during their imprisonment in the concentration camp on the territory of the municipality Visoko during the war which left permanent consequences in the form of impaired health status and disability of the appellants.

Decision of 27 February 2008

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1) and 4(15), Article 59(2)(1) and (2), Article 61(1) and 2 and Article 64(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), in Grand Chamber and composed of the following judges:

Ms. Hatidža Hadžiosmanović, President

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Ms. Seada Palavrić

Mr. Krstan Simić

Having deliberated on the appeal of Mr. **Radovan Milanović and** Ms. **Smilja Milanović** in case no. **AP 1107/06,** at its session held on 27 February 2008 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Radovan Milanović and Ms. Smilja Milanović is hereby granted.

A violation of the right to life under Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention for Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 6 to the European Convention for Protection of Human Rights and Fundamental Freedoms, as well as a right not to be subjected to inhuman treatment under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for Protection of Human Rights and Fundamental Freedoms is hereby established.

The Cantonal Prosecutor's Office of Zenica-Doboj Canton is ordered, in accordance with the positive obligation laid down in Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention for Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 6 to the European Convention for Protection

of Human Rights and Fundamental Freedoms, as well as Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for Protection of Human Rights and Fundamental Freedoms, to conduct an investigation on disappearance and violent death of the appellants' close relative in an expedited manner and without further delay as well as to inform the appellants on the results thereof.

The Decision of the Constitutional Court of Bosnia and Herzegovina shall be remitted to the Cantonal Prosecutor's Office of Zenica-Doboj Canton for enforcement within the meaning of Article 64(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The Cantonal Prosecutor's Office of Zenica-Doboj Canton is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within a time limit of six months from the date of delivery of this Decision, on the measures taken to enforce this Decision, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal of Mr. Radovan Milanović and Ms. Smilja Milanović lodged for compensation of pecuniary and non-pecuniary damages caused while held captives during the war, is hereby rejected as inadmissible for failure to exhaust legal remedies available under the law.

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 5 April 2006, Mr. Radovan Milanović and Ms. Smilja Milanović („the appellants") from Bijeljina, represented by their daughter Ms. Ranka Dabić from Banja Luka, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the failure to prosecute the violent death of their son Mr. Vladimir Milanović and torture they were exposed to during their imprisonment in the concentration camp on the territory of the municipality Visoko during the war which left permanent consequences in the form of impaired health status and disability of the appellants.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Constitutional Court requested the Cantonal Prosecutor's Office of Zenica-Doboj Canton („the Prosecutor's Office") on 28 August 2007 and the Public Utility Company „Gradska groblja" Visoko („the competent legal entity") on 27 December 2007, to submit their respective replies to the appeal.

3. The Prosecutor's Office submitted its reply on 24 September 2007. The competent legal entity submitted its reply to the appeal on 8 January 2008.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the response of the Prosecutor's Office was submitted to the appellants on 30 November 2007 and the reply of the competent legal entity was transmitted on 12 February 2008.

III. Facts of the case

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

6. The appellants allege that on 20 June 1992, on the territory of the Municipality Visoko, their son, Mr. Vladimir Milanović was killed as a civilian in the presence of a number of witnesses. They state that their son was wounded in the back by a gunshot and that three witnesses who tried to help him were brutally beaten, tied up with a wire and taken away to the concentration camp. On the same occasion the appellants were also captured and taken to the camp where they were physically and mentally harassed, starved, and, in all of that, they were deprived of medical aid which caused the permanent consequences in the form of impaired health status and disability.

7. On 21 June 1992, the competent legal entity took over the dead body of the appellants' son from the Regional Department of the Moštre Health Care Centre in Visoko. On that occasion a coroner made the Autopsy Record no. 44-SP/92 of 21 June 1992 where the diagnosis established that this involved a „violent death" and „most probably murder". A burial of the body was performed on 24 June 1992.

8. On 20 January 1996, the appellant filed a written request to the competent legal entity for exhumation of mortal remains of her son Mr. Vladimir Milanović.

9. Upon previously obtained consent of the competent legal entity, the mortal remains of the appellants' son were exhumed in the cemetery Visoko on 6 February 1996. The appellants allege that his body was buried in a sack and the skull was separated from it and wrapped in a sheet.

IV. Appeal

a) Allegations of the appeal

10. The appellants allege that they were subjected to inhuman treatment and great mental sufferings because of the violent death of their son in respect of which the competent authorities failed to initiate an investigation and establish circumstances of the occurrence, or to reveal and punish persons liable. In the course of imprisonment, as the appellants claim, they were subjected to the vast physical and mental pain, brutal maltreatment and torture which resulted in the permanent consequences; impaired health status and disability. They hold that the public authorities have violated their positive obligation to protect the life of their close relative as guaranteed by Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention for Protection of Human Rights and Fundamental Freedoms („the European Convention") and the right not to be subjected to inhuman treatment safeguarded by Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention.

b) Reply to the appeal

11. In its reply to the appeal, the Prosecutor's Office states that the official records were inspected and it was established that with regard to the death of the appellants' son, which allegedly occurred on 20 June 1992, no evidence on the case being received or prosecuted before the Prosecutor's Office existed. Moreover, the Police Administration Visoko has no records on the disputable event or any report on the murder concerned.

12. The competent legal entity stresses in its reply that, as the public company, it was established by the act of the then Municipality Assembly in 1984 for the funeral services as services of special social interest. It is also underlined in their reply that since the date of its establishment this company has performed its basic, funeral activity which, amongst other things, consists of taking over, transportation and burial of dead persons notwithstanding the cause of their death, as well as the organization and performance of coroner's services for the territory of the Municipality Visoko. The competent legal entity described in detail all the actions undertaken from the moment they took over the dead body of the appellants' son to the moment of exhumation and issuance of a permission for the transfer of his mortal remains for the burial in Bijeljina and appended the relevant documentation thereto. The competent legal entity especially indicated that, in the period between 1992 and 1995, the official persons from the competent investigatory bodies had been present to the examination of dead bodies in the case of possibility of violent death. The competent legal entity stresses in its reply to the appeal that the Constitutional

Court has a possibility to address the competent investigatory bodies for those actions and pieces of information that are not within the competencies, scope of operations and work description of the company.

V. Relevant Law

13. The **Criminal Procedure Code** (*Official Gazette of SFRJ* no. 26/86, 74/87, 57/89, 3/90 and 35/03) in the relevant part reads:

Article 18

The Public Prosecutor must undertake criminal prosecution if there is evidence that a crime has been committed which is automatically, ex officio, prosecuted.

Article 148

(1) All government bodies, associated labour enterprises and other self-managing enterprises and associations have a duty to report crimes which are automatically, ex officio, prosecuted of which they have been informed or which they have learned of in some other manner.

14. The **Criminal Procedure Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 43/98) in the relevant part reads:

Article 16

The competent prosecutor must undertake criminal prosecution if there is evidence that a crime has been committed which is automatically prosecuted.

Article 140

(1) Responsible officials of government bodies and agencies, the Ombudsmen of the Federation, public enterprises and public institutions have a duty to report crimes which are automatically prosecuted of which they have been informed or which they have learned of in some other manner.

15. The **Criminal Procedure Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 35/03) in the relevant part reads:

Article 18

The competent prosecutor must undertake criminal prosecution if there is evidence that a crime has been committed which is automatically prosecuted.

Article 228

(1) Official and responsible persons in all governmental bodies in the Federation, public companies and public institutions shall be bound to report criminal offenses of which they have knowledge, through information provided to them or learned by them in some other manner. Under such circumstances, the official and responsible person shall take steps to preserve traces of the criminal offense, objects on which or with which the criminal offense was committed, and other evidence, and shall notify an authorized official or the prosecutor's office without delay.

16. The **Criminal Code of the Federation of Bosnia and Herzegovina** *(Official Gazette of the Federation of Bosnia and Herzegovina* no. 35/03) in the relevant part reads:

Genocide and War Crimes as Criminal Offenses Not Subject to the Statute of Limitations

Article 126

Criminal prosecution and execution of a sentence are not subject to the statute of limitations for criminal offenses of genocide and war crimes, nor for other criminal offenses which pursuant to international agreements are not subject to the statute of limitations.

17. The **Criminal Code of Bosnia and Herzegovina** *(Official Gazette of Bosnia and Herzegovina* no. 35/03)

Criminal Offences not Subject to the Statute of Limitations

Article 19

Criminal prosecution and execution of a sentence are not subject to the statute of limitations for criminal offences of genocide, crimes against humanity and war crimes, or for other criminal offences that, pursuant to international law, are not subject to the statute of limitations.

VI. Admissibility

18. 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.

19. In the particular case, the appeal is filed for failure to prosecute the events that occurred during the war in Bosnia and Herzegovina, i.e. before the entry into force of the

Constitution of Bosnia and Herzegovina. On the basis of the allegations of the appeal, it follows that the appellants complain, in a part of their appeal, against the failure of the competent public authorities to conduct the official investigation on the circumstances of death and determine the persons responsible for the death of their close relative that occurred during the hostilities of war.

20. In this respect, the Constitutional Court recalls that its *ratione temporis* jurisdiction relates to the acts and occurrences that happened after the entry into force of the Constitution of Bosnia and Herzegovina, on 14 December 1995. The Constitutional Court, therefore, has no jurisdiction to consider the constitutionality of acts and events that had occurred before the entry into force of the Constitution of Bosnia and Herzegovina but holds that it has jurisdiction to review such acts and occurrences for the purpose of obtaining evidence regarding the establishment of a violation that occurred after the entry into force of the Constitution of Bosnia and Herzegovina (see the Decision of the Constitutional Court no. *U 38/02* of 19 December 2003, paragraphs 36 and 37, *Official Gazette of Bosnia and Herzegovina* no. 8/04).

21. The European Court of Human Rights considers that where the events the appellant is complaining of had occurred before the entry into force of the European Convention and continued after that, only the last part may be a subject-matter of complaint (see, the ECHR, *Kerojarvi vs. Finland*, Decision on Admissibility of 7 April 1993, Series A-328). Similarly, the Human Rights Chamber for Bosnia and Herzegovina concludes that when the allegations concern the violation of human rights of family members whose loved ones went missing during the armed conflict in a part in which the alleged violation continued after the entry into force of the Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, they fall within its competence. The Human Rights Chamber for Bosnia and Herzegovina held that, as the family members had not been officially informed on the fate and whereabouts of their missing loved ones, the allegations concerned the continuing violation to the date of submission of the applications (see, *Selimović and others vs. the Republika Srpska*, Decision on Admissibility and Merits of 7 March 2003, CH/01/8365 *et all.*, paragraph 169).

22. In the present case, the appellants request the conduct of official investigation to establish the circumstances of death and persons responsible for the death of the member of their family and the perpetrators to be punished in accordance with the law. Such investigation has not been initiated to date. The alleged violation, therefore, represents the continuing violation and the Constitutional Court has the competence *ratione temporis* to consider the appeal in this respect.

23. 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.

24. The legal remedies exhaustion rule requires the appellant to obtain a final decision. The final decision represents a reply to the last effective legal remedy and adequate enough to evaluate the lower instance decision in respect of both the facts and the law. The appellant decides whether he would use the remedy regardless of it being ordinary or extraordinary one. The decision by which the remedy is rejected because the appellant did not comply with the formal requirements of the remedy (time-limit, payment of taxes, form or fulfillment of other legal prerequisites) cannot be held final. The use of such remedy does not disrupt the time-limit of 60 days provided for by Article 16(1) of the Rules of the Constitutional Court (see decisions of the Constitutional Court nos. *AP 283/03* of 14 October 2004 and *AP 106/04* of 18 January 2005).

25. The Constitutional Court holds that legal remedies have to be available and effective to secure redress for alleged violations. The existence of legal remedies concerned must be certain enough not only in theory but also in practice as, if not so, they would not have necessary accessibility and efficiency (see, European Court of Human Rights, *Akdivar vs. Turkey*, judgement of 30 August 1996, Reports 1996-IV, paragraph 66). In other words, the legal remedy exhaustion rule is neither an absolute nor it has to be applied automatically. Special circumstances might exist which would dissolve the appellants of duty to exhaust remedies available to them (*ibid.* paragraph 67).

26. In this respect, the Constitutional Court recalls that under Article 1 of the European Convention, the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined by the European Convention while under Article 13 thereof they shall have the positive obligation to secure an effective remedy before a national authority.

27. In the particular case, the appellants request the investigation to be carried out, i.e. to establish the circumstances of death and persons liable for the death of the immediate member of their family and to punish the perpetrators in accordance with the law. The Constitutional Court again stresses that under Article 13 of the European Convention the positive obligation of the state exists to secure effective remedy before a national authority. The aforesaid positive obligation of the state must be brought into connection with the facts which indisputably indicate that in the case at hand, the death of the appellants'

immediate family member was violent, i.e. that he did not die of natural causes. The decisive statements of the appellants indicate the violent death of their family member, since they claim that their son was wounded by a gunshot in the presence of a number of witnesses, that those witnesses were prevented to help him and that his skull was separated from the body at the moment of exhumation.

28. The Constitutional Court considers in the present case, that the competent prosecution bodies could have obtained the information (evidence) on the violent death of the appellants' relative and initiated the official investigation on it. However, it follows from the reply to the appeal that the official investigation had not been initiated which leads the Constitutional Court to the conclusion that the appellants did not have an efficient remedy available on the basis of which the independent investigation would be conducted into the death of their family member.

29. In addition to all of the above stated, the Constitutional Court refers to its own position taken in the Decision no. *AP 143/04* of 23 September 2005, when, in the identical situation, the Constitutional Court concluded that the appellants, as relatives of persons who went missing or killed during the hostilities of war on the territory of Bosnia and Herzegovina, had no efficient legal remedy available which would guarantee an efficient and impartial investigation on the circumstances of death of their relative and establishment of responsibility for it. The Constitutional Court, therefore, holds that the appellants in the present case should be exempted of the obligation to exhaust legal remedies in a part of the appeal relating to the failure to prosecute the violent death of their son and the present appeal should be declared admissible insofar as it relates to this issue.

30. However, in examining the appeal in a part concerning the compensation of pecuniary and non-pecuniary damages for the deterioration of health caused by the appellants' imprisonment in the concentration camp during the war, the Constitutional Court invoked Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1) and (4)(15) of the Constitutional Court's Rules.

Article VI(3)(b) of the Constitution of Bosnia and Herzegovina reads:

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.

Article 16 (1) and 4(15) of the Rules of the Constitutional Court reads:

1) The Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and

if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last effective remedy used by the appellant was served on him/her.

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

(15) the appellant did not exhaust all remedies available under the law;

31. The Constitutional Court notes that from the allegations of the appeal and the enclosed documentation follows that the appellants have not initiated any proceedings, under the positive provisions, for compensation of damages regarding their imprisonment in the concentration camp to obtain a final decision which would be the subject-matter before the Constitutional Court, in fact, they have not exhausted the legal remedies under Article 16(1) of the Rules of the Constitutional Court.

32. Therefore, as the requirement of the exhaustion of all legal remedies available under the law has not been complied with, the appeal is inadmissible in the part concerned.

VII. Merits

33. The appellants allege that, because of failure to conduct the investigation into the violent death of their son and because of mental sufferings that they sustain therefore, the right to life under Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention and the right not to be subject to inhuman treatment safeguarded by Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention have been violated.

Right to life

34. The appellants complain of the violation of the right to life under Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention regarding the failure of competent bodies to conduct an investigation into the violent death of their son. In addition, the appellants stress that their right contained in Article 2 of the European Convention as the right of immediate relatives, i.e. parents of the deceased person has been violated in that manner.

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

a) The right to life.

36. Article 2 of the European Convention, as far as relevant, reads:

(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. [...].

37. The Constitutional Court, however, recalls the fact that the accession to Protocol no. 6 to the European Convention strengthens the right to life even further. Namely, the relevant provisions of Protocol no. 6 to the European Convention read:

Article 1

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

38. The Constitutional Court concludes that, under Article 1 of Protocol no. 6 to the European Convention the death penalty is prohibited and abolished as such.

39. However, even under Article 2 of the European Convention, as the Constitutional Court notes, the first sentence of Article 2(1) instructs the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see, the European Court of Human Rights, *L.C.B. vs. The United Kingdom,* judgement of 9 June 1998, Reports on Judgements and Decisions 1998-III, pg. 1403, paragraph 36). The obligation of the State in this respect, through the adoption of efficient criminal code provisions, is to discourage a conduct of criminal offences against persons with the support of mechanisms of the law enforcement, all with the objective of prevention, control and sanctioning the breach thereof (see, European Court of Human Rights, *Osman vs. the United Kingdom,* judgement of 28 October 1998, Reports on Judgements and Decisions 1998-VIII, pg. 3159, paragraph. 115). It is also required, amongst other things, that there should be *some form of effective official investigation when individuals have been killed as a result of the use of force* (see, ex., European Court of Human Rights, *Mc Kerr vs. the United Kingdom,* judgement of 4 May 2001, paragraph 111). The essential purpose of such an investigation *is to secure the effective implementation of the domestic laws which protect the right to life (ibid.), The*

investigation must also be effective in the sense that it is capable of leading to '[...] the identification and punishment of those responsible', and 'this is not an obligation of result but of means.' (ibid., paragraph. 113). In the examination of whether these requirements of Article 2 of the European Convention have been complied with, not only the adequacy of police investigation is taken into account but also the contribution of prosecutorial bodies and courts to the relevant criminal proceedings (see, ex., *ibid.,* paragraph 130-136) (*E.M. and Š.T. vs. the Federation of Bosnia and Herzegovina,* Decision on Admissibility and Merits of 8 March 2002, CH/01/6979, paragraph 50).

40. The obligation to secure the effective official investigation is not confined to cases where it has been established that the agents of the State were involved (see, ex., European Court of Human Rights, *Yasa vs. Turkey*, judgement of 2 September 1998, paragraph 100). In accordance with the position taken in the Decision of the European Commission of Human Rights in the case *Dujardin vs. France* of 2 September 1991 (European Commission of Human Rights, no. 16734/90, Decisions and Reports 72, pg. 236), the positive obligation by the State exists, under Article 2 of the European Convention, to undertake the criminal prosecution of those who have committed the criminal acts against life (*ibid*., paragraph 51).

41. The Human Rights Chamber concluded, in support of aforesaid jurisprudence of the European Court of Human Rights, that the fact that the responsibility of the public authorities had not been established regarding the disappearance and death of the applicants' son did not absolve the public authorities of their positive obligation to conduct the effective investigation in order to protect the right to life under Article 2 of the European Convention (see, *Ranko and Goran Ćebić vs. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, Decision on Admissibility and Merits of 4 July 2003, CH/98/668, paragraph 78).

42. The Constitutional Court recalls that there is the established case-law of the Human Rights Chamber and the European Court of Human Rights according to which they have established violation of Article 2 of the European Convention for the relatives of killed persons because the effective investigation into the death of such person had not been conducted (see, ex., *Akdeniz*, judgement of 31 May 2001, or *Mc Kerr*, judgement of 4 May 2001) (*E.M. and Š.T. vs. the Federation of Bosnia and Herzegovina,* Decision on Admissibility and Merits of 8 March 2002, CH/01/6979, paragraph 61). Moreover, following the aforesaid case-law, the Constitutional Court, in the analogous situation to the one in which the appellant was a close relative of a killed person, where the investigation was not conducted into her violent death, concluded that Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention have been violated

as the state authorities failed to undertake the necessary measures to comply with the positive obligation to protect the life of the appellants' son as close relative (see, the Constitutional Court, Decision on Merits no. *AP 1045/04* of 17 November 2005).

43. Applying those principles to the particular case, the Constitutional Court notes that the appellants, as close relatives of the killed person for whom the coroner established, during the receipt and examination of the dead body, that his death was violent, are authorized to request the public authorities to comply with the positive obligation to protect the life of their son contained in Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention. Failure to prosecute the death of the appellants' close relative opens the issue of possible breach of the constitutional right concerned. The Constitutional Court stresses that the obligation to protect the right to life safeguarded by Article 2 of the European Convention arises when an individual is killed by the use of force. The issue arising before the Constitutional Court is whether the competent bodies undertook the effective investigation prescribed by law to establish if the appellants' son was killed by the use of force and, if so, whether they initiated the necessary procedure against the perpetrators of the criminal offence in order to comply with the positive obligation to protect the right to life under Article 2 of the European Convention.

44. On the basis of the reply to the appeal by the competent legal entity and the documentation enclosed thereto, the Constitutional Court notes that the coroner established when receiving the dead body of the appellants' close relative that it was the death caused by the use of force and most probably violent homicidal death and the officials of the authorized investigative bodies had been present to the examinations of the dead bodies for the case of violent death in the period between 1992 and 1995. Contrary to these allegations, the Cantonal Prosecutor's Office claims in its reply to the appeal that neither the Cantonal Prosecutor's Office nor the Police Administration Visoko have any entries of the disputed event in their official records and they had not taken any action in that respect. Therefore, in the particular case it is obvious that the public authorities failed to undertake legally prescribed measures, whether by the competent legal entity informing and inviting the investigative bodies to attend the coroners' examination of the body of the appellants' relative who was violently killed or the competent investigative bodies register such possible information, attend the examination and undertake appropriate measures and investigative actions.

45. Furthermore, the Constitutional Court notes that the competent legal entity did not comply with its legal obligation as it has not conducted or offered any evidence that it had informed the competent investigative bodies on the violent death of the appellants'

son at the moment of the receipt of body and the coroners' examination thereof. It again failed to do so at the moment of exhumation of mortal remains of the appellants' relative, which was performed upon the consent, and organized by the competent legal entity. Notwithstanding its own relevant documentation registering the violent death of the appellants' close relative and alleged features and position of his mortal remains, the competent legal entity failed to undertake necessary measures in the present case and inform the prosecution authorities on the aforesaid circumstances which indicate that this is the case of violent homicidal death, as it is provided for in all of three criminal procedure codes that were in force in the relevant period. It also failed to report of the criminal acts and to protect the life of the appellants' relative in accordance with its positive obligation within the meaning of Article 2 of the European Convention.

46. In view of the aforementioned, the Constitutional Court concludes that the failure of the bodies of public authorities to comply with their positive obligation of protecting the life of the appellants' relative amounts to the violation of Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention.

Right not to be subjected to inhuman treatment

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

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

Article 3 of the European Convention stipulates:

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

48. Having regard to the allegations of the present appeal, the issue here is whether the sufferings that were imposed on the appellants because the competent authorities failed to initiate the official investigation into the violent death of their close relative, i.e. because they have no information on it, could be regarded as torture, inhuman and degrading treatment or punishment under Article 3 of the European Convention.

49. In its Decision no. *AP 143/04* of 23 September 2005, the Constitutional Court pointed out the importance attributed to Article 3 in the European Convention and in the

system of the international protection of human rights. It has been indicated that Article 3 is presented in absolute and non-qualifying terms. It has been stressed that contrary to Articles 8 through 11 of the European Convention, which contain the restrictive clause in the second paragraph, Article 3 does not contain a paragraph determining circumstances which would allow the restriction of the right concerned. Accordingly, it has been concluded that, with regard to this Article, there is no space for restrictions stipulated by the law. Moreover, an unconditional character of Article 3 means that, within the meaning of the European Convention and international law, the justification of acts violating this Article could never exist.

50. Furthermore, Article 3 of the European Convention contains also the substantive aspects, as well as those of procedural nature, such as the obligation to investigate into the allegations on torture and some other forms of inhuman treatment. Article 3 of the European Convention might equally be violated by intentional maltreatment, the same as by negligence or failure to undertake particular actions or afford the appropriate standards of protection. Moreover, Article 3 of the European Convention imposes both negative and positive obligations; namely, the obligation to refrain from certain kind of treatment, as well as the obligation to undertake positive actions in order to secure their rights to individuals and protect them from prohibited treatment.

51. The prohibition of torture, inhuman and degrading treatment or punishment is not contained only in the European Convention but it is also a part of international common law and it is considered as *ius cogens* (compulsory law). A large number of international norms have been adopted with the aim of fight against torture, inhuman and degrading treatment or punishment, starting with Article 5 of the Universal Declaration on Human Rights of 1948 (*No one shall be subjected to torture or to inhuman or degrading treatment or punishment)* to the Rome Statute of the International Criminal Court of 1998 by which the torture, as widely spread and systematic attack against civilians, has been declared the crime against humanity. In addition to the European Convention, the largest number of the member States of the Council of Europe are at the same time the parties to the following international agreements prohibiting torture; four Geneva Conventions of 1949, the UN International Covenant on Civil and Political Rights of 1966 (which reads in Article 7 that: *No one shall be subjected to torture or to inhuman or degrading treatment or punishment)*, the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) of 1984 and the European Convention for the Prevention of **Torture** and **Inhuman** or Degrading Treatment or Punishment of 1987.

52. In the particular case, the Constitutional Court holds that the allegations of the appeal raise the possibility that the breach of the prohibition of *inhuman treatment* under Article

3 of the European Convention could have occurred. In that respect the Constitutional Court recalls that inhuman treatment is the one that creates feeling of terror, severe unrest, and inferiority, which is capable of humiliating or degrading its victim. In consideration as to whether the punishment or treatment was „inhuman" within the meaning of Article 3 of the European Convention, it is necessary to take into account whether the aim was to humiliate or degrade a person concerned and whether the consequences thereof had negative impact on her/his personality in the manner incompatible with Article 3 of the European Convention. However, the lack of existence of such aim cannot exclude the finding of violation of Article 3 of the European Convention (see, European Court of Human Rights, *Ranninen vs. Finland*, judgement of 16 December 1997).

53. As previously stated, the appellants request to have the official investigation into the violent death of their son conducted, and to be informed about that by the competent bodies, which would give them the answer to the question as to who is liable for the death of their family member and what sanctions are to be taken against the perpetrators. When these facts are tied to the above considerations, it follows that Article 3 of the European Convention in respect to prohibition of „inhuman treatment" is applicable in the present case and, therefore, the Constitutional Court shall examine whether the right concerned has been violated.

54. In the previous part of reasoning of this decision, the Constitutional Court established that inhuman treatment is the one that creates feeling of terror, severe unrest, and inferiority, which is capable of humiliating or degrading its victim. Within the meaning of this conclusion, while examining whether the appellants have been exposed to the inhuman treatment because of failure to conduct the official investigation into the violent death of their family member, the Constitutional Court shall also have to take into account all relevant elements: *the proximity of the family tie; the parent-child bond; the extent to which the family member witnessed the events in question; the involvement of the family member in the attempts to obtain information about the disappeared person; the way in which the authorities responded to those enquiries* which have been determined by the European Court of Human Rights (see, the European Court of Human Rights, *Cyprus vs. Turkey,* judgement of 10 May 2001).

55. In that respect, the Constitutional Court notes that the appellants are closest relatives of the person that was subjected to the violent death. The fact that they were forcibly separated from the immediate family member, the uncertainty regarding his fate, and subsequently, the information of his death and that his mortal remains were exhumed, in the opinion of the Constitutional Court, must have impressed deep marks on mental and physical state of the appellants and caused severe sufferings to them. The Constitutional

Court already concluded that inhuman treatment is the one that creates feeling of terror, severe unrest, and inferiority, which is capable of humiliating or degrading its victim. These conclusions must be brought into relation with the overall situation of the appellants. In fact, it is clear on the basis of the allegations of the appeal that the appellants were forcibly separated from their close relative during their imprisonment and wounding of their son, then, that they were trying to obtain items of information that could help them to find out what had happened to their son. Finally, when there was no more doubt that their son is no longer alive, and that he lost his life in a violent manner, the authorities failed to initiate the official investigation on that issue and to transmit any information on it, although the positive obligation to act in that sense exists on the part of the authorities. The Constitutional Court refers to the jurisprudence of the European Court of Human Rights in the case *Çakici vs. Turkey*, which is upheld by the Constitutional Court, by which it is established that the essence of such violation, when the disappearance of a person is concerned, is not so much in the fact of „disappearance" of the family member as it is in the reaction and position of the authorities when such situation is brought to their attention. Therefore, the relatives might, especially as the last one is concerned, request to be directly recognized as victims of the conduct of authorities.

56. In the present case, the fact that the authorities failed to initiate the official investigation into the disappearance and violent death of the appellants' family member and to transmit any information on that, in the opinion of the Constitutional Court, could not leave the appellants indifferent. On the contrary, the failure of public authorities to act must cause the appellants the *feeling of terror, severe unrest, and inferiority, which is capable of humiliating or degrading the victim*, which amounts to inhuman treatment prohibited under Article 3 of the European Convention. Further, the Constitutional Court underlines that, in the particular case, the competent bodies in Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina were obliged to undertake all reasonable steps to obtain information relating to the circumstances of the violent death of the appellants' family member. That, primarily, purports finding persons responsible for the violent death of the appellants' family member and punishment thereof in accordance with the law. However, the competent authorities failed to undertake reasonable steps aiming at the disclosure of persons liable for the violent death of the appellants' family member and transmission of information on the measures taken to the appellants for the period longer than eleven years. That is exactly where the Constitutional Court perceives failure to implement the positive obligation of the public authorities which consists in the undertaking of reasonable steps with the aim of conducting the impartial investigation into the violent death of the appellants' family member, which failed to happen, and thus gave rise to the violation of the rights under Article 3 of the European Convention. Therefore,

the Constitutional Court, with the reference to its own position taken in the same situation and established in the Decision no. *AP 143/04* of 23 September 2005, concludes that the appellants were exposed to the inhuman treatment because of the lack of the official investigation into the disappearance and violent death of their family member and failure to inform them on that. This led to a violation of Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention.

57. The Constitutional Court emphasizes that for redress of the violation of Article 3 of the European Convention, it is of special importance that the Cantonal Prosecutor's Office conducts the investigation into the disappearance and violent death of the appellants' family member in an expedited manner and without further delay and inform the appellants on the results thereof.

VIII. Conclusion

58. The fact that competent authorities failed to initiate the official investigation into the disappearance and violent death of the appellants' family member during the war in Bosnia and Herzegovina, and that the appellants received no information on it whatsoever, is sufficient for the Constitutional Court to conclude that the appellants' right to life and not to be subjected to of inhuman treatment under Article II(3)(a) and (b) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention or Article 1 of Protocol no. 6 to the European Convention and Article 3 of the European Convention have been violated.

59. Pursuant to Article 16(1) and (4)(15), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this Decision.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. AP 6/08

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Neđo Zeljaja against the the Decision of the Court of Bosnia and Herzegovina no. X-KRN-07/419 of 7 December 2007, Decision of the Court of BiH no. X-KR-07/419 of 30 November 2007 and Decision of the Court of BiH no. X-KR-07/419 of 29 November 2007

Decision of 13 May 2008

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(4)(14), Article 59(2)(2), Article 59(2)(2), Article 61(1), (2) and (3) and Article 64 (1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), as the Grand Chamber and composed of the following judges:

Ms. Hatidža Hadžiosmanović, President

Mr. Miodrag Simović, Vice -President

Ms. Valerija Galić, Vice-President

Mr. Mato Tadić,

Mr. Krstan Simić,

Having deliberated on the appeal of Mr. **Neđo Zeljaja,** in case no. **AP 6/08,** at its session held on 13 May 2008, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Neđo Zeljaja is hereby partially granted.

A violation of Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(3) of the European Convention for the Protection of Human Rights and Freedoms is hereby established.

The Decisions of the Court of Bosnia and Herzegovina no. X-KRN-07/419 of 7 December 2007 and no. X-KR-07/419 of 30 November 2007 are hereby quashed.

The case shall be referred back to the Court of Bosnia and Herzegovina which is required to take a new decision in accordance with Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court of Bosnia and Herzegovina is ordered, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to inform the Constitutional Court of Bosnia and Herzegovina

about the measures taken to execute this Decision within 8 days from the date of submission of this Decision.

The appeal of Mr. Neđo Zeljaja lodged against decisions of the Court of Bosnia and Herzegovina no. X-KRN-07/419 of 7 December 2007, no. X-KR-07/419 of 30 November 2007 and no. X-KR-07/419 of 29 November 2007 is hereby dismissed as ill-founded in relation to Article II(3)(d) and Article II(4) of the Constitution of Bosnia and Herzegovina and Article 5(4) and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The appeal of Mr. Neđo Zeljaja lodged against decisions of the Court of Bosnia and Herzegovina no. X-KRN-07/419 of 7 December 2007, no. X-KR-07/419 of 30 November 2007 and no. X-KR-07/419 of 29 November 2007 is rejected as inadmissible in relation to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as it is premature.

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 28 December 2007, Mr. Neđo Zeljaja („the appellant"), represented by Ms. Vesna Tupajić-Škiljević, a lawyer practicing in Sokolac, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Decision of the Court of Bosnia and Herzegovina („the Court of BiH") no. X-KRN-07/419 of 7 December 2007, Decision of the Court of BiH no. X-KR-07/419 of 30 November 2007 and Decision of the Court of BiH no. X-KR-07/419 of 29 November 2007.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 20 February 2008 the Court of BiH was requested to submit its reply to the appeal. The Prosecutor's Office of Bosnia and Herzegovina („the Prosecutor's Office of BiH), as a party to the proceedings, was requested to do so on 11 March 2008.

3. The Court of BiH submitted its reply to the appeal on 9 March and the BiH Prosecutor's Office on 20 March 2009.

4. Having regard to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 24 March 2008.

III. Facts of the Case

5. The facts of the case as they appear from the appellant's allegations and the documents submitted to the Constitutional Court can be summarized as follows:

6. The BiH Prosecutor's Office conducted the investigation against the appellant due to a reasonable doubt that he had committed a criminal offence of crime against humanity under Article 172 in conjunction with Article 173 of the BiH Criminal Code („the BiH CC"). During the investigation stage the Court of BiH, by its Decision no. X-KRN-07/419 of 31 August 2007 dismissed the motion of the BiH Prosecutor's Office for ordering custody against the appellant. Instead, the Court ordered a measure under Article 126 paragraph 1, item d) of the BiH Criminal Procedure Code („the BiH CPC") whereby the appellant had to report to the Police Station in Kalinovik on a daily basis. During the further course of investigation the Court of BiH extended the measure by its decision no. X-KRN-07/419 of 31 October 2007 and in the relevant decision it was concluded that the measure is to be executed in accordance with the decision ordering this measure and the appellant is to comply with the ordered measure fully and timely.

7. By its decision no. X-KRN-07/419 of 19 November 2007, the Court of BiH declared as confidential all personal data on witnesses in respect of whom, according to the motion of the BiH Prosecutor's Office, the measures of protection were sought. In this decision it was ordered that the true names and other personal data of the witnesses identified before the Court shall not be revealed even after the filing of an indictment and the BiH Prosecutor's Office was ordered to disclose true names of witnesses to the defence at least 30 days before the witnesses take stand.

8. On 23 November 2007, the BiH Prosecutor's Office filed an indictment against the appellant due to the commission of the aforementioned criminal offence. The motion for custody against the appellant and other accused persons was also attached to the indictment filed by the BiH Prosecutor's Office for the reasons prescribed under Article 132 paragraph 1 item a) of the BiH CPC. In this motion, the BiH Prosecutor's Office argued that „there is no reasonable risk that [the appellant] would obstruct the criminal proceedings by exerting influence on the witnesses and accomplices concerning this criminal offence." The

BiH Prosecutor's Office reasoned this position by stating, as follows: „This conclusion is based on the fact that the offence the appellant is charged with, was committed by several accomplices who were engaged in a joint criminal enterprise and that, in the chain of command, the appellant was highly positioned since he was the Commander of the Police Station Kalinovik and was holding this office at the time of the commission of the criminal offence. When these facts are tied to the possibility that, upon the confirmation of indictment, the evidence against the suspect will be accessible to him, a clear conclusion follows that the suspect will have a stronger motive to exert his influence on the witnesses and accomplices, which means not only on the witnesses who implicate him directly but also on those who implicate other suspects, owing to his commanding position and given the fact that he has been accused of being engaged in the joint criminal enterprise. Furthermore, the data about the witnesses who testified with regards to this criminal offence will be accessible to [the appellant] and thus he may exert his influence on them to change their testimonies during the main trial and he has an extremely strong motive to do so because of the gravity of the offence he is charged with". The Prosecutor's Office further stated that the appellant resides in Kalinovik „whereto the witnesses testifying in this case come on regular basis in their capacity either as direct victims or the members of victims' families and this is a reason for a large number of witnesses to be frightened and scared given the high position [the appellant] was holding at the time of the commission of the aforementioned criminal offence. The aforementioned fact has been confirmed in the testimony of witness F. and there is also an example of a greater number of witnesses who sought protective measures". In addition to these reasons, the BiH Prosecutor's Office pointed out that given the nature of the offence the appellant is charged with and vulnerability of witnesses, the appellant's staying at large during the trial „would certainly cause anxiety in the witnesses who should give their testimonies in an atmosphere free of intimidation and fear during the main trial before the Court of BiH".

9. On 28 November 2007, the Court of BiH confirmed the indictment and after that, by its Decision no. X-KR-07/419 of 29 November 2007, ordered a custody measure due to the grounds under Article 132 paragraph under Article 132 paragraph 1, item b) of the BiH CPC. By this decision it was determined that the custody may last until the end of the main trial and at most three years, which means until 29 November 2010 and that the review of justification of custody will be conducted upon the expiry of each two months as of the day of the issuance of the last decision. In the reasoning for this decision, the Court of BiH stated that it considered the fact that a large number of witnesses should be interrogated, particularly the victims and the members of their families, some of whom live in the territory where the accused have their residence, as well as the witnesses who took part in the events the appellant and other accused are charged with „in which case they have

no status of the accused, but are, at the same time, the neighbours, the acquaintances and even the friends of the accused." Furthermore, the Court of BiH stated that in this stage of criminal proceedings the evidence are obtained for the purpose of confirmation of indictment, but that the main trial has not commenced and that „it is necessary to ensure that the witnesses are interrogated without being exposed to threats or pressures."

10. Further, „according to the assessment of the Court, it is exactly this stage of investigation which requires that the witnesses be free to give their statements without fear and exposure to retaliation, which, according to the court's opinion, might happen if the accused are at large". The Court of BiH points out that it considered the fact that „only in this stage of proceedings the accused became aware of the identity of witnesses and of their testimonies on which the indictment is based". After accepting the arguments of the BiH Prosecutor's Office in their entirety, Court of BiH concluded that „the stay of the accused at large would certainly cause anxiety in the witnesses who should give their testimonies in an atmosphere free of intimidation and fear, which justifiably leads to a conclusion that, in the case at hand, all of the aforesaid makes the mentioned circumstances extraordinary indicating that there is a risk that the influence on the witnesses may be exerted", and therefore it is justified to order a measure of custody against the appellant and other accused as set forth under Article 132 paragraph 1 item b) of the BiH CPC. As to the appellant, the Court of BiH additionally considered the fact „that the investigation, according to the Prosecutor's statements, is being conducted against the persons in charge of enforcing the measure and who, together with the accomplices, were engaged in the joint criminal enterprise, in which case the position of the [appellant] as the Commander of the Police Station Kalinovik at the time of the commission of the criminal offence is to be taken into consideration" stating that „it unquestionably leads to a conclusion that in this stage of the proceedings the measures are purposeless, inefficient and they cannot contribute to the purpose of the custody measure, in other words these measures cannot prevent the witnesses from being influenced, and consequently, these measured cannot prevent the obstruction of the criminal proceedings in this stage".

11. As to the motion of the BiH Prosecutor's Office that the appellant should be under custody on the grounds prescribed under Article 132 paragraph 1 item b) of the BiH CPC, the Court of BiH established that this motion is ill-founded considering the fact that the appellant is retired, that he is lacking material possessions, that he has not changed his residence address for a long period of time and that he has no dual citizenship. Furthermore, the Court of BiH stated that no evidence were presented to the court that the appellant was on the run or that he attempted to flee so as to avoid being accessible to the judicial authorities concluding that the appellant „was responding to the summons of the court on regular basis"

and the fact that the indictment has been confirmed „does not, in itself, constitute a decisive fact based on which the risk that the accused persons may flee would be determined".

12. The decision of the First Instance Court was delivered to the appellant on 29 November 2007 when he was deprived of liberty and brought to the Penal and Correctional Facility in Kula and his defence counsel was delivered the decision on 1 December 2007. Given that the time-limit for lodging the complaint against the first instance decision was 24 hours, the appellant challenged the first instance decision on the same day when the decision was delivered to him and he also noted that the legal arguments would be given by his defence counsel. The defence counsel lodged a complaint on 1 December 2007. By its Decision no. X-KR-07/419 of 30 November 2007 the Court of BiH dismissed the complaint filed by the appellant and by its Decision no. X-KR-07/419 of 7 December the Court of BiH dismissed the complaint filed by the appellant's defence counsel and the defence counsels of other accused. In both decisions, the Court of BiH stated that the challenged decision of the first instance court contains concrete reasons for which the court considered that there are specific circumstances indicating that there are grounds for the custody measure. Furthermore, the Court of BiH stated that the conclusion contained in the first instance decision is correct wherein it is stated that the custody is justified given the grounds listed under Article 132 paragraph 1 item b) of the BiH CPC and referred again to the grounds from the first instance decision pointing out that the fact that „the witnesses were interrogated in the course of investigation does not mean that the evidence, within the meaning of Article 132 paragraph 1 item b) of the BiH CPC, have been secured as the witnesses are about to be interrogated during the main trial".

13. Furthermore, the Panel of the Court of BiH accepted the conclusion from the first instance decision that the BiH Prosecutor's Office is conducting an investigation due to a suspicion that in the commission of the offence in question, a large number of accomplices, currently at large, took part, and that, given the gravity of the offences the appellant is charged with, it could be unambiguously considered that by remaining at large, bearing in mind the nature of the criminal offence they are charged with, it would cause anxiety and fear in the witnesses and lead to possible contacts with perpetrators". Further, the Panel of the Court of BiH stated that the appellant had been at large until the time the custody measure was ordered and during that time certain restrictions have been imposed. Nevertheless, the Panel concluded that the first instance decision was properly explained „because the restrictive measures in this moment may not serve the purpose for which the custody is ordered, even if the accused moves to another place, as it is suggested in the complaint". Taking into consideration the fact that the investigation, as claimed by the Prosecutor, is also being conducted against the persons in charge of enforcement

of restrictive measures who, as claimed, together with the accused, had been engaged in the joint criminal enterprise, the Panel concluded that there are objective grounds due to which the measures could neither prevent exertion of influence on the witnesses and accomplices nor obstruction of the criminal proceedings at this stage.

IV. Appeal

a) Statements from the appeal

14. The appellant considers that the challenged decisions violated his right to liberty and security of person under Article II (3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraphs 3 and 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") as well as his rights to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(2) and (3)(a) and (d) of the European Convention, an effective legal remedy under Article 13 and non-discrimination under Article 14 of the European Convention.

15. While explaining his allegations of the violation of Article 5(3) of the European Convention, the appellant states that the proposed measure of custody on the grounds under Article 132 paragraph 1 item b) of the BiH CPC was not substantiated by the BiH Prosecutor's Office which offered no evidence in this regard and that „the abstract citation of facts is not sufficient for considering that there is a legal ground for ordering custody". The appellant states that the prosecution has failed to give a proposal which includes the necessary evidence that the appellant, in person or through another person, exerted or attempted to exert his influence on a witness or a possible accomplice, which means that the BiH Prosecutor's Office has offered no evidence with which it would substantiate the statement that the appellant would obstruct the criminal proceedings in this manner. The appellant further states that „the risk of collusion ends or it becomes less possible by the completion of certain stages of criminal proceedings and by presentation of evidence obtained by the Prosecution". The appellant also states that during the investigative proceedings the Panel of the Court of BiH established that ordering custody against the appellant is not justified and that for the above reasons the appellant was pronounced a more lenient measure during that stage of investigation - although the custody was suggested on the grounds stipulated under Article 132 paragraph 1 items a), b) and d) of the BiH CPC.

16. The appellant states that in other similar cases, the Court of BiH took a position that in a situation where the accused persons are aware of the names of witnesses there is no ground for ordering custody under Article 132 of the BiH CPC „for the reason that

a particular risk of collusion has not been made concrete yet" referring to the Decision of the Court of BiH no. X-KRN-06/290 of 2 November 2006, in which it was noted that „the grounds for custody must be actually existent and objectively manifested". The appellant finds that the aforementioned indicates that the Court of BiH applies Article 132 paragraph 1 item d) of the BiH CPC in a different manner in individual cases due to which he considers that he is being discriminated. Further, the appellant states that the position of the court on the existence of the risk of influencing the accomplices and accessories is unfounded as it would be relevant only in a situation where the influence exerting has been attempted or carried out. The appellant notes that according to the statements of the BiH Prosecutor's Office, some of the alleged accomplices do not even reside in the appellant's place of residence and are not accessible to the prosecution authorities and that the appellant, except for the names of the persons stated in the indictment who are not residing in the territory of BiH, is not aware of other alleged accomplices. Therefore, it is not quite clear in which way the influence may be exerted on them. The appellant is of the opinion that there are neither real nor legal grounds for ordering custody against him, particularly given the fact that in the decision of the Court of BiH the conclusion was made that the appellant had fully complied with the prohibitive measure ordered against him during the investigative proceedings.

17. The appellant also states that he suggested that the court issue other prohibitive measure as an addition to the measure already pronounced and that the said measures could be enforced outside the municipality of Kalinovik. In this regard, the appellant submitted to the Court of BiH the evidence of ownership over a family house and referred to a possibility that the ordered prohibitive measure may be enforced in the municipality of Ilidža. However, the Court of BiH has not taken the aforementioned into its consideration. Further, the appellant points out that the Court of BiH, upon the motion of the BiH Prosecutor's Office, by its decision no. X-KRN-07/419 of 19 November 2007 ordered a protective measure for eight witnesses whose identity is not known to the accused in this stage of the criminal proceedings.

18. The appellant considers that his right to a fair trial was also violated, particularly the right to presumption of innocence under Article 6 paragraph 2 of the European Convention, for the reason that the Court of BiH, in the first instance challenged decision, stated the following: „…As to the [appellant] the Court additionally considered the fact that the investigation, according to the Prosecutor's allegations, is also being conducted against persons tasked with the execution of prohibitive measure and who were engaged, together with the accused, in a joint criminal enterprise" from which the court concludes that it is purposeless to order a prohibitive measure. Further, the appellant is of the opinion that his

right to a fair trial was violated because separate decisions were taken on the appellant's complaint and the defence counsel's complaint although, as stated, the accused and the defence counsel are a single party to the proceedings. The appellant considers that in this way his right to a defence counsel and effective legal remedy was also violated since the issuing a decision on the complaint which was lodged by the appellant in person, without proper arguments from his defence counsel, constitutes a pointless and ineffective legal remedy. Moreover, the appellant considers that in this manner his right to an adequate and effective defence was violated, as well as his right to effective access to court, which amounted to the violation of his right under Article 5 paragraph 4 of the European Convention.

b) Reply to the appeal

19. In its reply to the appeal, the Court of BiH considers that the appellant's allegations of a violation of his right under Article 5 paragraph 3 of the European Convention are unfounded because he was ordered into custody while the previously pronounced measure was not left in force. Namely, the Court of BiH holds that although the measures had served their purpose during the investigation „a new stage of the proceedings commenced upon the confirmation of the indictment and that stage precedes a main trial". Given that it is expected that the witnesses who were interrogated should appear at the main trial, the Court of BiH considers that the grounds, which existed before this stage commenced, became stronger upon the confirmation of the indictment, and therefore it is necessary for all the witnesses to be interrogated at the main trial without fear of threats and pressures. It is for the above reason that the Court of BiH considered that the measure in this specific stage of the proceedings would not serve the purpose of ordered measure of custody. The Court of BiH also considers that the allegations about a violation of the right under Article 6 paragraph 3, Article 13 and Article 5 paragraph 4 of the European Convention are ill-founded. Namely, the Court of BiH states that the appellant's complaint had been received before the complaint was filed by his defence counsel and the decision on the complaint must be made within 48 hours as set forth in Article 136 paragraph 6 of the BiH CPC. Furthermore, the Court of BiH states that the issuance of the decision on the appellant's complaint had no effect on the issuance of the decision on the complaint lodged by his defence counsel.

20. The BiH Prosecutor's Office, after it thoroughly referred to the standards of the European Court of Human Rights, stated that the Prosecution „entirely supports the reasoning given by the Court of BiH in the challenged decision", particularly when it comes to the existence of grounds for ordering custody. Given the fact that the stage of main trial is about to commence it will be necessary to interrogate the witnesses „in

an atmosphere free from the fear of retaliation". Further, the BiH Prosecutor's Office states that in the context of existence of this ground for ordering custody, „a fear of possible subsequent testifying referred to by witness S.H. in his statement given before the Prosecutor's Office" is of significant relevance. The BiH Prosecutor's Office considers that the Court of BiH has taken into its consideration all the circumstance in accordance with both the law and case-law which are essential for the existence of grounds for ordering custody against the appellant and this is entirely in accordance with the requirements set forth under Article 5 of the European Convention. Furthermore, the Prosecution considers that the risk of collusion has been concretely and sufficiently explained in the challenged decisions, as well the issue of purposefulness of ordering custody measure instead of prohibitive measure. The BiH Prosecutor's Office also challenged the allegations relating to the right to a fair trial, particularly the right to defense, as well as those regarding the right to an effective legal remedy. In connection with the last statement mentioned above, the BiH Prosecutor's Office considers that it is not necessary to examine whether the disputed proceedings before the Court of BiH met all the requirements under Article 13 of the European Convention as this proceeding has a specific legal nature and in this specific case it is not necessary to go beyond the limits referred to under Article 5 paragraph 4 of the European Convention within which the existence of an effective legal remedy is examined and which must have a judicial character. Moreover, the Prosecution also challenges the appellant's allegations about him being discriminated.

V. Relevant Law

21. 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), as relevant, reads:

Article 126

(1) In a reasoned decision, the Court may place the accused under house arrest if there are circumstances indicating that the accused might flee, hide or go to an unknown place or abroad.

(2) In addition to the measure referred to in Paragraph 1 of this Article the accused may be prohibited from visiting certain places or from meeting with certain persons or be ordered to report occasionally to a specified authority or his travel document or driver's license may be temporarily confiscated. The accused may also be prohibited from performing certain business activities.

[...]

Article 131

(1) Custody may be ordered only under the conditions prescribed by this Code and only if the same purpose cannot be achieved by another measure.

(2) The duration of custody must be reduced to the shortest necessary time. It is the duty of all bodies participating in criminal proceedings and of agencies extending them legal aid to proceed with particular urgency if the suspect or the accused is in custody.

(3) Throughout the proceedings, custody shall be terminated as soon as the grounds for which it was ordered cease to exist, and the person in custody shall be released immediately.

Article 132

(1) If there is a grounded suspicion that a person has committed a criminal offense, custody may be ordered against him:

(...) b) if there is a justified fear to believe that he will destroy, conceal, alter or falsify evidence or clues important to the criminal proceedings or if particular circumstances indicate that he will hinder the inquiry by influencing witnesses, accessories or accomplices;

[...]

Article 134

(3) A decision on custody shall be delivered to the pertinent person at the moment of deprivation of liberty. The files must indicate the hour of the deprivation of liberty and the hour of the delivery of the decision.

(4) The person taken into custody may appeal the decision on custody with the Panel (Article 24, Paragraph 6) within 24 hours of the receipt of the decision. (...)

(6) In cases referred to in Paragraphs 4 and 5 of this Article, the Panel deciding the appeal must take a decision within 48 hours.

Article 137

(1) After the confirmation of indictment, custody may be ordered, extended or terminated. The review of justification of the custody shall be carried out upon the expiration of each two (2) month period following the date of issuance of the most recent decision on custody. The appeal against this decision shall not stay its execution.

(2) After the confirmation of indictment and prior to the pronouncement of the first instance verdict, custody may last no longer than:

(...) three years in case of criminal offence for which a long term prison sentence is prescribed.

[...]

VI. Admissibility

22. 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 court in Bosnia and Herzegovina.

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

24. In examining the admissibility of the appeal pertaining to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, the Constitutional Court invoked the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16 (1) and (4)(14) of the Rules of the Constitutional Court.

Article VI(3) (b) of the Constitution of Bosnia and Herzegovina reads as follows:

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.

Article 16(1) and (4)(14) of the Rules of the Constitutional Court reads as follows:

1) The Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him/her.

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

14) the appeal is premature;

25. The appellant challenges the decisions of the Court of BiH no. X-KR-07/419 of 30 November 2007 and no. X-KRN-07/419 of 7 December 2007, whereby the custody was ordered against him. He further states that by that decision his right to a fair trial under Article II (3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention was also violated. In connection with the aforementioned appellant's allegations, the Constitutional Court recalls that the answer to the question as to whether the appellant has or shall have a fair hearing before a court cannot be given while the proceedings are still pending. In accordance with the case law of the Constitutional Court and the European Court for Human Rights, the issue at hand as to whether the principle

of a fair procedure has been complied with must be viewed based on the proceedings as a whole. In view of the multiple instances of criminal proceedings, possible procedural omissions and deficiencies that appear in one phase of the proceedings can be rectified in some of their following phases. It follows that, in principle, it is not possible to determine whether criminal proceedings were fair until a legally binding decision has been reached (see judgment of the European Court for Human Rights, *Barbera, Meeseque and Jabardo vs. Spain*, of 6 December 1988, Series A, no. 146, paragraph 68, and Decision of the Constitutional Court no. U 63/01 of 27 June 2003, item 18, published in the *Official Gazette of Bosnia and Herzegovina*, no. 38/03).

26. In the case at hand the criminal proceedings against the appellant have not been completed yet, in which case the decision on ordering custody against the appellant was issued. Therefore, the allegations from the appeal in relation to a violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention are premature.

27. However, the appellant challenges the mentioned decision due to a violation of his right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Articles 5 paragraphs 3 and 4 of the European Convention, as well as due to a violation of his right under Articles 13 and 14 of the European Convention. In view of the aforementioned allegations, the Constitutional Court notes that there are no other effective legal remedies available under law against the decisions challenged by the appellant. Given that the appeal was filed on 28 December 2007, it follows that it was filed within the time-limit of 60 days as stipulated by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also fulfils the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court as it is not manifestly (prima facie) ill-founded nor are there any other formal reasons to render the appeal inadmissible.

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

VII. Merits

29. The appellant challenges the referenced decisions claiming that those decisions violated his rights under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraphs 3 and 4 of the European Convention, as well as his rights under Articles 13 and 14 of the European Convention.

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

d) The rights to liberty and security of person. (...)

31. Article 5 of the European Convention, as relevant, reads:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(...) c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable doubt of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

3) Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

a) Article 5 paragraph 3 of the European Convention

32. The appellant considers that the decision ordering him into custody is inconsistent with Article 5 paragraph 3 of the European Convention because, as he stated, the Court of BiH failed to concretise the existence of real risk that the appellant, if he stays at large, would obstruct the criminal proceedings by influencing the witnesses and prospective accomplices and because it failed to consider the possibility for achieving the same procedural aim by employing more lenient means, in other words by issuing alternative measures.

33. The Constitutional Court, first and foremost, notes that the provision of Article 5 paragraph 3 of the European Convention requires that if a person is to be deprived of liberty it should be done in accordance with Article 5 paragraph 1 c) of the European Convention, in other words this provision requires that the deprivation of liberty be „lawful" within the meaning of the mentioned Article and it includes both the procedural and substantive protection of the person concerned. The European Court of Human Rights concluded that compliance with Article 5 paragraph 3 of the European Convention requires that the

national judicial authorities examine all issues pertaining to custody and that a decision on custody be issued by referring to objective criteria stipulated under law. In view of the aforementioned, the existence of reasonable doubt that a person who is deprived of liberty committed a criminal offence he is charged with is a *condition sine qua non* when it comes to ordering or extending the custody. However, after certain period of time that is not sufficient and an assessment must be made whether sufficient and relevant grounds exist for ordering custody (see, the European Court of Human Rights, *Trzaska vs. Poland*, Judgment of 11 July 2000, Application no. 25792/94, paragraph 63).

34. The Constitutional Court also refers to the case-law of the European Court of Human Rights which concluded that in deciding whether it is justified to order custody against the suspect or the accused the seriousness of the criminal offence the person concerned is charged with, is definitely a relevant element for making a decision. Therefore, the Court of Human Rights accepts that the seriousness of the accusation and gravity of prescribed penalty constitute an initial risk which could be justifiably considered by the authorities. However, the European Court of Human Rights has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand (see, the European Court of Human Rights, *Ilijkov vs. Bulgaria*, Judgment of 26 July 2001, Application no. 33977/96, paragraphs 80-81).

35. In the case at hand, the appellant does not challenge the fact that the decision on custody is based on a reasonable doubt that he committed the criminal offence he is charged with, and therefore the Constitutional Court will not deal with that issue. However, the appellant challenges the existence of other relevant grounds for ordering him into custody after the indictment was filed, in other words he states that the court failed to concretize and specify those grounds. In this regard, the Constitutional Court notes that the appellant was ordered into custody upon the filing of the indictment due to the existence of grounds under Article 132 paragraph 1 item b) of the BiH CPC, in other words due to the risk of collusion in a situation where particular circumstances exist which indicate, *inter alia*, that the accused may obstruct the criminal proceedings by exerting his influence on the witnesses, accomplices or accessories.

36. The Constitutional Court notes that the first time the appellant was ordered into custody was after the indictment had been confirmed and this order was issued due to the criminal offence of crime against humanity. However, the Constitutional Court notes that it was not the first time that the grounds for ordering custody were considered. Namely, during the investigation the Court of BiH, by its decision of 31 August 2007, dismissed the motion of the BiH Prosecutor's Office for ordering custody measure against the appellant

arguing that „the presented evidence do not indicate that there is a concrete danger to which the witnesses may be exposed or that they may be exposed again to the inconveniences they had already suffered form" and that „the possibility of influence on the witnesses was not concretized", but it is established that there are the circumstances that justify the ordering of a prohibitive measure. Further, by its decision of 31 October 2007, the Court of BiH concluded that there are still circumstances present that justify the extension of a prohibitive measure against the appellant and the court further stated that certain measures are carried out as per the order and that the appellant fulfils the ordered obligations.

37. Further, the Constitutional Court notes that it is undisputable that all the witnesses were interrogated during the investigation and that by the Decision of the Court of BiH of 19 November 2007, which is prior to the indictment confirmation, all personal data of witnesses for whom the BiH Prosecutor's Office sought protection were declared confidential „to ensure that they testify before the Court of BiH without disruption and without begin exposed to psychological or physical consequences given the fact that the witnesses come from the same geographical area as the suspects and that they stay in that area on regular basis and for those reasons they feel insecure and fear when they come to the suspects' place of residence in the municipality of Kalinovik". While rendering this decision, the Court of BiH has considered the gravity of the criminal offence the appellant is charged with and it also took into its consideration the fact that „some of the witnesses were seriously, both physically and psychological traumatized, by the circumstance under which the criminal offense was committed" and that „a certain number of witnesses condition their testifying by issuance of protective measures".

38. Given such status of things, the Constitutional Court cannot accept the arguments that the grounds for custody due to the risk of collusion are justified by the concretized facts which indicate that the appellant, either in person or indirectly, attempted to exert his influence on the witnesses or prospective accomplices. Namely, a mere existence of the presumption that such a behaviour of the appellant would be possible is not sufficient as the court should not only presume such a possibility but it also must have arguments that there are some objective circumstances or concrete actions which could be a valid legal basis for ordering custody in the case at hand. The BiH Prosecutor's Office did not propose or present any evidence in this regard, but it only based its motion on the presumptions which the Court of BiH accepted, but it failed to explain a specific risk to which the witnesses are exposed. It is a fact that in the instant case the issue concerns the victims or the members of the victims' families who suffered from a very serious and delicate criminal offence but that fact, in itself, is not sufficient to satisfy the standards under Article 5 paragraph 3 of the European Convention. Accordingly, the grounds for custody must be viewed in the light

of specific circumstances and one of those circumstances is the fact that the witnesses who feel fear and insecurity have been already granted protective measures. While acting in this manner, the Court of BiH, in essence, transferred the burden of proof on the appellant which is inconsistent with the rules under Article 5 of the European Convention according to which a custody is an exceptional measure of limitation of the right to liberty which is admissible only in cases listed under that article and it could apply under strictly defined conditions *(Op.cit*. Judgment in the *Ilijkov* case, paragraph 85).

39. Furthermore, the Constitutional Court observes that all the witnesses were interrogated in the course of investigation. Therefore, as for the existence of a pre-trial ground for ordering the appellant into custody, it would be necessary to establish whether new circumstances exist in relation to each individual witness. The Prosecution gave no statement as to this, while the Court of BiH failed to assess it separately. The Constitutional Court considers that custody on this ground cannot be entirely excluded at the stage of main trial, in other words in a situation where all the witnesses have been already interrogated during the investigation. However, in this specific case there was no mention of special or concrete circumstances which would justify the custody. The fact that the appellant, upon the confirmation of the indictment, will have an insight into all evidence against him is not, in itself, sufficient for making a conclusion that there is a justified fear that the appellant, by exerting his influence on the witnesses, would obstruct the proceedings. All the more so as the Court, in all cases where it considered justified, granted certain protective measures for the witnesses, in other words their personal data are kept confidential unless the Court of BiH decides otherwise. On the other hand, even if it the appellant was aware of witnesses' names, it again would not be sufficient as the Court of BiH must establish that the appellant, either indirectly or directly, exerted his influence or attempted to exert his influence on the witnesses. That, *de facto* and *de jure*, means that certain risks that criminal proceedings may be obstructed must be restrictively interpreted and it also means that some of those risks, over time, cease to exist. As to the instant case, a measure of custody is admissible, as reasoned by the Court of BiH, exactly for the purpose of ensuring that the witnesses, who had given their statements during the investigation and among whom some had been granted the protective measures, testify without any impediments. Under such circumstances, the Court of BiH has failed to precisely and concretely reason the ground for its conclusion that by the first instance decision, a proper conclusion was made that the appellant may exert or attempt to exert his influence on the witnesses or prospective accomplices during the next stage of the proceedings, in particular that he may exert his influence on the protected witnesses. The Court of BiH has also failed to precisely and concretely point to specific circumstances indicating that something like that may occur and that only a measure of custody, as a

procedural measure that has the most serious effect on the accused, may achieve the aim which the Court of BiH has already considered in the course of ordering the measure of witnesses protection.

40. In view of the aforementioned, the Constitutional Court considers that by the challenged decision the appellant's right under Article 5 paragraph 3 of the European Convention was violated.

b) Article 5 paragraph 4 and Article 13 of the European Convention

41. The appellant considers that his right under Article 5 paragraph 4 of the European Convention and his right to an effective legal remedy under Article 13 of the European Convention was violated by issuance of decisions on his complaint and then on the complaint of his defence counsel, in which case both complaints were lodged against the same decision.

42. In view of the aforementioned, the Constitutional Court points that Article 5 paragraph 4 of the European Convention provides that everyone who is deprived of his liberty by arrest or detention shall be entitled to challenge the lawfulness of such deprivation of liberty in the court, in other words before a judicial authority which must be independent and impartial and must be competent to adopt a binding decision which may lead to the release of a person concerned (see the European Court, *De Wilde, Ooms and Versyp vs. Belgium*, judgment of 18 November 1971, series A, no. 12, paragraphs 76 and 77). This body must also provide for the *procedural guarantees that are appropriate for the specific kind of deprivation of liberty*, which are not *markedly inferior* to those existing in a criminal matter when the result of deprivation of liberty is a long lasting detention. In particular, these guarantees require the following: an oral hearing accompanied by legal assistance in the proceedings attended by both parties; a review of the lawfulness of the detention in the broadest sense; and a decision that is adopted promptly. The guarantees under Article 5 paragraph 4 mused be ensured in domestic law and legal remedy must be effective and sufficiently safe, in other words there must be a possibility for examining the lawfulness of custody and not of the proceedings or abuse of powers.

43. The Constitutional Court notes that Article 134 of the BiH CPC provides that a decision on custody shall be delivered to the pertinent person at the moment of deprivation of liberty, that the decision on custody may be appealed within 24 hours of the receipt of the decision and that the Panel deciding the appeal must take a decision within 48 hours. In the instant case, the Constitutional Court notes that the first instance decision ordering the appellant into custody was delivered to him at the moment he was deprived of liberty

on 29 November 2007, that the appellant lodged a complaint against that decision within a prescribed time-limit of 24 hours, and that he stated that the legal arguments in this regard would be given by his defence counsel who was delivered the said decision on 1 December 2007. The defence counsel also lodged the complaint within 24 hours from the day of receiving the decision and the Court of BiH decided each of the complaints within the time-limit stipulated by law. The Constitutional Court considers that a mere fact that two complaints were lodged against the first instance decision and that two decisions were issued does not constitute a violation of rights under Article 5 paragraph 4. Namely, the law provides for a legal remedy to challenge a decision on custody, as well as urgent time-limits within which, given the nature of the measure of deprivation of liberty, the court must take a decision. As to the case at hand, these provisions were fully complied with.

44. Therefore, the fact that the Court of BiH decided two complaints against the same decision by issuing two separate decision does not imply the appellant was in any way denied his right to use a legal remedy against the decision on custody, neither was any procedural guarantee under Article 5 paragraph 4 of the European Convention violated. In view of the aforesaid conclusion, the Constitutional Court considers that is not necessary to separately examine the possible violation of the right to an effective legal remedy under Article 13 of the European Convention.

c) Allegations of discrimination

45. The appellant considers that Article 14 of the European Convention was violated by the challenged decisions, in other words that he is discriminated as the Court of BiH was taking different position in similar cases.

46. Article 14 of the European Convention reads as follows:

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.

47. Pursuant to the case-law of the European Court of Human Rights, the right under Article 14 of the European Convention is an accessory right. That means that this Article does not guarantee an independent right to non-discrimination, but it is rather that one may refer to discrimination under this Article only in conjunction with „the enjoyment of the rights and freedoms provided for in the European Convention. The Constitutional Court recalls the case-law of the European Court of Human Rights according to which discrimination exists if a person or group of persons in an analogous situation are differently

treated and there is no objective or reasonable justification for such differential treatment (see, the European Court of Human Rights*, Belgian Linguistic Case*, the judgment of 23 July 1968, Series A, no. 6).

48. As to the instant case, the Constitutional Court considers that the appellant complains about the discrimination relating to the right under Article 5 of the European Convention. However, the appellant does not refer to a specific ground on which he is discriminated against, in other words he has not mentioned which ground should be taken for the assessment of the alleged differential treatment, neither has he offered any evidence to substantiate his claims about being discriminated against. The Constitutional Court notes that a mere fact that the Court of BiH issues different decisions on custody in cases which could, according to some elements, be similar to his case does not imply that there is a discrimination on some prohibited ground just because different decisions were issued in such cases. Namely, as it was already reasoned by the Constitutional Court, the pre-trial custody ground must be assessed in each individual case as it depends on the concrete circumstances, and therefore nobody is to consider that issuance of different decisions, given the circumstances of each individual case, constitute, in itself, discrimination on some prohibited ground.

49. Taking into account the aforesaid, the Constitutional Court considers that there was no violation of the right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in conjunction with Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention.

VIII. Conclusion

50. The Constitutional Court concludes that there is a violation of Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraph 3 of the European Convention if the appellant was ordered into custody due to a fear that he may, by exerting his influence of the witnesses, obstruct the criminal proceedings although such a fear is not justified by concrete and valid arguments that may indicate that the appellant attempted or that there is a serious risk that he may attempt to exert influence on the witnesses, but rather the decision is based only on the presumptions of the court due to the nature and gravity of the offence the appellant is charged with and due to a prospective investigation against the accomplices.

51. The Constitutional Court concludes that there is no violation of Article 5 paragraph 4 of the European Convention in the case where the Court, by issuing separate decisions

within a prescribed time-limit, decided the complaints which had been separately lodged by the appellant and his defence counsel against the decision on custody.

52. The Constitutional Court concludes that there is no violation of the right to non-discrimination under Article 5 of the European Convention in the case when the appellant bases his conclusions solely on the fact that the court decided differently in some other case because it should be taken into account that a different decision of the court that concerns some participants in the proceedings does not constitute a differential treatment.

53. Pursuant to Article 61(4) (14), Article 61(1), (2) and (3) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this Decision.

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

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Case no. AP 1828/06

DECISION
ON ADMISSIBILITY
AND MERITS

Appeal of Mr. Pero Gudelj against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, no. Kž-346/05 of 18 April 2006 and the Judgment of the Cantonal Court of Zenica, no. K-49/01 of 4 April 2005

Decision of 30 May 2008

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)(2) and (3) 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 Hadžiosmanović, 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,

Mr. Krstan Simić

Having deliberated on the appeal of **Mr. Pero Gudelj** in case no. **AP 1828/06**, at its session held on 30 May 2008 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Pero Gudelj is partially granted.

A violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in relation to hearing of evidence and arbitrariness in the assessment of evidence is hereby established.

The following judgments are quashed:

- **Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, no. Kž-346/05 of 18 April 2006 and**
- **Judgment of the Cantonal Court of Zenica, no. K-49/01 of 4 April 2005.**

The case no. K-49/01 shall be referred back to the Cantonal Court in Zenica for renewed proceedings in accordance with all guarantees provided for by Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Decision of the Constitutional Court of Bosnia and Herzegovina on interim measure no. AP 1828/06 of 26 June 2007 shall be rendered ineffective.

The appeal of Mr. Pero Gudelj lodged against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, no. Kž-346/05 of 18 April 2006 and the Judgment of the Cantonal Court in Zenica no. K-49/01 of 4 April 2005 in relation to other aspects of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 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 Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 20 June 2006 Mr. Pero Gudelj („the appellant") from Vitez, represented by Mr. Almin Dautbegović, a lawyer practicing in Zenica, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina („the Supreme Court"), no. Kž-346/05 of 18 April 2006 and judgment of the Cantonal Court of Zenica („the Cantonal Court"), no. K-49/01 of 4 April 2005. On 14 July 2006, the appellant submitted a supplement to the appeal adducing facts which, in his opinion, could be crucial for the position of the Constitutional Court. On 26 October 2006, the appellant requested from the Constitutional Court to examine his case in an expedited procedure or order an interim measure postponing the enforcement of the prison sentence pending a final decision on the appeal by the Constitutional Court.

II. Proceedings before the Constitutional Court

2. By its decision no. AP 1828/06 of 26 June 2006, the Constitutional Court granted the appellant's request for an interim measure and postponed the enforcement of the prison sentence imposed by the legally binding judgment of the Cantonal Court, no. K-49/01 of 4 April 2005, pending a final decision on the appeal.

3. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 15 September 2006 the Supreme Court, the Cantonal Court, the Cantonal Prosecutor's Office of Zenica-Doboj Canton („the Cantonal Prosecutor's Office") and D.B. and E.B., as the injured parties, in their capacity a subsidiary prosecutors, were requested to submit their replies to the appeal.

4. The Supreme Court submitted its reply on 4 October 2006. The Cantonal Court submitted its reply on 28 September 2006 and the Cantonal Prosecutor's Office did so on 13 October 2006. D.B. and E.B. submitted their replies to the appeal on 17 and 21 April 2008 considering that the appeal was submitted to them as participants in the proceedings, subsequently, on 7 April 2008.

5. Having regard to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 30 July 2007 and 25 April 2008.

III. Facts of the Case

6. 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.

7. Deciding on an indictment brought by the injured parties D.B. and E.B., in capacity of subsidiary prosecutors, the Cantonal Court rendered judgment no. K-49/01 of 4 April 2005 whereby it found the appellant guilty of having committed a criminal offence of attempted murder of E.B. in violation of Article 166 paragraph 1 in conjunction with Article 28 of the Criminal Code of the Federation of Bosnia and Herzegovina („CC FBIH") and sentenced him to three years and six months of prison. According to the same judgment, the appellant was acquitted of the criminal charges that he had committed a criminal offence of attempted murder of D.B. at the same time and place in violation of Article 166 paragraph 1 in conjunction with Article 11 of the CC FBIH.

8. In the reasoning of its judgment, the Cantonal Court stated that with regard to the same criminal act, the Cantonal Prosecutor's Office brought Indictment no. Kt-556/97 of 16 October 1997 charging E.B., M.P. and D.B. with the criminal offence of attempted

murder of the appellant, as the injured party in the same case, in violation of Article 36 paragraph 1 in conjunction with Articles 19 and 22 of the then applicable Criminal Code. By its judgment no. K-431/97 of 31 December 1997, the Cantonal Court acquitted E.B., M.P. and D.B. of the charges that they had committed a criminal offence of attempted murder of the appellant but, however, found that they were guilty of the criminal offence of aggravated theft and robbery in violation of Article 151 paragraph 1 of the then applicable CC RBIH and that they had committed that criminal offence against the appellant as accomplices. The aforementioned judgment became legally binding by the judgment of the Supreme Court, no. Kž-325/98 of 13 January 2000.

9. As reasoned by the Cantonal Court, prior to filing the charges, as subsidiary prosecutors, on 17 May 2001, the injured parties D.B. and E.B. had filed criminal charges against the appellant for the criminal offence of attempted murder on 6 June 2000. By its ruling no. Kt-42/00 of 5 June 2000, the Cantonal Prosecutor's Office rejected the criminal charges. The Cantonal Prosecutor's Office stated in paragraph 2 of its ruling that the persons that had filed criminal charges were allowed to pursue criminal prosecution within a time limit of eight days. Having received the ruling of rejection, on 29 June 2000 the injured parties D.B. and E.B., as subsidiary prosecutors, brought an indictment against the appellant. The appellant raised an objection to the indictment. Having considered the appellant's objection, the Cantonal Court issued ruling no. Kv-177/00 of 3 October 2000, whereby it decided to refer the indictment back to the investigating judge to carry out an investigation. The investigating judge of the Cantonal Court, by ruling no. Ki-77/00 of 1 February 2001, which was upheld by the ruling of the Cantonal Court, no. Kv-21/01 of 13 February 2001, decided that an investigation of the appellant would be carried out since there was a reasonable suspicion that the appellant had committed a criminal offence of attempted murder on 25 July 1997.

10. By Judgment no. K-49/01 of 4 April 2005, the Cantonal Court found the appellant guilty of having committed the criminal offence in question and sentenced him to 3 years and 6 months in prison. The Cantonal Court pointed out in the reasoning of its judgment that it followed from the presented evidence and findings relating to the proceedings as a whole that the criminal case in question had been dealt with by the same court and that it had been completed by Judgment no. K-431/97 of 31 December 1997. It was found that the injured parties were acquitted of the charge that they had committed the criminal offence of attempted murder of the appellant. According to the same decision, they were convicted of a criminal offence of aggravated theft and robbery of the appellant and were sentenced to prison. The first-instance court reached the conclusion that the accused persons, namely E.B., D.B and M.P. had not intended to murder the appellant

and that there was no premeditation as a relevant element of the criminal offence. The Cantonal Court therefore gave credence to the findings which the first-instance court and the second-instance court reached in their judgments nos. K-431/97 and Kž-325/98. The Cantonal Court, having conducted the evidentiary proceedings and having assessed the presented evidence, found that the appellant had committed the criminal offence of attempted murder of the injured party E.B., that he had been sentenced to prison for that criminal offence and that he had been acquitted of the charge that he had committed the same criminal offence against the injured party D.B.

11. The Supreme Court, having considered the appeal against the judgment of the Cantonal Court, rendered judgment no. Kž-346/05 of 18 April 2006, whereby it dismissed as ill-founded the appeals of the appellant and the injured party E.B. as subsidiary prosecutor and upheld the challenged judgment insofar as its convicting part was concerned. The Supreme Court, in the same judgment, partially granted the appeal of the injured party D.B., as subsidiary prosecutor, and his attorney, and quashed *ex officio* the challenged judgment insofar as its acquitting part was concerned and referred that part of the case back for a new trial. The Supreme Court held that the first-instance court had correctly applied the Criminal Code to the completely and correctly established facts by classifying the appellant's act as a criminal offence of an attempted murder.

IV. Appeal

a) Allegations stated in the appeal

12. The appellant finds that there was a violation of his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraphs 1 and 3(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") during the proceedings before the Supreme Court and the Cantonal Court as well as of his right not to be tried or punished twice under Article 4 of Protocol No. 7 to the European Convention. The appellant sees the violation of this right in the fact that the acquitting part of the legally binding judgment of the Cantonal Court, no. K-431/97 of 31 December 1997, and the convicting him are based on the identical relevant facts: time and place of the conflict, persons involved in the conflict, the manner in which the conflict took place and its effects, which the ordinary courts did not take into account when rendering the judgment. In particular, the appellant holds that the instant case relates to *res iudicata*, that the indictment brought by the injured parties in capacity as subsidiary prosecutors had formal deficiencies and that the injured parties put a tremendous pressure on the court, which all together amounted to an unfair trial.

13. Furthermore, the appellant claims that he was put in an unequal position compared to the subsidiary prosecutors in the course of the proceedings before the ordinary courts, which amounted to a serious violation of the right to a fair trial before an impartial tribunal. He alleges that he complained on many occasions that the matter had already been judged but that the court failed to give any explanation as to this objection in the reasoning of its decision i.e. the court neither dismissed nor rejected it, which, in the appellant's opinion, amounted to the violation of Article 6 of the European Convention as the court had to examine this issue separately. The appellant claims that the indictment was brought on 28 June 2000 and that the final decision, i.e. the Supreme Court's Judgment was taken on 18 April 2006, which, in the appellant's view, is an unreasonably long period of time. The appellant claims that the court could have presented evidence within a considerably shorter time since the case was not particularly complex. The appellant therefore holds that the length of the proceedings was unreasonably excessive because of the conduct of the injured parties as subsidiary prosecutors and owing to the inefficient work of the court, which amounted to the violation of the right to a fair trial within reasonable time.

b) Reply to the appeal

14. In its reply to the appeal, the Supreme Court alleges that the appellant sees the violation of his right to a fair trial in the fact that the matter had already been adjudicated. The Supreme Court holds that the appellant's allegations are ill-founded since the acquitting part of the legally binding judgment of the Cantonal Court, no. K-431/97 of 31 December 1997, relates to the event examined in the challenged judgments but the case does not relate to *res iudicata* since the judgment rendered in 1997 dealt with the indictment relating to E.B., D.B. and M.P., whereas the judgment challenged by this appeal was related to the appellant. Taking into account that the judgments do not refer to the same accused person, the Supreme Court holds that the matter was not *res iudicata*. For these reasons, the Supreme Court concludes that the appellant unfoundedly alleged that the same proceedings against him were conducted twice. As for the allegations on the formal deficiencies in the indictment brought by the injured parties in capacity as subsidiary prosecutors, which the appellant alleges as a ground for his complaint that he was denied the right of access to court, the Supreme Court holds that the criminal proceedings against the appellant were conducted on the basis of the indictment dated 17 May 2001, and not the indictment dated 29 June 2000. The reason being that the indictment, in accordance with Article 259 paragraph 2 of the then applicable Criminal Procedure Code, was considered as a request for investigation which had been submitted to the investigating judge of the Cantonal Court whereupon the injured parties as subsidiary prosecutors brought the indictment dated 17 May 2001. Therefore, the Supreme Court maintains that the appellant

unfoundedly alleges that the criminal proceedings against him were conducted on the basis of the indictment of 29 June 2000, which was incomplete in formal terms and that this amounted to the denial of his right of access to court. As to whether the facts were correctly established and whether the substantive law was correctly applied, the Supreme Court holds that the ordinary courts gave complete and clear reasons in respect of the established facts and applied criminal code provisions. As for the reasonableness of length of the proceedings, the Supreme Court outlines that the appellate proceedings conducted before that court were completed within a time limit of ten months being a length which, given the nature of the criminal case in question, can be considered as reasonable.

15. In its response to the appeal, the Cantonal Court alleges that the appellant's allegations in the appeal are unfounded and that the appellant's right to a fair trial was not violated in those proceedings since the appellant was represented by his defense counsels during the entire proceedings, evidence for the prosecution and for defence was presented, the court assessed it carefully and following the criminal proceedings the court rendered the judgment which was the subject of appellate proceedings conducted by the Supreme Court, which related to appeals lodged by the appellant and the respondent party. The Cantonal Court points out that the facts were correctly established and that the punishment imposed on the appellant was upheld by the Supreme Court' judgment. As to the part of the appeal in which the appellant complains about the length of the proceedings, the Cantonal Court holds that the majority of the hearings relating to the main trial were postponed because the formal requirements were not met and that the appellant, his attorney, injured parties as subsidiary prosecutors and their attorney predominantly contributed to such situation. As stated by the Cantonal Court, during the course of the proceedings the appellant and his attorney requested disqualification of the presiding judge of the panel on two occasions and the president of the criminal department, while the injured party as subsidiary prosecutor requested disqualification of a judge. Both the appellant and the injured party requested that the jurisdiction be transferred to another court. A number of hearings were postponed because of ill health of the injured party E.B., as subsidiary prosecutor and the hearings were also adjourned because of the failure of the appellant or his attorney to appear at the main hearing. Furthermore, in 2004 and 2005, deceased Mr. Drago Goronja was presiding judge and he was seriously ill at that time. During a period of 5 years, 5 hearings relating to the main trial, including its resumptions, were held so that the Cantonal Court holds that the court, following a short period relating to the main trial, rendered a judgment within reasonable time, and that the delay occurred due to the constant requests by the appellant, his attorney and the injured parties as subsidiary prosecutors. The Cantonal Court proposed that the appeal be dismissed for the reasons mentioned above.

16. In its response to the appeal, the Cantonal Prosecutor's Office alleges that after having examined the case-file with the former Cantonal Prosecutor's Office it established that the criminal charges had been filed with that body by the injured parties and that they had been rejected. Furthermore, it alleges that the competent prosecutor instructed the injured parties to undertake the criminal prosecution on their own, which they did, so that the Cantonal Prosecutor's Office did not participate in those criminal proceedings and, in that sense, is not a party to these proceedings.

17. E.B. stated in his reply to the appeal that the appeal is ill-founded, since the appellant's right to a fair trial in the proceedings before the ordinary courts was not violated. The appellant, in the case which was pending against the damaged parties as the subsidiary prosecutors, had the status of the damaged party so there are no grounds for objection to the adjudicated matter. The ordinary courts during the proceedings already decided on the objection to the adjudicated matter and it is therefore ill-founded to have it brought up in the appeal again. In addition, E.B. points to the fact that the judgment of the Cantonal Court no. K-49/01 in the acquitting part which the appeal refers to, was annulled by the judgment of the Supreme Court. These proceedings are still pending. In terms of the formal oversights of the indictment, referred to by the appellant, E.B. stated that the appellant was given a possibility to file objection against the indictment. However, he failed to avail himself of this legal possibility. It is therefore ill-founded to refer to the alleged violations of the right to a fair trial in the appeal, if there was a failure to do so during the proceedings. He proposed to have the appeal dismissed.

18. In his reply to the appeal, D.B. stated that the appeal is ill-founded and that the appellant's right he referred to in the appeal was not violated. The indictment against the appellant, as stated by D.B. did not have any formal oversights as the ordinary courts decided on it following the filed objection. The objection to the adjudicated matter is also ill-founded as the appellant, in the case which was pending against the damaged parties as the subsidiary prosecutors, had the status of the damaged party and not the accused. It is ill-founded to state in the appeal the objections to the findings and opinion of the expert witnesses, considering that such possibility existed during the proceedings before ordinary courts. For the above referenced, he proposed to have the appeal dismissed as ill-founded.

V. Relevant Law

19. The **Criminal Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of FBiH n*o. 37/03), in the relevant part, reads:

Article 28
Attempt

(1) Whoever intentionally commences perpetration of a criminal offence, but does not complete it, shall be punished for the attempted criminal offence when, for the criminal offence in question, the punishment of imprisonment for a term of three years or a more severe punishment may be imposed, and for the attempt of another criminal offence when the law expressly prescribes punishment for the attempt alone.

Article 166, paragraph 1
Murder

(1) Whoever deprives another person of life, shall be punished by imprisonment for not less than five years.

20. The **Criminal Procedure Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 35/03), in the relevant part, reads:

Article 4

No person shall be tried again for a criminal offense that he has been already tried for and for which a legally binding decision has been rendered.

Article 16

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.

Article 296

(1) The court shall reach a verdict solely based on the facts and evidence presented at the main trial.

(2) The court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, to conclude whether the fact(s) have been proved.

Article 313

The following points shall constitute a violation of the Criminal Code:

a) as to whether the act for which the accused is being prosecuted constitutes a criminal offense;

b) as to whether the circumstances exist that preclude criminal responsibility;

Article 305

(7) The court shall specifically and completely state which facts and on what grounds the court finds to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence, the reasons why the court did not sustain the various motions of the parties, the reasons why the court decided not to directly examine the witness or expert witness whose testimony was read, and the reasons guiding the court in ruling on legal matters and especially in ascertaining whether the criminal offense was committed and whether the accused was criminally responsible and in applying specific provisions of the Criminal Code to the accused and to his act.

21. The **Criminal Procedure Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina* nos. 43/98).

Article 56

When the competent prosecutor finds that there are no grounds to undertake prosecution of a crime which is automatically prosecuted or when he finds that there are no grounds to prosecute any of the reported accomplices, or when it is considered by this law that he has withdrawn from prosecution, he must inform the injured party of this within a period of 8 days and instruct him that he may undertake prosecution himself […]

22. The **Criminal Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH* nos. 43/98, 2/99, 15/99).

Article 171, paragraph 1

(1) Whoever deprives another person of his/her life shall be punished by imprisonment for not less than five years.

Article 20

(1) Whoever intentionally commences execution of a criminal offense, but does not complete his/her doing, shall be punished for the attempted crime only when the criminal offenses in question is punished by imprisonment of five years or more, and for other criminal offenses only where the law expressly prescribes punishment of the attempt alone.

(2) Attempted criminal offense shall be punished within the limits of the punishment prescribed for the same criminal offense committed, but may be punished less severely.

VI. Admissibility

23. 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 court in Bosnia and Herzegovina.

24. According to Article 16(1) of the Rules of the Constitutional Court, the Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

25. In the present case, the subject challenged by the appeal is the judgment of the Supreme Court no. Kž-346/05 of 18 April 2006 which the appellant received on 17 May 2006 and against which there are no other effective legal remedies available under the law. Next, the appeal was filed on 20 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.

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

VII. Merits

27. The appellant complains that the challenged judgments of the Supreme Court and Cantonal Court have violated his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraphs 1 and 3(d) of the European Convention and his right not to be tried or punished twice under Article 4 of Protocol No. 7 to the European Convention. Moreover, the appellant complains that his right to have his case decided within a reasonable time under Article 6 of the European Convention has been violated.

Right to a fair trial and the principle *ne bis in idem*

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

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

29. Article 6 paragraphs 1 and 3(d) of the European Convention, in the relevant part, reads:

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

3. Everyone charged with a criminal offence has the following minimum rights:

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

30. Article 4 of Protocol No. 7 to the European Convention, so far as relevant, reads as follows:

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

31. The present case relates to criminal proceedings in which the appellant was found guilty of a criminal offence in accordance with the law and was sentenced to prison. Therefore, the result of the relevant proceedings was decisive to the *determination of any criminal charge* against the appellant and, consequently, Article 6 of the European Convention is applicable to this case. Therefore, the Constitutional Court must examine whether the challenged judgments breach the appellant's right to a fair trial as guaranteed under Article 6 of the European Convention. The Constitutional Court shall first examine whether the principle *ne bis in idem* forming part of the right to a fair trial has been violated in the instant case, since the case relates to a matter tried twice, i.e. a matter in which a punishment was imposed twice for the same offence.

32. As to the appellant's complaints about the violation of the principle *ne bis in idem*, the Constitutional Court notes that the protection of this principle is guaranteed by Article 4 of Protocol No. 7 to the European Convention but that simultaneously this principle forms part of the right to a fair trial under Article 6 of the European Convention since the

term „criminal proceedings" referred to in Article 4 of Protocol No. 7 to the European Convention can be identified with the term „criminal proceedings" referred to in Article 6 of the European Convention. The appellant's ground for his allegations on the violation of this right is that the same criminal offence as the offence for which he had been sentenced to prison had already been decided by the legally binding judgment, no. K-431/97 of 31 December 1997, which the Cantonal Court rendered in proceedings conducted against the injured parties as subsidiary prosecutors in the capacity of suspects.

33. The Constitutional Court notes that according to the national criminal legislation the principle *ne bis in idem* includes two cumulative requirements: first, that the criminal proceedings were already conducted against a person for a criminal offence and second, that a legally binding judicial judgment was rendered in that criminal case. Therefore, the prohibition of double jeopardy relates to the person and the offence for which that person was tried, i.e. the person against which proceedings were already conducted for a criminal offence and in respect of which a judicial decision was already taken. Turning to the instant case, the legally binding judgment of the Cantonal Court, no. K-431/97 of 31 December 1997, related to the accused E.B., D.B. and M.P. and to the events that took place on 3 July 1997 when, jointly and by mutual agreement, they cheated the appellant into entering a house threatening to kill him if he did not give them 15,000.00 DM. According to the same judgment, they were acquitted of the charge that on 25 July 1997 they had committed a criminal offence of attempted murder of the appellant. The appellant did not participate in those proceedings as suspect but as the injured party so that the appellant unfoundedly alleges that the case relates to a *res iudicata.* Furthermore, although the appellant claims that the Supreme Court did not examine this issue, the Constitutional Court notes that the Supreme Court, having offered a reasoning for the challenged judgment emphasized that in the present case there were no circumstances which would exclude criminal liability, as it was correctly concluded by the first instance court. Taking into account all the aforesaid, the Constitutional Court considers that the principle *ne bis in idem* has not been violated in the instant case, since the previous judgments rendered in the proceedings in which the subsidiary prosecutors participated as suspects and the convicting judgments against the appellant do not relate to the same person so that the challenged judgments cannot relate to *res iudicata.*

34. With regard to the appellant's allegations that the reasoning of the challenged judgments in terms of objection of *res iudicata* are insufficient and incomplete, the Constitutional Court notes that the right to a fair trial entitles *inter alia* the appellant to be provided with the reasons of a judgment since this makes it possible for him or her to exercise effectively the rights of available legal remedies. However, Article 6 paragraph

1 of the European Convention does not require that the court deals with all arguments put forward by the parties during the course of the proceedings, but only with those the court considers to be relevant. The court has to take into account the arguments of the parties to the proceedings, but there is no need for all of them to be reflected in the reasons of the judgment (see Constitutional Court, Decision no. *U 62/05* of 5 April 2002 and *AP 352/04* of 23 March 2005) and in the present case the courts acted exactly in that manner, stating reasons for finding the objection of *res iudicata* as ill-founded.

35. As to the appellant's allegations that he was placed in an unequal position in relation to the subsidiary prosecutors, Constitutional Court notes that during the proceedings before the first instance court the appellant, as the subsidiary prosecutor, was allowed to propose evidence and the facts on which the fair hearing relies, to propose and summon witnesses, to attend main hearing, to confront the witnesses as well as to have the defence attorney. It is also necessary to stress that Article 6 of the European Convention does not grant the party an unrestricted right to examine witnesses before the court since the local courts enjoy discretionary power in deciding on their own to interrogate those witnesses they deem to be of assistance in ascertaining the truth or to evaluate whether it is necessary for them to be summoned. They, however, have to be attentive not to infringe upon the fundamental nature and aim of the right to a fair trial in the process which obligates that the proceedings are conducted „under equal conditions" and with „equality of arms". Indeed, Article 6 requires that the court only states the reasons based on which it decided against summoning those witnesses whose interrogation is explicitly required. In this case, there were no such requests. In terms of the objection of the appellant that the courts in two court instances were biased, without stating how is that biasness reflected nor submitting any evidence in that regard, the Constitutional Court finds that they are arbitrary and ungrounded and as such they must be dismissed.

Considering the above said, the Constitutional Court concludes that in the present case there was no violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraphs 1 and 3 of the European Convention in conjunction with Article 4 of Protocol No. 7 to the European Convention.

As to the right to a fair trial within a reasonable time

36. The appellant complains about the violation of the right to a fair trial within a reasonable time under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention. In particular, the appellant claims that his right to a fair trial has been violated, since the length of the proceedings was unjustifiably excessive, i.e. since the judgment was not rendered within a reasonable time. In

considering those allegations, the Constitutional Court obtained the case no. K-49/01 from the Cantonal Court to examine whether the right to a trial within a reasonable time under Article 6 paragraph 1 of the European Convention has been violated. Taking into account the standards set by the case-law of the European Court, the Constitutional Court outlines that the reasonableness of length of the proceedings is evaluated in the light of the circumstances of the case, taking particularly into account the complexity of the case, conduct of the parties to the proceedings on the one and that of the court and public authorities on the other hand.

a) As to the period to be taken into consideration

37. On 17 May 2001, the injured parties as subsidiary prosecutors E.B. and D.B. brought an indictment against the appellant for a criminal offence of attempted murder. The Cantonal Court, having acted upon the indictment, rendered a judgment on 4 April 2005. The Supreme Court, having acted upon an appeal, rendered a Judgment on 18 April 2006. Therefore, the length of the proceedings relating to the indictment brought against the appellant was barely 5 years and they are pending before the Cantonal Court insofar as their irrelevant part is concerned, i.e. the part in which the Supreme Court quashed the judgment of the Cantonal Court and referred the case back for a new trial.

b) As to the complexity of the case

38. The complexity of the case must be regarded within the factual and legal aspects of the criminal procedure, i.e. evidence to be presented and assessed individually and taken together in order to establish the facts forming integral part of the elements constituting a criminal offence with which the suspect has been charged. Taking into account the fact that the appellant has been charged with the criminal offence of attempted murder, i.e. a criminal offence against integrity of life and body whose incriminations relate to a serious bodily injury, the Court concludes that the case is particularly complex.

c) As to the conduct of the court

39. The Constitutional Court outlines that under Article 6 of the European Convention, everyone has the right to a final decision within reasonable time in the *determination of a criminal charge against him.* It is for the Contracting States to organize their legal systems in such a way that their courts can meet this requirement (see ECtHR, the *Rugliese (II) against Italy* judgment of 24 May 1991, Series A-206-A, pages 10 and 11, paragraph 19).

40. As already concluded, the proceedings relating to the indictment brought by the injured parties in capacity as subsidiary prosecutors lasted for almost 5 years. The

Constitutional Court shall therefore examine whether the ordinary courts contributed to such long duration of the proceedings. Having acted upon the indictment, the Cantonal Court delivered the indictment to the appellant and his defence counsel in July 2001 and the first hearing relating to the main trial was scheduled for 15 January 2002. The appellant and his defence counsel failed to appear at that hearing. At the resumption of the main trial held on 27 February 2002, the appellant was heard in his capacity as accused and proposals put forward by the injured parties in capacity of subsidiary prosecutors by the appellant for presentation of evidence by hearing witnesses were granted. At the hearings relating to the main trial held on 18 March and 15 April 2002, the proposed witnesses were heard and the hearing was adjourned until 13 May 2002 in order to hear the injured parties in capacity as witnesses. At the hearing dated 13 May 2002, only one of the injured parties was heard since the other one failed to appear. The hearing was postponed until 7 June 2002. Neither the injured parties nor the appellant appeared at that hearing. The procedural requirements therefore were not met so that the hearing was postponed until 9 September 2002 with the consent of the defence counsel of the appellant. At the resumption of the main trial held on 9 September 2002, a witness was heard whereupon the defence counsel of the appellant, prior to passing on to hearing the injured party E.B., stated that he was informed that the injured party was put on the wanted list, that he was at large, that he was convicted according to a legally binding judgment and that a sentence had been passed on him. He requested from the presiding judge to check the reliability of information mentioned above. After a break the court set, in order to verify the aforementioned information, he requested from the court to disqualify the presiding judge of the panel and a member of the court panel whereupon the trial was postponed until an unspecified date, while the request for disqualification was rejected as being untimely. Meanwhile, on 9 December 2002 the injured party in the capacity of a subsidiary prosecutor filed a request for disqualification of judge. That request was also rejected. The next hearing relating to the main trial was scheduled for 13 January 2003 at which the appellant requested anew the disqualification of judge of the court panel so that the hearing was postponed until an unspecified date. The hearing scheduled for 28 February 2003 was postponed by mutual agreement of the parties and the hearing scheduled for 21 March 2003 was adjourned since the appellant's defence counsel failed to appear before the court. At the hearing held on 10 April 2003, it was concluded that the injured party E.B., in his capacity as subsidiary prosecutor filed a request for disqualification of a member of the court panel so that the hearing was postponed until an unspecified date whereupon the court issued a ruling whereby it granted the request for disqualification of a member of the court panel. The request for disqualification of the president of the panel was dismissed. The hearing scheduled for 1 August 2003 was adjourned until an unspecified date by mutual agreement of the parties due to the medical treatment of the injured party as subsidiary prosecutor. At

the hearing of 1 October 2003, it was concluded that the defence counsel of the appellant filed a request for transfer of the local jurisdiction to any of the cantonal courts of the Federation of BiH so that the hearing was postponed pending a decision on the request by the Supreme Court. By its ruling no. Kr-129/03 of 5 November 2003, the Supreme Court dismissed the request whereupon the Cantonal Court scheduled a new hearing relating to the main trial for 29 March 2004 which was postponed by mutual agreement of the parties to the proceedings in order to provide home addresses of the witnesses. None of the summoned parties appeared at the hearing of 4 May 2004, since the injured party in capacity as subsidiary prosecutor informed the court that he would undergo a medical treatment at the Clinical Centre of the University of Sarajevo until 14 June 2004. On 20 May 2004, the injured party E.B. in capacity as subsidiary prosecutor filed a request for the transfer of jurisdiction to another Cantonal Court with real jurisdiction. By its ruling no. Kr-45/04 of 15 June 2004, the Supreme Court dismissed the request. A new hearing was scheduled for 6 August 2004 but it was adjourned until 26 August 2004 because of death of one of the judges. The hearing of 26 August 2004 was postponed until 15 September 2004 because the appellant's defence counsel was on vacation. At the hearing of 15 September 2004, it was concluded that the hearing should be renewed; at the same hearing, the appellant presented his defence, witnesses were heard whereupon the hearing was adjourned until 12 October 2004 when the proposed witnesses were heard. At the resumption of the hearing held on 29 October 2004, a medical expert witness and expert witness in ballistics were heard. That hearing was postponed for unspecified time due to the illness of the presiding judge. A new hearing relating to the main trial before another court panel was held on 9 March 2005 when the appellant was heard in his capacity as defendant, E. B. was heard in his capacity as subsidiary prosecutor, a witness was heard as well as D.B. in his capacity as a witness. At the resumption of the trial held on 31 March 2005, by mutual agreement of the parties, the witnesses' statements made earlier were read out and closing speeches were delivered. The pronouncement of the judgment was scheduled for 4 April 2005. After appeals had been lodged, the Supreme Court rendered a judgment on 18 April 2006.

41. It follows from the stated chronology of the criminal proceedings that the hearings were scheduled often and in continuity in accordance with the Criminal Procedure Code of the Federation of BiH and that a great number of evidence was presented. However, the Cantonal Court postponed the main trial seven times, i.e. three times due to the appellant's requests for disqualification of judges and due to the request for transfer of local jurisdiction to the court with real jurisdiction. The hearings relating to the main trial were also postponed three times at the request of the injured party in his capacity as subsidiary prosecutor and one time because of the illness of the judge to whom the case

was assigned, which is also in compliance with the procedural law. Taking into account all the aforesaid, the trial could not be held in continuity from September 2002 to June 2004, whereupon it was concluded within time limit of 9 months before the Cantonal Court and 10 months before the Supreme Court.

d) As to the conduct of the appellant

42. The Constitutional Court observes that in the period from the first hearing which was held on 15 January 2002 when the appellant and his defence counsel failed to appear, the appellant requested from the court on two occasions to disqualify judges, and he filed a request for transfer of competence to the court with the real jurisdiction one time, which was the reason why the hearings were adjourned until an unspecified date. Furthermore, the Constitutional Court observes that at the hearing relating to the main trial held on 9 September 2002, when all legal requirements were met to hold the hearing and to present the proposed evidence, the appellant insisted on requesting disqualification of the presiding judge of the panel, although his defence counsel was aware that such request was untimely, since it was filed in the course of the main trial and not before the main trial, which was the reason why it had been rejected. At the next hearing the appellant requested a new disqualification of judge because of the changes in the composition of the court panel. The request was rejected. The transfer of territorial jurisdiction was requested as well about which the Supreme Court decided and dismissed this request. Therefore, by exercising his rights referred to in the Criminal Procedure Code of F BiH, the appellant partially contributed to the length of the proceedings, but such kind of behaviour cannot be a reason for blaming him because he pursued legal remedies available and prescribed under the law.

43. In view of the conclusion mentioned above, the Constitutional Court concludes that the challenged judgments are not in violation of the appellant's right to a fair trial within the reasonable time as integral part of the 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.

Right to fair trial in connection with the process of hearing of evidence and assessment of evidence

44. As to the appellant's allegations relating to accuracy of establishing the facts of the case and application of the substantive law, the Constitutional Court, primarily, refers to the case-law of the European Court of Human Rights („the European Court") and the Constitutional Court, according to which the task of these courts is not to review the

findings of the regular courts as to the facts and application of the substantive law (see ECHR, *Pronina vs. Russia*, and Decision on Admissibility of 30 June 2005, Application no. 65167/01) unless decisions of the regular courts violated the constitutional rights (the right to a fair trial, the right of access to court, the right to an effective remedies etc). The Constitutional Court cannot generally substitute its own appraisal of the facts or evidence for that of the ordinary courts but it is the ordinary courts' task to appraise the presented facts and evidence (see ECHR, *Thomas vs. United Kingdom,* judgment of 10 May 2005, Application no. 19354/02). The Constitutional Court is therefore not called upon to review the establishment of facts and give its assessment of evidence in place of the ordinary courts, unless the established facts and evidence on which the judgment is based seem manifestly arbitrary and unacceptable. This is the case if an ordinary court wrongfully interpreted applied or disregarded some constitutional right, if the application of the law was arbitrary and discriminatory, if there was a violation of procedural rights or if established facts indicate a violation of the Constitution of Bosnia and Herzegovina.

45. In that regard, the Constitutional Court notes that the ordinary court is obliged to conscientiously evaluate each piece of evidence and in connection with the rest of the evidence and, based on such assessment, conclude whether the facts have been proved (Article 296 paragraph 2 of the Criminal Procedure Code of the Federation of Bosnia and Herzegovina). Furthermore, Article 16 of the Criminal Procedure Code of the Federation of BiH provides that the court and other bodies participating in the criminal proceedings to evaluate the existence of facts shall not be related or limited to special formal rules of evidence. This free assessment of evidence requires the reasons to be given in respect of each individual piece of evidence, all evidence taken together and their mutual logical connection.

46. The Constitutional Court holds that in the instant case the assessment of evidence was carried out and that the first-instance court, in its judgment, assessed each individual piece of evidence and their mutual connection. In particular, in its judgment no. K-49/01 of 4 April 2005, the Cantonal Court presented all evidence that produce the facts, evaluation and conclusions, *inter alia* stating that there were no objections of the parties to the finding of Mr. Nedim Mutapčić, the permanent court appointed expert in ballistics, that the finding was based on relevant substantive evidence to which the court gave credence. The finding presented facts on basic data on the fire arms (pistol TT model 1945, calibre 7,62 and pistol model Bereta, 70, cal 7,65). However, when obtaining the complete case file and the finding and opinion in question, the Constitutional Court established that they are dated 10 September 1997 that the court expert was appointed by the written order of 14 August 1997 in the criminal proceedings conducted against Mr. Ervin Barišić and others, with a

task to examine the fire weapon used at the time in question and to examine analysis of the findings of the crime technical team of Zenica. This finding stated that the fire weapons were used by Mr. Sadik Varda and Mr. Momo Pajkanović. Although the finding is rather extensive, in its challenged judgment, the Cantonal Court only stated that it was based on relevant evidence and that the court gave to it its full credence. Court examines the finding and the opinion as any other evidence, therefore in accordance with the *intime conviction* (free judicial evaluation of evidence, personal conviction of the court), but it is indeed for that reason necessary that the evaluation is to be sufficiently critical particularly when given in the form of hypothetical finding and in the instant case it was the paraffin gloves finding. The Court reiterated the same conclusion in terms of the finding and opinion of the medical expert Mr. Zdenko Cihlaž dated 6 September 1997.

47. In regards to the assessment of other evidence, more precisely assessment of testimonies of the witnesses heard, the Constitutional Court notes that in the proceedings challenged by the appeal the Cantonal Court accepted the conclusions of the first and second instance court presented in the judgments nos. K-431/97 and Kž-325/98 that followed from hearing of evidence, with the appellant as the damaged party and subsidiary prosecutors as the accused, with no direct presentation of evidence through interrogation of witnesses for the prosecution and defence. In fact, the Cantonal Court conducted the main hearing on 9 March 2005 before a new court panel, for which reason the entire proceedings had to be conducted anew. This was followed, with the agreement by the parties, by reading of the testimonies of the witnesses, given in the proceedings conducted under no. K-431/98 in which the appellant was the damaged party. Therefore, in the proceedings challenged by this appeal, the witnesses' testimonies given much earlier (judgment no. K-431/98) were used and evaluated in the criminal proceedings in which the appellant was the damaged party with a completely different legal situation and circumstances as to which the witnesses testified. The Constitutional Court points out that the fundamental right of the accused, in this case the appellant, is to raise questions as to the presented evidence. A requirement for that is that the evidence is presented directly. Having in mind the complexity of these criminal proceedings which arises from the gravity of the criminal offense the appellant was charged with, the Constitutional Court finds that the appellant was not given these guarantees as he was not entitled to raise questions as regards the presented evidence, either personally or through his defence attorney. In regards to the above stated, the Constitutional Court did not examine any further the conducted hearing of evidence as it got an impression, by examining the findings and opinions and conclusions included in the judgment of the Cantonal Court, that they were arbitrarily and uncritically interpreted. Thus, adequate reasoning of evidence lacked in this case. For the above, the Constitutional Court finds that reasons given in the judgment

were not clear, logical or convincing enough but rather that an arbitrary assessment of evidence occurred in the present case.

48. In the instant case, the Constitutional Court holds that the appellant's allegations that the challenged judgments were not sufficiently substantiated, are well-founded. Thus, the Constitutional Court holds that the ordinary courts failed to give clear, extensive and precise reasons for its positions presented in the reasoning of the challenged judgments, particularly in terms of the findings and opinions of the court appointed experts, assessment of evidence of interrogated witnesses, considering that they were vaguely interpreted, without stating the circumstances the expert findings covered and as to circumstances the witnesses were interrogated due to which there are elements that indicate that the assessment of evidence and therefore the hearing of evidence, was conducted and evaluated arbitrarily entirely to the appellant's detriment.

VIII. Conclusion

49. The Constitutional Court concludes that in this case there is a violation of the 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, in the part of the appeal relating to arbitrariness in assessment of evidence by the ordinary courts. This case lacks clear, precise and critical analysis of the presented evidence, particularly the expert opinions and finding and assessment of statements of interrogated witnesses given in the other proceedings while only read in the proceedings conducted against the appellant, which gives an impression of hearing of evidence having been conducted to the appellant's detriment. Contrary to that, there is no violation in relation to other aspects of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraphs 1 and 3 (d) of the European Convention and the right of the appellant not to be tried twice or sentenced in the same case under Article 4 of Protocol No. 7 to the European Convention, as the Constitutional Court established that the previous judgment concerns the same criminal act relating to the subsidiary prosecutors in their capacity as suspects and not the appellant. The Constitutional Court concludes that there has been no violation of the right to a decision within the reasonable time since the court did not contribute to the adjournments of the hearings relating to the main trial being that the requests for disqualification of judges and request for transfer of jurisdiction to another court with real competence were filed on six occasions.

50. Pursuant to Article 61(1), (2) and (3) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as set out in the enacting clause

of this Decision. Separate Dissenting Opinion of Judge David Feldman shall make an integral part of this Decision.

51. Pursuant 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

SEPARATE DISSENTING OPINION OF JUDGE FELDMAN

1. In its Decision in Case no. AP 1828/06, Appeal of Mr. Pero Gudelj, the Constitutional Court (a) dismissed as ill-founded the appellant's claim that the criminal proceedings against him were not concluded within a reasonable time, and so violated his right to a fair hearing within a reasonable time under Article II(3)(e) of the Constitution of Bosnia and Herzegovina (the Constitution) and Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), and (b) granted his appeal on the basis that the regular courts had acted arbitrarily and uncritically in assessing the evidence against him and had denied his right to raise questions about the evidence and to present and cross-examine witnesses, as guaranteed by the same provisions of the Constitution and the European Convention.

2. I have the misfortune to disagree, with great respect, with the majority of the Constitutional Court on both issues.

3. In relation to the question of delay, the indictment for attempted murder was brought against the appellant on 17 May 2001, and the court of first instance, the Cantonal Court of Zenica, gave judgment in the case on 4 April 2005, nearly four years later. The appellant appealed, and the Supreme Court of the Federation of Bosnia and Herzegovina gave judgment on the appeal on 18 April 2006, rejecting parts of the appeal and referring back other parts of the case to the Cantonal Court. In my view, the Supreme Court acted within a reasonable time, but the time taken by the Cantonal Court was not reasonable.

4. The Constitutional Court in its reasoning considers several factors that are relevant to deciding whether the time taken to determine the case was reasonable. The Constitutional Court considers (at paragraph 38 of its reasoning) that the case was particularly complex, because it concerned an offence against the victim's life and bodily integrity. I cannot agree. The seriousness of the offence and its complexity are two different matters and should not be confused. Whilst the allegations against the appellant were serious, I do not consider that the case as a whole was particularly complex. The legal issues were not particularly difficult, and the factual issues and evidence were not unusually complex.

5. As to the course of proceedings before the Cantonal Court, it is true that the process was beset by an unfortunate series of delays several of which were outside the control of the Cantonal Court. Nevertheless, in my view, the Cantonal Court should have taken a grip on the proceedings and compelled the parties to proceed at the scheduled times. Instead, the Cantonal Court allowed the proceedings to drift on for years without making any progress. Part of this delay was the result of the appellant exercising his procedural

rights, but, as the reasoning of the plurality of the Constitutional Court recognizes at the end of paragraph 42 of its reasoning, the appellant cannot be blamed for doing so.

6. I therefore take the view that the proceedings were not completed within a reasonable time. However, in itself this would not necessarily have resulted in the annulment of the decisions against which the appellant appealed. If the Constitutional Court had shared my opinion, it would have been necessary to decide what remedy should be granted for undue delay. As matters have turned out, it is unnecessary for me to express a view about that.

7. In relation to the assessment of evidence, the Constitutional Court points out (with respect, correctly) that the unsatisfactorily disjointed progress of the first-instance proceedings led to a situation in which the trial court received much of the evidence against the appellant in a form which prevented him and his legal representatives from cross-examining witnesses before the judicial panel which actually decided the case. However, as the Constitutional Court acknowledges at paragraph 47 of its reasoning, the procedure whereby witnesses' testimonies in previous proceedings were read to the panel was adopted with the agreement of the parties. That being so, I consider that the appellant effectively waived his right under Article II(3)(e) of the Constitution and Article 6.3(d) of the European Convention to cross-examine witnesses.

8. Finally, I am unable to agree with the view of the Constitutional Court that the Cantonal Court failed to give clear and convincing reasons for its conclusions, and that it interpreted the evidence arbitrarily and uncritically so as to violate the appellant's right to a fair hearing under Article II(3)(e) of the Constitution and Article 6.1 of the European Convention (see paragraphs 46 and 47 of the reasoning). It is not clear to me whether the Constitutional Court's reasoning is directed to the way in which the Cantonal Court assessed the evidence or the way in which it expressed its judgment. Admittedly the two are inevitably connected, as the form and expression of the judgment indicate the way in which the first-instance court reached its decision. However, the Supreme Court of the Federation of Bosnia and Herzegovina took the view that the Cantonal Court had considered carefully the evidence put before it, and I have found nothing in the record to cast doubt on the correctness of the view of the Supreme Court.

9. For these reasons, I respectfully dissented from the decision of the Constitutional Court that there was a violation of Article II(3)(e) of the Constitution and Article 6 of the European Convention in this case.

Case no. AP 1222/07

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Imad Al Husin against the Verdict of the Court of Bosnia and Herzegovina, no. U-129/07 of 5 April 2007 and the Ruling of the Council of Ministers of Bosnia and Herzegovina – the State Commission for Revision of Decisions on Naturalization of Foreign Citizens, no. UP-01-07-99-2/06 of 9 January 2007

Decision of 4 October 2008

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(2) and (4) (4) and (9), Article 59(2)(2), Article 61(1), (2) and (3) and Article 64(1) 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. Seada Palavrić, President

Mr. Miodrag Simović, Vice-President

Mr. David Feldman, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Ms. Constance Grewe

Mr. Krstan Simić

Mr. Mirsad Ćeman

Having deliberated on the appeal of Mr. **Imad Al Husin** in Case no. **AP 1222/07,** at its session held on 4 October 2008, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. Imad Al Husin is partially granted.

A violation of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The following verdicts are quashed:

- **The Verdict of the Court of Bosnia and Herzegovina, no. U-1172/07 of 21 January 2008 and**
- **The Verdict of the Court of Bosnia and Herzegovina, no. Uvl-03/08 of 14 March 2008.**

Both cases shall be referred back to the Court of Bosnia and Herzegovina for a new proceedings in which the Court of Bosnia and Herzegovina shall

consider the evidence and establish whether the removal of the appellant from the country would be justified within the meaning of the requirements under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 60 days as from the date of delivery of this Decision, about the measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal of Mr. Imad Al Husin is hereby dismissed as ill-founded, which is lodged against the Verdict of the Court of Bosnia and Herzegovina no. U-1172/07 of 21 January 2008 and the Ruling of the Ministry of Security of Bosnia and Herzegovina no. UP-1-08/1-41-1-216-2/07 of 8 August 2007 in relation to Article II(3)(a) and (b) and Article II(4) of the Constitution of Bosnia and Herzegovina and Articles 2, 3, 13 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The appeal of Mr. Imad Al Husin is hereby dismissed as ill-founded, which is lodged against the Verdict of the Court of BiH no. U-129/07 of 5 April 2007 and Ruling of the State Commission for Revision of Decisions on Naturalization of Foreign Citizens no. UP-01-07-99-2/06 of 9 January 2007 issued by the Council of Ministers of Bosnia and Herzegovina in relation to Article I(7)(b) of the Constitution of Bosnia and Herzegovina.

The appeal of Mr. Imad Al Husin is hereby rejected as inadmissible, which is lodged against the Verdict of the Court of BiH no. U-129/07 of 5 April 2007 and Ruling of the State Commission for Revision of Decisions on Naturalization of Foreign Citizens no. UP-01-07-99-2/06 of 9 January 2007 issued by the Council of Ministers of Bosnia and Herzegovina in relation to Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as being manifestly (*prima facie*) ill-founded.

The appeal of Mr. Imad Al Husin is hereby rejected as inadmissible, which is lodged against the Verdict of the Court of Bosnia and Herzegovina

no. U-1172/07 of 21 January 2008 and Ruling of the Ministry of Security of Bosnia and Herzegovina no. UP-1-08/1-41-1-216-2/07 of 8 August 2007 in relation 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 for being *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

The appeal of Mr. Imad Al Husin is hereby rejected as inadmissible, which is lodged against the Verdict of the Court of BiH no. U-129/07 of 5 April 2007 and Ruling of the State Commission for Revision of Decisions on Naturalization of Foreign Citizens no. UP-01-07-99-2/06 of 9 January 2007 issued by the Council of Ministers of Bosnia and Herzegovina in relation 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 for being *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 30 April 2007, Mr. Imad Al Husin („the appellant"), represented by Association „Vaša prava BiH" from Sarajevo and Messrs. Osman Mulahalilović and Faruk Latifović, lawyers practicing in Brčko, 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. U-129/07 of 5 April 2007 and the Ruling of the Council of Ministers of Bosnia and Herzegovina – the State Commission for Revision of Decisions on Naturalization of Foreign Citizens („the Commission") no. UP-01-07-99-2/06 of 9 January 2007. In addition, the appellant submitted a request for an interim measure whereby the Constitutional Court would „prohibit appellant's deportation from Bosnia and Herzegovina" pending a decision on the appeal. The appeal is registered with the Constitutional Court under number AP 1222/07. On 31 May 2007 and 1, 4 and 6 February 2008, the appellant supplemented his appeal respectively.

2. On 28 January 2008, the appellant lodged an appeal against the Verdict of the Court of BiH no. U-1172/07 of 21 January 2008 and the Ruling of the Ministry of Security of Bosnia and Herzegovina („the Ministry of Security"), no. UP-1-08/1-41-1-216-2/07 of 8 August 2007. The appellant also requested an interim measure whereby the Constitutional Court would „prohibit appellant's deportation from Bosnia and Herzegovina" pending a decision on the appeal. The appeal is registered with the Constitutional Court under no. AP 306/08. On 28, 30 and 31 January 2008 and on 1 February 2008, the appellant supplemented his appeal respectively.

3. On 3 March 2008, the appellant lodged an appeal against the Ruling of the Court of BiH no. U-1141/07 of 28 January 2008, the Ruling of the Ministry of Security no. UP-2-07-07-2-69/07 of 27 July 2007 and the Ruling of the Department for Foreigners, Field Office in Sarajevo, no. 19.4.1-UP-1-1-498/07 of 18 May 2007. In this appeal, the appellant requested adoption of an interim measure whereby the Constitutional Court would „prohibit the appellant's deportation from Bosnia and Herzegovina" pending a decision on the appeal. The appeal is registered with the Constitutional Court under no. *AP 660/08*.

4. On 28 April 2008, the appellant filed the appeal against the Verdict of Court of BiH, no. Uvl-03/08 of 14 March 2008, whereby the appellant's request had been dismissed for extraordinary review of the Ruling of the Court of BiH, no. U-1141/07 of 21 January 2008. In this appeal the appellant again requested adoption of interim measure whereby the Constitutional Court would „prohibit the appellant's deportation from Bosnia and Herzegovina" pending a decision on the appeal. The appeal was registered under number *AP 1254/08*.

II. Procedure before the Constitutional Court

5. The Constitutional Court took a decision no. AP 1222/07 of 26 June 2007, rejecting the appellant's request for an interim measure.

6. Taking into account that four appeals from the jurisdiction of the Constitutional Court have been submitted to the Constitutional Court with regards to the same facts and legal basis, the Constitutional Court took a decision on merging the cases to conduct single proceedings and take a single decision under case number AP 1222-07. The appeals numbered as AP 1222/07, AP 306/08, AP 660/08 and AP 1254/08 have been merged.

7. On 30 January 2008, the Ministry for Human Rights and Refugees of BiH – Council of Ministers - Office for Representation before the European Court of Human Rights, informed the Constitutional Court that, on 22 January 2008, the appellant had filed an

appeal against Bosnia and Herzegovina to the European Court of Human Rights, which was registered under no. AP 3727/08 and that on 29 January 2008 and the European Court of Human Rights issued the interim measure suggesting to Bosnia and Herzegovina that the appellant should not be expelled from Bosnia and Herzegovina pending the final decision of the Constitutional Court on the appeal no. AP 1222/07 nor he should be expelled within the period of 7 days from the date of informing the appellant on that decision. A copy of translated letter of the European Court of Human Rights no. ECHR-LE2.G of 29 January 2008 has been attached herewith.

8. In addition, the appellant also submitted the said decision in English.

9. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 31 January 2008 the Court of BiH, the Ministry of Security and the Ministry of the Interior of Canton Sarajevo were requested to submit their replies to the appeal. On 29 May 2007, the State Commission was requested to submit a reply to the appeal.

10. The Court of BiH submitted its replies to the appeal on 5 June 2007 and 12 February 2008 and the Ministry of Security did so on 11 February 2008. On 15 February 2008, the Ministry of the Interior of Canton Sarajevo submitted its reply, while the State Commission did so on 13 June 2007.

11. On 19 February 2008, the Helsinki Committee, as *amicus curiae* submitted its expert opinion in writing.

12. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were forwarded to the appellant on 17 March 2008.

III. Facts of the Case

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

14. The appellant is and at all material times was a national of the Arab Republic of Syria. He came to the territory of the former Yugoslavia and to the (then) Republic of Bosnia-Herzegovina (R BiH) and was granted citizenship of R BiH in March 1992 by the Ruling of the Ministry of the Interior of the Republic of Bosnia and Herzegovina („the Ministry of the Interior of R BiH"), no. 09/2-204-454/92 of 23 March 1992. In 1994 the appellant, perhaps anticipating that the grant of citizenship in 1992 had been invalid, applied again for citizenship on different grounds, and was again granted citizenship by another Ruling of the Ministry of the Interior of R BiH, no. 07/2-204-1384/94 of 22 November 1994. During the period of his residence on the territory of the former Yugoslavia the appellant

met and married his wife, to whom his child was born, and became part of a family unit consisting also of children from his wife's previous marriage.

The facts of the case no. AP 1222/07

15. By the Ruling no. UP-01-07-99-2/06 of 9 January 2007, the Commission revoked the BiH citizenship of the appellant, granted by both Rulings of the Ministry of the Interior of mentioned in paragraph 13 above. The said Ruling is final in the administrative proceedings and no appeal is admissible. However, according to Article 19 of the Law on Administrative Disputes of BiH, administrative proceedings may be initiated against it by filing a lawsuit with the Court of BiH

16. In the reasoning of the Ruling it is, *inter alia*, stated that based on the conducted proceedings it has been established that the appellant acquired the R BiH citizenship by means of fraudulent conduct, *i.e.* through concealment of the relevant facts and therefore the said Ruling was adopted in accordance with Article 23, paragraph 1 and Article 41, paragraph 4, item b) of the Law on Citizenship of Bosnia and Herzegovina.

17. The appellant filed a lawsuit with the Court of BiH against the Ruling of the State Commission no. UP-01-07-99-272 of 9 January for the purpose of annulling the said Ruling of 9 January 2007. By its Verdict no. U-129/07 of 5 April 2007, the Court of BiH dismissed the appellant's lawsuit as ill-founded.

18. In the reasoning of its verdict, the Court of BiH stated that the lawfulness of a final administrative act was examined within the scope of the claim in the lawsuit, i.e. only the part wherein the appellant requested the ruling on revocation of citizenship to be annulled, as referred to in Article 35 of the Law on Administrative Disputes of BiH (*Official Gazette of BiH* no. 19/02). While examining the lawfulness and regularity of the challenged Ruling, the Court of BiH found that the State Commission correctly applied Article 23 in conjunction with Article 41 of the Law on Citizenship of BiH (*Official Gazette of BiH* nos. 13/99, 6/03, 14/03 and 82/05), and reviewed the Ruling of the Ministry of the Interior of R BiH no. 07/2-204-1384/94 of 22 November 1994 based on the data the appellants submitted, as well as the data obtained *ex officio.* It follows from the Ruling on acquisition of citizenship of 22 November 1994, that the appellant was granted the citizenship of BiH on the basis of citizenship application, statement, a copy of his passport and an excerpt from a register of births. Following the examination of evidences presented in that procedure, it was established that the plaintiff satisfied the requirements under Article 8(1) of the Law on Citizenship of R BiH (*Official Gazette of BiH* nos. 18/92, 11/93, 27/93, 13/94 and 15/94). However, it follows from the citizenship application of 12 October

1994, lodged by the appellant through the Embassy of R BiH in Zagreb that he demanded BiH citizenship based on his marriage with Ms. Zinaida Softić, a citizen of BiH, and based on his participation in the Army of BiH from 15 September 1992 to 1 January 1993. In the opinion of the Court of BiH, the facts stated in his citizenship application, which are relevant for the acquisition of citizenship, are not true. Further, it is not true that the appellant, at the time of submitting his application for citizenship, was married to a citizen of BiH, i.e. that he was married to Ms. Zinaida Softić. The appellant entered into marriage with the BiH citizenship only on 14 June 1995, as indicated in the marriage certificate issued by the Municipality of Stari Grad of 9 May 2001 and this certificate was submitted to the Court of BiH as an attachment to the claim. This means, as per the Court of BiH, that at the time of submitting his application on 12 October 1994, the appellant was not married to a BiH citizen, in other words, no marriage contract was concluded although the appellant referred to the above marriage as to a relevant fact. Given that the appellant, while lodging his citizenship application, gave a declaration of loyalty to the Constitution, laws and other regulations of the Republic of Bosnia and Herzegovina, the Court of BiH states that he could have and should have known and must have been aware that the laws in BiH provide that the marriage may be entered into exclusively in accordance with the Family Law of BiH and that marriage entered into in accordance with the Sharia (Islamic law) is not considered as valid and has no legal effect in BiH. This circumstance is relevant for the Court of BiH because the Law on Citizenship of RBiH, which was applicable at the time of his acquisition of citizenship, stipulated that an alien may be granted the citizenship of BiH by naturalization if married to a citizen of BiH. Therefore, the Court of BiH has concluded that the requirement for acquisition of citizenship by naturalization based on the marriage with citizen of BiH was not satisfied and that the appellant gave false information in this regard.

19. Therefore, the Court of BiH is of the opinion that the appellant was unjustifiably challenging the ruling claiming erroneous establishment of facts and misapplication of substantive law since the State Commission made a proper conclusion stating that the appellant failed to give true facts decisive for evaluation of his status. Moreover, the Court of BiH states that neither it is true the appellant's allegation that he was a member of Army of BiH during the period from 15 September 1992 to 1 January 1993 because there are no valid or legally prescribed evidence in the case file, nor did the appellant submit the relevant evidence in the documents attached to the claim. Quite the contrary, it follows from the copy of certificate of the Ministry of Defense - Administration of Defense in Zenica, no. 19-8-02-34-11-9-3595/01 of 18 December 2001, that the appellant was a member of military unit – Armed Force Zenica during the period from 1 May 1993 to 31 December 1995. It is not clear, as per Court of BiH, what was the reason that the

appellant, in his application for citizenship from 1994, failed to state that he was a member of the BiH Army as from 1 May 1993, if he ever had this status, but, in his application, he only stated that he was a member of BiH Army form 15 September until 1 January 1993 and failed to prove the related fact in the proceedings. Therefore, the conclusion of the State Commission is correct, according to the Court of BiH, that the appellant acquired his citizenship based on false information with regards to his status as a the member of R BiH Armed Force. The Court of BiH pointed out that this information, when it comes to the appellant's status as a member of R BiH Armed Force, was significant only in regards to evaluating the loyalty of the appellant as an alien towards the State of Bosnia and Herzegovina (related to Article 8a of the Law on R BiH). This is due to the reason that the appellant did not acquire the BiH citizenship on the basis of his membership in the R BiH Armed Forces in accordance with Article 9 paragraph 5 of the cited Law, and therefore it is not a decisive fact, in this specific case, from which date the appellant was the member the R BiH Armed Forces. Given that the appellant managed to refute the challenged Ruling only in part relating to the revocation of his citizenship acquired by the Ruling of 22 November 1994, the Court of BiH refrained from making an assessment concerning the acquisition of BiH citizenship in accordance with the Ruling no. 09/2-204-454/92 of 23 March 1992.

20. The Court of BiH rejected the appellant's request as inadmissible in which he sought issuance of interim measure to prevent his deportation given that the Law on Administrative Disputes of BiH did not provide for the issuance of interim measure. The challenged Ruling only establishes the facts concerning the revocation of citizenship and thus it does not contain a decision on deportation of the appellant from the territory of Bosnia and Herzegovina, in which case that ruling cannot be the subject of enforcement because deportation of aliens from the territory of BiH is to be decided in a separate proceedings and a separate decision is to be adopted by the competent institutions of BiH.

Facts of the Case no. AP 306/08

21. The Ministry adopted the Ruling no. UP-1-08/1-41-1-216-2/07 of 8 August 2007, whereby the appellant's request for asylum was dismissed and the appellant, as a citizen of the Arab Republic Syria, born on 8 October 1963 in Mouhassan, Syria, was ordered to leave the territory of Bosnia and Herzegovina within 15 days from the date of the said Ruling taking effect.

22. In the reasoning of the Ruling it is, *inter alia*, stated that based on the conducted proceedings it was established that the requirements provided for by Article 72 paragraph 1 item a) of the Law on Movement and Stay of Foreigners and Asylum (*Official Gazette*

of BiH no. 29/03 and 4/04) that the appellant be approved the asylum in BiH have not been met since there are no prerequisites for recognition of the appellant's refugee status, which is referred to in the 1951 Convention on the Status of Refugees and 1967 Protocol on the Status of Refugees.

23. The appellant filed a lawsuit against the Ministry, whereby he initiated an administrative dispute before the Court of BiH for the purpose of annulment of the Ruling of the Ministry no. 1-08/1-41-1-216-2/07 of 8 August 2007. By its Verdict no. U-1172/07 of 21 January 2008, the Court of BiH dismissed the appellant's lawsuit as ill-founded. In the reasoning of its Verdict the Court stated that the Ministry correctly decided when it dismissed the appellant's request for approval of asylum since even according to the opinion of this court the requirements were not met which are referred to under Article 72 of the Law on Movement and Stay of Aliens and Asylum in order to meet the appellant's request. Namely, the Court states that, according to this law provision, the asylum in BIH shall not be approved to the foreigner unless there are conditions for the recognition of the refugee status. Furthermore, according to the Convention and Protocol on the Status of Refugees, a refugee status shall be recognized to every person who is outside the country of his/her nationality owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

24. According to the evidence presented in the proceeding of adoption of the challenged Ruling, the court considers that the Ministry properly established that the appellant had not abandoned the country of his citizenship due to his fear of persecution by the authorities of that country, but that he, after the school demonstrations that took place in 1980 and 1981, enrolled in the Faculty of Biology in Damascus, and after that, in 1982, he came to Belgrade where he enrolled in the Faculty of Medicine. In 1985 he moved to Rijeka in order to continue his studies at the Faculty of Medicine. During 1992 and finally in 1994 or 1995, the appellant came to Bosnia and Herzegovina for the purpose of joining the Army of BiH. Furthermore, taking into account the appellant's statement that during 1986 he visited his country for the first time, and then in 1989, and even in 1991 and 1992 and that he had no problems concerning his stay in the country of his citizenship, the court considers that the conclusion of the Ministry that the appellant did not find himself outside his country of origin due to the fear of persecution was correct since he stated that he had not been a member of any banned political party, religious or national organization in his country nor was he ever arrested in his country or apprehended for a questioning. In view of the aforesaid, the Court is of the opinion that the case at hand does not involve an alien finding himself outside of the country of his citizenship due to a justified fear of persecution or his political view finding that the Ministry properly decided that the

requirements prescribed by law were not met for recognition of the appellant's refugee status and approval of the asylum within the meaning of the Law on Movement and Status of Aliens and Asylum accordingly.

25. The Court has also taken into its consideration that the appellant's motive for requesting the asylum because of his political opinion and beliefs is not well-founded because the appellant's fear of persecution only because his political opinion is similar to the objectives of the organization „Brothers Muslims" is not justified. Therefore, the Court of BiH is of the opinion that there is no threat of prosecution against the appellant for only the members and activist of organization „Muslim Brotherhood" are being prosecuted in Syria and that the appellant, according to his statement, is not a member of the mentioned organization. The Court has also established that the Ministry, taking into account reports from his country of origin and other reports obtained during the proceedings, made a proper conclusion that the persons who took part in the war of BiH or joined the BiH Army are not persecuted in the country of appellant's origin. The Court found that the Ministry had explained in details the reasons for which it considers that the appellant's fear is not justified due to the fact that he had taken part in the war as a member of the BiH Army and the said reasons have been accepted by the Court in their entirety. Finally, the fact that the appellant avoided military service in his country of origin and that on several occasions he was giving interviews to various media, cannot be views as a valid reason for his fear of persecution in his country of origin, as it was concluded by the Ministry in its Ruling. Therefore, the Court of BiH found that the claim of the appellant is ill-founded where he challenges the regularity and lawfulness of the decision on dismissal of application for asylum because the decision of the Ministry is based on properly established facts, as well as on the proper application of the Convention and Protocol on Refugees.

26. Taking into account the decision of the Ministry in part where the appellant was ordered to leave the territory of BiH, the court established that the Ministry explained in details the reasons for which it considers that in this specific case the requirements for application of Article 60 of the Law on Movement and Stay of Aliens and Asylum. Namely, the court established from the Ruling of Ministry no. UP-2-07-07-2-69/07 of 27 July 2007, whereby the appellant's stay was not approved for the following reasons that based on the documents, records of authorized law enforcement bodies and operational information from security services it was established that the presence of the appellant in Bosnia and Herzegovina represents a threat to a public order and national security, in which case the court found that the decision was adopted on the basis of proper application of law provisions and required standards regulating the issue of deportation of aliens for the purpose of protection of national security, and all of this applies even in case of existence of the conditions for application of principle of „prohibition of return".

27. After referring to Article 8 paragraph 2 of the European Convention, the Court concluded that the complaint of the appellant is unfounded where he complains that his right to family life under Article 8 of the European Convention has been violated since in paragraph 2 of the said Article it is stipulated that the respect for right to private and family life must be in accordance with the interests of state and its national security and therefore the interference of public authorities is „necessary in a democratic society, it is in the interest of national security, public security etc." and this interference did not exceed the limits of protection of state interests. This is because the national security of a State has a priority over private and family life of an individual. The Court concluded that in the instant case the appellant's right to family life under Article 8 of the European Convention has not been violated. Moreover, by referring to Article 54 of the Law on Movement and Stay of Aliens and Asylum and given that the appellant came from the Republic of Croatia, the court stated that it is necessary to assess whether, on occasion of deportation the appellant, he will be returned to his country of origin or to the country from which he came to BiH.

Facts of the Case no. AP 660/08

28. By the Ministry's Ruling - Department for Foreigners, Sarajevo Field Office, no. 19.4.1-UP-1-1-498/07 of 18 May 2007 upheld by the Ruling of Ministry no. UP-2-07-07-2-69/07 of 27 July 2007, the appellant's request for temporary stay was dismissed. Moreover, by paragraph 2 of the enacting clause of the Ruling the appellant was given a time limit of 15 days as form the date of delivery of final ruling to voluntarily leave the territory of Bosnia and Herzegovina. The appellant filed a lawsuit with the Court of BiH against this Ruling, wherein he suggested that the court modify the challenged Ruling by approving his temporary stay in BiH on the basis of his marriage with the citizen of Bosnia and Herzegovina.

29. By its Ruling No, U-1141/07 of 21 January 2008, the Court of BiH rejected the appellant's claim as inadmissible. In the reasoning of the said Ruling the Court of BiH stated that the lawsuit of the appellant is inadmissible for the reason that the Law on Movement and Stay of Aliens and Asylum, as a special law, clearly stipulates that an alien shall be entitled to court protection, i.e. that he/she shall be entitled to filing a lawsuit against a final administrative act only if the issue is approval of asylum and only in the event that the subject of administrative proceedings was a request for temporary stay for the reasons referred to in Article 35, paragraph 1, item d). i.e. if the temporary stay is requested for humanitarian reasons and the conditions have been met in accordance with Article 60 of the said law, i.e. in the event when an alien must be approved a temporary stay because of reasonable doubt that they would be in danger of being subjected to torture

or other inhuman or degrading treatment or punishment if deported. In all other cases relating to taking a decision on the stay of aliens in the territory of BiH no court protection has been envisaged by the said law, i.e. no initiation of administrative dispute against a final administrative act has been envisaged. This is because the right of aliens to stay in a certain county or to be approved the stay falls within the domain of public law of each country. If a state denies such a right to an alien for the reasons prescribed by the law that is to be considered an act of the respective state falling within its public-law domain and it does not enjoy the protection of Article 6 of the European Convention as a „civil right or obligation". For the mentioned reason, the Court of BiH concluded that the lawsuit of the appellant is inadmissible since the appellant is not entitled to initiate an administrative dispute against the above referenced Ruling, as stated in the challenged Ruling.

Facts of the case no. AP 1254/08

30. The appellant submitted a request for review of the Ruling of Court of BiH no. U-1141/07 of 21 January 2008. By its Verdict no. Uvl-03/08 of 14 March 2008, the Court of BiH dismissed the appellant's request for review as ill-founded. In the reasoning of its verdict it is stated that the Appellate Administrative Panel finds that the panel of Court of BiH dealing with administrative disputes, in the procedure of examining the existence of procedural – legal prerequisites for taking a decision on merits in the administrative dispute, acted in a proper and legal manner and, by referring to the reasons established in the first instance proceedings, the Panel concludes that in the instant case the lawsuit is not admissible after establishing that the challenged Ruling is correct and lawful and that the request for review is unfounded. Namely, the Appellate Panel of the Court of BiH stated that in the procedure of adoption of the challenged Ruling it was clearly established that the requirements under Article 41, paragraph 1, items d) and f) of the Law on Movement and Stay of Aliens and Asylum have not been met concerning the approval for temporary stay of the appellant and after establishing that the Ministry properly decided when it dismissed the appellant's application for asylum because, in the opinion of the said panel, the requirements under Article 72 of the Law on Movement and Stay of Aliens and Asylum have not been met for the appellants request to be granted. Namely, the court states that according to this law provision an alien shall be approved asylum in BiH provided that the conditions for recognizing the refugee status of an alien have been met.

IV. Appeal

a) Allegations from the appeal no. 1222/07 (revocation of citizenship)

31. The appellant complains that the verdict of the Court of BiH no. U-129/07 of 5 April 2007 has violated his rights 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 Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 paragraph 1 of the European Convention. He points out that he was not given an opportunity to give his opinion about the reasons for which the Court of BiH adopted the challenged verdict since those reasons were not stated in the Ruling of the State Commission and therefore he considers that the mentioned verdict was not adopted by an „impartial tribunal". Moreover, the appellants alleges that the Court of BiH did not rely on the facts that had been established in the administrative proceedings, but it rather based its decision on the facts that the Ministry was not establishing at all and thus the court undertook the role of the party in accordance with the „power of unity" principle. For the said reasons, as well as for the fact that he was not given an opportunity to have public hearing before the Court of BiH, the appellant considers that he was denied his right of access to the court.

32. The appellant states the reason why he sought issuance of interim measure referring to the previous case law in similar cases (*Farchichi Badreddine and Atmmani*), which indicates that, subsequent to the decision revoking citizenship from naturalized citizens, the administrative authorities in BiH have been rendering decisions on deportation. He particularly emphasizes that it is a well known fact that the situation in Syria, when the respect for human rights is concerned, is very difficult and that the death penalty is still in force in Syria. The appellant considers that by his expulsion, due to non-issuance of the requested interim measure, his right to life would be endangered. Also, he points out that in the daily newspaper „Avaz" of 13 April 2007, „the Director of Foreigners Department announced his deportation, which would in this way endanger his right to respect of his family life and right to prohibition of torture".

Allegations from the appeal no. AP 306/08 (rejection of asylum application and order to leave Bosnia and Herzegovina)

33. The appellant complains that by the challenged decision his rights safeguarded by Article II (3)(a)(b)(e) and (f) and Article II (4) of the Constitution of Bosnia and Herzegovina have been violated, as well as his rights safeguarded under Articles 2, 3, 6, 8,13 and 14 of the European Convention and right under Article 1 of the Protocol no.

7 to the European Convention. As for the appellants' complaint about the violation of his right to a fair trial, the appellant states that the Court of BiH arbitrarily applied the provisions of the Law on Movement and Stay of Foreigners and Asylum since he proved that human rights are violated in Syria even for the reason of being a member of certain social group or for having a political opinion. The appellant states that the Court of BiH failed to take into its consideration the fact that he has been a member of the „voluntary unit El-Mujaheed" since 1992 and that is why he could be placed in danger of torture and death in Syria if deported. Moreover, the appellant considers that his right to a fair trial has been violated, as well as Article 1 of Protocol no. 7 because he was not allowed to submit reasons against his expulsion, i.e. to state why he constitutes a threat to the public order or national security. The appellant states something quite the contrary since there is no investigation pending against him. Furthermore, as for the violation of Articles 2 and 3 of the European Convention, the appellant states that there is a possibility of pronouncing death penalty against him in Syria, that there is a real risk of him being subjected to torture and inhumane and degrading treatment or punishment, as well as the risk of prosecution in his country of origin due to his political opinion, participation in the Armed Forces of BiH. He claims that BiH has never requested any guarantees from Syria that he would not be subjected to torture unlike the case *Chalal vs. the United Kingdom*, to which he refers, where the Court of Human Rights prevented the appellant's deportation to India regardless of the given guarantees.

34. Further, as for the alleged violation of his and his family's right to family life, the appellant alleges that he entered into marriage with a BiH citizen and that he has three children who were born into this marriage and therefore the challenged verdict leads to the expulsion of his wife and children from BiH although they are the citizens of BiH and this results in their collective punishment. The appellant states that the opinion of the Court of BiH is arbitrary that in the instant case Article 8 of the European Convention has not been violated and he refers to cases *Abdellah Berrehab vs. The Kingdom of Netherlands* and other cases dealt with by the European Court of Human Rights. Finally, the appellant considers that his rights have been violated because of his dark skin, because he practices the religion of Islam and because he is of Afro-Asian national origin since no other conclusion can be drawn form the presented evidence. He suggests that the appeal be granted and challenged decision quashed.

Allegations from appeals no. AP 660/08 and no. AP 1254/08
(refusal of permission for temporary stay in Bosnia and Herzegovina)

35. In his appeals of identical contents, the appellant complains that the challenged decisions are in violation of his rights under Article II(3)(a) of the Constitution of

Bosnia and Herzegovina and Article 2 of the European Convention, Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention and Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. Moreover, in his both appeals the appellant states that in the said cases the Court of BiH violated Article 9 of the Law on Administrative Disputes of BiH, Article 35, paragraph 1, item d) of the said law in conjunction with Article 60 of the Law on Movement and Stay of Foreigners and Asylum and therefore he deems the challenged decisions to be unlawful. Namely, the appellant alleges that by Article 35 of the Law on Movement and Stay of Foreigners and Asylum the initiation of administrative dispute against an administrative act of the Ministry is not forbidden and that there is no law provision the court refers to in this regard.

b) Reply to the appeal

36. In its reply to the appeal, the Commission states that it found a series of irregularities and unlawfulness in granting the BiH citizenship to the appellant and, based on the reasons stated in the challenged Ruling, the Commission unanimously decided to revoke the appellant's BiH citizenship. In addition, the Commission underlines that the relevant ruling was passed in accordance with the Constitution and laws of Bosnia and Herzegovina. The Commission followed the proper procedure and heard the appellant, who also made contacts with the Commission and brought certain documentation relevant for the decision revoking the appellant's citizenship. Given that the appellant has kept his former citizenship, the Commission recalls that the appellant has not become a person without citizenship because of the withdrawal of the appellant's BiH citizenship. The Commission concludes that in the procedure of revision of citizenship it has not violated the appellant's fundamental human rights and it presented its opinion that Article II of the Constitution of Bosnia and Herzegovina – Human Rights and Fundamental Freedoms does not encompass the right to citizenship and, consequently, there has been no violation of Article II of the Constitution of Bosnia and Herzegovina.

37. In its reply to the appeal, the Court of BiH recalls the fact that the appellant has failed to file a request for judicial review against the verdict of the said Court or any other extraordinary remedy, as provided for under Article 40 of the Law on Administrative Disputes of BiH; therefore, pursuant to Article 16(4)(15) in conjunction with Article 16(1) of the Rules of the Constitutional Court, the appellant's appeal is inadmissible. However, in the event that the Constitutional Court finds the appeal admissible, the Court of BiH will deem the appeal to be ill-founded for the reasons stated in the challenged verdict and therefore this court suggests that the appeal be dismissed in accordance with Article 61(3) of the Rules of the Constitutional Court.

38. In its reply to the appeal, the Ministry emphasizes that given the results of the proceedings the appellant is not placed in danger of being subjected to torture or any other inhuman or degrading treatment or punishment after his deportation to his country of origin. In view of the aforementioned, the Ministry is of the opinion that there are no reasons for granting a temporary stay to appellant because of humanitarian reasons in accordance with Article 35 paragraph 1 item d) of the Law on Movement and Stay of Foreigners and Asylum. Furthermore, the Ministry remains entirely supportive of its statements given in the challenged Ruling since the decisive facts have been fully established, reasoned and the provisions of the substantive law have been applied as well.

V. Relevant Law

39. The **Law on Movement and Stay of Aliens and Asylum** (*Official Gazette of Bosnia and Herzegovina* no. 29/03 of 6 October 2003), as relevant reads:

Article 34
(General conditions for issuing a residence permit)

1. Temporary residence shall be granted to an alien on the condition that:

a) he/she has evidence justifying the existence of the grounds required for granting temporary residence,
b) he/she has funds to support himself/herself, including the funds for his/her health care,
c) he/she has a medical certificate issued not more than three months following the date of submitting the application, showing that he/she does not suffer from a disease of high risk for the community and/or that he/she is capable for work.

2. Evidence referred to in item a) of this Article shall refer to:

a) marriage certificate or other relevant evidence of the marriage concluded,
b) work permit issued by the competent employment agency,
c) registration with the competent Pension and Invalidity of paragraph 1 Insurance Fund,
d) decision on registration of the legal entity into the court registry, accompanied with the evidence of their solvency,
e) attestation of enrolment into an educational institution for the current year,
f) medical report accompanied with the recommendation of a health institution confirming the necessity of a long-term medical treatment in BiH,
g) documents on completed education and qualifications acquired,

h) other evidence required to support the justified stay of the alien in the country whose validity shall be assessed by the competent organisational unit of the Ministry based on Article 55 of this Law.

2. Evidence referred to in item a) of paragraph 1 of this Article shall refer to:

a) marriage certificate or other relevant evidence of the marriage concluded,

b) work permit issued by the competent employment agency,

c) registration with the competent Pension and Invalidity Insurance Fund,

d) decision on registration of the legal entity into the court registry, accompanied with the evidence of their solvency,

e) attestation of enrolment into an educational institution for the current year,

f) medical report accompanied with the recommendation of a health institution confirming the necessity of a long-term medical treatment in BiH,

g) documents on completed education and qualifications acquired,

h) other evidence required to support the justified stay of the alien in the country whose validity shall be assessed by the competent organisational unit of the Ministry based on Article 55 of this Law.

Article 35

(Temporary residence on humanitarian grounds)

1. Temporary residence on humanitarian grounds shall be exceptionally granted to an alien who does not fulfil the requirements for granting temporary residence prescribed in this Law, as follows:

a) to an alien who has been a victim of an organised crime and/or trafficking of human beings, for the purpose of providing protection and assistance for his/her rehabilitation and repatriation into the country of his/her habitual residence,

(...)

(d) to an alien with respect to whom it is determined that the requirements referred to in Article 60 of the present Law have been met and to whom asylum has not been granted in accordance with this Law,

(...)

Article 41

(Refusal of the application for a residence permit)

An alien, who fulfils the conditions for granting residence prescribed in the present Law, shall have his/her application for a temporary or permanent residence permit refused if:

a) he/she has entered the BiH territory while not complying with the entry requirements set out in this Law, unless there exist reasons for issuance of a residence permit on humanitarian grounds in the sense of Article 35 of this Law, or

(...)

(f) his/her presence, based on the information available to the Ministry, constitutes a threat to public order and national security of BiH.

Article 43
(Appeal against the decision of the organisational unit of the Ministry)

1. An appeal against the decision upon the application for a residence permit may be filed with the Ministry within 15 days from the date of notification of the decision.

2. An applicant for a residence permit cannot be expelled or forcibly removed from the BiH territory pending the expiration of a deadline for the appeal and/or pending the decision to be taken in the appellate procedure.

3. An alien must remain at the address he/she has registered as his/her residence and every day report to the authority at the territory of which he/she resides pending a final and binding decision to be taken in the appellate procedure.

4. An alien shall be temporarily deprived of his/her passport and provided with an attestation, pending the conclusion of the procedure, unless he/she has voluntarily agreed to leave the country before the completion of the procedure referred to in paragraph 2 of this Article.

Article 44
(Appeal against the decision of the Seat Office of the Ministry)

1. No appeal is allowed against the decision of the Ministry on issuing a residence permit on humanitarian grounds in the sense of Article 35 paragraph 1 item d) of this Law.

2. An alien cannot be expelled or forcibly removed from the BiH territory pending a final and binding decision taken in the sense of Article 35 paragraph 1 item d) of this Law.

Article 60
(Principle of non-refoulement)

Aliens shall not be returned or expelled in any manner whatsoever to the frontier of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, regardless of whether or not they have formally been granted asylum. The prohibition of return or expulsion shall also apply to persons in respect of whom there is a reasonable suspicion for believing that they would be in danger of being subjected to torture or other

inhuman or degrading treatment or punishment. Aliens may not be sent to a country where they are not protected from being sent to such a territory either.

Article 72

Under this Law, asylum shall be granted to:

a) an alien who according to the definition stated in Article 1 A (2) of 1951 Convention Relating to the Status of Refugees and Article 1 of 1967 Protocol, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable or, owing to such fear, is unwilling to avail himself to the protection of that country; or

b) to an alien who, not having a nationality and being outside the country of his/her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Article 76

a) Procedure for asylum shall be regulated by a basic organizational unit in charge of asylum issues and this unit shall be in charge of adopting a decision in form of ruling (...)

b) The ruling shall be adopted independently, individually, objectively and impartially after finalisation of a complete interview procedure where all facts relevant for taking the decision shall be established. An applicant must be given the opportunity to present all the circumstances known to him/her, to have access to all available evidence, as well as to suggest presentation of particular evidence.

3. An alien shall be given an opportunity to follow the course of the procedure through an interpreter if he/she does not know the language used during the procedure, as well as to use the services of a legal or another counsellor. The obligation of the conductor of the procedure is to inform the applicant about all the rights and obligations stemming from the Law.

(...)

5) Any decision taken upon validity of the request for asylum must be fully reasoned and shall be communicated to the applicant in person.

(...)

40. The **Law on Administrative Disputes of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* no. 19/02) as relevant reads:

Article 8

An administrative dispute may only be conducted against the final administrative act.

The final administrative act, in terms of this Law, shall be the act by which the competent institution referred to in Article 4 of this Law decides on a certain right or duty of a citizen or legal person in some administrative issue (hereinafter: the final administrative act).

Article 10

An administrative dispute cannot be conducted:

1) against final administrative acts issued in matters in which judicial protection is provided apart from the administrative dispute;

2) against acts issued in the matters that, according to the strict stipulation of the law, cannot be the subject of the administrative dispute;

3) in matters in which the Parliamentary Assembly of Bosnia and Herzegovina or Presidency of Bosnia and Herzegovina directly bring decisions based on the constitutional authorizations.

Article 37, paragraph 2

The judgement shall grant the law suit or dismiss as ill-founded. If the law suit is granted the court shall annul the challenged administrative act.

41. The **Book of Rules on Conditions and Procedures for Entry of Aliens** (*Official Gazette of Bosnia and Herzegovina* no. 4/05), so far as relevant reads as follows:

(...)

(2) An application for temporary or permanent residence in Bosnia and Herzegovina shall be refused if the alien is recorded at the BiH authorities competent to implement laws, particularly if the alien has international criminal record at the Office for Cooperation with the Interpol of the Ministry of Security.

(3) The basis for refusing the application referred to in paragraph 2 of this Article are the facts in the records at the disposal of the aforementioned authorities, taken decisions and operative information at the disposal of the aforementioned authorities while dealing with the application for residence in Bosnia and Herzegovina.

VI. Admissibility

42. 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.

43. 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.

Admissibility as to appeal no. AP 1222/07 (revocation of citizenship)

44. In examining the admissibility of the present appeal, the Constitutional Court invokes the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(1), (2) and (4)(9) of the Rules of the Constitutional Court.

Article VI(3)(b) of the Constitution of Bosnia and Herzegovina reads:

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.

Article 16 (1), (2) and (4)(9) of the Rules of the Constitutional Court reads:

1. The Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him/her.

2. The Constitutional Court shall reject an appeal as being manifestly (prima facie) ill-founded when it establishes that the request of the party to the proceedings is not justified or when the presented facts do not in any way justify the allegation of a violation of the constitutional rights and/or when the Constitutional Court establishes that the party to the proceedings is not a „victim" of a violation of the constitutional rights, so that the examination of the merits of the appeal is superfluous.

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

(9) the appeal is ratione materiae incompatible with the Constitution;

45. As to the appeal concerned and the appellant's complaints of a violation of his constitutional rights based on the challenged decisions revoking the BiH citizenship of

the appellant, the Constitutional Court first recalls that the appellant has already lodged the appeal with the Constitutional Court with regards to the same issue. Namely, on 7 March 2007 the appellant filed an appeal with the Constitutional Court against the Ruling of the Commission no. UP-01-07-99-2/06 of 9 January 2007. The said appeal has been registered under no. AP 746/07 and in the said appeal, the appellant challenges the same administrative Ruling of the same State Commission as he did in his appeal which is the subject of these proceedings. However, as to appeal no. AP 1222/07, the difference is that at the time of filing the mentioned appeal no. AP 746/07 the administrative dispute was pending before the Court of BiH which the appellant initiated against the above referenced Ruling of the State Commission and the decision on its lawfulness had not been taken at the time of deciding on the appeal.

46. On 5 April 2007, the Constitutional Court adopted a decision on admissibility whereby it rejected the mentioned appeal no. *AP 746/07* as *ratione materie* incompatible with the Constitution in relation to the appellant's 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. Hence, the Constitutional Court pointed out that taking a decision on granting a citizenship falls within the scope of public-legal authorities of a certain state, which is excluded form the scope of Article 6 of the European Convention (see the Constitutional Court, unpublished Decision on Admissibility, no. *AP 746/07* of 5 April 2007, paragraph 7). The Constitutional Court found the grounds for such position in the case-law of the European Court which explicitly holds that generally speaking the right to enter, reside or the right not to be expelled from a particular country, or its particular part, is not the right guaranteed by the provisions of the European Convention, not even for the citizens of the country at issue. Such rights are, in accordance with the mentioned case-law, provided for by the public law, through the public administration acts, wherefrom it follows that the term „civil rights" in Article 6 paragraph 1 of the European Convention does not include any such right. Therefore, the decision granting or refusing the entry, and the proceedings during which the respective decision was adopted are not subsumed under the provisions of Article 6 paragraph 1 of the European Convention (see Application no. 3325/67 *X, Y, Z, V and W vs. the United Kingdom*, Volume 25 (1968)).

47. Therefore, the right of an alien to be granted citizenship, that is to be revoked citizenship in a particular country, according to the positions of the European Court, falls in the domain of public law of every country. If a certain country has revoked citizenship from an alien on the grounds prescribed by law, this constitutes an act of the state falling within the public sphere and it does not enjoy protection of Article 6 of the European Convention as „a civil right or obligation". Accordingly, even though such decision may

have certain effect on the appellant's civil rights and obligations, the State is not required in such cases to grant a public hearing or other requirements referred to in Article 6 of the European Convention (see Judgment *Philip Burnett Franklin Agee vs. the United Kingdom*, Application no. 7729/76 of 17 December 1976, DR 7, paragraph 28).

48. Since the appellant complains in the present case that the challenged decisions violated his right to a fair trial, and in view of the said case-law of the European Court, as well as the decision of the Constitutional Court on the appeal against the said challenged Ruling of the State Commission, it follows that Article 6 paragraph 1 of the European Convention is not applicable to the present case. Given that Article II(3)(e) of the Constitution of Bosnia and Herzegovina does not provide in the present case a wider scope of protection than Article 6 of the European Convention, it follows that the appellant's complaints of a violation of his right to a fair trial are *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

49. As to the appellant's allegations that the challenged decision of the Court of BiH and the State Commission, which revoked his citizenship of Bosnia and Herzegovina, violated his right to respect for home, private and family life and correspondence, the Constitutional Court observes that it is far from obvious how revoking the appellant's citizenship of Bosnia and Herzegovina could, in itself, interfere with the appellant's right to respect for his home, private and family life, home and correspondence. Yet the appellant failed to submit any single evidence with regard to the said right, which could indicate that it indeed concerns the violation of the said right, nor does that follow from information and documents presented to the Constitutional Court. Therefore, the Constitutional Court holds that the appellant's allegations are arbitrary in this part of the appeal, and that the appellant does not offer facts warranting the assertion that there is a violation of the constitutional right he referred to. Since the challenged decisions are constitutive decisions by their legal nature, which only noted the change in the status right of the appellant relating to the issue of citizenship, and given that there is nothing to indicate that the appellant has „a justified request" raising issues from the Constitution of Bosnia and Herzegovina or the European Convention, and also that there is nothing to constitute an indication of a violation of the said right of the appellant, the Constitutional Court holds that the appellant's allegations about the violation of the right to respect home, private and family life and correspondence referred to in Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention are manifestly (*prima facie*) ill-founded.

50. The Constitutional Court considers that the appeal directly engages Article I(7) of the Constitution of Bosnia and Herzegovina, which provides:

7. Citizenship

There shall be a citizenship of Bosnia and Herzegovina, to be regulated by the Parliamentary Assembly, and a citizenship of each Entity, to be regulated by each Entity, provided that:

a) All citizens of either Entity are thereby citizens of Bosnia and Herzegovina.

b) No person shall be deprived of Bosnia and Herzegovina or Entity citizenship arbitrarily or so as to leave him or her stateless. No person shall be deprived of Bosnia and Herzegovina or Entity citizenship 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.

c) All persons who were citizens of the Republic of Bosnia and Herzegovina immediately prior to the entry into force of this Constitution are citizens of Bosnia and Herzegovina. The citizenship of persons who were naturalized after April 6, 1992 and before the entry into force of this Constitution will be regulated by the Parliamentary Assembly.

d) Citizens of Bosnia and Herzegovina may hold the citizenship of another state, provided that there is a bilateral agreement, approved by the Parliamentary Assembly in accordance with Article IV(4)(d), between Bosnia and Herzegovina and that state governing this matter. Persons with dual citizenship may vote in Bosnia and Herzegovina and the Entities only if Bosnia and Herzegovina is their country of residence.

e) A citizen of Bosnia and Herzegovina abroad shall enjoy the protection of Bosnia and Herzegovina. Each Entity may issue passports of Bosnia and Herzegovina to its citizens as regulated by the Parliamentary Assembly. Bosnia and Herzegovina may issue passports to citizens not issued a passport by an Entity. There shall be a central register of all passports issued by the Entities and by Bosnia and Herzegovina.

The Constitutional Court considers that an issue arises as to whether the appellant has been arbitrarily deprived of his citizenship in violation of the first sentence of Article I(7)(b), and holds that the appeal in case AP 1222/07 is admissible so far as it raises issues in respect of that paragraph.

Admissibility as to the appeal no. AP 306/08 (rejection of the appellant's application for asylum and order for leaving Bosnia and Herzegovina)

51. By the appeal at issue, the appellant challenges the Judgment of the Court of BiH no. U 1172/07 of 21 January 2008 and the Ruling of the Ministry no. UP-1-08/1-41-1-216-2/07 of 8 August 2007, claiming that the challenged decisions violated his rights under Article

II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention, Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention, Article 13 of the European Convention, and Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as Article 1 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Furthermore, the Constitutional Court considers that the appellant's claim that his life is threatened by the risk of being subjected to the death penalty should he return to Syria, raises directly an allegation that forcibly removing him from Bosnia and Herzegovina to Syria would violate his right not to be subjected to the death penalty under Article 1 of Protocol No.13 to the European Convention, and will be assessed accordingly.

The right to a fair trial

52. The Constitutional Court recalls that the right of an alien to stay in a particular country, relating to the right to obtain and/or revoke the citizenship referred to in the previous appeal, falls within the scope of public authority of a particular country which is singled out from the scope of Article 6 paragraph 1 of the European Convention. Such right, in particular, in Bosnia and Herzegovina is governed by the Law on Movement and Stay of Aliens and Asylum. The case-law of the European Court of Human Rights in Strasbourg is exclusively based on the position that decision-making on movement and stay of aliens, and by analogy, the decision on expulsion of aliens from Bosnia and Herzegovina, lies in exclusive competence of state organs and it may not be included under the concept of „civil rights and obligations" protected by Article 6 of the European Convention.

53. Likewise, the decision of the European Court of Human Rights *V.P. vs. the United Kingdom* reads as follows „[…] The Commission holds that the procedure conducted by public authorities with the aim to decide on whether an alien should be allowed to stay in the country, or denied, is discretionary and administrative in nature and it does not include the application of civil rights and obligations within the meaning of Article 6 of the European Convention. Furthermore, the Commission established that requirements for granting the stay fall in the category of actions not determining civil rights and obligations under Article 6 of the European Convention. Therefore, the Commission has to reject this request as *ratione materiae* incompatible with the provisions of the Convention" (see Judgment *V.P. vs. the United Kingdom*, Application no. 13162/87 54 DR 211, page 2). The Constitutional Court holds that the said decision is applicable to the present case, for it was established before the administrative organ and before the Court of BiH that the

appellant's application for asylum was ill-founded within the meaning of the provisions of the Law on Movement and Stay of Aliens and Asylum, as well as that decisions dismissing his application were adopted based on margin of appreciation by the state organs and in accordance with the special Law on Movement and Stay of Aliens and Asylum.

54. Therefore, the right of an alien to stay in a particular country, according to the positions of the European Court, falls within the domain of public law of any country. If a particular country has denied such a right to an alien on the grounds prescribed by law, it is considered an act of the state falling within the public domain and it does not enjoy protection of Article 6 of the European Convention as a „civil right or obligation". Therefore, although such a decision may have certain effect on the appellant's civil rights and obligations, the state is not required to secure public hearing in such cases or any other requirements referred to in Article 6 of the European Convention (see Judgment *Philip Burnett Franklin Agee vs. the United Kingdom*, Application no. 7729/76 of 17 December 1976, DR 7, paragraph 28).

55. It follows from the aforementioned that Article 6 paragraph 1 of the European Convention, either in this procedure or in the procedure of revoking the citizenship to the appellant, is not applicable to the present case. Given that Article II(3)(e) of the Constitution of Bosnia and Herzegovina, in this case also, does not offer a wider scope of protection than Article 6 of the European Convention, it follows that the allegations stated in the appeals relating to the violation of the right to a fair trial are *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

Admissibility as to other rights

56. Considering the examination of decisions on merits that were challenged by the appeal no. AP 306/08, the subject challenged is the Verdict of the Court of BiH no. U-1172/07 dated 21 January 2008, against which no other effective legal remedies are available under the law. The challenged verdict was adopted on 21 January 2008, and the appeal was lodged on 28 January 2008, that is within 60 days as prescribed by Article 16 (1) of the Rules of the Constitutional Court. As to the allegations stated in the appeal about the violation of the right referred to in Article 1 of Protocol No. 13 to the European Convention, Article 13 of the European Convention, Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention, and Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, this part of the appeal meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court, for it is not manifestly (*prima facie*) ill-founded, nor is there any other formal reason rendering the appeal in relation to those issues inadmissible.

57. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the present appeal in relation to those matters meets requirements as to its admissibility.

58. As to the other part of the appeal no. *AP 306/08* related to the violation of the appellant's constitutional rights referred to in Article II(4) of the Constitution of Bosnia and Herzegovina, and Article 14 of the European Convention, as well as Article 1 of Protocol No. 7, the Constitutional Court observes that the appellant failed to elaborate on the violations of the said rights specifically, or he did so arbitrarily.

59. The Constitutional Court recalls that the appeal is manifestly ill-founded if lacking *prima facie* evidence indicating with sufficient clarity that the mentioned violation of human rights and freedoms is possible (see already mentioned decision, European Court, *Vanek vs. Slovakia*, judgment of 31 May 2005, application no. 53363/99, and Decision of the Constitutional Court no. *AP 156/05* of 18 May 2005), and if the facts that the appeal relates to, do not manifestly constitute violation of rights alleged by the appellant, i.e. if the appellant's request is not justified. The Constitutional Court considers that there is no evidence that the decisions affecting the appellant were the result of unconstitutional discrimination. The decisions to reject the appellant's claim to asylum and requiring him to leave the country were based on a conclusion that he did not meet the criteria for refugee status under the Refugee Convention and was a threat to the security of Bosnia and Herzegovina. The Constitutional Court has been presented with no evidence suggesting that the appellant was denied the procedural rights guaranteed by Article 1 of Protocol No. 7 to the European Convention to aliens who are threatened with forcible removal from the country. In addition, the Constitutional Court has not seen evidence that the decisions would have been different had the appellant been someone with a similar history but a different nationality or religion.

60. Thus, as to the allegations stated in the appeal with regards to the said constitutional rights, the Constitutional Court observes that the challenged decisions in no way infringed upon the said appellant's rights, and that the appellant, at the same time, failed to submit any evidence whatsoever indicating that indeed there was a violation of the constitutional rights he referred to, nor can that be deduced from the information and documents presented to the Constitutional Court. The Constitutional Court holds that the appellant's allegations on discrimination, violation of the right to life, effective legal remedy and the right of an alien legally staying in the territory of a state not to be deported, are arbitrary, and possible arbitrariness and discriminatory application of laws is not manifest. Therefore, the Constitutional Court holds that the appellant does not have an „arguable claim" in

relation to the violation of the said rights, and that these allegations are manifestly (*prima facie*) ill-founded.

Admissibility as to the appeals no. AP 660/08 and no. AP 1254/08 (application for temporary residence permit)

61. By the respective appeals, the appellant challenged the Ruling of the Court of BiH no. U-1141/07 dated 21 January 2008 and the Verdict of the Court of BiH no. Uvl-03/08 dated 14 March 2008, which respectively rejected the lawsuit against the final Ruling of the Ministry dismissing the appellant's application for temporary residence in Bosnia and Herzegovina, and dismissed the request for review of the ruling rejecting this lawsuit. The appellant holds that the challenged decisions violated his right under Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention, Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention, and the right under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. In addition, the appellant alleges in both appeals that the Court of BiH committed a violation in these cases of Article 9 of the Law on Administrative Disputes in BiH, Article 35 paragraph 1(d) of the same Law in conjunction with Article 60 of the Law on Movement and Stay of Aliens and Asylum, for which reason he deems the challenged decisions as unlawful. Namely, the appellant alleges that Article 35 of the Law on Movement and Stay of Aliens and Asylum does not prohibit the institution of administrative dispute against the administrative act of the Ministry, and that there is no provision in the law that the court referred to.

62. Considering the said appeals, the Constitutional Court noted that the issue, deliberated on in the challenged decisions, relating to the right of the appellant to grant him temporary residence in the territory of Bosnia and Herzegovina, is relevant. Deliberating on the said issue, the first instance body adopted Ruling no. 19.4.1-UP-1-1-498/07 dated 18 May 2007, dismissing the appellant's request, whereas the Ruling of the Ministry no. UP-2-07-07-2-69/07 of 27 July 2007 dismissed the appeal against the decision of the first instance body. The said Ruling of the Ministry was based on Article 41 paragraph 1 items (d) and (f) of the Law on Movement and Stay of Aliens and Asylum and Article 39 of the Rules on Conditions and Procedures for Entry and Stay of Aliens, finding that the first instance body has, based on evidence arising from records and operative information on disposal of these authorities, completely and fully established the facts of the case and correctly applied substantive regulations as well as adopted decision based on the law. The said Ruling of the Ministry is final in the administrative proceedings being that the explicit provision of the Law on Movement and Stay of Aliens does not provide that the appeal against the same is admissible or that the administrative dispute may be initiated. Thus, considering the

fact that the present case concerns the issue of public and legal character, regarding which the state retains the right to settle by a margin of appreciation, Bosnia and Herzegovina, through the relevant provisions of the Law on Movement and Stay of Aliens and Asylum, ceased to apply guarantees of a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

63. Keeping in mind the aforementioned, the Constitutional Court must, first and foremost, establish the final decision, i.e. whether the appellant has exhausted all effective legal remedies and whether he has lodged the appeal within 60 days as provided for by Article 16(1) of the Rules of the Constitutional Court.

64. The Constitutional Court recalls that the rule of exhausting legal remedies requires that the appellant has obtained the final decision. The final decision constitutes a response to the last legal remedy, which is effective and adequate to examine in merits the lower-instance decision, both in terms of facts and law. The decision which rejected the effective legal remedy on the grounds that the appellant failed to meet formal requirements of the legal remedy (time limit, fees payment, form or meeting legal requirements and such like), cannot be considered as final. On the other hand, using ineffective legal remedy does not terminate the time limit of 60 days for lodging an appeal with the Constitutional Court (see Constitutional Court, Decision no. *U 12/01* dated 5 May 2001, published in the *Official Gazette of Bosnia and Herzegovina* no. 20/02).

65. It follows from the allegations stated in the appeal and attached documents that in order to quash the final Ruling no. UP-2-07-07-2-69/07 dated 27 July 2007, the appellant launched administrative dispute by filing a claim against the Ministry with the Court of BiH, however, by the Ruling of the Court of BiH no. U-1141/07 dated 21 January 2008, it was rejected as inadmissible.

66. The Constitutional Court considers that the decision of the Court of BiH on this issue failed to take proper account of the relevant legislation. The general principle is set out in Article 8 of the Law on Administrative Disputes of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 19/02), permitting an administrative dispute as a remedy for final administrative acts by which the competent authority decides the right or duty of a citizen or legal person in respect of an administrative matter. Article 10 of the Law makes it clear that an administrative dispute procedure is not available where there is an alternative means of obtaining judicial protection, or the issue is not properly concerned with an administrative (as distinct from constitutional) decision. However, in relation to administrative decisions an administrative dispute is the appropriate judicial remedy of last resort, unless another Law expressly excludes it. Contrary to the view of the Court of BiH, the administrative dispute procedure is not excluded in the circumstances

of this case by the Law on Movement and Stay of Aliens and Asylum (*Official Gazette of Bosnia and Herzegovina* no. 29/03 of 6 October 2003). Article 44 of this Law excludes the possibility of an appeal against a decision of the Ministry to refuse a certificate permitting temporary residence in BiH on humanitarian grounds. However, the appellant's case is not relating to humanitarian grounds: he claims that removing him from BiH would violate his constitutional rights in BiH, not that it would violate humanitarian law, which is concerned instead with the position of refugees, the protection of civilians and others in time of war, and similar matters. That being so, this part of the decision of the Court of BiH was based on an error of law which denied to the appellant a legal procedure to which he was properly entitled. As the Court of BiH was wrong to hold that the initiation of an administrative dispute had been inadmissible, it follows that the administrative dispute must be regarded as an effective remedy for the purpose of deciding whether the appellant's appeal to the Constitutional Court was timely, and the appellant was also entitled to a review of the erroneous decision of the Court of BiH.

67. Therefore, since the claim in the administrative dispute on this legal matter, and the request of the appellant for review of the court decision, must be regarded as effective legal remedies within the meaning of Article 16(1) of the Rules of the Constitutional Court, it follows that the final decision on merits in case no. AP 660/08 is the Ruling of the Court of BiH no. U-1141/07 dated 21 January 2008, and the final decision on merits in case no. AP 1254/08 is the Verdict of the Court of BiH no. Uvl-03/08 dated 14 March 2008, which respectively rejected the lawsuit against the final Ruling of the Ministry dismissing the appellant's request for temporary stay in Bosnia and Herzegovina and dismissed the request for review of the ruling rejecting that lawsuit. The appeal in case no. AP 660/08 was lodged on 3 March 2008, and appeal no. AP 1254/08 was lodged on 28 April 2008. It follows that the appellant lodged both appeals within the time limit for lodging an appeal prescribed by Article 16(1) of the Rules of the Constitutional Court. There are no other formal reasons for holding the appeals to be inadmissible. The Constitutional Court therefore concludes that the appeals at issue are admissible.

VII. Merits

Revocation of citizenship

The right not to be arbitrarily deprived of citizenship

68. As noted above, the appeal raises an issue as to the right under the first sentence of Article I(7)(b) of the Constitution of Bosnia and Herzegovina not to be arbitrarily deprived of citizenship. There are many ways in which a decision may be arbitrary. The Constitutional

Court will not seek to enumerate them exhaustively. One form of arbitrariness occurs when a decision-maker takes account of irrelevant considerations, or fails to take account of relevant considerations, or acts in a way that is fully without rational or objective justification, or makes a decision that imposes a form of harm on the person subject to it that is disproportionate to the legitimate purpose which the decision-maker is seeking to achieve, or is made for a fully improper purpose. The purpose of the decision to withdraw the appellant's citizenship of Bosnia and Herzegovina has not been clearly established. It is clear that the Commission's reason for making the decision was that it concluded that the appellant had obtained citizenship on the basis of false statements. That satisfies one of the conditions for depriving him of citizenship, but the deprivation may still be arbitrary if the decision-maker is motivated by a desire to achieve an improper and ulterior purpose, i.e. a purpose not authorized by the Law permitting citizenship to be withdrawn and the effect is to impose a disproportionately and unnecessarily severe burden on the appellant. When a decision to deprive a person of citizenship is subject to review or appeal, it is the task of the reviewing or appellate body to decide not only whether the conditions set out in the relevant Law have been met but also whether the circumstances in which the power is exercised satisfy the requirements of non-arbitrariness and non-discrimination set out in Article I(7)(b) of the Constitution of Bosnia and Herzegovina. In this case, it is not clear that the Court of BiH addressed its mind to this issue. The Constitutional Court must therefore make its own judgment. Whilst the Constitutional Court considers the process of decision-making to have been less than perfect, giving rise to a suspicion that the decision was made for an ulterior purpose, the current state of the evidence, and particularly the evidence that the appellant knowingly obtained citizenship of RBiH improperly, makes it impossible for the Constitutional Court to conclude that the decision to deprive the appellant of citizenship was arbitrary and unconstitutional. The ground of challenge on the basis of Article I(7)(b) of the Constitution of Bosnia and Herzegovina has not been established and must be dismissed as ill-founded.

Asylum rejection and deportation order

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

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

(...)

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

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

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

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

70. The appellant alleges that Article 3 of the European Convention has been violated because if he is forced to leave Bosnia and Herzegovina and deported to his home country, there is a real risk of him being subjected to the torture and inhumane and degrading treatment or punishment since he was a member and activist of organization „Muslim Brotherhood" and since he took part in the demonstrations in Syria in 1980. However, the appellant offers no evidence in support of these allegations, but he rather refers to case *Chahal vs. The United Kingdom* and case *N. vs. Finland*, which were before the European Court of Human Rights.

71. However, the Constitutional Court considers the appellant's reference to the mentioned cases before the European Court of Human Rights as irrelevant. Namely, in case *Chahal vs. The United Kingdom,* the issue was related to the procedure of extradition […]. On that occasion, the European Court established that the decision on extradition of the applicant, if enforced, would lead to violation of Article 3 of the European Convention, in other words to […] to execution of death penalty", which the applicant would have to face.

72. The Constitutional Court points to the case *Saadi vs. Italy*, application no. 37201/06 (judgment of 28 February 2008), in which the European Court of Human Rights considered the application of a citizen of Tunisia. Mr. Saadi, who had sought asylum in Italy but was suspected of involvement with terrorist organizations, had been convicted of various offences in Italy and also, in his absence, in Tunisia. An order was made for his deportation from Italy to Tunisia. International human-rights agencies had published evidence that Tunisia had a record of serious mistreatment of Muslims and denial of due process. The Italian authorities exchanged diplomatic *notes verbales* with the Tunisian government, which stated that its laws gave effect to its obligations under international human-rights treaties to which it was party. The applicant argued that removing him to Tunisia would violate Italy's obligations under Article 3 of the Convention. Finding that the applicant

was sentenced for the terrorist acts committed in Tunisia, the European Court of Human Rights concluded that there is a real risk for the applicant to be subjected to the treatment that is inconsistent with Article 3 of the European Convention and therefore, the court has taken a legal position that the deportation of the applicant to Tunisia would constitute a violation of Article 3 of the European Convention.

73. However, the Constitutional Court is of the opinion that the aforementioned cases examined before the European Court of Human Rights do not apply to the instant case. The Constitutional Court recalls that during the proceedings the Ministry obtained the reports from Syria from which it appears that the appellant was neither a member nor an activist of the banned organization „Muslim Brotherhood" nor of any other terrorist organization, which the appellant himself admitted in the course of proceedings. Nor have the Syrian authorities yet commenced any legal proceedings against the appellant in this case. Accordingly, given that from the said reports no conclusion could be drawn that a criminal proceedings is initiated against the appellant due to his membership in the terrorist organization or due to his commission of criminal offense, it follows that in the event of appellant's deportation there is no real risk for him to be subjected to the treatment which is inconsistent with Article 3 of the European Convention. Therefore, the aforesaid cases are not identical in respect of their factual and legal parts neither are they similar to the appellant's legal position.

74. Nevertheless, it is clear from the judgment of the European Court of Human Rights in *Saadi vs. Italy*, above, that courts 'must examine the foreseeable consequences of sending the [appellant] back to the receiving country, bearing in mind the general situation there and his personal circumstances' (at paragraph 130, referring to *Vilvarajah vs. United Kingdom*, judgment of 30 October 1991, EurCtHR Series A no. 215 at paragraph 108). This involves assessing the situation in the receiving country and considering the foreseeable position of the appellant in those circumstances, making use of all reliable evidence (*Saadi* at paragraph 131). If the appellant alleges that he or she 'is a member of a group systematically exposed to a practice of ill-treatment…the protection of Article 3 enters into play when the applicant establishes, where necessary on the basis of the sources [such as reputable international organizations and governmental sources], that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned' (*Saadi* at paragraph 132). In the present case, the Ministry clearly accepted the existence of practices such as torture of suspects and coerced false confessions in the receiving state. The question, therefore, is whether there are serious reasons to believe that the appellant is a member of a group at significant risk of such treatment. It appears from the documents of the case file and particularly from the challenged final Ruling of the Ministry dated 27 July 2007 that the appellant

was visiting his country of origin on several occasions upon the end of the war in Bosnia and Herzegovina. It seems that the appellant had no problems with the authorities of his country of origin during his because of his participation in the war in Bosnia, he was not persecuted nor arrested, neither a criminal proceedings was initiated against him nor was any repressive measure taken against him. Taking all the aforementioned into account, the Constitutional Court is of the opinion that there are not sufficiently serious reasons to believe that in the event of the appellant's deportation to country of his origin he would be subjected to torture, inhuman or degrading treatment or punishment.

75. Therefore, the Constitutional Court concludes that by the adoption of the challenged decisions of the Ministry and the Court of BiH, there was no violation of Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention and that the appeals on these grounds are ill-founded.

Right to respect for private and family life

76. Article 8 of the European Convention reads as follows:

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

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

77. The Constitutional Court ought to first establish whether the appellant's appeal allegations fall in the domain of „private and family life" protected by Article 8 of the European Convention. Generally speaking, the concept of „private life" is broad and cannot be thoroughly defined: *However, it would be too restrictive to limit the notion to an „inner circle" in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings* (see Decision of the European Court of Human Rights, *Niemietz vs. Germany*, Judgment of 16 December 1992, Series A, no. 251, paragraph 29).

78. In addition, the European Court of Human Rights elaborated on the following fundamental principles as to the „family life": *The Court likewise does not see cohabitation as a sine qua non of family life between parents and minor children. It has held that the*

relationship created between the spouses by a lawful and genuine marriage has to be regarded as family life. It follows from the concept of family on which Article 8 is based that a child born of such a union is ipso iure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to family life, even if the parents are not then living together. Subsequent events, of course, may break that tie… (see the European Court of Human Rights, *Berrehab vs. the Netherlands*, Judgment of 21 June 1988, Series A, no. 138, paragraph 21).

79. In the present case, during the course of the proceedings following the appellant's application for asylum, it was established that the appellant had entered into marriage with the citizen of Bosnia and Herzegovina Ms. Zinaida Softić on 14 January 1995 and that they had three children during their marriage. The protection under Article 8 of the European Convention extends to all forms of *de facto* family relationships. It is entirely unnecessary for the relationship to be founded on a legal act or status such as marriage, although a marriage will usually suffice to give rise to a family relationship for the purposes of Article 8 (unless it is fictitious, such as false marriages with the purpose of evading regulations on immigration or obtaining citizenship, and even a marriage of that kind may mature into a genuine family relationship if the parties maintain de facto relations after the ceremony, particularly if they have children together). In the present case, existence of „family life" was established on the entry into marriage, and the decision dismissing the appellant's request for asylum concerns his „private and family life".

80. Second, the Constitutional Court ought to consider whether the decision dismissing the appellant's application for asylum and the application for temporary stay, in terms of the circumstances of the present case, interfered with the appellant's private and family life. For this purpose, the Constitutional Court distinguishes between the rejection of the application for asylum, which in itself does not interfere with the relationship between the appellant and members of his family, and the requirement that he leave the country coupled with a refusal of permission to reside temporarily in the country. The latter decisions can affect the appellant's rights under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, because there is no reason to suppose that the appellant's wife and children would or could accompany him to Syria. Indeed, bearing in mind that the appellant's wife and children have never lived in Syria and have lived in Bosnia and Herzegovina throughout their lives, it is clear that a coerced move to Syria would seriously interfere with their right to respect for their private lives, and requiring the appellant to depart to Syria without them would seriously interfere with their right to respect for their family lives, including their enjoyment of the companionship and support of the appellant. This is relevant, because it would be wholly

artificial to refuse to take their rights into account when they correlate directly to the rights of the appellant under Article II(3)(f) of Constitution of BiH and Article 8 of European Convention.

81. In the case *Boughanemi vs. France* (judgment of 24 April 1996), the European Court of Human Rights considered the appeal of the applicant, born in Tunisia in 1960, who had arrived in France in 1986 and had lived there up until his deportation. His entire family had moved there also, and eight of his siblings were born there. He alleges that he lived with a woman, a French national, who gave birth to his child whom he officially recognized on 5 April 1994. The European Court of Human Rights concluded that deportation of Mr. Boughanemi resulted in his separation from his family and child and, therefore, it may be considered as interference with the exercise of his right guaranteed by Article 8 of the European Convention.

82. In the present case, the appellant's application for asylum and the application for temporary stay were dismissed, and accordingly, he would have to leave the territory of Bosnia and Herzegovina. The appellant had entered into marriage with a citizen of Bosnia and Herzegovina and they had three children during their marriage. Following the approach of the European Court of Human Rights, the Constitutional Court notes that this constitutes interference with his right to respect for private and family life.

83. Article 8 paragraph 2 of the European Convention envisages that any interference of the public authority organs with the enjoyment of the right to private and family life must be, *inter alia,* „in accordance with the law".

84. The Ruling of the Ministry dated 8 August 2007 dismissing the appellant's application for asylum was based on Article 76 of the Law on Movement and Stay of Aliens and Asylum. The Ruling was based on the position that the grounds for filing the request for asylum was politically motivated, since the appellant based his request for asylum on certain political opinion, which is subject to persecution in his country of origin. As to the allegation stated in the request for asylum that the grounds for the appellant's persecution was his participation in the demonstrations against the regime in Syria in 1981 or 1982 and his participation in the war in Bosnia and Herzegovina, as well as his public appearances in the media, the challenged decisions read that no such data are available, and the appellant also failed to prove that these allegations lead to persecution in the present case within the meaning of the Law on Movement and Stay of Aliens and Asylum. The Ministry of Security, *ex officio*, within the meaning of Article 35 paragraph 1 item d in conjunction with Article 60 of the Law on Movement and Stay of Aliens and Asylum, examined the existence of conditions for granting temporary stay on

humanitarian grounds, and it found that there were no grounds for this form of protection. By its verdict dated 21 January 2008, the Court of BiH dismissed the claim by which the appellant launched the administrative dispute against the said Ruling, within the meaning of Article 37 paragraph 2 of the Law on Administrative Disputes of BiH. Thus, decisions dismissing the appellant's request for asylum and his request for temporary stay were adopted in accordance with applicable laws, published in official gazettes, which are clear and unambiguous and prescribe conditions under which an alien may be granted asylum and temporary stay in Bosnia and Herzegovina.

85. Article 8 paragraph 2 of the European Convention further stipulates that any interference of public authorities with the enjoyment of the right to private and family life must be „necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

86. In determining whether an interference was „necessary in a democratic society", „necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued" (see the European Court of Human Rights, *Berrehab vs. The Netherlands*, Judgment of 21 June 1988, Series A, no. 138, paragraph 28). Therefore, the legitimate aim pursued has to be „weighed against the seriousness of the interference with the applicants' right to respect for their family life" (id. paragraph 29). Throughout the course of decision-making, the state has the freedom to decide (id. paragraph 28).

87. In processing the issues of parents' rights within the context of the policy on immigration and residence, the European Court of Human Rights accepts that „the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens" (id. paragraph 28). All the more so, the function of the European Court of Human Rights is not to pass judgment on the national immigration and residence policy as such. Instead, the Court has only „to examine the interferences complained of, and it must do this not solely from the point of view of immigration and residence, but also with regard to the applicants' mutual interest in continuing their relations" (id. paragraph 29). However, the Constitutional Court is not in the same position as the European Court of Human Rights. The Constitutional Court is not an international tribunal which must recognize that national authorities are entitled to adopt immigration and residence policies normally without interference from international bodies. The Constitutional Court is a national authority of Bosnia and Herzegovina, and so it shares with other national bodies responsibility for developing and applying such immigration and residence policies in

accordance with the requirements of the Constitution of Bosnia and Herzegovina. This gives the Constitutional Court significant freedom to ensure that the national policies are enforced in ways that comply with the Constitution. Yet the Constitutional Court recognizes that neither Article II(3)(f) of the Constitution nor Article 8 of the European Convention imposes on the state a general obligation to respect the choice of a married couple which country they choose to reside in during their marriage and to approve the reunion of a family in its territory.

88. In the case *Boughanemi vs. France*, where the state issued a deportation order for Mr. Boughanemi on the grounds that his presence in the territory of France was a threat to public order, the European Court of Human Rights states that the duty of the Court concerns the establishment as to whether the respective deportation exercised fair proportion between relevant interests, that is between the right of the applicant to his private and family life on one hand, and prevention of disorder and crime on the other hand. The European Court of Human Rights observed that the applicant had arrived in France at the age of 8, that his parents and siblings are in France, that he lived with a French woman, that they lived as a husband and wife and that he officially recognized the child born during that relationship. Further, the European Court of Human Rights observes that Mr. Boughanemi retained his Tunisian citizenship, that he did not claim not to know Arabic language, or that he had broken off relations with his country of birth, or that he did not go back there after deportation. The European Court of Human Rights gives particular attention to the fact that Mr. Boughanemi's deportation was decided on after he was convicted to almost four years of imprisonment, without the right to release on parole, three years of which were for the form of pandering stipulated by law. The European Court of Human Rights concluded that „the deportation of the applicant was proportionate to the legitimate aims being pursued. Therefore, Article 8 of the European Convention was not violated".

89. The question, therefore, is whether the decision to require the appellant to leave the country, denying his request for temporary residence, was a proportionate response to a pressing social need to pursue one of the legitimate aims listed in Article 8(2) of the European Convention. In making this assessment, the Constitutional Court must consider all relevant circumstances. In the year 1980/81 the appellant enrolled in the Faculty of Biology in Damascus. However, in 1982 he left Syria, his country of citizenship and came to Belgrade where he enrolled in the Faculty of Medicine. In 1986 he visited his country of origin for the first time, and then in 1989 and during 1991 and 1992. Upon all of these entries to his country of origin he had no problems with his residence. During 1992 and finally in 1994, the appellant came to Bosnia and Herzegovina for the purpose of joining the Army of BiH. On 22 November 1994, the appellant was granted the citizenship of

Bosnia and Herzegovina and on 14 June 1995 he entered into marriage with Ms. Zinaida Softić, the citizen of BiH. According to the Ruling of the State Commission no. UP-01-07-99-2/06 of 9 January 2007, the appellant's citizenship acquired by the Ruling of the R BiH MoI no. 09/2-204-454/92 of 23 March 1992 was revoked, as well as his citizenship acquired by the Ruling of the R BiH MoI no. 07/2-204-1384/94 of 22 November 1994. According to the Verdict of Court of BiH no. U-129/07 of 5 April 2007, his lawsuit filed against the mentioned Ruling has been dismissed.

90. In order to make a conclusion whether the challenged decisions, whereby the appellant's application for asylum was dismissed based on which he would be forced to leave the territory of Bosnia and Herzegovina, are compatible with the right to respect for family life, a scope of relationships an individual has in a home county and in a receiving country must be considered.

91. The Constitutional Court notes that the appellant stayed in Bosnia and Herzegovina as a member of the BiH Army during the armed conflict in the period from 1994 to 1995 and that on 14 June 1995 he entered into marriage with a citizen of Bosnia and Herzegovina with whom he still lives. Based on the mentioned procedure, the State Commission for revision of decisions on naturalization of foreign citizens established that the appellant acquired his R BiH citizenship by means of fraudulent conducted, i.e. by concealment of relevant facts and therefore it adopted a Ruling no. UP-01-07-99-2/06 of 9 January 2007, whereby it revoked the appellant's citizenship of Bosnia and Herzegovina. The Constitutional Court notes that it follows from the appellant's allegations and attached documents that the appellant, after leaving Syria, was returning to his country of origin on three occasions and that he had no problems with the authorities concerning each of his returns, which means that he did not break contacts with his country of origin and members of his family. However, the appellant today does not have family or any other connections in Syria, and his wife and children have never had such connections there. Having been in Bosnia and Herzegovina with the apparent consent of the authorities of the state from the early 1990s until 2007, and having formed a family with a wife and children who are native-born nationals of this country and have no ties at all with Syria, it would require a compelling justification to require the appellant to leave the country when that would either break up the family or force his wife and children to uproot themselves and become strangers in a foreign land. Furthermore, whilst the Constitutional Court has dismissed the appeal based on an alleged violation of the right not to be subject to torture and inhuman or degrading treatment or punishment on the ground that there is insufficient evidence to establish a significant likelihood that the appellant would suffer such treatment or punishment in the Arab Republic of Syria, the possibility of such treatment or

punishment reinforces to some degree the appellant's claim on the basis of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

92. In order to establish a justification, it must be demonstrated that the interference is proportionate to a legitimate aim. Two possible aims have been referred to in the papers before the Constitutional Court. First, the Court of BiH in its verdict of 21 January 2008 in case no. U-1172/07 took the view that 'in case of a threat to public order or national security interference by a public authority with the exercise of [the right to respect for family life] is necessary in a democratic society within the scope of the interests of the state. The reason for this is that national security has priority over the right to respect for an individual's private and family life. Therefore, the plaintiff's expulsion from BiH is not in violation of Article 8 of the European Convention…'. The Constitutional Court notes, however, that there is no evidence before it that the appellant represents a threat to national security. Secondly, it might be said that the removal of the appellant would help the state to advance the aim of ensuring that military personnel who are not of local origin withdraw from the territory of Bosnia and Herzegovina, furthering the aim of Annex IA to the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Agreement). This could, perhaps, fall within the notion of public order (*ordre public*) so as to be a legitimate aim for an interference with rights under Article 8 of the European Convention, although at this distance in time from the date of the Dayton Agreement its importance and the weight to be attached to it are much less than would have been the case ten years ago. However, it would be unconstitutional to pursue either aim if the effect would be to subject the appellant to violation of his constitutional rights, bearing in mind that Article II(1) of the Constitution, which also has its origin in an Annex (Annex 4) to the Dayton Agreement, requires the state and the Entities to 'ensure the highest level of internationally recognized human rights and fundamental freedoms.' With respect to the opinion of the Court of BiH, even if it could be shown that the appellant represented a threat to national security, national security does not automatically have priority over rights under Article 8 of the European Convention. There has to be an assessment of the proportionality of the interference with the right, taking account of the seriousness and immediacy of the threat and of the seriousness of the impact on the right of removing the appellant from the country. The same applies, *mutatis mutandis*, in the context of securing the withdrawal from the territory of Bosnia and Herzegovina of non-local military personnel. It does not appear that either the Ministry of Security Department of Asylum or the Court of BiH conducted such a proportionality assessment.

93. The Constitutional Court accordingly holds that the effect of the challenged decisions is to subject the appellant to an interference with his right to respect to private and family

life, and bearing in mind the severity of that interference and its impact on both the appellant and his family the justifications suggested in the proceedings so far do not establish that the interference is proportionate to a legitimate aim. The challenged decisions may therefore violate the appellant's rights under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention on Human Rights. However, the Constitutional Court recognizes that the unfortunate way in which these proceedings have come before it, make it difficult, and perhaps impossible, for it to decide whether the interference is justifiable. In particular, the relevant authorities and the Court of BiH have not given reasons assessing evidence establishing possible constitutional justifications for interfering with the appellant's rights. The relevant authorities and the Court of BiH have not given reasons assessing evidence establishing possible constitutional justifications for interfering with the appellant's rights. Nor have they conducted an inquiry into the grounds for forcibly removing the appellant from Bosnia and Herzegovina. Where removal may violate a constitutional right or a right under the European Convention, the courts must carefully examine the grounds for removal and consider whether the interference with the right can be justified in the circumstances of the case. Where some evidence offered to justify the interference may affect national security, the courts must establish a procedure to ensure that the evidence can be assessed giving the greatest possible opportunity to the appellant to confront and rebut that evidence: see *Chahal vs. United Kingdom* (1996) 23 EHRR 413. The Court of BiH did not conduct such an inquiry, so the Constitutional Court has been deprived of the evidence on the basis of which it might assess whether the interference with the appellant's constitutional right is justified. The Constitutional Court has therefore decided to remit the case to the Court of BiH for that Court to conduct an appropriate inquiry and make necessary findings in the light of this Decision.

94. As the Constitutional Court is remitting to the Court of BiH the appeal against the rulings denying permission for temporary stay in BiH and ordering him to leave BiH, it would be premature for the Constitutional Court to decide the appeal against those rulings. Those parts of the appeal are therefore to be regarded as inadmissible on the ground that they are premature at the present time.

Freedom from the death penalty

95. Article 1 of Protocol No. 13 to the European Convention provides: *The death penalty shall be abolished. No one shall be condemned to such penalty or executed.* Like Article 3 of the European Convention, this confers a right that is absolute and non-derogable, and in principle a decision to remove a person from Bosnia and Herzegovina to a country where he or she would be likely to face the death penalty would violate that person's right and

the obligations of the agents of Bosnia and Herzegovina under the Constitution of Bosnia and Herzegovina. However, in this case, for the same reasons as were given in paragraph 91 above in relation to Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention, the evidence does not establish that the appellant would be likely to face the death penalty if deported to Syria. The Constitutional Court therefore concludes that the appeal on this ground is ill-founded.

VIII. Conclusion

96. Having regard to Article 16(2) and (4)(4) and (9), and Article 61(1) and (3) of the Constitutional Court's Rules, the Constitutional Court decided as set out in the enacting clause.

97. According 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

Case no. AP 2763/06

DECISION
ON ADMISSIBILITY
AND MERITS

Appeal of Ms. Aziza Hasanović against the Judgment of the Basic Court in Livno, no. 068-0-P-06-000-296 of 7 December 2006 and the Judgment of the Cantonal Court in Livno, no. 010-0-Gž-07-000-105 of 14 March 2007

Decision of 28 November 2008

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1), (2) and (3), and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05 and 64/08), in Plenary and composed of the following judges:

Ms. Seada Palavrić, President

Mr. David Feldman, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Krstan Simić

Mr. Mirsad Ćeman

Having deliberated on the appeal of **Ms. Aziza Hasanović** in case no. **AP 2763/06**, at its session held on 28 November 2008 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Ms. Aziza Hasanović is hereby partially granted.

A violation of the right to a fair hearing under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Judgment of the Cantonal Court in Livno, no. 010-0-Gž-07-000-105 of 14 March 2007, in the part deliberating on the request of the appellant for reimbursement of salaries and payment of contributions arising from employment, is hereby quashed.

The case shall be referred back to the Cantonal Court in Livno which is to follow an expedited procedure and take a new decision in the part deliberating on the request of the appellant for reimbursement of salaries and payment of contributions arising from employment, in accordance with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article

6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Cantonal Court in Livno is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within sixty days as from the date of delivery of this Decision, about the measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal lodged by Ms Aziza Hasanović against the judgment of the Cantonal Court in Livno, no. 010-0-Gž-07-000-105 of 14 March 2007, is dismissed in the remaining part 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 14 September 2006, Ms. Aziza Hasanović („the appellant") from Livno lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") claiming violation of employment rights. On 15 December 2006, she supplemented her appeal challenging the Judgment of the Basic Court in Livno („the Municipal Court"), no. 068-0-P-06-000-296 of 7 December 2006. On 19 March 2007 she submitted and challenged the Judgment of the Cantonal Court in Livno („the Cantonal Court"), no. 010-0-Gž-07-000-105 of 14 March 2007.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 29 February 2008, the Constitutional Court requested from the Cantonal Court, the Municipal Court, the parties to the proceedings, and the Secondary Vocational School of Tomislavgrad („the defendant") to submit their respective replies to the appeal.

3. The Cantonal Court and the legal representative for the defendant, the Cantonal Public Attorney's Office of Livno, submitted their replies to the appeal on 10 March 2008. The Municipal Court submitted its reply on 12 March 2008.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal by the Cantonal Court, Municipal Court, and the Cantonal Public Attorney's Office of Livno were communicated to the appellant on 20 March 2008.

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 decision of the secondary school „Marko Marulić", as a legal predecessor of the defendant, no. 111/92 of 15 September 1992, the appellant, as an employee of the defendant, was laid off pending the ruling on the complaint against the decision on the termination of employment, pending the end of the war operations at the latest, starting as of 14 September 1992.

7. By the Decision of the defendant no. 145/92 of 9 November 1992, the complaint of the appellant was partly granted, whereby the challenged Decision no. 111/92 of 15 September 1992 was modified so that the appellant, during the wartime or in the event of war threat, had been laid off starting from 14 September 1992, during which time she would be entitled to all the rights and obligations arising from employment, save for her right to personal income, throughout the wartime.

8. By the Decision of the defendant no. 244/93 of 19 November 1993, as a result of a sudden deterioration of the safety situation, the appellant was sent on unpaid leave until further notice.

9. On 1 December 2000, the appellant lodged an appeal with the Commission for the Implementation of Article 143 of the Labor Law (*Official Gazette of FBiH* no. 43/99; „Cantonal Commission"), in order to exercise her right pursuant to Article 143 of the said Law. Deliberating on the appeal, the Cantonal Commission issued a Ruling no. 10/4-34-395/00 of 26 July 2001, dismissing the appellant's appeal, as it found that item 5 of the Instruction on the application of Article 143 paragraph 2 of the Labor Law stipulates that the mentioned article does not apply to administration bodies, public institutions and institutions, given that the employees had attained the „laid off" status in accordance with the General Collective Agreement of the Republic of BiH (*Official Gazette of SR BiH* no. 24/90), applied to the economy solely.

10. The Federation Commission for implementation of Article 143 of the Law on Labor („Federation Commission"), deliberating on the appellant's appeal against the first instance ruling, issued a Ruling no. 03-34-1250/01 of 3 October 2003, granting the appellant's

appeal and quashing the Ruling of the Cantonal Commission dated 26 July 2001, and referred back the case to the Cantonal Commission for renewed procedure. The reasoning of the ruling reads that the Instruction on the application of Article 143 paragraph 2 of the Labor Law ceased to be in effect upon the issuance of the Instruction on Abolishment of Instruction on the Application of Article 143 paragraph 2 of the Labor Law (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 35/01).

11. In the renewed procedure, the Cantonal Commission issued a Ruling no. 10/2-34-395/00 of 4 February 2004 granting the appellant's appeal and noting that the appellant fulfilled conditions referred to in Article 143 of the Labor Law regarding the acknowledgement of the employee's laid-off status with the employer, and the defendant was ordered to resolve the appellant's employment status within 15 days from the day of receiving the ruling.

12. Given that the defendant failed to fulfill the obligation voluntarily, on 23 March 2004 the appellant submitted a proposal to the Municipal Court for enforcement of the ruling of 4 February 2004. Municipal Court issued a Ruling of Enforcement no. I-491/04 of 6 September 2004 and on 21 April 2005 the defendant was ordered to comply with the ruling of the court dated 6 September 2004 within additional time limit of 15 days.

13. Next, the defendant issued a ruling on reinstatement of employment status, no. Ur. 293/05 dated 17 October 2005, thereby reinstating the appellant's laid-off employee status from November 1993 through 5 May 2000. The said ruling read that the appellant's employment status was terminated on 5 May 2000, and that she was entitled to severance pay in the amount of KM 1,179.52.

14. The appellant lodged a complaint against the said ruling with the School Board of the defendant, and as she did not receive a reply to it, she initiated judicial procedure against the defendant requesting that the ruling of the defendant no. Ur. 293/05 dated 17 October 2005 be quashed, that she be reinstated to work, reimbursed the unpaid salaries and that contributions arising from employment be paid out for the period at issue.

15. Deliberating on the lawsuit and the claim, the Municipal Court issued a judgment dismissing the appellant's request for the ruling to be quashed, dismissing the request to reinstate her to duties and tasks she had performed prior to being laid-off, dismissing the request for reimbursement of unpaid salaries for the period of 1 November 1993 until she has been reinstated to work, in the amount of KM 300.00 with a legal default interest, starting as of maturity date of each individual amount pending reimbursement. It also dismissed the request for contributions arising from employment to be paid for the said period.

16. In the reasoning of the judgment, the Municipal Court stated that the defendant on 17 October 2005 regulating the appellant's employment status, on the basis of the decision of the Commission establishing her laid-off employee status from 1 November 1993 to 5 May 2000, on which date her employment was terminated, and it was established that the appellant was entitled to severance pay of KM 1,179.52. The court holds that the obligation of the defendant was fulfilled in full. In the opinion of the court the appellant is not entitled to salaries or contributions in respect of her salary, given that according to the complaint of the defendant, within the meaning of Article 106 of the Labor Law, the claims arising from employment relation shall be subject to statute of limitations within three years. Also, under Article 372 paragraph 1 of the Law on Obligations, occasional claims, such as salaries and salary contributions shall not be subject to statute of limitations within three years. Municipal Court is of an opinion that claims of the plaintiff shall be applied from 5 May 2000 retroactively (to the date when her employment had been terminated). As she has filed a lawsuit on 13 April 2006, in the opinion of the court, the claim is barred by the statute of limitations.

17. The Judgment of the Cantonal Court no. 010-0-GŽ-07-000-105 dated 14 March 2007 dismissed the appellant's appeal and upheld the first instance judgment. In the reasoning of the judgment the court stated that the defendant, by its decision dated 17 October 2005, reinstated the appellant's employment status of a laid-off employee from November 1993 to 5 May 2000, when her employment was terminated, with entitlement to severance pay. In the part of the claim relating to the payment of salaries and contributions, in the opinion of the Cantonal Court, the Municipal Court had acted correctly, by correctly applying Article 106 of the Labor Law, for the appellant's employment had been legally terminated on 5 May 2000, and she filed the lawsuit within the deadline of three years prescribed by law, namely on 13 April 2006.

IV. Appeal

a) Allegations stated in the appeal

18. The appellant holds that the challenged decisions violated her right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina („Constitution of BiH") and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („European Convention"). The appellant presents the chronology of events related to the adoption of the challenged decisions, and states that she was dissatisfied with the challenged decisions, whereby she states that she was exposed to manifest discrimination over her ethnic and religious affiliation, and that since 1993 to date she has not received any financial assistance, nor does she have any social

or healthcare protection. Due to the aforementioned, she holds that her right under Article II(4) of the Constitution of BiH and Article 14 of the European Convention was violated.

b) Reply to appeal

19. In its reply to the appeal, the Cantonal Court states that the reasoning of the second instance judgment states the reasons for which the appeal was dismissed, due to which it was proposed that the appeal be dismissed as ill-founded.

20. Giving its opinion as to the allegations stated in the appeal, the Municipal Court states that the appellant filed a lawsuit in the present legal matter on 13 April 2006, that the court adopted a first instance judgment on 10 November 2006 and published it on 7 December 2006, and that the first instance judgment was upheld by the Cantonal Court following an appeal.

21. In the reply to the appeal, the defendant states that in the present case no violations of the law occurred to the detriment of the appellant for the reasons stated in the challenged judgments, and states that the appellant gave no other new reasons based on which it would be possible to conclude that she was treated differently from other persons in the same legal situation, and suggests that the appeal be dismissed as ill-founded.

V. Relevant Law

22. The **Labor Law** (*Official Gazette of the Federation of Bosnia and Herzegovina* nos. 43/99 and 32/00), in the relevant part, reads:

Article 106

An absolute expiry of statute of limitations on claims arising from employment shall occur within three years from the arising of the claim, unless the law provides otherwise.

Article 143

(1) An employee who has the status of a laid off employee on the effective date of this law shall retain that status no longer than six months from the effective date of this law, unless the employer invites the employee to work before the expiry of this deadline.

(2) An employee who was employed on 31 December 1991 and who, within three months from the effective date of this law, addressed in written form or directly the employer for the purpose of establishing the legal and working status - and had not accepted employment from another employer during this period, shall also be considered a laid off employee.

(3) While laid off, the employee shall be entitled to compensation in the amount specified by the employer.

(4) If a laid off employee referred to in paragraphs 1 and 2 of this Article is not invited to work within the deadline referred to in Paragraph 1 of this Article, his or her employment shall be terminated with a right to a severance pay which shall not be lower than three average salaries paid at the level of the Federation within the three previous months, as published by the Federal Statistics Bureau, for up to five years of service and for each additional year of service at least another half of the average salary.

....

(7) The way, conditions and deadlines for the severance payment referred to in paragraphs 4 and 5 of this Article shall be determined in a written contract between the employer and employee.

(8) If the employee's employment is terminated in terms of paragraph 4 of this Article, the employer may not employ another employee with the same qualifications or educational background within one year except the person referred to in Paragraphs 1 and 2 of this Article if that person is unemployed.

23. The **Law on Obligations** (*Official Gazette of SFRY* nos. 29/78, 39/85 and 57/89; and *Official Gazette of RBiH* nos. 2/92, 13/93 and 13/94), in the relevant part, reads:

Article 360

(2) Statute of limitations takes place upon the expiry of the time defined by law within which the creditor was entitled to request obligation fulfillment.

Article 361

(1) The statute of limitations starts to lapse on the first day after the day on which the creditor had the right to request obligation fulfillment, unless the law prescribes otherwise for specific cases.

Article 362

Statute of limitations comes into effect upon the expiry of the last day of the time period determined by law.

Article 372

(1) Claims related to periodical giving which are due annually or in shorter determined time spans (periodical claims), even if accessory claims are in question, such as claim of interest rate, even if in such periodical claims the right itself is used,

such as claim of alimony, expire within three years period from the maturity day for each individual giving.

VI. Admissibility

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

25. According to Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

26. In the present case, the appellant had initially lodged an appeal against the ruling of the Cantonal Commission, and given that in the interim, the ordinary courts had issued their judgments dismissing her claim, and that the appellant had supplemented her appeal two times upon receiving the challenged judgments, the Constitutional Court refers to Article 16 (1) of the Rules of the Constitutional Court, which prescribes as a requirement for admissibility of the appeal the obligation that an appeal be lodged within 60 days from the day the appellant received the decision on the last legal remedy she used. With regards to this, the Constitutional Court recalls that in its Decision no. *AP 1718/05* dated 21 December 2006, it stated that this time limit of 60 days necessarily applies to the submission of a supplement to the appeal, and concluded that only in exceptional circumstances can the supplement to the appeal, filed upon the expiry of the time limit, be accepted, if relating to new legal circumstances occurring after the expiry of the said time limit. In the said decision the Constitutional Court took a stance that a possibility of a supplement to the appeal may not be interpreted in broad terms so as to imply the right that the appellants can be supplementing the appeal with regards to the facts of the case and the same challenged decision for as long as the proceedings on the appeal are pending before the Constitutional Court, on the expiry of the time limit of 60 days (see the Constitutional Court, Decision no. *AP 1718/05* dated 21 December 2006).

27. Given that in the present case, within the meaning of the aforementioned stance of the Constitutional Court, new legal circumstances had occurred during the proceedings related to the initial allegations stated in the appeal, whereby the first instance and second instance decisions were adopted, and bearing in mind that the appellant had notified the court of the new circumstances, on 19 September 2006 the Constitutional Court requested from the appellant to specify the appeal. Complying with the request of the Constitutional

Court, in the supplement to the appeal of 29 September 2006, the appellant informed the Constitutional Court that she challenged the ruling of the Cantonal Commission in her appeal, and that she initiated a court proceeding for the quashing of the said ruling, which is pending. In the supplement to the appeal dated 13 December 2006, the appellant challenged the Judgment of the Municipal Court no. 068-0-P-06-000-296 dated 7 December 2006, and in the supplement dated 19 March 2007 she challenged the Judgment of the Cantonal Court no. 010-0-GŽ-07-000-105 dated 14 March 2007.

28. The subject matter of the appeal is the judgment of the Cantonal Court no. 010-0-Gž-07-000-105 of 14 March 2007, against which there are no other effective remedies available under the law. Given that the appellant communicated the said judgment to the Constitutional Court on 19 March 2007 or within the time limit of 60 days from the day the appellant received a decision on the last effective legal remedy she used, the appeal is timely within the meaning of Article 16(1) of the Rules of the Constitutional Court. In conclusion, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court as neither being manifestly (*prima facie*) ill-founded nor inadmissible for any formal reasons.

29. In view of the provisions of Article VI(3)(b) of the Constitution of BiH and Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the admissibility requirements have been met in the relevant appeal.

VII. Merits

30. The appellant challenges the mentioned judgments of the Cantonal and Municipal Courts and complains that her rights referred to in Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention, in relation to the right not to be discriminated against referred to in Article II(4) of the Constitution of BiH and Article 14 of the European Convention, were violated.

Right to a fair trial

Article II(3)(e) of the Constitution of BiH, in the relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

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

Article 6(1) of the European Convention, in its relevant part, reads:

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

31. The Constitutional Court notes that in the proceedings finalized by a challenged judgment of the Cantonal Court it was deliberated on the appellant's claim aimed at the quashing of the defendant's decision dated 17 October 2005 on the reinstatement of the employment status, reinstatement of the appellant to work and reimbursement of salaries and contributions arising from employment. The Constitutional Court concluded on the basis thereof that this concerned a civil procedure case. That implies that Article 6 of the European Convention is applicable in the present case. In view of the aforementioned, the Constitutional Court shall examine whether the proceedings before the court were fair as required under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention.

32. The Constitutional Court observes that the essence of the allegations related to the violation of the right to a fair trial refers to erroneous, that is arbitrary application of the substantive law by the ordinary courts. With regards to this, the Constitutional Court recalls that, in accordance with the hitherto case-law, the competence of the Constitutional Court referred to in Article VI(3)(b) of the Constitution of BiH is restricted solely to „issues under this Constitution". The Constitutional Court is therefore not called upon to review the establishment of facts or the interpretation of laws by ordinary courts, unless the decisions of the ordinary courts violated constitutional rights. This is the case when an ordinary court's decision does not imply or erroneously applies constitutional law, when application of positive regulations is manifestly arbitrary, when relevant law is in itself unconstitutional or when fundamental procedural rights are violated, such as the right to a fair trial, the right of access to court, the right to an effective legal remedy and in other cases (see Constitutional Court, Decision *no. U 29/02* of 27 June 2003, published in the *Official Gazette of Bosnia and Herzegovina* no. 31/03).

33. In the context of the aforementioned, the Constitutional Court notes that the ordinary courts had based their decisions on the provisions of Articles 106 and 143 of the Labor Law in conjunction with Article 372 paragraph 1 of the Law on Obligations. Namely, after the proceedings were completed the ordinary courts found that the appellant's employment status was regulated by the decision of the defendant dated 17 October 2005, in a way so as to treat her as a laid-off employee starting from November 1993 to 5 May 2000, on which date her employment was terminated, thereby entitling her to a severance pay of KM 1,179.52. The parties have no doubts that the appellant had addressed the defendant

in a timely fashion with a request for reinstitution of her employment status, and that within the time limit referred to in Article 143 paragraph 1 of the Labor Law she had not been called to work, resulting in the termination of her employment on 5 May 2000. Given the aforementioned, the Constitutional Court did not observe any arbitrariness in the application of the substantive law relating to the conduct of the ordinary courts in the part where the appellant requested for the decision simultaneously reinstating her employment status and terminating her employment to be quashed. Namely, the appellant, complying with the provisions of the Labor Law, filed a request for reinstitution of her employment status first with the defendant, and then with the competent Cantonal Commission, which, by the Ruling no. 10/2-34-395/00 dated 4 February 2004, which is not the subject matter of this appeal, established that the appellant meets legal requirements for her status of a laid-off employee to be recognized, and ordered the defendant to resolve the appellant's employment status. Given that it is undisputed that the defendant had failed to call the appellant to work within the time limit of six months prescribed by law and applicable from the day of entry into force of the Labor Law, the appellant's employment was terminated by the force of law on 5 May 2000, and she was entitled to severance pay in accordance with the amended provision of Article 143 paragraphs 4 and 5 of the Labor Law. This implies that the decision of the defendant is only declaratory in nature, therefore the appellant's allegations as to the violation of her rights in that part are absolutely ill-founded. Considering the aforementioned, the Constitutional Court sees no arbitrariness in the application of the law in the part dismissing the appellant's claim aimed at quashing the defendant's decision no. 293/05 dated 17 October 2005 related to the reinstatement of the appellant's employment status as a laid-off employee, and the request for reinstatement to work and to assignments she had performed prior to being laid-off.

34. However, with regards to the appellant's allegations in the part dismissing her request for reimbursement of salaries and payment of contributions, the Constitutional Court holds that the Cantonal Court had arbitrarily applied provisions of Article 106 of the Labor Law. Namely, the Cantonal Court, by upholding the first instance judgment, took a stance that the appellant had filed a lawsuit after the expiry of the prescribed time limit of three years, under Article 106 of the Labor Law and Article 372 paragraph 1 of the Law on Obligations. The Cantonal Court argues that the appellant had filed a lawsuit on 13 April 2006, requesting reimbursement of the unpaid salaries for the period since 1 November 1993 until her reinstatement to work. Given that her employment was terminated on 5 May 2000, the Appellate Court concluded that the defendant's complaint about the claim being barred by the statute of limitations is well-founded, whereby the court found that the statute of limitations of three years had expired, during which the appellant, under Article 106 of the Labor Law, was allowed to request for the obligations to be fulfilled.

35. With regards to this, the Constitutional Court recalls that in its Decision *no. AP 299/06* dated 27 January 2007, it found that *the statute of limitations for exercising the right under Article 143 of the Labor Law started running the first day after the ruling establishing her status of a laid-off employee became legally binding*. Also, in its unpublished Decision *no. AP 1920/06* dated 25 January 2008, the Constitutional Court took the same stance. The reasons offered in the mentioned decisions of the Constitutional Court fully apply to the present case, the reason being that the ruling of the Commission no. 10/2-34-392/00 dated 4 February 2004, establishing that the appellant meets all legal requirements for her status of a laid-off employee to be recognized, became legally binding in February 2004. The defendant implemented the mentioned ruling only after the appellant had requested the enforcement of the ruling through court on 23 March 2004. Following this, on 17 October 2005, the defendant issued a decision reinstating the appellant's employment status. This implies that the appellant was not in a position to request compensation of salaries before the Cantonal Commission issued a ruling reinstating the appellant's employment status as a laid-off employee, nor did the defendant have the obligation in that sense. Given that the statute of limitations could not start running before the date of entry into force of the ruling of the Cantonal Commission, and taking into account that the lawsuit in the present legal matter was filed on 13 April 2006, the Constitutional Court holds that the Cantonal Court, in deliberating on the part of the claim concerning the compensation of salaries to the appellant for the period from 1993 to 5 May 2000, had manifestly arbitrarily applied the provisions of Article 106 of the Labor Law. In view of the aforementioned, it follows that the lawsuit in the part claiming the compensation of salaries was timely, and that a decision on merits should have been adopted concerning that part.

36. With regards to the allegations stated in the appeal relating to the erroneous application of the substantive law in the part dismissing the appellant's claim for the payment of contributions due to the claim being barred by the statute of limitations, the Constitutional Court, referring to its case-law (see Constitutional Court, Decision no. *AP 311/04* dated 22 April 2005, published in *Official Gazette of Bosnia and Herzegovina* no. 60/05), holds that the substantive law was arbitrarily applied in that part as well, as the courts rejected this request too on the grounds of the complaint about the claim being barred by the statute of limitations. In the mentioned decision no. *AP 311/04,* the Constitutional Court established the violation of the right to a fair trial, for the ordinary courts concluded that the appellant did not have a standing to request in the ordinary court procedure the payment of compensations arising from employment. The court provided a reasoning that the appellant did not have a standing to request so in the civil proceedings, for in the system of compulsory insurance this does not concern obligation relation between the

appellant and the defendant, but between the defendant as an employer, and the competent pension insurance fund, which is regulated by special law and special extrajudicial procedure for reimbursement. Given that the mentioned decision of the Constitutional Court established that the appellant had a standing to claim before a competent court the payment of contributions arising from employment, it is possible to deduce that in the present case the ordinary courts should have deliberated on the appellant's request for the payment of contributions, and not to arbitrarily apply the provision of Article 106 of the Labor Law considering as well-founded the complaint about the claim being barred by the statute of limitations. Reasons stated by the Constitutional Court in the part of the appeal relating to the payment of salaries may be analogously applied to the payment of contributions arising from employment.

37. In view of the above, the Constitutional Court considers that the manner in which the ordinary courts had applied positive regulations in the challenged judgment regarding the payment of salaries and contributions is arbitrary and it constitutes a violation of the appellant's constitutional right to a fair trial referred to in Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

38. As far as the remaining challenged judgments, given that the defendant, by its Ruling dated 17 October 2005, had reinstated the appellant's employment status as a laid-off employee starting from November 1993 to 5 May 2000, when her employment was terminated entitling her to a severance pay, the Constitutional Court found no violations whatsoever of the appellant's constitutional rights and accordingly dismissed the appeal in that part as ill-founded.

b) Other allegations

39. In view of its finding of a violation of Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention, the Constitutional Court holds that it is not necessary to examine the part of the appeal related to the alleged violation of the right referred to in Article II(4) of the Constitution of BiH and Article 14 of the European Convention.

VIII. Conclusion

40. There is a violation of the right to a fair trial under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention in a situation when the Cantonal Court had arbitrarily interpreted Article 106 of the Labor Law, which regulates the statute of limitations on exercising the rights arising from employment in relation to exercising

the right referred to in Article 143 of the Labor Law, related to the payment of salaries to laid-off employees and the payment of contributions arising from employment.

41. Pursuant to Article 61(1), (2) and (3) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

42. According to Article VI(4) of the Constitution of BiH, the decisions of the Constitutional Court shall be final and binding.

Seada Palavrić
President
Constitutional Court of Bosnia and Herzegovina

Case no. AP 1362/06

DECISION
ON ADMISSIBILITY
AND MERITS

Appeal of Mr. Husein Muratović against the Judgment of the Appellate Court of the Brčko District of Bosnia and Herzegovina, no. Rev-2/05 of 10 March 2006

Decision of 30 January 2009

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(2), Article 59(2)(2), Article 61 (1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05 and 64/08), in Plenary and composed of the following judges:

Ms. Seada Palavrić, 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,

Mr. Mirsad Ćeman,

Mr. Krstan Simić,

Having deliberated on the appeal of **Mr. Husein Muratović** in case no. **AP 1362/06**, at its session held on 30 January 2009, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. Husein Muratović is hereby partially granted.

A violation of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The following judgments are quashed:

- **Judgment of the Appellate Court of the Brčko District of Bosnia and Herzegovina, no. Rev-2/05 of 10 March 2006,**
- **Judgment of the Appellate Court of the Brčko District of Bosnia and Herzegovina, no. Gž-489/04 of 1 December 2004,**

- **Judgment of the Basic Court of the Brčko District of Bosnia and Herzegovina, no. P-274/02-I of 15 June 2004.**

The Appellate Court of the Brčko District of Bosnia and Herzegovina is ordered to take a new decision under the expedited proceedings in accordance with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Appellate Court of the Brčko District of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 3 months as from the date of delivery of this Decision, about the measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal of Mr. Husein Muratović lodged against the judgment of the Appellate Court of the Brčko District of Bosnia and Herzegovina, no. Rev-2/05 of 10 March 2006, judgment of the Appellate Court of the Brčko District of Bosnia and Herzegovina, no. Gž-489/04 of 1 December 2004 and judgment of the Basic Court of the Brčko District of Bosnia and Herzegovina, no. P-274/02-I of 15 June 2004 in relation to Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is rejected as inadmissible for being manifestly (*prima facie*) 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 10 May 2006, Mr. Husein Muratović („the appellant") from Brezovo Polje, represented by Mr. Murat Mujadžević, a lawyer practicing in the Brčko District of Bosnia and Herzegovina („the Brčko District") filed an appeal with the Constitutional Court of

Bosnia and Herzegovina („the Constitutional Court") against the judgment of the Appellate Court of the Brčko District of Bosnia and Herzegovina („the Appellate Court"), no. Rev-2/05 of 10 March 2006, judgment of the Appellate Court, no. Gž-489/04 of 1 December 2004 and judgment of the Basic Court of the Brčko District of Bosnia and Herzegovina („the Basic Court"), no. P-274/02-I of 15 June 2004.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Appellate and Basic Court, as the participants to the proceedings, the Brčko District („the defendant"), represented by the Office for Representation of the Government of the Brčko District were requested on 22 May 2007 to submit their replies to the appeal.

3. The Appellate Court submitted its reply to the appeal on 15 June 2007. The Basic Court submitted its reply to the appeal on 14 June 2007. The defendant failed to submit its reply to the appeal.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 24 April 2008.

II. Facts of the case

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

6. The appellant is the owner of a mill containing the sophisticated equipment and accompanied premises in Brezovo polje, Brčko District which he had left due to the war activities in 1992. He returned in 1997 and saw that the mill and equipment were in good condition, after which he requested the Municipality of Brčko to allow him to reclaim the mill. Concurrently, on 18 March 1997, he found that the Municipality of Brčko through the Housing Company had concluded a Contract on Lease of the mill and business premises with O.M. from Hrtkovci authorizing O.M. to renovate the mill but the mill had been dismantled and taken to Hrtkovci, the Republic of Serbia. As the mill was damaged while being dismantled, the appellant initiated contentious proceedings for damage compensation.

7. By the judgment of the Basic Court, no. P-274/02-I of 15 June 2004, which was upheld by the judgment of the Appellate Court, no. Gž-489/04 of 1 December 2004, the appellant's claim was dismissed (which he filed together with M.H.). The appellant requested in his claim that the defendant be obliged to pay the appellant KM 202,252.23

by way of damage compensation and default interest as of 21 June 2002 until the payment in full within 15 days under the threat of the enforcement.

8. It was indisputably established during the proceedings that the appellant had suffered the damage in the amount specified in the enacting clause of the first-instance judgment. However, despite the fact that the contract (dated 19 March 1997) had been concluded with OJDP „Stambeno" Brčko, it had not been submitted to the mayor for revision, which was stipulated by the provisions of Article 71 of the Statute of the Brčko District so that the contract was considered to be cancelled. Moreover, the court found that pursuant to Article 6 of the Statute of the Brčko District (*Official Gazette of the Brčko Di*strict no. 1/00), the District is a legal person and has such legal capacity as may be necessary to exercise its functions, including the capacity to make commitments and take on commitments; to charge and be charged in court. Although the aforementioned Article 71 of the Statute of the Brčko District provides that the Brčko District of Bosnia and Herzegovina is the legal successor to the Republika Srpska Brčko Municipality as well as to the administrative arrangements of Brka and Ravne – Brčko, the Brčko District, as concluded by the courts, had no standing to be sued in this dispute and thus was not responsible for the damage caused. Finally, item 4 of the Supervisory Order dated 13 April 2000 clearly stated that, absent agreement with the Entities in respect of specific obligations, the District would assume no obligations to take over debts incurred prior to the date of proclamation of the Brčko District.

9. By the judgment no. Rev-2/05 of 10 March 2006, the Appellate Court dismissed the appellant's revision-appeal by referring to the same reasons as the lower-instance judgments of the Appellate and Basic Court. The Appellate Court concluded that the substantive law in the mentioned judgments was not misapplied to the detriment of the plaintiffs upon the claim being dismissed due to the lack of standing to be sued. Finally, the Appellate Court stated that the orders, regulations or directives of the Supervisor, according to the provisions of the Final Award for Brčko District of 5 March 1999, have priority in terms of its application over the domestic law in the event of dispute. Further, the court found that in the instant case the issue is about the so-called „specific obligations" and, therefore, the responsibility of the Brčko District for the damage compensation is excluded.

IV. Appeal

a) Statements from the appeal

10. The appellant complains that the challenged judgments are in violation of his 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 for the Protection of Human Rights

and Fundamental Freedoms („the European Convention"), the right to respect for private and family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and right to an effective legal remedy under Article 13 of the European Convention. The appellant is of the opinion that the courts' conclusion that the Brčko District had no standing to be sued because of the fact that the Supervisory Order, dated 13 April 2000, stipulated that *absent agreement with the Entities regarding specific obligations, the District assumes no responsibility for any debts incurred prior to the date of establishment of the District*. The reduction in the appellant's property is not to be associated with the concept of „specific obligations" which concerns organization of the Entity's financial obligations within the fiscal system and not compensation for pecuniary damage and lost profit suffered by physical persons, which was the defendant's responsibility. The appellant is of the opinion that the defendant cannot be absolved from the responsibility for damage, since the defendant, as stated by the appellant, *constitutes the continuity of the unified authority for the entire territory of the pre-war Brčko Municipality.* Since the appellant upholds his opinion that his claim is justified, he proposes that the Constitutional Court should take a decision on the merits, whereby it would award the appellant the damage compensation to the amount of KM 202,252.23 with default interest as of 21 June 2002 until the finalization of the payment, including costs of the proceedings, all within a time limit of 15 days under the threat of the enforcement.

b) Reply to the appeal

11. In its response to the appeal, the Appellate Court notes that regarding the decision on the revision-appeal there is no dispute that the appellant is the owner of the mill including the accompanying business premises and equipment, but it is also noted that the damage dates back to 1997 when those premises were at the disposal of the Republika Srpska. The substantive law was not misapplied given the fact that due to the lack of standing to be sued the defendant Brčko District cannot be held responsible for the sustained damage.

12. In response to the appeal by the Appellate Court regarding the decision on the appellant's complaint, the reasons stated in the decision dismissing the appeal are repeated as those in the revision proceedings before the Appellate Court.

13. In response to the appeal the Basic Court notes that the proceedings were conducted in accordance with the provisions of the contentious proceedings and other provisions of the substantive law so that the Basic Court took a decision according to which there were no conditions for determination of damage compensation and violation of the constitutional right to which the appellant referred.

V. Relevant Law

14. The **Civil Procedure Code of the Brčko District** (*Official Gazette of the Brčko District of BiH* no. 5/00) reads in relevant part as follows:

Article 102

The party that has lost the litigation entirely shall be obliged to compensate the costs to the adverse party.

Article 295

The Appellate Court shall refuse the appeal as unjustified and confirm the first instance judgment by judgment when it finds out that the reasons to contest the judgment are not present.

15. The **Law on Administration and Management of the State-owned Premises** (*Official Gazette of the Republika Srpska* no. 20/96) reads in relevant part as follows:

Article 3

The public enterprise referred to in the previous article shall be assigned a task to temporarily manage the business premises which had been abandoned by their owner or holder of disposal right due to the war conflict until a final resolution of ownership relations either by repossession of abandoned property or by compensation for that property.

16. The **Law on the Cessation of Application of the Law on the Use of Abandoned Property** (*Official Gazette of the Republika Srpska* nos. 38/98 and 31/99) reads in relevant part as follows.

Article 3

The owner, possessor or user of the real property who abandoned the property shall have the right to repossess the real property with all the rights which s/he had before 30 April 1991 or before the real property became abandoned.

Article 4

For the purpose of this Law, the owner, possessor or user shall be understood to mean the person who was the owner, possessor or user of the real property under the applicable legislation at the time when the real property became abandoned.

17. The **Statute of the Brčko District of Bosnia and Herzegovina** (*Official Gazette of the Brčko District of BiH* no. 1/00) in its relevant part reads as follows:

Article 1 paragraph 4

The Constitution of Bosnia and Herzegovina, as well as relevant laws and decisions of the institutions of Bosnia and Herzegovina, are directly applicable throughout the territory of the District. The laws and decisions of all District authorities must be in conformity with the relevant laws and decisions of the institutions of Bosnia and Herzegovina.

Article 71
Legal Succession

All municipal administrations existing within the territory of the District shall cease to exist at the time this Statute enters into force. Municipal offices and legal persons founded or financed by the existing municipal administrations shall continue to provide services in accordance with applicable law under the direction of the District Government and until otherwise determined by the District Government or superseded by District Law.

The Brčko District of Bosnia and Herzegovina is the legal successor to the Republika Srpska Brčko Municipality as well as to the administrative arrangements of Brka and Ravne - Brčko.

All contracts and agreements entered into by the municipal governments referred to in paragraph (2) of this Article shall be disclosed to the Mayor by the parties involved within thirty (30) days of the Mayor's assuming office. Any such contract or agreement not disclosed shall be deemed repudiated. The Mayor shall immediately present the referred contracts and agreements to the Assembly. Upon the recommendation of the Mayor or at the initiative of five (5) councilors the Assembly may repudiate any of these contracts or agreements.

18. The **Supervisory Order on the Financial System of the Brčko District of Bosnia and Herzegovina** of 14 April 2000, in its relevant part reads as follows:

4. Absent agreement with the Entities regarding specific obligations, the District assumes no responsibility for any debts incurred prior to the date of establishment of the District.

VI. Admissibility

19. 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 under a judgment of any other court in Bosnia and Herzegovina.

20. 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.

21. In examining the admissibility of the appeal in respect of Article II(3)(f) of the Constitution of Bosnia and Herzegovina, Article 8 of the European Convention and Article 13 of the European Convention, the Constitutional Court has referred to the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(2) of the Rules of the Constitutional Court.

Article VI(3)(b) of the Constitution of Bosnia and Herzegovina read as follows:

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.

Article 16(2) of the Rules of the Constitutional Court read as follows:

The Constitutional Court shall reject an appeal as being manifestly (prima facie) ill-founded when it establishes that the request of the party to the proceedings is not justified or when the presented facts do not in any way justify the allegation of a violation of the constitutional rights and/or when the Constitutional Court establishes that the party to the proceedings is not a „victim" of a violation of the constitutional rights, so that the examination of the merits of the appeal is superfluous.

22. In the present case, the appellant alleges that the challenged decisions are in violation of his right to respect for private and family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and his right to an effective legal remedy under Article 13 of the European Convention.

23. The decisions wherein the courts dealt with justification of the claim for damage compensation so as to decide that the defendant had no standing to be sued in a dispute cannot be associated to the guarantees for the constitutional rights to private and family life. Taking into account the aforesaid, the Constitutional Court concludes that the allegations relating to the violation of the right to private and family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention (*prima facie*) are ill-founded, since the appellant submitted the facts which in no way may justify the allegation on the violation of the aforementioned constitutional rights within the meaning of Article 16(2) of the Rules of the Constitutional Court.

24. Furthermore, the appellant has failed to submit the facts and evidence which would prove that he was deprived of the right to an effective legal remedy under Article 13 of the

European Convention. Taking into account the appellant's allegations and the case-file, the Constitutional Court holds that the submitted facts can in no way justify the appellant's allegations on the violation of the constitutional rights and it concludes that the appellant's allegations do not give rise to issues under Article 13 of the European Convention. Article 13 of the European Convention stipulates an obligation for the member states to secure the right to an effective legal remedy before a national authority for everyone whose rights and freedoms as set forth in this Convention are violated. In this connection, the Constitutional Court recalls that in the contentious proceedings relating to the claim for damage compensation, the appellant, being unsatisfied with the decision of the Basic Court and Appellate Court, filed an appeal and a revision-appeal with the Appellate Court, which dismissed both appeals as ill-founded. Taking into account the aforesaid, the appellant's allegations on the violation of the right to an effective legal remedy are arbitrary, since the appellant was given an opportunity to file an appeal and a revision-appeal so that the availability of an effective legal remedy cannot be called into question in the present case. The appellant's allegations are therefore *prima facie* unfounded.

25. In the present case, the appeal is directed against the judgment of the Appellate Court no. Rev-2/05 of 10 March 2006 against which there are no other legal remedies available under the law. The appellant received the challenged judgment on 31 March 2006 and the appeal was filed on 10 May 2006, i.e. within 60-day time limit as prescribed by Article 16(2) and (4) of the Rules of the Constitutional Court. Finally, the appeal meets the requirements under Article 16(2) and (4) of the Rules of the Court, since it is not manifestly (*prima facie*) ill-founded, nor is there any other formal reason which would render the appeal inadmissible.

26. Taking into account Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Articles 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court concludes that the appeal meets the admissibility requirements.

VII. Merits

27. The appellant complains that the challenged judgment violated his 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.

28. Article II(3)(k) of the Constitution of Bosnia and Herzegovina in its relevant 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:

[...]

k) the right to property

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

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.

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.

30. In the context of the right to property, the Constitutional Court points out that a state cannot be denied a right to pass laws whereby certain human rights may be revoked or restricted, unless such a restriction is provided for by the European Convention according to which, under certain circumstances, certain rights may be restricted, such as the right to property.

31. The word „possessions" includes a wide range of proprietary interests representing an economic value (see the Constitutional Court, Decision no. U *14/00* of 4 April 2001 published in the *Official Gazette of Bosnia and Herzegovina* no. 33/01). Furthermore, according to the jurisprudence of the European Court of Human Rights, the term „possessions to be protected" may only apply to „existing possessions" (see the European Court of Human Rights, *Van der Mussele,* judgment of 23 November 1983, Series A, no. 70, page 22, paragraph 48), or at least to the „possessions" in relation to which the appellant has „legitimate expectations", such as the compensation for damages (see the European Court of Human Rights**,** *Pine Valley Developments Ltd and Others,* judgment of 29 November 1995, Series A, number 332, paragraph 31).

32. The Constitutional Court recalls its earlier decisions and jurisprudence of the European Court of Human Rights, whereby it is determined that Article 1 of Protocol No. 1 to the European Convention contains three rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference of the State

with the right to peaceful enjoyment of property (see judgment of European Court of Human Rights, *Holy Monasteries vs. Greece* of 9 December 1994, Series A, no. 301-A, page 29, and paragraph 51).

33. It becomes clear from the appeal and attached documents that on 18 March 1997 the Contract on Temporary Lease of Business Premises (no. 200/97) was concluded between the ODJP „Stambeno" of Brčko Municipality and O.M. from Hrtkovci and the subject of contract was the mill and its equipment owned by the appellant. On 14 March 2000, the appellant came into possession of the business premises in Brezovo Polje, but at the moment of taking over the mentioned property he found a devastated building with destroyed installations and the crops milling machinery was either devastated or stolen. At the moment of taking over his property in 2000 the appellant was neither aware of the Contract whereby the Municipality of Brčko, through the ODJP „Stambeno", had leased out the mill, including the rest of machinery, to some other person nor of the fact that the mill had been dismantled and transported to Hrtkovci in 1997. Since the mill had sustained damage in the dismantling process which made a restitution claim impossible, the appellant initiated the contentious proceedings in order to be compensated for the sustained damage.

34. While presenting the reasons for the decisions rejecting the appellant's claim for damage compensation, the ordinary courts stated that although, according to Article 71 of the Statute of the Brčko District, the Brčko District is a legal successor to a part of the municipality of Brčko and to the administrative arrangements of Brka and Ravne Brčko, it has no legal standing in this dispute and is not responsible for the sustained damage. The courts drew this conclusion from the fact that the damage for which the Municipality of Brčko is held responsible had occurred in 1997 and that the Brčko District was constituted three years after. Considering that the obligations assumed by the legal predecessors to the Brčko District are of specific nature and given the absence of agreement with the Entities regarding specific obligations, the ordinary courts invoked the applicable substantive law regulating the contentious proceedings, the compensation for damage and legal grounds for renting the mill. Apart from the mentioned provisions, the ordinary courts also invoked the Statute of the Brčko District and the Supervisory Order stipulating that „absent agreement with the Entities regarding specific obligations, the District assumes no responsibility for any debts incurred prior to the date of establishment of the District".

35. In the case at hand, the ordinary courts applied the substantive law to the established facts and in doing so they referred to application of the Statute of the Brčko District and Supervisory Order and thus dismissed the appellant's claim for damage compensation in its entirety. By the challenged decisions the ordinary courts of the Brčko District,

without refuting the state of facts, applied Article 71 of the Statute of the Brčko District as special general acts which they connected with the case at hand whereby, *inter alia*, it was established that the Brčko District is a legal successor to a part of the municipality of Brčko in the Republika Srpska, as well as to the administrative arrangements of Brka and Ravne-Brčko. Furthermore, the courts quoted the standard provision according to which all contracts and agreements entered into by the municipal governments referred to in Article 71, paragraph 2 of the Statute of the Brčko District shall be disclosed to the Mayor by the parties involved within thirty (30) days of the Mayor's assuming office. Finally, any such contract or agreement not disclosed shall be deemed repudiated and the Mayor shall immediately present the referred contracts and agreements to the Assembly.

36. In examining whether there was violation of the right to property the answers should be given to the following questions: a) whether the relevant property falls under the protection of Article 1 of Protocol No. 1 to the European Convention; b) whether there was an interference with the property; c) within which of the three stated rules the interference should be considered, d) whether the interference followed the legitimate objectives of public and general interest; e) whether the interference was proportional and f) whether the interference was in accordance with the principle of legal certainty or lawfulness.

37. In giving an answer to the question whether it was the property that falls under the protection of Article 1 of Protocol No. 1 to the European Convention, the Constitutional Court concludes that the present case involves „legitimate expectations" for granting the compensation for sustained damage and therefore Article 1 to Protocol No. 1 to the European Convention is applicable.

38. The Constitutional Court concludes that in the case at hand the issue involves the appellant's right to property within the meaning of the first sentence under Article 1 paragraph 1 to Protocol No. 1 to the European Convention given the fact that by the first instance judgment the appellant's claim was dismissed in which he sought compensation for damage inflicted to his property (mill and equipment).

39. The next question is „whether there was the interference with the property, in other words whether the interference followed the legitimate objectives of public and general interest". In giving an answer to this question the Constitutional Court concludes that the requirement for „interference to be in accordance with law" was met since the compensation for damage which was inflicted to the appellant's property was challenged by application of the substantive law on contentious proceedings (it was alleged that the Brčko District lacks standing to be sued), i.e. the obligatory regulations (the Brčko District is not responsible for the damage caused prior to its establishment). Furthermore, the

court referred to Article 71 of the Statute of the Brčko District whereby it is stipulated that the Brčko District of Bosnia and Herzegovina is the legal successor to the Republika Srpska Brčko Municipality as well as to the administrative arrangements of Brka and Ravne - Brčko. Moreover, the provisions of the Brčko District's Statute stipulates that all contracts on transfer of right to property shall be disclosed to the Mayor by the parties within thirty (30) days of the Mayor's assuming office. Finally, in the reasons for its judgments the courts also referred to the Supervisory Order whereby the financial system of legal entities has been regulated at the level of Brčko District. In giving an answer to the question „whether the interference was provided for by law", the Constitutional Court concludes that the interference with the appellant's property, except for the application of the Supervisory Order, followed the principle of lawfulness.

40. Furthermore, the Constitutional Court has to establish whether the interference was proportional to the aim sought to be achieved, i.e. whether a fair balance has been struck between the appellant's right and general public interest. The Constitutional Court concludes that by their judgments the ordinary courts of Brčko District, to the appellant's determent, have indeed interfered with the balance which must be struck between the individual right to property and demands of the public interests. It is indisputable that there is a public interest in determining the rules on who is responsible for making compensation for damage caused to the property of legal entities and that a person causing that damage is to be held responsible and that the existence of damage is to be established in the procedure provided for by law. However, the Constitutional Court considers that the ordinary courts of Brčko District, while rendering the challenged judgments, disregarded the reasonable relationship relating to the principle of proportionality between the means employed and the aim sought to be achieved. The requirement of proportionality was not met since the appellant bears such an excessive burden which is reflected in the entire loss of his property rights and in impossibility to be compensated for the damage sustained after so many years of his work and investments placed in the construction of mill and its maintenance.

41. Furthermore, in the reasons for their judgments the ordinary courts of Brčko District presented their positions that due to the Supervisory Order the right of the appellant to compensation for damage cannot be recognized by referring to Article 4 of the Order which provides that „absent agreement with the Entities regarding specific obligations, the District assumes no responsibility for any debts incurred prior to the date of establishment of the District." According to the Agreement on Implementation of Entity Obligations set forth by the Final Arbitration Award for Brčko, which was signed on 24 October 2000 between the Government of Brčko District, the Government of Federation of Bosnia and Herzegovina and the Government of Republika Srpska, it is stipulated that the Entities,

i.e. the Government of Entities shall be obliged to settle all obligations of legal entities, political arrangements and institutions making an integral part of the Brčko District and the above refers to the obligations assumed prior to 31 March 2000. Upon the signing of the Agreement by the Entity Governments and Brčko District a full consent of Entities has been given in regards to settling the claims incurred prior to the establishment of Brčko District. Finally, according to the Supervisory Order of 13 April 2000, it is clearly stated that „absent agreement with the Entities regarding specific obligations, the District assumes no responsibility for any debts incurred prior to the date of establishment of the District", the conclusion is drawn that the Supervisory Order has „stronger and more obligatory force in the area of the Brčko District than the previous valid laws". It follows from the aforesaid that the ordinary courts of the Brčko District concluded that the Entities, and not the Brčko District, are those responsible for the mentioned obligations given the absence of any other agreement on assuming such kind of obligations.

42. It further follows from the Supervisory Order that „the Brčko District Revenue Agency controls, operates, manages, and exercises authority over the payment bureaus and all transactions regarding the payment bureaus taking place within and on behalf of the Brčko District", from which it becomes clear that this order, which the ordinary courts refer to, regulates the „financial system" that provides for the legal transactions between the legal entities of the Brčko District. The Constitutional Court considers that in the instant case the issue is not about fulfillment of financial obligations of the defendant towards the appellant - as concluded by the courts, but the issue is about fulfillment of defendant's obligations relating to the recognition of the appellant's right to compensation for damage inflicted to his property. The appellant has unlimited legitimate expectation that the defendant would compensate him for the amount of damage sustained given that, as it is already stated, he is entitled to have legitimate expectations concerning his property. Accordingly, the application of the Supervisory Order to this specific case constitutes an application of law to this legal relationship, which pursues no public interest and constitutes an excessive burden placed on the appellant. In this specific case, the Constitutional Court considers that by application of the Supervisory Order the interference with appellant's property has failed to pursue public interest and therefore it constitutes an excessive burden placed on the appellant in terms of depriving him from his property rights.

43. Having regard to the aforesaid, the Constitutional Court concludes that in the instant case the appellant's right to property under Article II (3) (k) of the Constitution of BiH and Article 1 of Protocol No. to the European Convention was violated by application of the provisions of substantive and procedural law, the Statute of the Brčko District and the Supervisory Order.

VIII. Conclusion

44. The Constitutional Court concludes that there is a violation of the right to property under Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention in this case where an interference with the appellant's property occurred in a way that by application of the provisions of substantive law on determination of the right to compensation for damage, as well as by application of the Statue of Brčko District and Supervisory Order, a balance between the public interest and the appellant's interest was disturbed by placing an excessive burden on the appellant and depriving him of his right to have „legitimate expectations" in terms of his property.

45. Having regard to Article 41 of the Rules of the Constitutional Court, the annex to this decision contains Separate Partially Dissenting Opinion of the Vice-Presidents Miodrag Simović and Valerija Galić.

46. Pursuant to Article 61(1) and (5) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision. A Separate Partially Dissenting Opinion of the Vice-President Valerija Galić and Miodrag Simović shall make an integral part of this decision.

47. 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

JOINT SEPARATE PARTIALLY DISSENTING OPINION OF VICE-PRESIDENTS GALIĆ AND SIMOVIĆ

Pursuant to Article 41 of the Rules of the Constitutional Court of BiH (*Official Gazette of BiH* nos. 60/05 and 64/08), we hereby give a joint partially dissenting opinion on the mentioned decision.

We disagree with the decision of majority of the esteemed Judges of the Constitutional Court in part where a violation of Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") was established. We consider that by such kind of decisions the Constitutional Court of BiH departed from its case-law in similar cases (see decisions nos. *AP 538/04* of 28 June 2005 and *AP 532/05* of 12 April 2006). In those decisions a proper application of laws by ordinary courts of the Brčko District was established since in such cases there are certain legal limitations on the exercise of the rights when it comes to responsible subjects and time frames for realisation of claims relating to unfulfilled obligations of the Brčko District and it is further stated that those limitations did not place an excessive burden on the appellant. Thus, the criterion of proportionality between the appellant's interest and general interest was met. Given the position of the Constitutional Court of BiH in the mentioned decisions, wherein no arguments are given for the change of the opinion in the instant case, and given the appellant's allegation of violation of the challenged judgments his right under Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol 1 to the European Convention, we would like to note as follows:

(1) In the instant case the ordinary courts dismissed the appellant's claim which concerns the Brčko District due to the Brčko District's lack of standing to be sued. In fact, it indisputably follows from the case-file that the damage inflicted to the mill and accompanying business premises was established, which was neither denied by the appellant and it also follows that the appellant managed to prove that fact in court. Accordingly, possible appellant's right to compensation for damage to the amount of 202.252.23 KM was due, in any case, by 1 March 2000, in other words it was due by the day of the proclamation of the Brčko District. Given such kind of state of facts, a question is raised as to whether the position of ordinary courts on the lack of legal standing of the Brčko District is based on the law, which is a condition for considering the appellant's deprivation of property as justified within the meaning of Article 1 of Protocol No. 1 to the European Convention.

(2) In the instant case a legal position of the Brčko District within Bosnia and Herzegovina was resolved by the Final Arbitration Award which was issued by the International Arbitration Tribunal for Brčko. Pursuant to Article 71 of the Statute of the Brčko District, the Brčko District of Bosnia and Herzegovina is the legal successor to the Republika Srpska, Brčko Municipality as well as to the administrative arrangements of Brka and Ravne – Brčko and that it has a legal capacity as legal person. However, the Brčko District, as a legal successor of the mentioned territorial units, did not take over their obligations such as those referred to in the mentioned case for the reason that in this regard a limitation is stipulated under item 4 of the Supervisors Order on the Financial System of the Brčko District of 14 April 2000. Namely, that provision provides that absent agreement with the Entities (as in the case at hand) in respect of specific obligations, the District would assume no obligations to take over debts incurred prior to the date of proclamation of the Brčko District. It should be noted that this Order, including other Orders of the Supervisor for the Brčko District, has a legally binding force based on the provisions of the Final Arbitration Award for Brčko and constitutes a *sui generis* law for the area of the Brčko District.

Taking into account the mentioned circumstances, we are of the opinion that the decision of ordinary courts on the lack of grounds for the appellant's claim in relation to the Brčko District is not inconsistent with the principles and request that require within Article 1 of Protocol No. 1 to the European Convention that such kind of decision should be based on the relevant domestic law.

(3) As to the question whether the act of depriving the appellant of his property is in accordance with public interest, it should be noted that every state has a right and obligation to organise its legal system in a functional manner and that, with the said aim, it has a legitimate right to establish limitations on the exercise of civil rights in certain cases in order for the legal system to function properly. What limitations are to be imposed depends on the legal state system of the respective state considering, first of all, the capacities and needs of the respective community or an individual (see, the European Court of Human Rights, *the Belgium Linguistics Case,* judgment of 9 February 1967, Series A, no. 6, paragraph 5).

(4) The norms determining subjects that are responsible for compliance with the appellants' civil rights fall within those limitations when it comes to the matter of exercise of civil rights. That issue should be efficiently and clearly regulated by legal regulations and ordinary courts are tasked with interpretation and application of those regulations in each individual case. This limitation is aimed at focusing on the responsibility of certain subjects and that the proceedings for the exercise of civil rights are facilitated.

Accordingly, the holder of civil rights is obliged to exercise his/her rights in relation to the responsible persons exclusively. Accordingly, the Constitutional Court is limited to issues of control whether there is abuse of the rights and obligations of ordinary courts (see, the Constitutional Court, decision no. *AP 384/03* of 21 January 2004, published in the *Official Gazette of Bosnia and Herzegovina* no. 13/04).

(5) As to the limitation on the exercise of the appellant's rights in relation to the Brčko District due to its lack of standing to be sued, the ordinary courts concluded that the mentioned obligation is not an obligation of the Brčko District for that obligation existed prior to the proclamation of District, in which case the Brčko District did not conclude any agreement with the Entities on assuming these obligations. In view of the aforesaid, we are of the opinion that in the instant case there is an efficient system providing for the exercise of appellant's civil rights. To be more precise, the State defined the responsible subjects and the manner in which the claims are met in this or similar cases and it did that in a particular manner through the Supervisory Order for the Brčko District. Accordingly, with the aim of preserving public interest, there are certain legal limitations when it comes to the exercise of these rights. This is primarily related to responsible subjects and time frames for the realisation of claims relating to the District's unfulfilled obligations. These limitations are required in specific situations - for the sake of legal certainty and proper functioning of legal system. In this regard, we are of the opinion that apart from the fact that there was no abuse of the appellant's constitutional rights, no „excessive" burden was placed on the appellant as an individual and the legal modalities of the mentioned limitations are proportional to the aims sought to be achieved.

(6) Having regard to aforesaid, we are of the opinion that the appellant's right to property under Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol 1 to the European Convention was not violated by the decisions of ordinary courts of the Brčko District which were adopted with respect to the instant case.

Case no. AP 3388/06

DECISION
ON ADMISSIBILITY
AND MERITS

Appeal of Mr. Nermin Ćupina against the judgments of the Court of Bosnia and Herzegovina nos. Kž-45/06 of 25 October 2006 and K-71/05 of 25 April 2006

Decision of 17 March 2009

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 is rejected.

V. Relevant Law

14. 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.

15. 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) 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, entered 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:

(...)

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 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:

(...)

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 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

Case no. AP 1274/08

DECISION
ON ADMISSIBILITY
AND MERITS

Appeal of TP „Malbašić Company" d.o.o. Banja Luka against the Ruling of the District Court in Banja Luka, no. 011-0-Pž-07-000 310 of 30 January 2008

Decision of 30 May 2009

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1) and (4) (4) and (5), Article 59(2)(2), Article 61(1) and (2), and Article 64(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina *(Official Gazette of Bosnia and Herzegovina* nos. 60/05 and 64/08), in Plenary and composed of the following judges:

Ms. Seada Palavrić, 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

Mr. Mirsad Ćeman

Having deliberated on the appeal of **TP „Malbašić Company" d.o.o. Banja Luka** and **„Astral" d.o.o. Banja Luka** in case no. **AP 1274/08**, at its session held on 30 May 2009, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of TP „Malbašić Company" d.o.o. Banja Luka, lodged against the Ruling of the County Court in Banja Luka no. 011-0-Pž-07-000 310 of 30 January 2008 is hereby granted.

A violation of 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 for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Ruling of the County Court in Banja Luka no. 011-0-Pž-07-000 310 of 30 January 2008 is hereby quashed.

Pursuant to Article 64(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Ruling of the Basic Court in Banja Luka no. 071-0-IP-07-000884 of 4 September 2007 shall remain in effect.

An interim measure ordered in the Decision of the Constitutional Court of Bosnia and Herzegovina no. AP 1274/08 of 4 September 2008 shall be rendered ineffective.

The appeal of TP „Malbašić Company" d.o.o. Banja Luka, lodged against the Judgment of the Supreme Court of the Republika Srpska no. 118-0-Rev-07-000 619 of 27 March 2008, the Judgment of the County Court in Banja Luka no. 011-0-Pž-06-000 293 of 22 December 2006 and the Judgment of the Basic Court in Banja Luka no. PS-953/05 of 19 May 2006 is hereby rejected for being lodged by an unauthorised person.

The appeal of „Astral" d.o.o. Banja Luka lodged against the Judgment of the Supreme Court of the Republika Srpska no. 118-0-Rev-07-000 619 of 27 March 2008, the Judgment of the County Court in Banja Luka no. 011-0-Pž-06-000 293 of 22 December 2006 and the Judgment of the Basic Court in Banja Luka no. PS-953/05 of 19 May 2006 is hereby rejected as being filed in an untimely manner.

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 County of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 26 April 2008, „Gold export-import" d.o.o. Banja Luka, as a legal predecessor of TP „Malbašić Company" d.o.o. Banja Luka („the appellant"), represented by the Director, as its authorised representative, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Ruling of the County Court in Banja Luka („the County Court"), no. 011-0-Pž-07-000 310 of 30 January 2008. The appeal was registered under no. AP 1274/08. On 15 May 2008, the appellant supplemented its appeal. In addition, the appellant filed a request for an interim measure by which the Constitutional Court would order the Basic Court in Banja Luka („the Basic Court") to suspend all enforcement actions in case no. 071-0-IP-07-000884.

2. On 29 July 2008, TP „Malbašić" Company" d.o.o. Banja Luka, as a legal successor of „Gold export-import" („the appellant") and „ASTRAL" d.o.o. Banja Luka („the enforcement

debtor”), represented by the Directors, as its authorised representatives, lodged the appeals with the Constitutional Court, registered under numbers AP 2326/08 and AP 2327/08, against the Judgment of the Supreme Court of the Republika Srpska („the Supreme Court”) no. 118-0-Rev-07-000 619 of 27 March 2008, the Judgment of the County Court in Banja Luka no. 011-0-Pž-06-000 293 of 22 December 2006 and the Judgment of the Basic Court in Banja Luka („the Basic Court”) no. PS-953/05 of 19 May 2006.

II. Procedure before the Constitutional Court

3. The Constitutional Court rendered the Decision no. AP 1274/08 of 4 September 2008 granting the appellant’s request for interim measures.

4. Given that several appeals were lodged within the competence of the Constitutional Court, and that these appeals concern the same factual and legal grounds, the Constitutional Court, pursuant to Article 31(1) of the Rules of the Constitutional Court, has taken a decision on the joinder of the cases in which the Constitutional Court shall conduct one set of proceedings and take a single decision under no. AP 1274/08. Appeals nos. AP 1274/08, AP 2326/08 and AP 2327/08 have been joined.

5. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the County Court and the enforcement debtor and „Krajina Borac AD Banja Luka („the enforcement creditor”), as the parties to the proceedings, were requested on 22 May 2008 to submit their replies to the appeal.

6. The County Court submitted its reply to the appeal on 9 June 2008 and the enforcement creditor did so on 11 September 2008. The enforcement debtor failed to submit its reply to the appeal.

7. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 8 October 2008.

8. Pursuant to Article 93(1)(3) of the Rules of the Constitutional Court, at its session held on 28 November 2008, the Constitutional Court has taken a decision, upon request of Judge Krstan Simić, on his exemption from deliberation and decision-making in this case.

III. Facts of the Case

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

10. The subject matter of the dispute is business premises of 360 m² surface located in Banja Luka at Trg Krajine bb. The owner of the business premises was d.o.o. „Trgovina

Borac" Travnik („Borac" Travnik), which sold the business premises to Mihajlo Kovačević from Banja Luka on the basis of a sales contract of 5 August 1999. At that time, the enforcement creditor („Krajina Borac" a.d. Banja Luka) was a possessor of the disputed business premises.

11. In its judgment no. P-8843/99 of 19 October 1999, the Basic Court established that the sales contract of 5 August 1999 concluded between Mihajlo Kovačević and „Borac" Travnik had been legally valid. By the said judgment, respondent „Borac" Travnik was ordered to recognise and bear the burden that plaintiff Mihajlo Kovačević is registered in the land books as the owner of the business premises with full ownership. On 1 July 2002, the same contractual parties concluded an additional contract. Article 4 of the mentioned contract reads: *Verification of this additional contract with the Basic Court shall imply that buyer Mihajlo Kovačević has taken full possession and ownership over the business premises and that he may carry out the activities therein as he deems necessary and as registered with the competent authorities and without any further consents or conditions by the seller*.

12. The RS Public Prosecutor in Banja Luka lodged a request for protection of legality against the said Judgment. The Supreme Court, deciding on the request, rendered Judgment no. Gvl-7/02 of 23 August 2002. The Supreme Court partially granted the request and modified the challenged judgment, in the part which reads: „on the basis of the contract by which plaintiff Mr. Mihajlo Kovačević had acquired the ownership right to the business premises purchased", so that the Supreme Court dismissed this part of the claim. The remainder of the request for protection of legality was dismissed. The Supreme Court dismissed the part of the Public Prosecutor's request as ill-founded, wherein it is claimed that the signatures on the sales contract should not have been verified with the Municipal Court in Travnik but in Banja Luka since the business premises concerned are located in Banja Luka. The Supreme Court held that the verification of signatures on the contracts carried out before the courts of the Federation of BiH was valid since it was not foreseen that the verification of a signature on a real estate sales contract should be carried out by the courts which operate in the area where such real estate was located. Furthermore, the Supreme Court declared a part of the request admissible, where it is stated that, based on the relevant contract, plaintiff Mihajlo Kovačević had become the owner of the business premises, since the ownership right to the business premises purchased could not be acquired „based on the contract", as decided by the challenged judgment, but only by entry into the public register or other appropriate mode determined by law.

13. Based on the Basic Court's Ruling no. DN-132/03 of 23 January 2003, a deposit of documents in the ledger of deposited contracts in favour of Mihajlo Kovačević was allowed for the purpose of acquiring the ownership right to the business premises concerned.

14. Subsequently, Mr. Mihajlo Kovačević sold the business premises concerned to the appellant's legal predecessor („Gold export-import" d.o.o. Banja Luka) based on sales contract no. OV-20223/05 of 15 December 2005. Based on the said sales contract, the Basic Court passed Ruling no. DN-1096/06 of 3 March 2006, allowing the deposit of the documents for the purpose of acquiring the full ownership right by the appellant. On 16 December 2005, the appellant took the possession of the business premises and, together with Mihajlo Kovačević, made a handover certificate about it.

15. The enforcement creditor initiated the civil proceedings before the Basic Court, in respect of the mentioned sales contracts, and challenged the legal validity thereof. In case no. P-413/04, the enforcement creditor demanded that the Basic Court determine that the business premises be the enforcement creditor's property and that the Basic Court's Judgment no. P-8843/99 of 19 October 1999 be legally invalid and, consequently, that the acts passed prior to the said judgment be declared null and void and, in particular, the sales contract of 5 August 1999 and the Basic Court's Ruling no. DN-132/2003 of 23 January 2003. In addition, in the lawsuit it was also requested that the Court order that the previous state of possession be restored *i.e.* the right to manage and to use the business premises in the enforcement creditor's favour. Those proceedings are still pending. Furthermore, in the enforcement creditor's lawsuit before the Basic Court it is requested that the sales contract of 23 December 2005, based on which Mihajlo Kovačević sold the business premises to the appellant, be declared null and void. The case was registered under number P-521/07 and no decision has been taken in those proceedings.

16. Before Mr. Mihajlo Kovačević sold the business premises in question to the appellant, the enforcement creditor had been in possession of the business premises and entered into a lease agreement with enforcement debtor „Astral" d.o.o. Banja Luka, as a lessee. The lease agreement was made on 12 April 2000 for a term of two years, starting from 1 May 2000, and there was a possibility to extend the lease for another year. After the expiry of the lease term, the enforcement creditor requested the enforcement debtor to surrender possession of the business premises. Since the enforcement debtor failed to do so, on 19 July 2002, the enforcement creditor filed a lawsuit with the Basic Court in order to obtain a judgment obliging the enforcement debtor to surrender possession of the business premises in favour of the enforcement creditor.

17. In respect of the enforcement creditor's lawsuit against the enforcement debtor for obtaining possession of the business premises based on the expiry of the lease term, the Basic Court passed Judgment no. PS-953/05 of 19 May 2006, which was upheld by the County Court's Judgment no. 011-0-Pž-06-000 293 of 22 December 2006. In the relevant judgment, the enforcement debtor was ordered to hand over to the enforcement creditor

into possession of the business premises free from property and persons and compensate the costs of the proceedings plus the statutory default interest, although the applicant was in possession of the business premises at the time when the first instance judgment was rendered. Moreover, in its Judgment no. 118-0-Rev-07-000 619 of 27 March 2008, the Supreme Court dismissed the enforcement debtor's revision appeal lodged against the said Judgment of the County Court of 22 December 2006.

18. The enforcement creditor initiated the proceedings against the enforcement debtor for the enforcement of the said judgment. In its ruling on enforcement no. 071-0-IP-07-000135 of 26 March 2007, the Basic Court obliged the enforcement debtor to hand over to the enforcement creditor into possession of the business premises free from property and persons. However, at the time when the first instance judgment was passed, the enforcement debtor was not in possession of the business premises but the appellant, who, in the meantime, purchased the business premises at issue and took the possession thereof (see paragraph 14 of the present decision). Consequently, the enforcement debtor and the appellant, as the third party to the enforcement proceedings, filed the timely objections challenging the said ruling on enforcement. They pointed to that the enforcement creditor's claim ceased due to the impossibility that the obligation be met by the enforcement debtor given that the third person, *i.e.* the appellant, had entered into possession of the disputed business premises. In its objection, the appellant underlined that, on 16 December 2005, it had entered into possession of the business premises based on the sales contract, by which the appellant acquired the ownership right, and that in case that the enforcement of the challenged enforcement ruling were executed, the enforcement would be carried out against the third person, contrary to the fundamental principles of the Law on Enforcement Proceedings.

19. Deciding on the objections lodged by the enforcement debtor and the appellant, the Basic Court passed, in the renewed enforcement proceedings, Ruling no. 071-0-IP-07-000884 of 4 September 2007, granting the objections of the enforcement debtor and the appellant and rendering ineffective the enforcement ruling of 26 March 2007 and quashing all enforcement actions in the part obliging the enforcement debtor to hand over the possession of the business premises to the enforcement creditor, and suspending the enforcement proceedings in this part. In the reasoning of the ruling, the Basic Court stated that the enforcement was not allowed in respect of the real property over which the third person acquired the ownership based on the contract which had been concluded before the issuance of the ruling on enforcement and when it was allowed to deposit the documents for registration of ownership in accordance with the Law on Land Registry of the Republika Srpska („the Law on Land Registry"). The Basic Court concluded that the appellant, as the third person to the enforcement proceedings concerned, had submitted evidence in respect of the object of the enforcement and its right preventing the enforcement, and that

the conditions had been met so that the court of enforcement could decide on the merits of the third person's objection as Article 94 of the Law on Land Registry stipulates that the ledger of deposited contracts pursuant to the provisions related to the establishment and maintaining of this ledger shall remain in effect until the prerequisites for the registration of ownership of the separate parts of the building pursuant to the said Law have occurred. Also, the Basic Court stated that based on the mentioned provision and in terms of Article 64 of the same Law, the court decision guaranteed certain rights as determined in that court decision and the prerequisites for the deposit of the documents were thus created. According to the court, if an issue is raised as to the validity of registration in those books, then „it may be raised only by an interested party, the relevant court or the office authorised to determine prerequisites necessary for registration", as well as „[I]f there had been any irregularity hindering the registration, then the Land Registry Office should have refused the depositing of documents." As to the documents proving the appellant's ownership in the present legal situation, the Basic Court states that „in this situation […] it is all that is possible to have since a ledger „E" for the registration of ownership of the separate parts of the building has not been established and the appellant is not responsible to carry the burden resulting from incomplete law."

20. While deciding on the enforcement creditor's appeal lodged against the said Ruling, the County Court passed Ruling no. 011-0-Pž-07-000310 of 30 January 2008, whereby it granted the appeal and modified the challenged Ruling of the Basic Court by referring the appellant to „litigation." As to the enforcement debtor, the County Court quashed the Basic Court's Ruling of 4 September 2007 in the part granting the enforcement debtor's objection and suspending the enforcement proceedings and referred this part back to the Basic Court for renewed proceedings.

21. In the reasoning of the challenged Ruling, the County Court states that the First Instance Court's position is incorrect as to the appellant's actual right to the subject-matter of the enforcement, given that the appellant failed in the enforcement proceedings to give evidence within the meaning of Article 52(2) of the Law on Enforcement Proceedings. The Second Instance Court states that the provision of Article 78(2) of the Law on Land Registry stipulates that only the land register excerpts represent the deed in terms of the provision of Article 52(2) of the Law on Enforcement Proceedings, on the basis of which the ownership rights may be established. Therefore, in the view of the County Court, the First Instance Court failed to assess the validity of the sales contracts and of the Basic Court's ruling allowing the deposit of the documents required for acquiring the ownership right to the business premises concerned. Since the First Instance Court granted the appellant's objection on the basis of evidence, which, in the view of the County Court, were not the evidence within the meaning of Article 52(2) of the Law on Enforcement

proceedings, the County Court holds that the First Instance Court erroneously applied the substantive law in this part of its decision. Namely, the County Court reasons that the Law on Land Registry stipulates that the ownership right and other rights to immovable shall be acquired by entry into the public register and that, after the coming into force of this Law, registrations in the Land Register shall be undertaken pursuant to the rules of the Law on Land Registry. The court also states that the ledger of deposited contracts, pursuant to the provisions related to the establishment and maintaining of the ledger, shall remain in effect until the prerequisites for the registration of ownership of the separate parts of the building pursuant to the Law on Land Registry are created. The County Court concludes that the aforesaid implies that, after the entry into force of the Law on Land Registry, the land register excerpt is the only document on the basis of which the property right can be proved. According to the County Court, this does not involve the assessment of validity of the contracts entered into by the parties concerned or of the ruling of the Basic Court allowing the deposit of the documents required for acquiring the ownership right over the business premises, but it regards the assessment as to whether the appellant, as the third party, has the real right over the property subject to the enforcement. For these reasons, the Court granted the enforcement creditor's appeal and modified the challenged ruling in the part relating to the appellant's objection, as stated in the enacting clause of the relevant ruling, and referred the appellant to litigation.

IV. Appeal

a) Statements from the appeal no. AP 1274/08

22. The appellant holds that the challenged Ruling is in violation of its 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 for the Protection of Human Rights and Fundamental Freedoms („the European Convention"). The appellant states that it entered into the sales and purchase agreement on 15 December 2005 and purchased the business premises concerned from Mr. Mihajlo Kovačević. Prior to that, on 5 August 1999, Mr. Mihajlo Kovačević purchased the disputed business premises from d.o.o. „Trgovina Borac" Travnik and the legal validity of the sales contract concluded between the said buyer and the seller was determined by the legally binding judgment of the Basic Court no. P-8843/99 of 19 October 1999. However, the enforcement debtor and the enforcement creditor had entered into the lease agreement over the business premises prior to the purchase thereof by the appellant. As to the lease agreement, the dispute was completed by the legally binding judgment of the Basic Court, no. PS-953/05 of 19 May 2006, which represents an executive title in the relevant enforcement proceedings. The appellant states

that the enforcement debtor is not in possession of the business premises nor is there any possibility to carry out the enforcement taking into account that the appellant is the owner of the relevant business premises and in possession thereof at the time of filing the present appeal. The appellant highlights that d.o.o. „Trgovina Borac" Travnik, as the first buyer, purchased the business premises from „Housing Construction Fund" Banja Luka, an investor, but it did not register in the Land Books as a holder of the right to manage the property (owner or proprietor), since the relevant business premises constitute the separate part of the business building and a book on condominium ownership had not been established. In addition, the business building where the relevant business premises are located has not been registered in the Land Books. A result of these facts is that buyers Mihajlo Kovačević and the appellant were unable to register their rights to the disputed business premises in the relevant land register maintained by the Cadastral Municipality of Banja Luka, but they were allowed to deposit the documents in the ledger of registered contracts in order to acquire the right of ownership. In the appellant's view, it, as the purchaser of the business premises concerned and any other successor in the real property transactions, should not suffer detrimental consequences of failing to establish the book on condominium ownership. The appellant states that the County Court applied the law in an arbitrary manner and, therefore, violated its property rights.

23. In its supplement to the appeal of 15 May 2008, the appellant reiterates the allegations stated in the appeal and adds that the challenged decision of the County Court is also in violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

b) Reply to the appeal no. AP 1274/08

24. In its reply to the appeal, the County Court states that following the entry into force of the Law on Land Registry, as of 23 August 2003, all registrations in the land register are recorded in accordance with the rules of the said Law and that the ledger of deposited contracts remains in effect until the prerequisites for the registration of ownership of the separate parts of the building pursuant to this Law have occurred. In the view of the County Court, the aforementioned does not interfere with the rights of the persons who consider that they had acquired certain right on the basis of certain legal transaction, and who can prove their right in the enforcement proceedings by the land register excerpt, as the deed, as explicitly stipulated in the Law on Land Registry. Therefore, this is the evidence of its actual right to be submitted to the court of enforcement by the third person, as evidence necessary to prove this right and preventing the enforcement within the meaning of Article 52(2) of the Law on Enforcement Proceedings. Thus, there is no interference with other rights and with the validity of the sales contract submitted by the third person in these

enforcement proceedings, since it is not the subject-matter of assessment by the court of enforcement. Hence, the court of enforcement may decide on the merits of the third person's objection if it provides adequate evidence supporting the right referred to by the third person. This court considers that the third person in the present case failed to do so and, therefore, the first instance ruling was modified and the third person was referred to litigation. The County Court proposed that the appeal be dismissed as ill-founded.

25. In its reply to the appeal, the enforcement creditor underlines that it has the exclusive right to manage the disputed business premises since the privatisation process of the state-owned capital with the enforcement creditor, as the state company, was completed in accordance with the relevant laws governing the privatization of the state-owned capital in enterprises. In particular, it is highlighted that the sales contract of 5 August 1999 concluded between „Borac" Travnik, as a seller, and Mr. Mihajlo Kovačević, as a buyer, is invalid, *i.e.* null and void. This is the reason why the enforcement creditor initiated the civil proceedings before the Basic Court, with the participation of the RS Public Attorney's Office, against „Borac" Travnik and Mr. Mihajlo Kovačević, and requested that the said contract be declared null and void. The case was registered under number P-413/04 and is still pending before the Court. As to the sales contract of 23 December 2005, based on which Mr. Mihajlo Kovačević sold the business premises to the appellant, the enforcement creditor also filed a lawsuit with the Basic Court and requested that the said contract be declared null and void. The case was registered under number P-521/07 and is still pending before the Court. In the view of the enforcement creditor, the relevant sales contracts are invalid under Articles 103, 104, 109 and 110 of the Law on Obligations. It is further stated that by the Ruling of 3 March 2006, allowing the deposit of the documents required for acquiring the ownership right, the appellant did not acquire the ownership right to the business premises concerned since the relevant contract was invalid. As alleged by the enforcement creditor, according to the certificate issued by the Basic Court, the Land Registry Department, no. RZ-447/07 of 15 August 2007, this just proves that the document for acquiring the ownership right was deposited with the Land Registry Office. The real property mentioned in the said sales contract is still recorded in the land register excerpt and cadastre as socially-owned property. The enforcement creditor holds that the appeal is ill-founded.

c) Statements from the appeals nos. AP 2326/08 and AP 2327/08

26. In their appeals, the appellant and the enforcement debtor challenge the Supreme Court's Judgment no. 118-0-Rev-07-000 619 of 27 March 2008, the Judgment of the County Court in Banja Luka no. 011-0-Pž-06-000 293 of 22 December 2006 and the Judgment of the Basic Court in Banja Luka no. PS-953/05 of 19 May 2006. They point

to that the subject matter of the civil proceedings concluded by the said judgment of the Supreme Court was the legal validity of the lease agreement related to the business premises in question, which had been concluded between the enforcement creditor and the enforcement debtor on 12 April 2000. The courts held that the said agreement was legally valid and obliged the enforcement debtor to surrender possession of the business premises to the enforcement creditor. In the appellants' view, the aforementioned amounts to a violation of their rights 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 for the Protection of Human Rights and Fundamental Freedoms.

V. Relevant law

27. The **Law on Enforcement Proceedings** (*Official Gazette of the Republika Srpska* no. 59/03), in the relevant part, reads:

Article 51(1)

A person claiming to have such a right which prevents the enforcement related to the item against which enforcement is to be carried out may lodge an objection against enforcement and seek that enforcement against that item is declared inadmissible in respect of the third person's rights encompassed by the enforcement order.

Article 52

(1) The court shall decide on the third person's objection in the enforcement proceedings or instruct the party that filed the objection to initiate litigation.

(2) The court of enforcement shall decide on objection in the enforcement proceedings where the circumstances of the case allow so and particularly if the party that filed the objection proves with a legally binding decision or a deed or a legally certified personal document that the objection is justified.

28. The **Law on Land Registry in Republika Srpska (***Official Gazette of the Republika Srpska* nos. 74/02, 67/03 and 46/04), in the relevant part, reads:

Article 1

This present Law regulates the manner of keeping, maintenance and establishment of land registers as well as the registration of real estate and rights in real estate in the land register in the Republika Srpska.

(...)

Article 31

The registration shall be made on the basis of a registration Decision which is made by the land register clerk. The registration Decision refers to the registration application pursuant to Art. 3, paragraph 1 of this Law.

Article 34

The application for registration received by the land register office shall be registered without undue delay in the journal and numbered in accordance with the time of receipt. The applicant shall be stated in the registration. [...]

Article 64

For the determination of ownership, other rights and restrictions to real estate, the land registry office shall undertake the ex officio necessary investigations and shall impose the appropriate proof. [...]

Article 78
Right to Land Register Folio Extracts

(1) Every person can obtain land register extracts pursuant to Article 77 hereof upon payment of a respective fee herefor.

(2) The certificate pursuant to paragraph 1 of this Article is a public document.

Article 94

The ledger of deposited contracts pursuant to the provisions concerning the establishment and maintaining of this ledger shall remain in effect until the prerequisites for the registration of ownership of the separate parts of the building pursuant to this Law occur.

VI. Admissibility

29. 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.

30. 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.

31. In examining the admissibility of the appeals in cases no. AP 2326/08 and AP 2327/08, whereby the appellant and the enforcement debtor challenge the Supreme Court's Judgment no. 118-0-Rev-07-000 619 of 27 March 2008, the Constitutional Court invokes the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(4)(4) and (5) of the Rules of the Constitutional Court.

Article 16(4)(4) and (5) of the Rules of the Constitutional Court reads:

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

(4) the time-limit for the appeal expired;

(5) the appeal was lodged by an unauthorized person;

32. The Constitutional Court notes that the appellant was not a party to the relevant civil proceedings in which the challenged Judgment no. 118-0-Rev-07-000 619 of 27 March 2008 was passed by the Supreme Court, given that the enforcement creditor was a plaintiff and the enforcement debtor was a defendant. Therefore, it follows that the appellant in the present case is not a person authorised to institute the proceedings before the Constitutional Court as the appellant was not the party to the proceedings that ended in the challenged judgments. Taking into account the provision of Article 16(4)(5) of the Rules of the Constitutional Court, according to which an appeal shall be rejected as inadmissible if it is filed by an unauthorized person, the Constitutional Court decides to reject the appeal filed in case no. AP 2326/08 as inadmissible, as being filed by an unauthorized person.

33. Furthermore, as to the appeal lodged by the enforcement debtor, the Constitutional Court states that a delivery note related to the challenged judgment of the Supreme Court shows that the enforcement debtor's authorise representative received the challenged judgment on 23 April 2008. Taking into account this fact as well as the fact that the appellant lodged the appeal with the Constitutional Court on 29 July 2008, it follows that the appeal was lodged upon the expiration of the time limit set out in Article 16(1) of the Rules of the Constitutional Court. Accordingly, the Constitutional Court holds that the relevant appeal is filed in an untimely manner, *i.e.* that it is filed upon the expiration of the time-limit of 60 days from the date the appellant received the challenged judgment. Having regard to Article 16(4)(4) of the Rules of the Constitutional Court, the Constitutional Court decides to reject the appeal filed in case no. AP 2327/08 as inadmissible, as being filed in an untimely manner.

34. In case no. AP 1274/08, the subject matter of the appeal is the Ruling of the County Court no. 011-0-Pž-07-000 310 of 30 January 2008, against which there are no other

effective legal remedies available under law. Next, the appellant received the challenged ruling on 28 February 2008 and the appeal was lodged to the Constitutional Court on 26 April 2008, *i.e.* within the 60 days time limit as stipulated 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.

35. Having regard to the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the appeal no. AP 1274/08 meets the admissibility requirements.

VII. Merits

36. The appellant maintains that the challenged Ruling of the County Court is in violation of 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.

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

k) The right to property

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

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.

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.

38. The Constitutional Court points to that the notion of „property" includes a wide scope of property interests to be protected, and it represents an economic value (see Constitutional Court, Decision no. *U 14/00* of 4 April 2001, published in the *Official Gazette of Bosnia and Herzegovina* no. 33/01). Furthermore, under the case-law of the European Court of Human Rights, „possession" that is protected may be only „existing possession" (see

European Court of Human Rights, *Van der Mussele vs. Belgium*, Judgment of 23 November 1983, Series A no. 70, paragraph 48), or at least possessions for which the appellant has a „justified expectation" of obtaining it (see European Court of Human Rights, *Pine Valley Developments Ltd and others vs. Ireland*, Judgment of 29 November 1995, Series A no. 332, paragraph 31). In the instant case, the Constitutional Court holds that the appellant's possession of the business premises on the basis of the legally binding sales contract and the Basic Court's ruling allowing the deposit of the documents required for acquiring the ownership right, as foreseen by the law, constitutes a „possession" within the meaning of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. Hence, the Constitutional Court concludes that Article 1 of Protocol No. 1 to the European Convention is applicable to the present case.

39. The next question which ought to be answered by the Constitutional Court is whether the challenged decision of the County Court constitutes an interference with the appellant's property? In this context, the Constitutional Court indicates 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, covers deprivation of possession and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not „distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.

40. In the present case, the Constitutional Court recalls that, as to the business premises, the appellant has *iustus titulus* – the legally binding judgment by which the sales contract, on the basis of which the appellant purchased the business premises, is declared legally valid, and it also has *modus acquirendi* – which is the only legally recognized method of registration of the business premises concerned in the land books, *i.e.* in the ledger of deposited contracts in the present case. However, regardless of these undisputable facts, the appellant is referred to litigation by the challenged judgment of the County Court to prove its legal position related to the business premises. Thus, the appellant is referred to institute the new civil proceedings to establish its ownership right to the business premises, and the appellant, while the relevant enforcement proceedings is pending, may be dispossessed of the business premises in favour of the enforcement creditor. Consequently, the Constitutional Court holds that, for the abovementioned reasons, the present case concerns the interference with the appellant's right to property within the

meaning of the first rule, set out in the first paragraph of Article 1 of Protocol No. 1 to the European Convention.

41. In view of the above, the key questions to be answered by the Constitutional Court would be: (a) whether the interference with the appellant's property is provided for by law; (b) whether the interference pursues the public interest; and (c) whether the interference is in accordance with the principle of proportionality *i.e.* whether the interference strikes a fair balance between the appellant's right and the general interest. In other words, to be justified, the interference with the appellant's right must not only be imposed by a legal provision which meets the requirements of the rule of law and serves a legitimate aim in the public interest but must also maintain a reasonable relationship of proportionality between the means employed and the aim sought to be realized. In particular, the interference with the right must not go beyond than necessary to achieve the legitimate aim, and the right holders must not be subject to arbitrary treatment, or required to bear an excessive burden in pursuit of the legitimate aim (see, Constitutional Court of BiH, Decision no. *AP 774/04* of 20 December 2005, paragraph 376, published in the *Official Gazette of Bosnia and Herzegovina* no. 39/06).

42. As to the lawfulness of interference, the Constitutional Court points to that interference is lawful only if the law, which is the basis of the interference, is: (a) adequately accessible to the citizens; (b) precise so as to enable the citizen to regulate his/her conduct, (c) in accordance with the rule of law so that the legal discretion granted to the executive is not expressed in terms of an unfettered power, *i.e.* the law must give to the citizens adequate protection against arbitrary interference (see European Court of Human Rights, the *Sunday Times* judgment of 26 April 1979, Series A, no. 30, paragraph 49; the *Malone* judgment of 2 August 1984, Series A, no. 82, paragraphs 67-68).

43. The Constitutional Court recalls that, in the relevant enforcement proceedings, the appellant, as the third person claiming to have such a right that prevents the enforcement against the object of enforcement, has the right under the Law on Enforcement Proceedings to lodge an objection against the enforcement and to demand that the enforcement be declared invalid in part related to the third person's rights subject to the enforcement. Given that the enforcement debtor had been ordered in the relevant proceedings to hand over the possession of the business premises to the enforcement creditor, the appellant lodged the objection underlining that the appellant was in possession of the business premises and that it acquired the ownership right thereto.

44. The County Court dismissed the appellant's objection as it concluded that the appellant had failed to present the land register extract to the court, which, according

to the court's view, represents the public document in terms of Article 52(2) of the Law on Enforcement Proceedings, which serves as a proof of the right of ownership over the real within the meaning of Article 78(2) of the Law on Land Registry. In view of the aforementioned, the Constitutional Court states that the Law on Enforcement Proceedings and the Law on Land Registry were published in the Official Gazettes of the Republika Srpska and, as such, they are adequately accessible to everyone. In addition, the linguistic meaning of the relevant provisions of Articles 78 and 94 of the Law on Land Registry and Article 52(2) of the Law on Enforcement Proceedings is clear and precise and according to these provisions a extract from the land register represents a public document. However, the Constitutional Court notes that Article 94 of the Law on Land Registry stipulates that the ledger of deposited contracts pursuant to the provisions concerning the establishment and maintaining of this ledger shall remain in effect until the prerequisites for the registration of ownership of the separate parts of the building pursuant to this Law have occurred. Moreover, it is clearly prescribed that the evidence within the meaning of Article 52(2) of the Law on Enforcement Proceedings shall be a final Court decision, a public document or private document certified in accordance with the law.

45. In view of the above, the Constitutional Court notes that in the challenged ruling no. 011-0-Pž-07-000 310 of 30 January 2008, the County Court, unlike the First Instance Court, failed to take into consideration the relevant provision of Article 94 of the Law on Land Registry, although it stated the contents of this provision in the challenged decision as well as in the reply to the appeal. In addition, the Constitutional Court observes that the County Court, while taking its decision, completely disregarded the undisputed fact that the prerequisites for the registration of ownership of the separate parts of the building in accordance with the Law on Land Registry had not been created, which cannot be the burden on the appellant, as reasoned by the First Instance Court. The Constitutional Court holds that, in such a situation, the County Court construed the relevant legal provisions in an arbitrary manner, i.e. it failed to take into consideration the provision of Article 94 of the Law on Land Registry according to which a ruling on registration of the right in the ledger of deposited contracts has legal force of an excerpt from the land register until the prerequisites for the registration of ownership of the separate parts of the building have occurred, which is the responsibility of the competent authorities. The Constitutional Court emphasizes that in the present case it is undisputable that the appellant has existing property, protected within meaning of Article 1 of Protocol No. 1 to the European Convention, which is under his legal possession, for which it has legal grounds and legal certificate on ownership registration. By an application of the clear and explicit provisions of the Law on Land Registry, the County Court treated the appellant

in an arbitrary manner and, consequently, the interference with the appellant's right to property was not in accordance with the law as required by Article 1 of Protocol No. 1 to the European Convention.

46. In view of the above, the Constitutional Court concludes that, in the case at hand, there is a violation of the appellant's 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.

Other statements

47. Considering its conclusion as to the violation of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, the Constitutional Court finds it unnecessary to examine other allegations stated in the appeal in respect of a violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

VIII. Conclusion

48. The Constitutional Court concludes that there is a violation of 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 in case when the interference with the appellant's property right is not in accordance with the law. In fact, there is a violation when the court has applied the substantive law in an arbitrary manner, concluding that only the land register extract is a public document that proves the ownership right, in the situation when no prerequisites for the registration of ownership of the separate parts of the building pursuant to the Law on Land Registry have occurred, due to which, pursuant to the same law, the obligation of establishment and maintaining of the ledger of deposited contracts shall remain in effect.

49. Having regard to Article 16 (1) and (4)(4) and (5), Article 61(1) and (2) and Article 64(2) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of the present decision.

50. The Constitutional Court has taken its decision on the basis of Article 64(2) of the Rules of the Constitutional Court since it is established that the appeal is well-founded and that the Basic Court established all the relevant facts and applied all the relevant regulations and that there is no reason for further delays in proceedings. Consequently, the Constitutional Court decided that the Ruling of the Basic Court no. 071-0-IP-07-000884 of 4 September 2007 shall remain in effect.

51. Based on the present Decision, the Decision of the Constitutional Court of Bosnia and Herzegovina no. *AP 1274/08* of 4 September 2008 shall be rendered ineffective.

52. Pursuant 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

Case no. AP 2157/08

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Slavko Milojica and Ms. Dijana Milojica against the Judgment of the Supreme Court of the Republika Srpska, no. 118-0-Rev-07-000 470 of 12 May 2008

Decision of 30 May 2009

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 64 (1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05 and 64/08), in Plenary and composed of the following judges:

Ms. Seada Palavrić, President

Mr. Miodrag Simović, Vice-President

Mr. David Feldman, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Ms. Constance Grewe

Mr. Mirsad Ćeman

Having deliberated on the appeals of **Mr. Slavko Milojica, Ms. Dijana Milojica and Trgovina „Borac" Travnik dd Travnik,** in case no. **AP 2157/08**, at its session held on 30 May 2009, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeals lodged by Mr. Slavko Milojica, Ms. Dijana Milojica and Trgovina „Borac" Travnik dd Travnik against the Judgment of the Supreme Court of the Republika Srpska, no. 118-0-Rev-07-000 470 of 12 May 2008, are hereby granted.

A violation of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The judgment of the Supreme Court of the Republika Srpska no. 118-0-Rev-07-000 470 of 12 May 2008 is quashed.

The case shall be referred back to the Supreme Court of the Republika Srpska which is to follow the expedited procedure and take a new decision

in accordance with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Supreme Court of the Republika Srpska is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months as from the date of delivery of this Decision, about the measures taken in order to enforce this Decision, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

This decision shall render ineffective the Decision of the Constitutional Court of Bosnia and Herzegovina on Interim Measure no. AP 2157/08 of 4 September 2008.

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 14 and 25 July 2008, Mr. Slavko Milojica and Ms. Dijana Milojica („the appellants") from Novi Grad, and Trgovina „Borac" Travnik dd /stock company/ Travnik („the second appellant") represented by the Director of the Company Mr. Fehim Bojić, filed appeals with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Judgment of the Supreme Court of the Republika Srpska („the Supreme Court"), no. 118-0-Rev-07-000 470 of 12 May 2008. On 1 August 2008, the appellants submitted a supplement to the appeal requesting for an interim measure to be issued, by which the Constitutional Court would postpone the enforcement of the challenged judgment pending the decision on the appeal. In the period from 20 October 2008 to 25 May 2009, the appellants submitted several submissions with attachments to the Constitutional Court. As of 19 November 2008 through 12 May 2009 the second appellant submitted a number of submissions to the Constitutional Court.

II. Procedure before the Constitutional Court

2. The Constitutional Court adopted Decision no. AP 2157/08 of 4 September 2008 granting the appellant's request for adoption of an interim measure and postponing the

enforcement of the Judgment of the Supreme Court no. 118-0-Rev-07-000 470 of 12 May 2008.

3. Given that the Constitutional Court had received several appeals from within its jurisdiction concerning the same factual and legal grounds, in accordance with Article 31(1) of the Rules of the Constitutional Court, the Constitutional Court adopted a decision on the merger of cases whereby single proceedings will be conducted and a single decision adopted under no. AP 2157/08. The appeals nos. AP 2157/08 and AP 2294/08 have been merged.

4. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Supreme Court and the parties to the proceedings, „Krajina Borac" A.D. /stock company/ Banja Luka („the plaintiff"), were requested on 1 August and 8 September 2008 to submit their respective replies to the appeal.

5. The Supreme Court submitted its reply on 15 September 2008. The plaintiff did so on 5 September 2008. As of 29 September 2008 through 26 May 2009 the plaintiff submitted a number of submissions to the Constitutional Court of BiH.

6. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies of the Supreme Court and that of the plaintiff were communicated to the appellants and the second appellant on 16 October 2008.

7. On 27 May 2009 the Government of the Republika Srpska communicated to the Constitutional Court a letter entitled „for your information".

8. Pursuant to Article 15(3) of the Rules of the Constitutional Court, on 15 April 2009 the Constitutional Court addressed a letter to the Legal Department of the Office of the High Representative and the European Union Special Representative in Bosnia and Herzegovina („Legal Department of the Office of the High Representative") and requested an expert opinion in relation to the allegations stated in the case at hand.

9. The Legal Department of the Office of the High Representative communicated its legal opinion on 4 May 2009.

10. Pursuant to Article 93(1)(3) of the Rules of the Constitutional Court, at its session held on 28 November 2008, the Constitutional Court has taken a decision, upon the request of Judge Krstan Simić, to disqualify him from deliberations and decision-making in this case.

III. Facts of the Case

11. 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.

12. The plaintiff filed a lawsuit with the Basic Court of Novi Grad („the Basic Court") requesting that a judgment be adopted establishing that the business premises located in Novi Grad, with a total surface area of 65.26 m2, is the plaintiff's property, and that the sales contract of real properties, concluded on 20 January 2001 between the second appellant and the appellants, is legally null and void, and that the appellants be obliged to hand over possession of the disputed business premises for use and to compensate him for the costs of the proceedings.

13. By the Judgment no. P-101/04 of 15 December 2004, which was upheld by the Judgment of the County Court of Banja Luka („the County Court") no. PZ-255/05 of 26 January 2007, the Basic Court dismissed the claim as ill-founded. The plaintiff is obliged to compensate the appellants and the second appellant for the costs of the proceedings in the amount of KM 3,150.00 within 30 days under threat of compulsory enforcement.

14. In the course of the first instance proceedings, the court presented a large number of evidence including the hearing of witnesses and also inspected the documentation presented by the parties. First, the first instance court reasoned that in the present case it was established as undisputed that the sales contract of the disputed business premises was entered into on 20 January 2001 between the second appellant, as a seller, and the appellants, as buyers, and that, based on the mentioned sales contract, the right of ownership over the business premises, located on the ground floor of a house built on the cadastral lot no. 5/36 in the land registry file no. 4472 of the Cadastral Municipality of Novi Grad, was registered in the land registers in favour of the appellants. The first instance court further stated that it follows from the mentioned land registry file that, on the basis of the sales contract of 20 September 1971, the right of ownership over the business premises, located on the ground floor of a house built on the cadastral lot no. 5/36 in the land registry file no. 4472 of the Cadastral Municipality of Novi Grad, was registered in favour of the second appellant. Therefore, it is undisputed that, on the basis of the sales contract, the appellants acquired the right of ownership over the mentioned business premises, over which, prior to the registration of sale and purchase in the land registers, the second appellant was the registered owner.

15. In its reasoning the court stated that under the provisions of the Law on Enterprises, property of an enterprise is made up of the ownership right over the movable and immovable

assets, cash assets, securities, and other property rights. Thus, the court concluded that for a certain real property to be treated as property of a certain enterprise, it is necessary that the ownership right of the enterprise existed over such real property. In the present case, the court stated that the plaintiff failed to offer any evidence whatsoever that would indicate that the right of ownership existed over the real properties referred to in the claim. The very fact that on the occasion of registering the plaintiff in the column „founder's name and seat" the Bosanski Novi Clothing Store and the Bosanski Novi Shoe Store were, *inter alia*, also included cannot constitute the grounds for the plaintiff to acquire the ownership right over the mentioned real properties. The Court further stated that, under the Law on Transfer of Socially-Owned Assets into the State-Owned, the socially-owned assets of enterprises, whose seats are located in the territory of the Republika Srpska, became state-owned and the plaintiff became a state enterprise. The privatization of the plaintiff's state-owned capital was conducted in accordance with the provisions of the Law on Privatization of Enterprises and the Directorate for Privatization of Republika Srpska („RS Directorate for Privatization") adopted a ruling no. 1141-01/00 dated 28 September 2000, establishing that the plaintiff did not carry out the ownership transformation and that the enterprise fully operated with the state-owned assets. The Court further notes that the RS Directorate for Privatization adopted Ruling no. 01-1141-4/99 of 4 July 2001, approving the plaintiff's privatization program. However, the shortcomings regarding, *inter alia*, unsettled property-legal relations were also mentioned in the said ruling.

16. Furthermore, the court noted that there is no disputing that the plaintiff failed to attach a single piece of evidence to the program of privatization of the State-owned capital submitted to the RS Directorate for Privatization and thus prove the ownership over the business premises at issue. Therefore, the ruling of the RS Directorate for Privatization approving the plaintiff's privatization program cannot constitute any basis whatsoever for the plaintiff to acquire the ownership right over the disputed business premises located in Novi Grad. The court stated that the Law on Privatization of State-Owned Capital in Enterprises of RS lays down conditions and procedure for sale and transfer of state-owned capital in the enterprises in RS into the ownership of national or foreign physical and legal persons. The term „state-owned capital" implies nothing else but the property of enterprises that was state-owned until the enactment of the Law on Transfer of Socially-Owned Assets into the State-Owned. The term „property of an enterprise", if it includes real properties, implies the right of ownership over immovable assets. The court concluded that the disputed business premises are not the property of the plaintiff, and as such it could not be subject to the procedure of the transfer of socially-owned assets into the state-owned, hence it was not transferred into a category of „state-owned capital", and therefore could not be subject to the privatization process as it exclusively applied to the

state-owned capital and its sale. Finally, the court stated that the plaintiff had no evidence pertaining to the ownership right over the disputed business premises, nor did it offer such piece of evidence during the procedure, whereas it was undisputedly established that the second appellant, prior to entering into a sales contract with the appellants, had been the owner of the business premises in question, and on the conclusion of the sales contract, the ownership right was transferred to the appellants.

17. In the reasoning of the judgment, the County Court stated that the plaintiff failed to prove that it acquired the ownership over the business premises at issue on any valid legal grounds, and that nevertheless, there are no shortcomings with regards to the disputed contract of purchase and sale rendering it null and void, and that such contract constitutes legal grounds for the ownership right to be acquired through the registration into the land registers in favour of the appellants. The County Court accepts the factual and legal substrate as correct, whereby the procedural law was correctly applied, therefore it found the appeal ill-founded. This court further stated that the plaintiff unjustifiably pointed out in the appeal that an excerpt from the court register and attachment no. 2 containing data on the founders, amount and structure of the founders' capital constituted evidence of ownership, regarding which the first instance court gave thorough reasons. Even if the plaintiff had had the evidence that the business premises at issue were its ownership, the County Court was of an opinion that after the entry into force of the Law on Privatization of State-Owned Capital in Enterprises, only the RS Directorate for Privatization was authorized to sell the state-owned capital in the privatization procedure. In addition, the court noted that the Law on Privatization of State-Owned Capital in Enterprises of RS did not suspend, in any of its segments, the application of the Law on Property Relations and the Law on Real Property Transfer, and the Decree Prohibiting Real Estate Management in the Territory of RS, which the plaintiff referred to, was declared unconstitutional and unlawful pursuant to the decision of the Constitutional Court of the Republika Srpska, no. U-33/99 of 13 June 2001.

18. Moreover, the County Court stated that the first instance court established that the business premises at issue had not been privatized because they were located in the territory of the Republika Srpska, a second Entity, which was in accordance with the provisions of Article 2 paragraph 1 and Article 4 paragraph 1 of the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina („the Framework Law on Privatization"). In addition to the aforesaid, the County Court noted that Article 19 of the Law on Initial Balance Sheet of Enterprises and Banks provided for the enterprises to sell assets and rights contained in the passive sub-balance during the privatization process. As it is undisputed that the business premises in question were registered in the passive

sub-balance of the second appellant, the property could be subject to sale. Even if the transfer had been carried out inconsistent with the law, the plaintiff would not have the right of action to seek the quashing of such legal business. Also, the court stated that the letter of RS Directorate for Privatization pointed to unsettled property relations regarding property of the plaintiff, and that the plaintiff was unable to submit valid piece of evidence regarding property to be subject to privatization while preparing the initial balance sheet. Contrary to this, prior to entering into a contract of purchase and sale with the appellants, the second appellant was registered in the land registers as the owner, which authorized it to manage the real property. Finally, this court states that the first instance court established all relevant circumstances relating to the second part of the claim and concluded that the contract on transfer of the business premises in question was not a null and void legal business, either in terms of its contents or in terms of its form, and that the defendant, as an owner registered in the land register, had only used one of its entitlements as the owner.

19. Deliberating on the revision-appeal of the plaintiff, by its judgment no. 118-0-Rev-07-000 470 of 12 May 2008, the Supreme Court partially granted the revision-appeal and modified the Judgment of the County Court in a way that this Court partially granted the plaintiff's appeal and modified the first instance judgment of the Basic Court establishing that the contract of purchase and sale of real properties at issue is null and void. By the said judgment, the Supreme Court ordered the appellants to hand over the possession over the business premises in question to the plaintiff and the second appellant and the appellants to jointly compensate the plaintiff for the costs of the proceedings to the amount of KM 6,432.00 within 30 days from the day of receiving the judgment. The Supreme Court dismissed the revision-appeal in the remaining part dismissing the request for establishment that the business premises at issue are the plaintiff's property.

20. In the first place, the Supreme Court stated that the second instance court correctly found that the business premises at issue had not been privatized because they were located in the territory of the Republika Srpska as a second Entity, which was in accordance with Article 2 paragraph 1 and Article 4 paragraph 1 of the Framework Law on Privatization. However, according to the established facts, it follows that a contract of purchase and sale of real properties was entered into on 20 January 2001 between the second appellant and the appellants, and that the said contract was verified at the Basic Court under no. Ov-111/2001 of 22 February 2002.

21. In the reasoning of the judgment, the Supreme Court stated that, according to the established facts it follows that the predecessor of the second appellant, Kombinat „Borac" Travnik, was a socially-owned enterprise, and that in accordance with the then applicable regulations the bought premises were also socially-owned. Its legal successor, that is the

second appellant, came into existence following its transformation in accordance with the provisions of the Law on Socially-Owned Capital (*Official Gazette of SFRY* nos. 84/89 and 46/90) when it became the mixed ownership enterprise. The Supreme Court states that the predecessor of the plaintiff was founded on the part of the property of the second appellant „Borac" from Travnik, which is located in the Republika Srpska and which was entered in the register on the basis of the Ruling of the Basic Court of Banja Luka, no. U/I-1718/92 of 15 May 1992, in accordance with the Law on Transfer of Socially-Owned Assets into the State-Owned (*Official Gazette of RS* nos. 4/93 and 29/94). This is how the status transformation of the plaintiff's predecessor was carried out, which was followed by the privatization of the part of the state-owned capital in that enterprise in 2001. The registration of such status transformation was made in the court register of the Trgovačko akcionarsko društvo /Commercial Stock Company/ Krajina-Borac Banja Luka (the plaintiff).

22. The Supreme Court further stated that the legally binding Ruling of the RS Directorate for Privatization, no. 01-1141-4/99 of 4 July 2001, approved the program of privatization of the plaintiff, which covered the business premises at issue as well, and stipulated methods of privatization. The Supreme Court states that the second appellant had been registered in 1990 as a mixed ownership enterprise, which means that is it was not fully transformed into a privately-owned enterprise and the disputed business premises did not become privately-owned by the said enterprise or by the employees-investors. Thus, the issue of ownership over the said premises cannot be resolved separately, which means that the issue of ownership transformation of a privately-owned enterprise, i.e. the privatization process should be taken into consideration. As the Framework Law on Privatization provides for the exclusive right of the Entities to carry out the privatization of enterprises located in their territory, which are not privately-owned, as far as the part of the state-owned capital in the disputed business premises located in the territory of the Republika Srpska, which was entered as part of the founders' capital in founding the legal predecessor of the plaintiff, the second appellant has no grounds to claim any right. The court assessed that the Framework Law on Privatization does not recognize the ownership right over the property of an enterprise which became part of such property during its founding and registration in the court register, which property, prior to the breakout of war in 1992, belonged to the enterprise which seat was located in the territory of another Entity. Instead, it established the right of an Entity to carry out privatization of enterprises in its territory, i.e. to carry out ownership transformation, under the regulations on privatization of an Entity concerned, and to manage cash assets upon the completion of privatization. In doing so, the right of ownership over such property shall be acquired by a legal or physical

person who, upon the completion of the privatization procedure, buys the socially-owned or the state-owned capital of that enterprise.

23. Thus, in the present case, the Supreme Court stated that the disputed contract of sale is inconsistent with the mentioned Framework Law on Privatization, as a coercive regulation which is *lex specialis* in comparison to the Law on Basic Property Relations and the Law on Real Estate Transfer, and therefore the said contract is null and void within the meaning of Article 103 of the Law on Obligations. By establishing that the contract of purchase and sale of the business premises in question is null and void legal effects are produced making the said contract null and void ever since it was concluded. In other words, the effects are of such nature that the contract is nonexistent. Therefore, as the Supreme Court stated, there are no legal grounds for the appellants to hold onto possession of the disputed business premises. Given that the predecessor of the plaintiff was founded on the property located in the territory of the Republika Srpska, which includes the disputed premises, that it was entered in the court register of the competent court as such, that no one had disputed such entry, that in the course of privatization the privatization program was approved by the legally binding ruling of the RS Directorate for Privatization, this court concluded that the plaintiff has the right of priority to possession of the disputed real properties within the meaning of Article 41 of the Law on Basic Property Relations. Finally, the court stated that the courts correctly dismissed the claim in the part requesting that it be established that the business premises are the property of the plaintiff, for, under the provision of Article 187(a) of the Law on Enterprises which was in force at the time of founding the predecessor of the plaintiff, the decision on the change of status of an enterprise shall be made by an administration body, and mutual relations of enterprises arising from the status change shall be governed by a contract.

IV. Appeal

a) Allegations stated in the appeal

24. The Constitutional Court observes that the appellants and the second appellant filed completely identical appeals, considering that the adoption of the challenged judgment caused 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 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), as well as a violation of the right to property referred to in Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. The appellants find the violation of both rights in the allegedly arbitrary interpretation

of regulations relevant for adoption of a lawful decision. The appellants consider that the Supreme Court manifestly arbitrarily interpreted the provision of Article 2 of the Framework Law on Privatization, which provision recognizes the right of the Entities to privatize non-privately owned enterprises and banks located in their territory. A decision on whether an enterprise or a bank is privately-owned shall be made under the regulations of the Entities. In the opinion of the appellants, this provision cannot be applied as *lex specialis* when compared to the Law on Basic Property Relations and the Law on Enterprises. The appellants stated that the Framework Law on Privatization is an umbrella law enacted for the area of Bosnia and Herzegovina based on which the Entities had the right and obligation to enact their respective laws. The Republika Srpska enacted the Law on Initial Balance Sheet in Privatization Procedure of State-Owned Capital in Enterprises. The Federation of Bosnia and Herzegovina did likewise by enacting the Law on Initial Balance Sheet of Enterprises and Banks. Article 15 of the Law on Initial Balance Sheet in Privatization Procedure of State-Owned Capital in Enterprises prescribes that property of enterprises located in the territory of other republics of the former SFRY and the Federation of BiH, which the enterprise cannot manage for that reason, shall be transferred to the Republika Srpska on the basis of the act of the Government. The appellants point out that the passive sub-balance of the respective enterprise should include the property of enterprises located in the territory of other republics of the former SFRY and the Federation of BiH, which the enterprise cannot manage and use for that reason and that the procedure was to be conducted in accordance with Article 18 of the Law on Initial Balance Sheet in Privatization Procedure of State-Owned Capital in Enterprises. The appellants further state that the Federation of BiH regulated this issue in almost the same manner, whereby it provided for a possibility for the property, which the enterprise stated in the passive sub-balance, to be sold within a limited period of time, i.e. until the completion of privatization procedure.

25. The appellants further state that, on the basis of authorization provided for by the law and based on the umbrella law, the DOO /Limited Liability Company/ „Trgovina Borac" Travnik – the second appellant managed the business premises at issue, by fully observing the law and form as prescribed by law. Therefore, the appellants deem the decision to be arbitrary. The appellants consider as ill-founded the conclusion of the Supreme Court that the plaintiff has „the right of priority to possession of disputed real properties", and point out that the application of the said mechanism was inadequate, and even if it were adequate then they would have the right of priority taking into account the special status of property stated in the sub-balance and authorization of the second appellant. The appellants deem the challenged decision to be contradictory, for the reason that in one part of the judgment the court dismisses the plaintiff's claim, by which the appellants requested that it be

established that they are the owners of the disputed business premises. On the other hand, on the basis of fabricated right of priority to possession, it grants to the plaintiff the right of action and the right to possession of the real property at issue. The appellants stated that the Supreme Court in a way fabricated that the plaintiff was the legal successor of the second appellant on the part of the property located in the territory of the Republika Srpska, and the plaintiff neither acquired nor could it acquire the status of the legal successor. The appellants allege as an example the decision of the Constitutional Court, no. *AP 2394/06*, whereby the Constitutional Court concluded that it was not possible to acquire the status of a legal successor, including rights and obligations thereof, by the mere act of founding any type of subject. By the act of its founding, the plaintiff could neither acquire, nor did it acquire, any rights to property, including its maintenance, thereby observing the umbrella law and the laws of the Entities regarding the initial balance, because both Entities' laws had granted special legal regime to the property stated in the sub-balance. As attachment to the appeal the appellants submitted the judgment of the Supreme Court, no. Gvl-7/02 of 23 August 2002, which established, in an identical situation (the seller is identical, and buyers are different), in the course of deliberation on the request for protection of legality of the Public Attorney of the Republika Srpska, that the contract, such as the one they had entered into, was legally valid. Thus they hold that the challenged judgment is inconsistent with the referenced judgment of the Supreme Court.

b) Reply to appeal

26. In its reply to the appeals, the Supreme Court states that the challenged decision did not violate the constitutional rights of the appellants and thus proposes that the appeal be dismissed.

27. In its reply to the appeal, the plaintiff stated that the allegations stated in the appeal are ill-founded for the reasons given in the challenged judgment of the Supreme Court. The plaintiff stated that the legal predecessors of the second appellant – seller, as social legal persons (socially-owned enterprise), purchased-acquired the business premises at issue from private ownership into social ownership of SFRY, which was transferred on the basis of the contract of 20 September 1997 into social ownership, over which the legal predecessors of the second appellant had acquired the right of use, which was afterwards renamed into the term „holder of the right of disposal" over socially-owned real property, and not the holder of the ownership right. The plaintiff further reasons that it managed the business premises in question as a socially-owned asset – real property, which was, by the force of law, transferred from social into the state ownership of the Republika Srpska, and thereby continued operating as a state-owned enterprise of the Republika Srpska. The plaintiff holds that the contract at issue on sale of real properties of 20 January 2001, is

absolutely null and void under Articles 103, 104, 109 and 110 of the Law on Obligations. Therefore, it is not possible to acquire the rights to the detriment of another, on the basis of an invalid contract, the challenging of which is not subject to the statute of limitations. Finally, the plaintiff notes that the laws of the Federation of BiH cannot be applied to the socially owned real properties in the territory of the Republika Srpska, in particular the provisions which have not been harmonized with the Framework Law on Privatization. The plaintiff proposed that the appellants' appeal be dismissed.

c) Legal opinion of the Legal Department of the Office of the High Representative

28. The Legal Department of the Office of the High Representative stated in its legal opinion, among other things, as follows: *…the non-privatized capital and assets of a legal person situated in the territory of an entity could not be subject to privatization by the other entity. We therefore believe that questions as to which body was responsible for the conduct of the privatization process in the case at hand, or whether the privatization was carried out by a body established specifically to conduct the process under entity regulation or whether such authority was granted to the non-privatized company under the entity regulation, are not of any relevance for the particular case*.

V. Relevant Law

29. **Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* no. 14/08) in the relevant part reads:

Article 2
Law Framework

1. In accordance with the General Framework Agreement for Peace in Bosnia and Herzegovina („GFAP") this law shall explicitly recognize the right of Entities to privatize enterprises and banks located in their territory, which are not privately-owned.

A decision on whether an enterprise or a bank is privately-owned shall be adopted under the Entities' regulations. Those regulations shall ensure transparent review of any changes in the structure of capital or ownership transformation of property, which is not privately-owned, if such changes are disputable and took place after 31 December 1991.

2. The exercise of the right of the Entities to privatize such public institutions falling under Annex 9 of the GFAP shall be consistent with any necessary reorganization with the aim of harmonizing it with new internal structure of the state in accordance with the provisions of the GFAP, Annex 9 in particular.

3. At no stage of the restitution process, will the privatization of enterprises and banks prejudge restitution-related claims which may be adopted in accordance with the applicable laws on restitution.

Article 3

Laws on Privatization enacted by the Entities

The Assembly of an Entity shall enact legislation that is not discriminatory, that ensures utmost transparency and public responsibility in the process of privatization in accordance with the GFAP.

The laws enacted by the Entities carrying out privatization shall apply only to such property and claims related to such property that is located in the territory of the Entity concerned.

[...]

Article 4

1. Funds acquired through privatization of enterprises and banks located in the territory of an Entity shall be managed by the Entity concerned or legal persons authorized to collect them in accordance with the laws of the Entity concerned.

30. **Law on Initial Balance Sheet of Enterprises and Banks** (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 12/98), in the relevant part, reads:

Article 2

Initial Balance Sheet shall constitute overview of assets, rights, liabilities and capital of enterprises and banks („the entities") with which they enter into the process of privatization. The initial balance shall consist of the following:

1. Passive sub-balance containing the value of assets and rights with accompanying capital and liabilities that are not in possession, that is under the control of an entity, as well as the value of rights and liabilities concerning which this court has established an obligation of appropriate treatment in the preparation of initial balance under paragraph 1 of this article.

[...]

Article 19

During the process of privatization an enterprise may sell assets and rights contained in the Passive sub-balance.

Article 20

On the completion of the approved program of privatization, the remainder of assets and rights in the Passive sub-balance shall be transferred to the competent agencies for privatization. [...]

31. **Law on Initial Balance Sheet in the Process of Privatization of State-Owned Capital in Enterprises** (*Official Gazette of the Republika Srpska* no. 24/98), in the relevant part, reads:

Article 15

Property of an enterprise, which is located in the territory of other republics of the former SFRY and the Federation of BiH, and which the enterprise is unable to manage and dispose of for that reason, shall be transferred to the Republika Srpska, on the basis of the act of the Government.

Article 18

The enterprise shall state the value of assets and capital in the passive sub-balance, as referred to in Article 9 through 15 of this law.

Assets and rights stated in the passive sub-balance may be sold in accordance with the regulations of the Government.

32. **Law on Basic Property Relations** (*Official Gazette of SFRY* no. 6/80, applicable pursuant to Article 12 of the Constitutional Law for Implementation of the Constitution of the Republika Srpska), in the relevant part, reads:

Article 20

The ownership right shall be acquired on the basis of the very law, legal transaction and inheritance.

Article 33

The ownership right to real estate, on the basis of a legal transaction, shall be acquired by entry into the public register or other appropriate mode determined by law.

Article 41

A person who acquired an individually defined thing on legal grounds and in a lawful manner, and did not know or could not have known that he/she has not become owner (reputed owner), shall be entitled to demand its return from an honest possessor holding such thing without legal grounds or on lesser legal grounds.

When two persons are deemed reputed owners of the same thing, the stronger legal grounds shall be with the person acquiring the thing through encumbrance as compared to the person acquiring it without encumbrance. If legal grounds of both persons are of same degree, seniority shall lie with the person having actual possession.

33. **Law on Obligations** (*Official Gazette of SFRY* nos. 29/78, 39/85 and 57/89, and *Official Gazette of RS* nos. 17/93, 3/96, 39/03 and 74/04), in the relevant part, reads:

Article 103

Contract which is contrary to coercive regulations, public order or good business practices is null and void, unless the objective of the violated regulation is related to some other penalty or other legal regulations are applied to a certain case.

34. **Law on Civil Procedure of the Republika Srpska** (*Official Gazette of the Republika Srpska* nos. 58/03, 85/03, 74/05 and 63/07), in the relevant part, reads:

Article 250 paragraph 1

If the revision court finds that the substantive law has been misapplied, it shall render a judgment admitting the request for revision and overruling the contested judgment.

35. **Law on Land Registry of the Republika Srpska** (*Official Gazette of the Republika Srpska* nos. 74/02, 67/03 and 46/04)

Article 1

This present Law regulates the manner of keeping, maintenance and establishment of land registers as well as the registration of real estate and rights to real estate in the land register in the Republika Srpska.

Article 5

Ownership and other rights to real estate first come into existence upon registration in the land register, including those which are provided for in Article 87 of this Law.

Article 31

The registration shall be made on the basis of a registration Decision which is made by the land register clerk. The registration Decision refers to the registration application pursuant to Article 3, paragraph 1 of this Law.

VI. Admissibility

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

37. In accordance with Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

38. In the present case, the subject matter of the appeal is the Judgment of the Supreme Court no. 118-0-Rev-07-000 470 of 12 May 2008, against which there are no other effective remedies available under the law. The appellants received the challenged judgment on 28 May 2008, and the appeal was filed on 14 July 2008, i.e. 25 July 2008, that is within the time limit of 60 days as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court, for it is neither manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

39. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the admissibility requirements have been met in the relevant appeal.

VII. Merits

40. The appellants and the second appellant challenge the mentioned judgment of the Supreme Court, claiming that the said judgment violated their right to property referred to in Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

Right to property

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

(k) The right to property.

Article 1 of Protocol No. 1 to the European Convention, in its relevant part, reads:

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.

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.

42. The Constitutional Court notes that the word „property", within the meaning of Article 1 of Protocol No. 1 to the European Convention, includes a broad scope of property interests constituting a certain economic value (see Constitutional Court, Decision no. *U 14/00* of 4 April 2001, published in the *Official Gazette of Bosnia and Herzegovina* no. 33/01). Further, according to the jurisprudence of the European Court of Human Rights, „property" that is subject to protection may only be „the existing property" (see European Court of Human Rights, *Van der Mussele*, judgment of 23 November 1983, series A, no. 70, paragraph 48) or at least the property concerning which the appellant has „a justified expectation" to obtain it (see, the European Court of Human Rights, *Pine Valley Developments Ltd et al*., judgment of 29 November 1995, series A, no. 332, paragraph 31).

43. The Constitutional Court observes that the subject of dispute in the present case is the establishment of invalidity of the contract on purchase and sale of the business premises located in Novi Grad, which was entered into on 20 January between the second appellant, as a seller, and the appellants, as buyers. Thus it is a property-related dispute where it was deliberated on property rights of the appellants and the second appellant and therefore the present proceeding falls within the scope of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

44. The next question to which the Constitutional Court must provide the answer is the question whether the challenged decision of the Supreme Court resulted in the interference with the property of the appellant. With respect to this, the Constitutional Court notes 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, covers deprivation of possession and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognizes that the Contracting

States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not „distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule. The Constitutional Court holds that the present case concerns the interference with the appellant's right to property as the challenged decision deprived the appellant of his property obliging him to hand over possession of the business premises to the plaintiff, whereas the second appellant was prevented from using his property.

45. The Constitutional Court needs to answer the following questions: (a) whether the interference with the appellant's property was provided for by law, (b) whether the interference serves the legitimate goal in the general interest and (c) whether the interference is proportionate to the goal sought to be achieved, i.e. whether it strikes a fair balance between the rights of the appellants and the general public interest.

46. The Constitutional Court notes that the subject of dispute in the present case is the plaintiff's request for establishing that the business premises with a total surface area of 65.26 m^2, located in Novi Grad, on the ground floor of a house built on the cadastral lot no. 5/36 entered in the land registry file no. 4472 of the Cadastral Municipality of Novi Grad, is the plaintiff's property, and that the sales contract of the mentioned business premises, concluded between the appellants and the second appellant, is legally null and void, and that the appellants be obliged to hand over possession of the disputed business premises for use. The first instance court established the facts of the case by presenting a series of relevant evidence, based on which it established undoubtedly that the plaintiff's request was ill-founded and that the plaintiff failed to prove that it had acquired the ownership over the disputed business premises on any valid legal grounds. Moreover, the court established that regarding the sales contract entered into between the appellants, as buyers, and the second appellant, as a seller, there are no shortcomings rendering it null and void, and that such contract constitutes legal grounds for the acquiring of the right of ownership by way of registration in the land registers in favour of the appellants. The County Court upheld the factual and legal substrate established as correct by the first instance court, and given that, in the opinion of the said court, the procedural law was correctly applied, the plaintiff's appeal was dismissed and the first instance judgment was upheld.

47. However, the Supreme Court modified the first instance judgment, thereby establishing that the lower instance courts had erroneously applied the substantive law to the correctly established facts of the case. The Supreme Court noted that the business premises at issue were not privatized as they were located in the territory of the Republika

Srpska as another Entity, which was in accordance with Article 2 paragraph 1 and Article 4 paragraph 1 of the Framework Law. The Supreme Court stated the following in the reasoning of its decision: *As the Framework Law on Privatization of Enterprises and Banks in BiH grants an exclusive right to Entities to carry out the privatization of enterprises located in their territory which are not privately owned, regarding a portion of the state capital in the business premises located in the territory of the Republika Srpska and registered as part of the founder's share in founding the legal predecessor of the plaintiff, the first defendant has no basis whatsoever to claim anything. The framework law dos not recognize the acquiring of the right of ownership over the property of an enterprise that was a part of such property when the enterprise was founded and registered in the court register, which property, prior to the breakout of the war conflict in 1992, had belonged to the enterprise located in the territory of another entity. Instead, the Entities were granted the right to carry out privatization of enterprises in their territory, [...]*. The Supreme Court held that the disputed contract of sale entered into between the appellants and the second appellant is in contravention of the mentioned Framework Law on Privatization, as a coercive regulation which is, in the opinion of the said court, *lex specialis* in comparison to the Law on Basic Property Relations. The Supreme Court concluded that the plaintiff has the right of priority to the possession of the disputed business premises, as *the predecessor of the plaintiff had been founded on the property located in the territory of the Republika Srpska which also includes the disputed premises in Novi Grad, that it was registered as such in the register of a competent court, that no one had challenged such registration, that during privatization procedure the privatization program was approved by a legally binding ruling of the RS Directorate for Privatization no. 01-1141-4/99 dated 4 July 2001, which program included the business premises in Novi Grad*.

48. The Constitutional Court observes that the provision of Article 2 of the Framework Law on Privatization prescribes that the said law explicitly recognizes the right of Entities to privatize enterprises and banks located in their territory that are not privately-owned. Thus, the Framework Law on Privatization constitutes an umbrella law and it establishes principles and gives competences and obligations to the Entities to regulate privatization, including privatization of enterprises that remained in the territory of an Entity, which owners are the subjects in the territory of another Entity. The Federation of Bosnia and Herzegovina regulated this issue by the Law on Initial Balance Sheet of Enterprises and Banks, and prescribed by Article 19 that an enterprise may, in the process of privatization, sell assets and rights contained in the passive sub-balance, while Article 8 regulates what „the passive sub-balance" implies, and among other things, it concerns assets that are not in possession, that is under the control of an enterprise. The Constitutional Court further notes that the Republika Srpska enacted the Law on Initial Balance Sheet in the process

of privatization of state-owned capital in enterprises and prescribed by Article 15 that the property of enterprises located in the territory of other republics of the former SFRY and the Federation of BiH, which the enterprise is not able to manage for that very reason, shall be transferred to the Republika Srpska on the basis of the act of the Government, and the enterprise was obliged to state it in the passive sub-balance in accordance with Article 18 paragraph 1 of the mentioned law. Therefore, the property stated in the sub-balance in the Federation of BiH has identical status as the situation which is regulated in the Republika Srpska by Article 15 of the Law on Initial Balance Sheet in the Process of Privatization of State-Owned Capital in Enterprises, only after the process of privatization has been granted, by which time enterprises were authorized to sell property stated in the passive sub-balance. In the present case, the business premises at issue, which are the ownership of the second appellant, were not privatized, as they were located in the territory of the Republika Srpska as another entity, which was in accordance with the provisions of the Framework Law on Privatization, and as undisputedly established that the disputed business premises, as the property of the second appellant were registered in the passive sub-balance, it means that the mentioned property, in accordance with Article 19 of the Law on Initial Balance Sheet of Enterprises and Banks, may have been the subject of sale.

49. The Constitutional Court considers that in a situation like this, the Supreme Court arbitrarily interpreted relevant legal provisions and it failed to consider the relevant provisions of the Law on Basic Property Relations. Article 20 of the said law regulates the legal grounds for acquiring the right of ownership, and when it comes to the acquiring of ownership through legal business, as was the case with the appellants, the ownership is acquired through the registration in the land registers, as prescribed by Article 33 of the mentioned law. Namely, the second appellant, prior to entering into the contract of purchase and sale with the appellants, had been registered in the land registers as the owner of the disputed business premises, which implies that his right contained all the legal power that might exist on an asset and which authorized him to use the said asset, which was done by entering into a contract of purchase and sale with the appellants on 20 January 2001. On the basis of the mentioned contract of purchase and sale, this was verified at the Basic Court, under no. Ov-111/2001 of 22 February 2002, the right of ownership over the business premises was registered in the land registers in favour of the appellants. The registration in the land registers by way of which one acquires real rights over real properties and which produces fiction of absolute accuracy constitutes proof of ownership and the legal relevance of the registration in the land registry is neither restricted nor eliminated by either the Framework Law on Privatization or by the Entities'

laws (the Law on Initial Balance Sheet of Enterprises and Banks and the Law on Initial Balance Sheet in the Process of Privatization of State-Owned Capital in Enterprises). The Constitutional Court also suggests that the registration of the right of ownership in favour of the appellants, which has a constituent character, means that the registered rights get the relevance of absolute effect (*erga omnes*) and not relative (*inter partes*) which would exist only between the contracting parties, which the decision of the Supreme Court disregards, as well as other effects of the registration in the land register, such as the fiction of absolute accuracy and reliability and other principles of land law. Therefore, the Supreme Court, by disregarding clear and explicit provisions of the Law on Basic Property Relations and the Law on Land Registers, subjected to arbitrary treatment the appellants, who upon the registration in the land registers became the owners of the disputed real property and holders of absolute right in which the highest legal power was concentrated. Therefore, the interference with their right to property was not in accordance with the law as required by Article 1 of Protocol No. 1 to the European Convention.

50. In view of the aforementioned, the Constitutional Court concluded that in the present case a violation of the appellants' right to property, referred to in Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, occurred.

Other allegations

51. In view of the conclusion regarding the violation of the right referred to in Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, the Constitutional Court holds that it is not necessary to examine the allegations of the appeals in connection with 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(1) of the European Convention.

VIII. Conclusion

52. The Constitutional Court concludes that there is a violation of the right to property referred to in Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention in the case where the interference with the appellants' right to property was not in accordance with the law and where the court applied the substantive law arbitrarily and disregarded the fact that the appellants, within the meaning of Article 20 of the Law on Ownership Relations, acquired the right of ownership upon the registration in the land registers based on the legal business (conclusion of the contract on purchase and sale with the second appellant).

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

54. Following the adoption of this decision, the Decision of the Constitutional Court on Interim Measure no. AP 2157/08 of 4 September 2008 shall be rendered ineffective.

55. Pursuant to Article 41 of the Rules of the Constitutional Court, annex to this decision contains a Separate Dissenting Opinion of the Vice-President Miodrag Simović and Judge Mato Tadić.

56. According 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

SEPARATE DISSENTING OPINION OF VICE-PRESIDENT SIMOVIĆ

1. I agree with the decision of the majority of judges in case no. AP 2157/08 in part relating to „admissibility" because, in my opinion, the appeal is neither inadmissible for formal reasons nor *prima facie* ill-founded.

2. However, I do not agree with the opinion of the majority of judges concerning the merits of the case. I hold that the appeal is ill-founded regarding the 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 right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 to Protocol No. 1 to the European Convention for the following reasons:

- As regards the right to a fair trial, I am of the opinion that the manner in which the Supreme Court of the Republika Srpska interpreted and applied the positive and legal regulations should not be considered arbitrary, as claimed by the appellant.
- First of all, in my opinion, if the arbitrariness is to be interpreted as unlawfulness or misapplication of the substantive and procedural law, the Constitutional Court would transform into an ordinary judicial instance and that is not the role of the Constitutional Court. In my opinion, arbitrariness means a lot more than unlawfulness itself and it implies, *inter alia*, a full and flagrant disregard of relevant law provisions or establishing of facts beyond any logic and reasonable argument or an absolute lack of reasoning in the decision.
- As regard the case at hand, I consider that the Supreme Court offered clear arguments why the Framework Law on Privatisation should be applied to the instant case and not the Law on Ownership Relations or the Law on Real Property Transfer and why the contract on purchase and sale of real property - business premises, which was concluded by the appellant as a purchaser and the second appellant as a seller is null and void within the meaning of Article 103 of the Law of Obligations.

3. Accordingly, the reasons for rendering the judgment, which are presented with regards to application of law, have been clearly and precisely argued. In the challenged judgment all reasons for its rendering have been stated, including the detailed arguments. There are no other complaints which would indicate that the court proceedings were unfair.

4. In view of the aforesaid, I consider that there is no violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 to Protocol No. 1 to the European Convention.

SEPARATE DISSENTING OPINION OF JUDGE TADIĆ

Pursuant to Article 41 of the Rules of the Constitutional Court of Bosnia and Herzegovina, I hereby join the Separate Dissenting Opinion of the Vice-President Miodrag Simović in Case no. AP 2157/08.

Case no. AP 286/07

DECISION ON ADMISSIBILITY AND MERITS

Appeal of V.B. against the Judgment of the County Court in Trebinje, no. 105-0-Gž-06-000 278 of 10 November 2006

Decision of 3 July 2009

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

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. David Feldman

Mr. Mato Tadić

Mr. Krstan Simić

Mr. Mirsad Ćeman

Having deliberated on the appeal of **V.P.** in case no. **AP 286/07**, at its session held on 3 July 2009 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by V.B. is hereby granted.

A violation of the 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 is hereby established.

The judgment of the County Court in Trebinje no. 015-0-Gž-06-000 278 of 10 November 2006 is hereby quashed.

The case shall be referred back to the County Court in Trebinje which is obliged to take a new decision in an expedited procedure in accordance with 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 County Court in Trebinje is ordered to inform the Constitutional Court of Bosnia and Herzegovina of the measures taken with the aim to enforce this Decision, within 90 days from the date of delivery of this Decision, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 15 January 2007, V.B. („the appellant") from Trebinje, represented by Mr. Rato Runjevac, a lawyer practicing in Trebinje, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the County Court in Trebinje („the County Court"), no.105-0-Gž-06-000 278 of 10 November 2006, and the judgment of the Basic Court of Trebinje („the Basic Court"), no. P-186/05 of 27 April 2006.

II. Procedure before the Constitutional Court

2. On 13 May 2008, the Constitutional Court took a Decision no. *AP 286/07* whereby it rejected the appeal as premature. On 8 September 2008, the appellant filed a request for review of the aforementioned decision claiming that the proceedings before the ordinary courts were completed and that he informed the Constitutional Court about it in a timely fashion. The Constitutional Court granted the request for review of the said decision.

3. Pursuant to Article 22 (1) of the Rules of the Constitutional Court, on 18 June 2008 the County Court and Mr. Milan Gnjate („the plaintiff") were requested to submit their replies to the appeal.

4. The County Court submitted its reply on 1 July 2008, and the plaintiff submitted his reply on 21 July 2008.

5. Pursuant to Article 26 (2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 19 May 2009.

III. Facts of the Case

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

7. The plaintiff initiated proceedings before the Basic Court against the appellant, JMDP „Elektroprivreda RS" Trebinje („the second defendant") and „Krajina Kopaonik" d.d. za osiguranje i reosiguranje Banja Luka („Krajina Kopaonik" Insurance and Reinsurance Joint Stock Company Banja Luka) („the third defendant"), claiming compensation for damage. By its judgment no. P-222/01 of 17 December 2003, the Basic Court ordered the appellant and others to jointly pay the plaintiff compensation for damage. Deciding on an appeal, on 9 June 2005 the County Court rendered judgment no. Gž-238/04 whereby it granted the appeal and quashed the first-instance judgment and referred the case back to the first-instance court for new proceedings. In the reasons for its decision, the County Court noted that the appeal was well-founded and that the requirements stipulated by Article 227 of the Law on Civil Procedure had been met, since the appellant and others had been deprived of an opportunity to give a response to the objections to the findings of the court-appointed expert. The County Court found that Article 151 of the Law on Civil Procedure was violated for a failure to summon the court-appointed expert to appear in court for the main hearing and it instructed the first-instance court to summon the court-appointed expert to appear before the court for the renewed proceedings.

8. Having conducted the renewed proceedings, the Basic Court rendered judgment no. P-186/05 of 27 April 2006 ordering the appellant and others jointly to pay the plaintiff pecuniary compensation for damage to the amount of KM 1,846.00 including the statutory default interest and the costs of civil proceedings. The court dismissed as ill-founded the part of the plaintiff's claim exceeding the awarded amount. In the reasons for its decision, the court noted that judgment no. P-221/01 was quashed for the failure to summon the court-appointed expert to appear in court for the hearing in order to remove deficiencies in the expert findings by presenting additional explanations. The court noted that the plaintiff and the appellant had been present at the hearing when the court had rendered the judgment, whereas the second-defendant and third-defendant had not been present at that hearing. Furthermore, the court noted that it had summoned the court-appointed expert to the hearing in accordance with the instructions given by the County Court in Judgment no. Gž-238/04. However, the first-instance court found that the court-appointed expert had failed to appear in court for the scheduled hearing, although he had been summoned in a timely fashion, the reason being the fact that the costs to appear in court and to submit a supplement to his findings and a response to the objections raised by the appellant and others had not been paid in advance. The court stated that neither the plaintiff who had

proposed the presentation of evidence through an expert examination nor the appellant who had proposed a new expert examination had been willing to pay the costs in advance.

9. Furthermore, the court stated that it had accepted the court-appointed expert's findings in writing as objective and professional and that it had not granted the appellant's request for a new expert examination, since the plaintiff and the appellant had not been wiling to pay the court-appointed expert's costs in advance. The court referred to Article 153 paragraph 3 of the Law on Civil Procedure when it concluded that it would have conducted a new expert examination if it had turned out that „a supplement to the opinion of court-appointed expert Mr. Dragoljub Šotra led to the conclusion that it was really unclear, incomplete and contradictory to itself or the evidence produced". Taking into account the court-appointed expert's findings, *i.e.* the illegal speed limit of the vehicle driven by the appellant, the court found that the appellant had not observed the provision of Article 45 of the Road Safety Code. Moreover, by referring to the Law on Obligations and Law on Insurance of Property and Persons the court found that the second defendant and third defendant were to be held jointly liable.

10. The appellant and the third defendant lodged an appeal against the first-instance judgment. The County Court rendered judgment no. 015-0-Gž-06-000 278 of 10 November 2006, whereby it dismissed the appeal and upheld the first-instance judgment. In the reasons for its decision, the County Court outlined that it had already quashed the first-instance judgment in the proceedings preceding the appealed judgment no. 186/05 and had given the instructions to the first-instance court how to act in order to remove deficiencies relating to the conducted expert examination, *i.e.* to give the defendants an opportunity to participate in the proceedings and interrogate the court-appointed expert. The County Court stated it had examined the minutes taken at the main hearing in the renewed proceedings and it found that the first-instance court had summoned the court-appointed expert to appear in court for the main hearing in accordance with Article 151 of the Law on Civil Procedure but the court-appointed expert had failed to appear before the court, the reason being the fact that „the plaintiff refused to pay in advance the amount covering the court-appointed expert's costs, and the appellant and other defendants did not accept to assume the obligation of summoning the same court-appointed expert in order for possible deficiencies in the findings to be removed." Furthermore, the County Court concluded that the first-instance court had fulfilled the obligation stipulated by Article 151 of the Law on Civil Procedure but the plaintiff had failed to pay in advance the amount covering the costs relating to the presence of the court-appointed expert so that the first-instance court, in the County Court's opinion, had removed deficiencies in the quashed judgment. The County Court stated that it could not be concluded that the first-instance court had deprived the parties to the proceedings of the right to present arguments by not

summoning the court-appointed expert to appear in court in order to give a response to the objections to the findings, which was the reason why it dismissed this complaint as ill-founded. Furthermore, the County Court alleged that based on the presented evidence the first-instance court found that the appellant had driven in excess of the legal speed limit and caused the car accident and, by applying the relevant regulations, it concluded that the appellant and other defendants were to be held liable.

11. On 28 December 2006, the appellant filed a revision-appeal with the Supreme Court of the Republika Srpska („the Supreme Court") against the judgment of the County Court and on 29 December 2006 he submitted a supplement to the revision-appeal. The Supreme Court issued a ruling whereby it rejected the revision-appeal. In the reasons for its decision the court stated that the revisions-appeal was inadmissible as the value of the challenged part of the judgment did not exceed the amount of KM 10,000.00 pursuant to the provision of Article 237, paragraph 2 of the Law on Civil Procedure, and, in the view of the Supreme Court, ruling on this case is not relevant to the application of law in other cases.

IV. Appeal

a) Statements from the appeal

12. The appellant complains that the challenged decisions are in violation of his right to a fair trial and right of access to court under Article II(3)(e) of the Constitution of Bosnia and Herzegovina, Article 6 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („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 complains about an erroneous and incomplete establishment of facts which led to a violation of the substantive and procedural law. The appellant outlines that before the appealed judgments were rendered the Basic Court had conducted proceedings and rendered the judgment granting the plaintiff's claim but the County Court, upon an appeal lodged for the failure to summon the court-appointed expert, quashed the first-instance judgment and referred the case back for new proceedings instructing the first-instance court to summon the court-appointed expert to appear in court. Furthermore, the appellant complains that meanwhile the plaintiff arrived at the final and binding decision and collected compensation for damage from the second defendant in the enforcement procedure, which was in violation of the law provisions. Furthermore, the appellant alleges that the court-appointed expert failed to appear in court for a hearing in the renewed proceedings in which the challenged judgments were rendered and that the court erroneously referred to the provisions of Article 151 of the Law on Civil Procedure. The appellant complains that the court erroneously stated that the parties, *i.e.* the plaintiff, the appellant and other defendants had refused to

pay in advance the costs related to the expert examination by the court-appointed expert. The appellant alleges that the examination by the court-appointed expert was proposed by the plaintiff and that he should have borne the costs of the expert examination. Moreover, as the plaintiff proposed the expert examination and he failed to pay the related-costs in advance, the court should have concluded that the plaintiff gave up the presentation of that piece of evidence. The appellant complains that the judgment is based on a piece of evidence on which it should have not been based, as the plaintiff waived the presentation of that piece of evidence. This being so and taking into account the fact that the same court took two different decisions in two identical situations (in the previous proceedings and in the appellate proceedings), in the appellant's view, his right to a independent, impartial and fair trial has been violated. The appellant has claimed compensation for damage to the amount of KM 10,000.00.

b) Response to the appeal

13. In response to the appeal, the County Court stated that the appeal was unfounded and that it upheld the reasons stated in its judgment.

14. In response to the appeal, the plaintiff proposed that the admissibility of the appeal with regards to the compliance with the prescribed time limit should be examined and that the appeal should be rejected as ill-founded. Furthermore, the plaintiff alleges that he did not pay in advance the costs related to the examination by the court-appointed expert because of his financial situation, which he was not obliged to do. The plaintiff further alleges that the appellant should have paid the costs in question as he raised objections to the findings of the court-appointed expert. The plaintiff further alleges that taking into account the fact that the court-appointed expert presented reasons for his findings the court did not have an obligation to summon the court-appointed expert according to Article 154 of the Law on Civil Procedure.

V. Relevant Law

15. The **Civil Procedure Code** (*Official Gazette of the Republika Srpska* nos. 58/03, 85/03 and 74/05)

Article 149

(1) One expert shall perform expert evaluation.

(2) The court may, at a party's proposal, assign more than one expert for different kinds of expertise.

(3) Experts shall in the first place be appointed from among the certified court experts for certain kind of expert evaluation.

(4) More complex expert evaluation shall be entrusted, in the first place, to professional institutions such as hospital, chemical laboratory, university, etc.

Article 150

The court shall decide to hear the expert evaluation by a decision containing the following:

1. the name, surname and occupation of the expert,
2. disputed matter;
3. the subject and the scope of expert evaluation;
4. the time limit for filing the findings and opinion.

Article 151

(1) An expert shall be always summoned to the main hearing.

(2) The transcript of the decision referred to in Article 150 of this Law shall be delivered to the expert, together with the summons for the main hearing.

(3) In the summons, the court shall advise the expert that s/he must present his/her opinion conscientiously and in accordance with the rules of science and profession and inform him/her of the consequences of the failure to deliver the findings and opinion within the set time limit or to attend the hearing, as well as of the right to a fee and reimbursement of costs.

Article 152

(1) Experts shall be obliged to respond to the court summons and state their finding and opinion.

(2) The court shall exempt an expert from the duty of providing expert evaluation, at his/her request, for the reasons for which a witness may refuse to testify or give an answer to certain questions.

(3) The court may also exempt an expert from the duty of providing expert evaluation, at his/her request, out of other justified reasons. Exemption from the duty of expert evaluation may also be requested by an authorized employee of the body or organization where the expert is employed.

Article 154

(1) Unless the court determines otherwise, the expert shall always present his/her findings and opinion in writing before the hearing.

(2) The expert must always explain his/her opinion.

Article 155

(1) If the expert fails to state findings and opinion within the set time limit, the court shall, following the expiration of the time limit left to the parties to state their opinion on this issue, assign another expert.

(2) If the expert submits unclear and incomplete findings or opinion, contradictory to themselves or to another presented evidence, the court shall direct the expert to supplement them, or correct them and set the time limit for re-submission of findings and opinion.

(3) If the expert fails to submit complete and understandable findings and opinion even upon the court direction, the court shall, after having heard the parties' opinion, assign another expert.

Article 157

(1) The main hearing shall be held even if the expert fails to appear at the hearing.

(2) As an exception to paragraph 1 of this Article, should the court find the presence of the expert at the hearing essential for the clarification or supplementation of his/her findings and opinion, it may, on the motion of a party, adjourn the hearing and set a new one to which the expert shall be re-summoned.

Article 160

An expert shall be entitled to reimbursement of travel costs, costs for food and overnight stay, the costs of expert evaluation and reasonable remuneration for conducted expertise.

Article 385

(1) When a party proposes the of evidence, s/he shall be obliged to, pursuant to court's order and in advance, deposit the amount required for covering the costs, incurred by the presentation of evidence.

(2) When both parties propose the evidence, the court shall order them to deposit the amount necessary for covering the costs.

(3) The court shall reject the application for the presentation of evidence if the amount required for covering the costs is not deposited within the time limit set by the court.

(4) As an exception from the provision of paragraph 3 of this Article, if the court orders ex officio the presentation of evidence in order to establish facts referring to the application of Article 3, paragraph 2 of this Law and the parties do not deposit the amount set, the costs of the presentation of evidence shall be advanced from the court funds.

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 Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant is served on him/her.

18. In the present case, the subject challenged by the appeal is the judgment of the County Court against which there are no other effective legal remedies available under the law. Furthermore, the appellant received the challenged judgment on 4 December 2006, and the appeal was filed on 15 January 2007, *i.e.* within a time-limit of 60 days as provided for 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.

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

VII. Merits

20. The appellant complains that the challenged judgments violate 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 and his 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.

VII. 1 Right to a fair trial

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

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

22. Article 6(1) of the European Convention, in its relevant part, reads:

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

23. The Constitutional Court notes that the challenged decisions were taken in the proceedings instituted upon the plaintiff's civil action instituted against the appellant and others with regard to compensation for damage, and that Article 6 of the European Convention is applicable to the present case.

24. The appellant alleges that there is a violation of his right to a fair trial as the court expert failed to appear at the main hearing so that the appellant was not given an opportunity to raise objections to his findings. As it follows from the appellant's allegations, he is of the opinion that the plaintiff was placed in more favourable position vis-à-vis the appellant, since the appellant was obligated, contrary to the law, to pay in advance the amount covering the costs of the court-appointed expert proposed by the respondent party. Furthermore, the appellant alleges that taking into account the fact that the plaintiff did not pay in advance the costs for the court-appointed expert to appear before the court, the court could not present this piece of evidence *i.e.* should have surrendered the presentation of this piece of evidence. The Constitutional Court shall therefore examine the appellant's allegations relating to this principle.

25. With regards to the aforementioned, the Constitutional Court concludes that an important element of the fair trial requirements is the principle of equality of arms. In Case *Dombo Beheer B.V. vs. the Netherlands* the European Court of Human Rights has stated that this principle implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see ECtHR, *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October1993, Series A no. 274, p.19). As to the criminal cases where the character of the proceedings implies fundamental inequality of the parties, this principle of equality of arms is even more important; it also applies, although to a lesser extent, to the administrative proceedings (see ECtHR, *Feldbrugge vs. the Netherlands,* judgment of 29 May 1986, Series A no. 99, p.17). This principle can have an important role at any stage of the proceedings and with regards to various issues. The principle of equality of arms comprises that the parties have to have the same access to the documents on case-file and other documents, at least insofar as they have a role in taking a view by the court (see ECommHR, *Lynas vs. Switzerland*, Decision of 6 October 1976, no. 7317/75 Yearbook XX, 1977, p. 412, 444-446). Each party must be given an opportunity to confront the arguments exposed by the other party. Therefore, the court is obligated to

ensure the compliance with the principle of equality of arms, which means each party has to be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent. The European Court of Human Rights has concluded as follows: *A party to the proceedings must have the possibility to familiarise itself with the evidence before the court, as well as the possibility to comment on its existence, contents and authenticity in an appropriate form and within an appropriate time, if need be, in a written form and in advance* (see ECtHR, *Krcmár and Others vs. the Czech Republic*, judgment of 3 April 2000).

26. The Court must determine whether the proceedings considered as a whole were fair (see ECHR, *Barbera, Messegue and Jabardo vs. Spain,* judgment of 6 December 1988, Series A no. 146, paragraph 68 and Constitutional Court, Decision no. *U 63/01* of 27 June 2003, published in *the Official Gazette of BiH* no. 38/03).

27. The Constitutional Court notes that from the challenged judgments it follows that the court-appointed expert's findings were the crucial piece of evidence in this case, since the first-instance judgment was based almost fully on the findings and opinion of the court-appointed expert. Furthermore, the Constitutional Court notes that before rendering the challenged judgment the County Court had already quashed the first-instance judgment, the reason being the fact that the court-appointed expert had not been present at the main hearing so that the appellant and other defendant had not been given an opportunity to confront the findings and opinion of the court-appointed expert. The Constitutional Court notes that the court *de facto* summoned the court expert to appear in court for a hearing in the renewed proceedings but he failed to appear.

28. The Constitutional Court recalls that the defendant's right to respond to the statements made by the other party, particularly to the findings and opinion of the court-appointed expert, in case where it is the crucial piece of evidence serving as a basis for taking decision, is closely connected to the principle of equality of arms. A general principle is established in adversarial procedure in order to allow the parties to the proceedings to propose other evidentiary material and to respond to the statements made by the respondent party. Taking into account that the appellant raised an objection to the court-appointed expert's findings and that the court expert failed to appear in court for the main hearing, the reason being that the amount required for covering the expert's costs to appear in court were not deposited in advance which was not stipulated by the law, a decision based solely on this peace of evidence, findings and opinion of the traffic and communications expert, indeed represents a violation of the principle of adversarial proceedings and the right to a fair trial under Article 6 paragraph 1 of the European Convention.

29. Moreover, the Constitutional Court recalls that such view of the courts placed the appellant in a position to „present" the evidence of the respondent party in order to make it possible for himself to confront the plaintiff's arguments by presenting his own arguments. The Constitutional Court emphasizes that in the civil proceedings almost everything depends on the parties, from the claim within the action to the presentation of evidence. It also emphasizes that the parties' disposition is great while the court's participation is restricted. Furthermore, Article 385, paragraphs 1 and 3 of the Law on Civil Procedure clearly and precisely provides that when a party proposes the presentation of evidence, s/he shall be obliged to deposit the amount required for covering the costs, incurred by the presentation of evidence and the court shall reject the application for the presentation of evidence if the amount required for covering the costs is not deposited within the time limit set by the court. Turning to the instant case, the Constitutional Court holds that the appellant erroneously refers to the aforementioned provision, since it is indisputable that the evidence was presented and that the costs relating to the presentation of evidence were not disputable. In particular, the court-appointed expert submitted his opinion in writing and that opinion was submitted to the appellant. However, in order for the adversarial principle to be fully complied with, the court should have given the appellant an opportunity to pose questions to the court-appointed expert at the public hearing and the court-appointed expert to respond to the appellant's question and the questions of other defendants. Moreover, this right could not be conditional upon the payment in advance by the appellant of the costs relating to the presence of the court-appointed expert at the hearing. The Constitutional Court notes that the expert was appointed by the court on the suggestion of the plaintiff (respondent before the Constitutional Court), and that the evidence of the expert formed the main basis on which the Basic Court gave judgment in favour of the plaintiff and against the appellant. It is not the task of the Constitutional Court to decide who should bear the costs of the court-appointed expert. However, where the trial court makes a party's right to cross-examine a witness who gives evidence against that party dependent on the party paying the expenses of the witness, it is clear that it violates the party's constitutional right to a fair hearing. The trial court has a constitutional obligation to arrange for the witness to attend and answer questions if the trial court expects to base its judgment to a significant extent of the evidence provided by the witness.

30. In view of the aforesaid, the Constitutional Court concludes that the challenged judgments which are based on the findings of the court-appointed expert who did not appear in court for a hearing, which was the reason why the appellant was not given an opportunity to challenge them and the fact that the burden related to the expert's failure to appear before the court was placed on the appellant amount to a violation of the appellant's right to a fair trial safeguarded by Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

Other allegations

31. Taking into account that the violation of the right to a fair trial has been established, the Constitutional Court finds that there is no need to consider other allegations from the appeal.

Request for compensation

32. The appellant requested the Constitutional Court to award him compensation for non-pecuniary damages. According to Article 76(2) of the Rules of the Constitutional Court, the Court may exceptionally award compensation for non-pecuniary damages on the appellant's request. However, the Constitutional Court recalls that unlike the procedure before the ordinary courts, compensation for non-pecuniary damages which may be awarded by the Constitutional Court is a symbolic one in exceptional cases of violation of safeguarded human rights and fundamental freedoms. Taking into account the provision of Article 76(2) of the Rules of the Constitutional Court, with regard to the appellant's request for non-pecuniary damages, the Constitutional Court finds that this Decision is a just satisfaction for the established violation.

VIII. Conclusion

33. The Constitutional Court finds a violation of the appellant's right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention in the case where the appellant was not given an opportunity to challenge the findings and opinion of the court-appointed expert at the main hearing, since the court-appointed expert refused to appear in court for a hearing, the reason being that the plaintiff did not pay him in advance the costs to appear before the court, while the appellant was not willing to assume the plaintiff's obligation nor is the payment of such costs stipulated by the law.

34. Having regard to Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this Decision.

35. Pursuant to Article 41 of the Rules of the Constitutional Court, an annex of this Decision shall make Separate Opinion of Judge Krstan Simić.

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

Prof. Dr. Miodrag Sumović
President
Constitutional Court of Bosnia and Herzegovina

SEPARATE OPINION OF JUDGE SIMIĆ

As to the facts and violation of the 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 I have voted with the majority in the Court but I have some reservations about paragraph 3 of the enacting clause of the Decision on Admissibility and Merits.

My key reservation relates to imprecision, that is to say, vagueness of paragraph 3 of the enacting clause of the Decision on Admissibility and Merits.

Namely, the appellant is one of the three joint debtors in the present case and the judgment relating to first defendant JMDP „Elektroprivreda RS" Trebinje became legally binding when the Basic Court rendered its judgment no. P-222/01 of 17 December 2003, as this defendant did not lodge an appeal against the said judgment. In addition, the judgment became legally binding upon the third defendant, „Krajina Kopaonik" Insurance and Reinsurance Joint Stock Company Banja Luka, given that its appeal together with the appellant's appeal was dismissed by the judgment of the County Court in Trebinje no. 015-0-Gž-06-000 278 of 10 November 2006.

The third defendant, „Krajina Kopaonik" Insurance and Reinsurance Joint Stock Company Banja Luka did not lodge an appeal against the judgment of the County Court in Trebinje no. 015-0-Gž-06-000 278 of 10 November 2006.

Taking into account the legal status of each of the three joint debtors which are liable individually, I hold that it should be emphasised in paragraph 3 of the enacting clause of the Decision on Admissibility and Merits that the judgment of the County Court in Trebinje no. 015-0-Gž-06-000 278 of 10 November 2006 is quashed in relation to the appellant; thereby any vagueness contained in the mentioned paragraph would have been avoided.

Case no. AP 3263/08

DECISION
ON ADMISSIBILITY
AND MERITS

Appeal of Mr. Vasilije Savić against the Rulings of the Court of Bosnia and Herzegovina, nos. X-KRN-07/351 of 6 October 2008 and X-KRN-07/351 of 23 September 2008

Decision of 3 July 2009

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), in the Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Paravlić, Vice-President

Mr. David Feldman,

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Mr. Krstan Simić,

Mr. Mirsad Ćeman,

Having deliberated on the request of **Mr. Vasilije Savić,** in case no. **AP 3263/08**, at its session held on 3 July 2009 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Vasilije Savić against the rulings of the Court of Bosnia and Herzegovina nos. X-KRN-07/351 of 6 October 2008 and X-KRN-07/351 of 23 September 2008, 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 Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 20 October 2008, Mr. Vasilije Savić („the appellant") from Bijeljina, represented by Mr. Stojan D. Vasić the lawyer practicing in Bijeljina, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the rulings of the Court of Bosnia and Herzegovina („the Court of BiH"), nos. X-KRN-07/351 of 6 October 2008 and X-KRN-07/351 of 23 September 2008. The appellant also submitted a request for an interim measure whereby the Constitutional Court would allow visits and telephone contacts with his closest relatives pending a final decision on the appeal. On 26 January 2009, the appellant sent a letter informing the Constitutional Court that he was released from detention but he maintained the allegations of his appeal and requested the finding of violation of rights he complained against.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 21 November 2008 the Constitutional Court requested the Court of BiH and the Prosecutor's Office of BiH („the Prosecutor's Office") to submit their replies to the appeal.

3. The Court of BiH and the Prosecutor's Office submitted their replies on 11 and 10 December 2008 respectively.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeals were submitted to the appellant on 14 January 2009.

5. Pursuant to Article 33 of the Rules of the Constitutional Court, on 5 June 2009 the Correctional Institution in Tuzla was requested to submit the Prison Rules with regards to the visits to detainees and their phone calls, i.e. information about whether the visits to detainees and phone calls provided for by Article 144 paragraph 1 and 4 of Criminal Procedure Code of Bosnia and Herzegovina, are approved without special procedure or whether the detainees are obliged to make a special request in this respect. The prison administration submitted its reply on 15 June 2009.

III. Facts of the Case

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

7. By the ruling of the Court of BiH no. X-KRN-07/351 of 17 September 2008, the detention of 30 days was ordered for the appellant on the grounds of the existence of special circumstances indicating that the appellant could by remaining free, influence the witnesses, abettors or accomplices which are the reasons to order the measure of detention pursuant to Article 132 paragraph 1(b) of the Criminal Procedure Code of Bosnia and Herzegovina („the CPCBiH"). In addition, the detention was ordered on the grounds of a reasonable suspicion that he committed the criminal offence of organized crime under Article 250 paragraph 2 in conjunction with criminal offence of abuse of office or official authority under Article 220 paragraph 3 of the Criminal Code of Bosnia and Herzegovina („the CCBiH").

8. In the reasons for the ruling ordering detention, the Court of BiH stated that based on the evidence submitted by the Prosecutor's Office, statements made by the witnesses and documentation seized during the search of the facilities and premises used by the appellant and other defendants, first of all identity cards, passports and other personal identification documents, it found that there was a reasonable doubt that the appellant had committed a criminal offence, i.e. that he had participated in the commission of the criminal offences in question. The Court of BiH further stated in the reasons for its ruling that on 16 September 2008 the facilities and premises used by the appellant and other suspected persons had been searched and as well as their motor vehicles and that on this occasion extensive documentation indicated in the proposal for detention by the Prosecutor's Office had been seized. The Prosecutor's Office stated in the proposal for detention that there was a risk of the appellant's and other suspected persons' flight, since the circumstances of the case indicated that there was a high probability that the suspected persons had provided false documents and that, in addition to this, the appellant had often stayed in Belgrade–Republic of Serbia „where he kept company of the criminals". The Prosecutor's Office also pointed to the circumstance that the appellant and other suspected persons as an organized group had continued committing incriminated actions regardless of the fact that their colleagues had been arrested in May 2008 on the grounds of a reasonable doubt that they had committed the same criminal offence of which the appellant and other persons were suspected. The Prosecutor's Office submitted the report taken during the interrogation of the witness by the Police of Brčko District, which confirmed the involvement of the appellant in issuing false documents for a certain sum of money.

9. The Court of BiH ordered detention for special reasons laid down in Article 132, paragraph 1, item b) of the CPC BiH. The Court of BiH stated that it had taken account of the fact that the present case was a very complex and extensive one with a number of suspected persons as it followed from the provided documentation and the fact that the

Prosecutor's Office conducted the investigation into other cases connected to this case. In addition to this, the Court of BiH held that there was a reasonable suspicion that the appellant and other suspected persons had acted as an organized group whose members were mutually connected and their roles were defined beforehand. The Court further held that the circumstances of the case pointed to a „wide-spread network" in which a number of persons could be involved, who knew each other or at least knew of each other so that it could be concluded that the appellant and other suspected persons knew the suspected persons against which an investigation was conducted and potential witnesses, since some of them were employees of CIPS, who were working on issuing personal identification documents. Taking into account the aforesaid, the court concluded that it was realistic to expect that the suspected persons, if released, could make contact with other suspected persons but also with the witnesses to be interrogated by the Prosecutor's Office and thus could obstruct the conduct of investigation.

10. The Court of BiH further stated that it took account of the fact that the Prosecutor's Office was still searching for evidence and clues relevant to these criminal procedures and that it followed from the preliminary hearings that the suspected persons had kept the relevant documentation outside the workplace. The Court of BiH found that it was feared that the suspected persons, if released, could destroy, hide or forge evidence and clues relevant to the criminal procedure. The Court of BiH also took account of the importance of CIPS project itself, concluding that this is an important state system and project whose security has been jeopardized by the offence the appellant and other persons are suspected of and it stated that it was indisputable that the consequences thereof would be far-reaching and immeasurable. The court concluded that the aforementioned circumstances as a whole justified the detention order.

11. Following the detention order permitting detention of the appellant, dated 17 September, the appellant requested the Court of BiH on 18 and 19 September 2008 to grant him permission for telephone calls and visits of his immediate family members, i.e. father, spouse, children and sister.

12. The Prosecutor's Office has been transmitted the aforesaid requests. In its reply to the request, the Prosecutor's Office explicitly opposed to visits and telephone contacts with the persons listed therein, with the exemption of the appellant's authorized or appointed defense councils. The Prosecutor's Office emphasized that the investigation, pending in this case, should lead to further knowledge about persons that appear to be the accomplices, abettors or aiders of the appellant in the perpetration of the criminal offences concerned or the persons that are potential witnesses in the case. The Prosecutor's Office also considered that, by the requested contacts, the appellant could hinder the investigation

by influencing the witnesses, accessories or accomplices or conceal, alter or destroy the items of evidence or clues of the criminal offence perpetrated in the specific function and which had been used for the commission of the criminal offence. The Prosecutor's Office pointed to the fact that until the moment of arrest, the appellant and other suspected persons had been employed in positions which they had used in order to commit criminal offences with which they were charged and that there was possibility of influencing the witnesses, and evidence and clues relevant to the criminal proceedings, either because of the number of persons they knew or because of accessibility to information. The Prosecutor's Office stated that the appellant could organize similar activities through his relatives and friends even during his detention in prison through the visits paid to him, phone calls or correspondence. It is proposed that the appellant should be prohibited any visits or telephone contacts with all the persons with the exception of his defense council.

13. By his ruling no. X-KRN-07/351 of 23 September 2008, the preliminary procedure judge of the Court of BiH prohibited to the appellant any visits and telephone contacts with other persons excluding his defense council. In the reasoning of the Ruling, the Court stated that in the instant case the court was guided by the obligations and restrictions laid down in Article 141, paragraph 2 of the Criminal Procedure Code of BiH, which specifies the manner in which the rights and freedoms of detained persons can be restricted. In this respect, the court concluded that in the present case it was necessary to restrict the appellant's rights and freedoms to achieve the purpose for which the custody measure has been ordered. Further, the Court notes that having regard to the fact that the custody has been ordered for the existence of particular circumstances indicating that the suspects would, if released, hinder the criminal proceedings by influencing the witnesses, accessories or accomplices or destroy, hide evidence and clues of evidences relevant to the proceedings, that a larger number of persons participated in the commission of the criminal offences the suspects have been charged with, that these persons are mutually connected and their roles were defined beforehand, that the investigation against the suspects has been pending and that it is necessary to interrogate a substantial number of persons, potential suspects and future witnesses, the Court established that in this stage of proceedings the visits and telephone calls to the appellant could have consequence on the further course of criminal proceedings. The Court concluded that the aforementioned circumstances in their entirety indicated that there was a realistic danger that the appellant could use the visits paid by other persons and phone calls to hide or destroy evidence and clues or to directly or indirectly make contacts with other suspected persons or other persons involved in the commission of incriminated acts.

14. Deciding upon the appeal against the first instance ruling, on 6 October 2008, the Court of BiH issued the ruling no. X-KRN-07/351, dismissing it as ill-founded. In the

reasoning thereof the Court of BiH notes that Article 141 paragraph 2 of the CPCBiH stipulates that the rights and freedoms of the person taken into custody may be restricted only insofar as it is necessary, amongst other things, to achieve the purpose for which custody has been ordered. The court indicates that it is correct that the prohibition of communication between the nearest family members represents an interference with the private family life. However, the Court evaluates that the investigation in this stage of proceedings represents a legitimate aim which does not infringe the principle of proportionality. That is for the reason that the purpose of determining the measure of custody would not be adequately achieved if the appellant would be in position, through the communication with other persons, be it the nearest family members, to influence the quality of investigation and, possibly, even the probative proceedings. The Court is also aware that the prohibition of visits and telephone contacts could restrict the right to privacy of the appellant. However, this right is not an absolute one and the restrictions are justified, as in the present case, where the interest to secure the rights of the appellant to contact other persons is harmonized with the need to secure the integrity of investigation and reaching the purpose for which the custody measure has been ordered.

IV. Appeal

a) Allegations of the appeal

15. The appellant claims that by the challenged ruling his right to a private and family life, home and correspondence safeguarded under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 paragraph 1 of the European Convention for Protection of Human Rights and Fundamental Freedoms („the European Convention") has been violated. The appellant alleges that the prohibition of visits and phone contacts with all persons except his defense council could be justified only if an attempt of direct or indirect negative influence on the probative proceedings through his closest relatives has been substantiated by the facts and that there is no justification for the issuance thereof on the basis of sole presumption that such action is possible. The appellant emphasizes that the Court also recognized that the prohibition of communication between the members of closest family members represented the interference with the private and family life but, at the same time, the Court considered that the investigation at this stage of the proceedings represented a legitimate aim that does not breach the proportionality principle. The appellant holds that the aim must be generally recognized to be legitimate and that the aim is generally recognized when general interest is realized thereby. The general interest, in the appellant's opinion, is primarily manifested in compliance with the citizens' rights and freedoms. He holds that the Court's decision directly endangers the principle of proportionality between the means used and aim sought to be achieved

since the Court by such a decision disturbed a fair balance between the duty of protection of the right to private and family life, home and correspondence of an individual and the right to take all necessary actions for the prevention of crime. The appellant proposes the Constitutional Court to establish the violation of the said right and quash the measure of prohibition of telephone contacts and visits to the appellant with other persons or to declare the disputed Ruling null and void and return the case for reconsideration. He also requested that the Constitutional Court issue an interim measure by which the appellant be granted the permission of visits and telephone contacts with his closest family members. On 26 January 2009, the appellant submitted a letter to the Constitutional Court stating that, notwithstanding his release from custody, he holds that he suffered the violation of aforesaid rights and requested the Constitutional Court to adopt a decision finding the violation of the rights.

b) Reply to the appeal

16. In its reply to the appeal the Court of BiH emphasizes with regard to the appellant's allegations on violation of his rights under Article 8 paragraph 1 of the European Convention that he ignored paragraph 2 of the same Article, i.e. entirely neglected the facts that the Court of BiH established at the time of adoption of the decision. The Court of BiH reminds that the custody was ordered pursuant to the reasons prescribed by Article 132 paragraph 1(b) of the CPCBiH. The Court of BiH underlines that the reasons for which the detention was ordered in their nature were such that they restricted the appellant's contacts with the outer world for the purpose of full protection of the criminal proceedings. Thus, it was logical that in the Court's decision challenged by the appeal the prohibitions were imposed on the appellant. The Court of BiH stated that it had in mind the nature of the criminal offence when adopting the challenged decision, as well as the manner and means of the perpetration thereof, i.e. that the appellant's status in his working place was used, and that his cooperation with third persons was necessary in the perpetration of the criminal offence concerned. The appellant could have influenced those persons through the contacts with his immediate family members. The Court of BiH considers the appellant's objections indicating that the prohibition imposed and the aim sought are not proportionate as ill-founded and emphasizes that the restrictions of the right of visits and telephone contacts in the appellant's case are determined in the entirely lawful manner.

17. The Prosecutor's Office states in its reply that the appellant has been released by the ruling of the Court of BiH no. X-KRN.07/351 of 14 November 2008, thus rendering ineffective the ruling on the restrictions of communication. They propose to reject the appeal as inadmissible in accordance with Article 16 of the Rules of the Constitutional

Court or, as an option, to dismiss it as ill-founded for the lack of violations the appellant refers to.

18. The administration of the Correctional Institution in Tuzla informed the Constitutional Court that the visits to detainees and phone calls could not be approved without special procedure; the detainees have to make a special request in this respect.

V. Relevant Law

19. The **Criminal Code of Bosnia and Herzegovina** (*Official Gazette of BiH* nos. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06 and 32/07)

Abuse of Office or Official Authority

Article 220 paragraphs 1 and 3

(1) An official or responsible person in the Bosnia and Herzegovina institutions who, by taking advantage of his office or official authority, exceeds the limits of his official authority or fails to execute his official duty, and thereby acquires a benefit to himself or to another person, or causes damage to another person or seriously violates the rights of another, shall be punished by imprisonment for a term between six months and five years.

(2) If a property gain acquired by the perpetration of the criminal offence referred to in paragraph 1 of this Article exceeds the amount of 50.000 KM the perpetrator shall be punished by imprisonment for a term of not less than three years.

Organized crime

Article 250

Whoever as a member of an organized criminal group perpetrates a criminal offence prescribed by the law of Bosnia and Herzegovina, for which a punishment of imprisonment of three years or a more severe punishment may be imposed, unless a heavier punishment is foreseen for a particular criminal offence, shall be punished by imprisonment for a term not less than five years.

20. 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, 2907, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09 and 16/09)

Article 132

(1) If there is a grounded suspicion that a person has committed a criminal offense, custody may be ordered against him:

a) if there is a justified fear to believe that he will destroy, conceal, alter or falsify evidence or clues important to the criminal proceedings or if particular circumstances indicate that he will hinder the inquiry by influencing witnesses, accessories or accomplices;

Article 141

(1) The rights and freedoms of the person taken into custody may be restricted only insofar as it is necessary to achieve the purpose for which custody has been ordered and to prevent the flight of the person taken into custody, commission of a criminal offense or endangerment to the life and health of people.

Article 144

(1) Upon the approval of the preliminary proceedings judge and under his supervision or the supervision of a person designated by him, the detainee may receive visits from his spouse or extramarital partner or relatives, and at his request, from a physician and other persons subject to internal regulations of the custody. Some visits may be prohibited if they could detrimentally affect the conduct of the proceedings.

(4) A detainee shall be prohibited from using cellular phone but shall have the right, subject to internal regulations of the custody, to make telephone calls at his own expense. To that end, the detention administration shall provide the detainees with a sufficient number of public telephone connections. The preliminary proceedings judge, the preliminary hearing judge, the individual judge or the presiding judge may, for a reason of security or due to the existence of one of the reasons referred to in Article 132 Paragraph 1 Item a) through c), of this Code restrict or prohibit, by a decision, the use of the telephone by a detainee.

VI. Admissibility

21. 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 court in Bosnia and Herzegovina.

22. Pursuant to Article 16(1) of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him.

23. In the particular case the subject matter of the appeal is the judgment of the Court of BiH no. X-KRN-07/351 of 6 October 2008, against which there are no other effective legal

remedies available under the law. Furthermore, the appellant received the challenged ruling on 8 October 2008 and the appeal has been filed on 20 October 2008, i.e. within 60 days time-limit as provided for by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal 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.

24. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the appeal meets the admissibility requirements.

VII. Merits

25. The appellant disputes the challenged rulings claiming that his rights under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 paragraph 1 of the European Convention have been violated.

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

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

27. Article 8 of the European Convention read as follows:

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

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

28. The basic aim of Article 8 of the European Convention is the protection of an individual from the arbitrary interferences with his/her rights protected by Article 8 of the European Convention (see the European Court for Human Rights, *Kroon vs. Netherlands*, judgment of 27 October 1994, Series A no. 297-c, paragraph. 31).

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

30. The Constitutional Court holds that the challenged rulings dismissing the appellant's request to be granted permission to get visits and telephone contacts with the members of immediate family or to whom the communication is restricted solely to the contacts with his defense council, resulted in the interference of public authorities with the appellant's right to private and family life within the meaning of Article 8 paragraph 1 of the European Convention.

31. Further, the Constitutional Court must determine justification of such interference within the meaning of Article 8 paragraph 2 of the European Convention, i.e. whether it has been in accordance with the law and necessary in a democratic society to achieve any of the goals listed in Article 8 paragraph 2 of the European Convention.

32. The Constitutional Court notes that the challenged rulings were adopted on the basis of the CPCBiH which in its Article 141 provides for the circumstances under which the rights and freedoms of the detainees may be restricted. The Constitutional Court, therefore, holds that the „interference" in the appellant's right to private and family life has been prescribed by the law. Furthermore, the Constitutional Court notes that the CPCBiH has been published in the Official Gazette, that the text thereof is clear, accessible and foreseeable, by which the elements of „lawful interference" with the appellant's right under Article 8 of the European Convention have been satisfied.

33. For the interference to be in conformity with the law, it must, at the same time, be a necessary measure in a democratic society for the achievement of legitimate aim provided for in Article 8 paragraph 2 of the European Convention. „Necessary" within this context means that the interference corresponds to the „pressure of social needs" and that a reasonable relation of proportionality exists between the interference and the legitimate aim sought (see the European Court for Human Rights, *Niemietz vs. Germany*, judgment of 16 December 1992, Series A, no. 251).

34. The Constitutional Court notes that the aims sought by the measures of restriction of rights and freedoms of detainees in the manner prescribed by Article 141 of the CPCBiH is the ensuring of undisturbed investigation conduct, i.e. the prevention of hindrance of criminal proceedings, which is a legitimate aim in a democratic state. In order to accomplish this goal it is necessary, however, to achieve a reasonable relation of proportionality between the legitimate aim on one hand and the protection of the appellant's right to private and family life, on the other hand. In this respect, the Constitutional Court notes that it is provided by the law in general that the detainee has the right to get visits from persons of his own choice. The exemption to this rule is when the preliminary procedure judge issues written and reasoned decision on prohibition of certain visits because of their detrimental effect on the course of proceedings. Furthermore, the law guarantees that the rights and freedoms of detainees may be restricted only in the measure necessary to achieve the purpose for which custody has been ordered. In the instant case, the Constitutional Court notes that the ordinary courts held that the purpose of determination of detention would not be adequately effectuated if the appellant was given a possibility of communicating with other persons, including even the members of his family, excluding his defense council. The Constitutional Court further stresses that in the particular case the appellant was suspected as having perpetrated the criminal offence of organized crime in conjunction with the abuse of office or official authority. Evidence gathered in the course of investigation, as the ordinary court established, indicated that the appellant, communicating with other persons, and even the immediate family members, could have a possibility to influence the quality of investigation conduct and, possibly, the presentation of evidence proceedings, especially taking into account the nature of criminal offence and manner and means of perpetration. Furthermore, the Constitutional Court notes that the ordinary courts concluded that the reasons for which the detention was imposed were such as to restrict the contact of the suspected persons with the outer world, so that they pointed to the prohibition.

35. Moreover, the Constitutional Court emphasizes that, under the case-law of the European Court of Human Rights, any detention lawful under Article 5 of the European Convention, in its own nature, imposes restrictions in terms of the private and family life. However, an important part of the detainee's right to respect of family life is that the detention authorities facilitate the maintenance of contacts with the immediate family. At the same time, the European Court recognizes that some measures of control over the detainee's contacts with the outer world are necessary and are not incompatible with the European Convention in their nature (see the European Court for Human Rights, *Ostrovar vs. Moldavia*, judgment of 15 February 2006, paragraph 105). Taking into account the aforesaid position, the Constitutional Court notes that in the particular case the appellant

has been ordered the custody as of 17 September 2008 to 14 November 2008, therefore, for the period of less than two months, in which the appellant has been prohibited any contacts with other persons with the exception of communication with his defense council. In essence, the measure pronounced was restricted to the period in which the custody measure was in force and in which, cumulatively, the legally prescribed reasons must have existed for its pronouncement. In this respect, the Constitutional Court notes that in the challenged rulings the Court of BiH gave detailed reasoning for temporary restriction of appellant's contacts only to the contacts with his defense council and that the measure of detention and, subsequently, the measure of prohibition of contacts with third persons, ceased when the reasons for such measure ceased to exist.

36. Constitutional Court particularly considered the facts that the appellant was ordered detention by the ruling of the Court of BiH of 17 September 2008 in which there was no additional restrictions as well as that the appellant requested the Court of BiH on 18 and 19 September 2008 to grant him permission for telephone calls and visits of his immediate family members, i.e. father, spouse, children and sister and that the Court of BiH decided on this request by its ruling of 23 September 2008. Constitutional Court finds that due to the shortness of the period from the appellant's detention to adoption of court decision on prohibition of visits and telephone contacts with other person, except with defense council, an issue of violation of appellant's rights under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention is not raised.

37. In view of aforementioned, the Constitutional Court concludes that in the present case in which the appellant's communication with the outer world has been restricted to the contacts with his defense council, where this restriction lasted for a limited period and it was in accordance with the purpose and reasons for which the detention was determined as provided for by the law, the proportionality between the protection of the legitimate aim sought, on one hand, and the protection of the appellant's right to private and family life on the other hand, has not been infringed upon.

38. Having regard to the above, the Constitutional Court concludes that in the present case there has been no violation of the appellant's right to respect of private and family life, home and correspondence stipulated by Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

VIII. Conclusion

39. The Constitutional Court finds that the appellant's right to private and family life, home and correspondence under Article II(3)(f) of the Constitution of Bosnia and

Herzegovina and Article 8 of the European Convention has not been violated, as the interference of public authorities with this appellant's right during his detention has been in compliance with the law and necessary in a democratic society for the purpose of achieving a legitimate aim. The reasonable relation of proportionality between the interference with the appellant's right and the legitimate aim sought has been achieved.

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

41. In view of the fact that this is the final decision on the appeal and that the appellant has been released from custody in the interim, the Constitutional Court concludes that there is no need to separately consider the request for interim measure.

42. Pursuant to Article 41 of the Rules of the Constitutional Court, annexed to this decision are Separate Partially Dissenting Opinions of Judges Mato Tadić and Krstan Simić.

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

Prof. Dr. Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

SEPARATE PARTIALLY DISSENTING OPINION OF JUDGE TADIĆ

1. At its plenary session held on 3 July 2009, the Constitutional Court of BiH adopted Decision on Admissibility and Merits in case of appellant Mr. Vasilije Savić no. AP 3263/08, dismissing the appeal as ill-founded.

2. I agree with the majority part of the adopted decision. However, I do not agree that there was no violation of the constitutional right under Article II(3)(f) of the Constitution of Bosnia and Herzegovina (right to private and family life, home and correspondence) and same right as guaranteed under Article 8 of the European Convention for Protection of Human Rights and Fundamental Freedoms in relation to Ruling of the Court of BiH no X-KRN.-07/351 of 17 September 2008 in the part in which, without court's decision, the appellant (detained person) was prohibited to communicate with the family. Indeed, the ruling on detention and reasons the Court gave to substantiate it, are not disputable. What I see as an interference with the appellant's constitutional right is the fact that the Court failed to adopt any restrictive measure by its ruling of 17 September 2008 but only by its ruling on 23 September 2008.

3. In accordance with the law, only court can additionally restrict certain rights of the persons-detainees, pursuant to Article 141 paragraph 2 and Article 144 paragraph 1 of the Law on Criminal Proceedings.

4. In paragraph 35 of its decision, the Constitutional Court concludes that the Court of BIH, by ruling of 17 September 2008, has restricted the appellant's right to communicate with his family to the defense attorney only and that it offered reasoning for such a position, which is, unfortunately, quite incorrect. The very ruling does not contain any restrictions, which is acknowledged by the Constitutional Court itself in the following paragraph, 36, when it concluded that there were no restrictions imposed by the ruling of 17 September 2008 but by ruling of 23 September 2008 (which is correct).

5. Thus, according to the ruling of 17 September 2008 there was no interference with the appellant's constitutional right in terms of Article II(3)(f) and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms only because there are no restrictions on communication with the members of the family in this ruling. Thus, this is where the violation occurred as only court could restrict this detainee's right.

6. The interference occurred only by ruling of 23 September 2008 which is, in my opinion, well-founded. However, the Constitutional Court acknowledges this (item 36)

but justifies it by the short period of interference. This position is unacceptable to me. It cannot be established that there is some interference and or no interference which is then justified by the short period of interference. The right guaranteed by the Constitution does not recognize this. Thus, either there is or there is no interference with the protected right.

7. With all due respect, such justification for interference with the appellant's right protected by the Constitution does not contribute to the rule of law, legal safety and consistent application of the law.

SEPARATE PARTIALLY DISSENTING OPINION OF JUDGE SIMIĆ

I fully join the separate opinion of Judge Mato Tadić in case no. AP 3263/08.

Case no. AP 1057/07

RULING

Appeal of „Kompas-Međugorje" d.d. Međugorje

Ruling of 21 November 2009

In accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 59(3) and Article 74(6) of the Rules of the Constitutional Court of BiH (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), the Constitutional Court of Bosnia and Herzegovina, sitting in Plenary, composed of the following Judges:

Mr. Miodrag Simović, President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. Krstan Simić

Mr. Mirsad Ćeman

In case no. **AP 1057/07,** at its session held on 21 November 2009, adopted the following

R U L I N G

It is hereby established that the Municipal Court in Mostar failed to enforce the Decision of the Constitutional Court of Bosnia and Herzegovina no. AP 1057/07 of 14 October 2008.

Pursuant to Article 74(6) of the Rules of the Constitutional of Court of Bosnia and Herzegovina, this Ruling shall be submitted to the Prosecutor's Office of Bosnia and Herzegovina.

This Ruling 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

1. By its decision no. AP 1057-07 of 14 October 2008, the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") granted the appeal of „Kompas-Međugorje" d.d. („the appellant") establishing a violation of 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") due to a violation of the right to a decision within a reasonable time in the case before the Municipal Court in Mostar („Municipal Court") no. Ps-101/01-I. By its decision, the Constitutional Court has ordered the Municipal Court to urgently complete the proceedings in this case in compliance with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention. In addition, the Constitutional Court has ordered the Municipal Court to inform it on the measures taken to enforce this decision within 90 days from the submission of this decision pursuant to Article 74(5) of the Rules of the Constitutional Court. Furthermore, the Constitutional Court also found a violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention in relation to the ruling of the Supreme Court of the F BiH („Supreme Court") no. Rev-784/05 of 30 November 2006 and judgment of the Cantonal Court in Mostar („Cantonal Court") no. Pž-5/05 of 2 March 2005 in the part dismissing the appellant's request for compensation on the grounds of illegal enrichment during the period from 23 December 1996 to 11 February 1999. The Constitutional Court annulled the ruling of the Supreme Court no. Rev-784/05 of 30 November 2006 and judgment of the Cantonal Court no. Pž-5/05 of 2 March 2005 in the part dismissing the appellant's request for compensation on grounds of illegal enrichment during the period from 23 December 1996 to 11 February 1999. By its decision the Constitutional Court referred the case back to the Cantonal Court for adoption of a decision in new expedited proceedings pursuant to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention. The Cantonal Court was further ordered to inform the Constitutional Court on the measures taken to enforce this decision pursuant to Article 74(5) of the Rules of the Constitutional Court within 3 months from submission of this decision.

2. Pursuant to Article VI(4) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding. In addition, pursuant to Article 74(1) of the Rules of Constitutional Court, every physical and legal person shall be obligated to comply with the Constitutional Court's decisions. Furthermore, pursuant to paragraph 2 of the same Article, all bodies shall be obligated to enforce decisions of the Constitutional Court within their competences established by the Constitution and the law.

3. On 11 December 2009, the Municipal and Cantonal Courts received the decision of the Constitutional Court no. *AP 1057/07* of 14 October 2008, which is the date from which the time limit for enforcement of the decision started to run.

4. The Constitutional Court concludes that the deadline for enforcing the decision expired on 11 March 2009 for both the Municipal and Cantonal Court.

5. On 12 February 2009, the Cantonal Court informed the Constitutional Court that on 9 February 2009 it had adopted the judgment no. 007-0-Pž.09-000002 (earlier Pž 5/05) in compliance with the relevant decision of the Constitutional Court and submitted a copy of the judgment.

6. On 23 March 2009, the Municipal Court informed the Constitutional Court on the measures taken to enforce the relevant decision of the Constitutional Court stating, *inter alia*, that the new hearing was scheduled for 20 April 2009.

7. Considering that the Municipal Court had failed to submit any evidence that the decision in question had been enforced, on 18 September 2009, the Constitutional Court requested the Municipal Court to submit a notification on the enforcement of the decision no. *AP 1057/07* of 14 October 2008 and an appropriate decision corroborating the enforcement.

8. On 25 September 2009, the Municipal Court informed the Constitutional Court that, in the interim, the Cantonal Court had decided about the relevant legal matter by its judgment no. 007-0-Pž.09-000002 of 12 February 2009 in respect of a part of the claim as ordered in the Constitutional Court's decision. The appellant had filed revision-appeal against the said judgment on 5 March and defendant had done so on 10 March 2009. The Municipal Court further stated that by its letter of 25 March 2009, the defendant had withdrawn the counterclaim and requested that the case-file is transferred in an expedited manner to the Supreme Court for a decision on the revision-appeals filed by the appellant and defendant. After the appellant's approval of withdrawal of the counterclaim, on 6 April 2009 the Court adopted a ruling acknowledging the withdrawal of the counterclaim. On the same date, the appellant also requested that the case-file be transferred to the Supreme Court for decision to be taken on the revision-appeals filed by both the appellant and defendant. The Court did so on the same date. Meanwhile, as the Supreme Court, on 16 September 2009, referred the case-file back together with the decision on the revision-appeals concerned, the Municipal Court, on that same date, scheduled a hearing for 16 November 2009.

9. In view of the above it clearly follows that the Municipal Court failed to enforce the Constitutional Court's decision no. *AP 1057/07* of 14 October 2008. The Constitutional Court notes that in the present case the appeal in question was in fact adopted due to a violation of the right to receive a decision within a reasonable time, which required the Municipal Court to act urgently. However, according to the notification submitted to the Constitutional Court, the Municipal Court had scheduled a main hearing only 11 months after the expiration of the time limit for enforcement of the decision. Thus, it follows that the Municipal Court, instead of acting urgently, continued with delaying the civil proceedings.

10. Pursuant to Article 74(6) of the Rules of the Constitutional Court, in the event of a failure to enforce a decision or a delay in enforcement or in giving information to the Constitutional Court about the measures taken, the Constitutional Court shall render a ruling in which it shall establish that its decision has not been enforced.

11. Having regard to the aforementioned, the Constitutional Court establishes that the Municipal Court has failed to enforce its decision no. *AP 1057/07* of 14 October 2008.

12. Pursuant to Article 74(6) of the Rules of the Constitutional Court, this Ruling shall be submitted to the competent Prosecutor's Office of Bosnia and Herzegovina.

13. Pursuant to Article 74 (6) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this ruling.

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

Prof. Dr. Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

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